BAJRANG FACTORY LTD. AND ANR

v.

UNIVERSITY OF CALCUTTA AND ORS

MAY 18, 2007

[S.B SINHA AND MARKANDEY KATJU, JJ.]

Indian Succession Act, 1925—Sections 113, 116, 129—Interpretation of will—Father bequeathing immoveable property in favour of son with stipulations that (a) it was for his natural life, and thereafter to his sons/grandsons as he may appoint absolutely, in default thereof to his eldest male descendants absolutely, and if the son did not have male issue, he could appoint his daughters or daughters' son (b) be could sell off those property subject to investment of entire money there from for purchase of immovable properties as specified in the will (c) he had right and testator/father 'devised' that he should settle said properties on one of his sons for such sons life with remainder to such son's son—Subsequent to will, testator/father executing a Codicil, to be read as a part of his last Will, providing that if his son did not have any issue, distant or adopted son or any issue of such adopted son, his estate shall go to a University for advancement of learning and suitably perpetuate for benefit of his elders—On death of testator and on being appointed sole executor of will, son letting out premises and also conveying a portion of said leasehold—Son/legatee died without any issue or adopting any son, and he did not make any appointment in terms of the Will, whereupon University filed suit claiming its right in terms of will—Maintainability of suit and validity of will—Held—Bequeath to sons/grandsons of testator was not void under Section 113 as it vested in them absolutely and was not for a life time; it was more so as in default of eldest male descendants absolutely, his son/legatee could appoint his daughters/daughters' sons—Power to transfer bequeathed property was not absolute, but merely provided for conversion thereof strictly in manner as laid down—Use of word 'devise' was inappropriate, and testator probably meant to use word 'desire'; said clause could neither be said to bequeath any property nor be applied for construction of Will or to properties which were to be substituted in place of immovable properties belonging to testator—Clause in Codicil was not void under Section 129; it did not substitute clauses in the will and could be read therein immediately after clause providing for appointment of daughters or

daughters' son of legatee—The bequeath was not void and University had locus standi to file the suit.

Will—Interpretation of—Held—For ascertaining intention of maker of will not only terms thereof are to be considered but also circumstances attending thereto—It must be considered as a whole for said purpose and not merely particular part thereof—If read in its entirety it can be given effect to, nothing should be read therein to invalidate it—Section 88 of Indian Succession Act, 1925 providing that in case of two irreconcilable clauses in Will the last prevails is a pointer to fact that once it is possible to give effect to apparently irreconcilable clauses, court should take recourse thereto—Only because a part of it is invalid, it cannot be invalidated entirely, if former forms a severable part—Also, for its construction and validity Court must see things as they were at relevant time and not what they are today.

The impugned property belonged to NC. The legatee under his Will was his son HC. After death of NC, on an application for grant of probate, the High Court appointed HC as the sole executor and trustee of the Will. He, allegedly by a registered indenture, let out the impugned premises in favour of the appellant company for a period of ten years with the option to renewal. He also, purportedly conveyed a portion of the said leasehold by a registered deed of sale in favour of CT, a company, subject to the lease granted in favour of the appellants.

The Will of NC, *inter alia* had following clauses:- "(5) I give all my immovable properties... to my son... to hold and enjoy the same during the term of his natural life without impeachment of waste and on the determinator of his life Estate to such one of his sons and grandsons as he may by deed, will or otherwise in writing appoint absolutely and in default of such appointment to his eldest male descendants absolutely. If my son has no male issue, the power of appointment may be exercised by him no favour of his daughters or daughters son. (6) My son may sell or convert into money any of the properties mentioned in the last foregoing clause but it will be obligatory on him to invest the entire proceed thereof in the purchase of immovable properties in Calcutta on the suburbs (7) My son shall have the right and I devise that he should settle the said immovable properties on one of his sons for such sons life with remainder to such son's son." Subsequently, NC executed a Codicil which *inter alia* provided:- "(12) If my son has no issue, however distant or adopted son or any issue of such adopted son, my estate shall go to the University of Calcutta for advancement of learning. It is my

Will and desire that the University should in that connection suitably perpetuate for the benefit of Hindus only the memory of (1) my father (2) my mother (3) my maternal grand father and (4) my maternal grandmother and also use my residence....as a Centre of learning to be called after my late father." This Codicil, according to NC, had to be read as a part of his last Will.

HC died without any issue or adopting any son. He had also not made any appointment in terms of the said Will. Respondent University claiming its right in terms of Clause 12 of the aforementioned Codicil filed an application for grant of a Letters of Administration. It was allowed, and pursuant to it, the Registrar of the respondent took over possession of the said property. Three suits came to be filed thereafter-one each by appellants, respondent and CT company. In the suit of respondent, the appellants raised issues about the validity of the Will, which were tried as preliminary issues, and contended that the bequeath for the property in terms of Clauses 5, 6 and 7 of the original Will, as amended by the Codicil was void in terms of Section 113 of the Indian Succession Act, 125. The High Court rejected this contention. Hence the present appeal.

Appellants contended (i) Clause 7 of the Will, being inconsistent with Clause 5 thereof, would prevail in view of Section 88 of the Act; however, as it provided for a bequest in favour of an unborn person, it was violative of Section 113 of the Act, and as the bequest which was to take effect on the failure of the prior bequest in terms of Section 129 thereof would also be void under Section 116 of the Act; (ii) assuming that the High Court judgment is correct, Clause 5 of the Will would be defeated by the contingencies contained therein or by Clause 6 thereof inasmuch as in such an event, the consequences provided for under Clause 7 of the Will would take over; as a consequence whereof, Clause 5 of the Will would also be void under Section 113 of the Act; (iii) if Clauses 5 and 7 of the Will were void, the consequences thereof would be that the bequest under Clause12, being dependant on the failure of the aforesaid bequest, would also be rendered void in view of Section 129 of the Act.

Respondents contended (i) the intention of the testator has to be implemented and in that process the inconsistencies have to be cleared; (ii) in view of the definition of Codicil in Section 2(b) of the Act, it will prevail and on reading it entirely, it is clear that the testator provided for gift to the respondent University if the legatee HC did not leave behind any son or had

A not adopted any; as the legatee died without any issue or without adopting any son or without appointing any person, Clause 12 of the Codicil came into effect; (iii) Clause 6 of the Will shows that merely a life interest was conveyed to the legatee in as much as even had he transferred the property, the same would be subject to investment of the sale proceeds in acquiring one or the other property; (iv) Clause 7 of the Will merely provides for an enabling clause in the hands of the legatee in terms whereof he may or may not appoint any person and only in the event such appointment is made, the desire of the legatee was to see that the same may be made in favour of his male issue; (v) Clauses 5 and 7 of the will , therefore, would not be hit by Section 113 of the Act; (vi) Clause 7 of the Will furthermore would not operate *qua* the property but *qua* the option of the legatee; (vii) the Will so read, both clauses 5 and 7 can be given effect to as it merely provided for a just pious hope or wishful thinking on the part of the testator.

Dismissing the appeal, the Court

HELD: 1.1. By reason of Clause 5, the testator bequeathed his right, title and interest in favour of his son Hamir Chandra Vasu Mullick *inter alia* of the immovable properties during the term of his natural life. The bequest was, therefore, not absolute. Only upon determination of his life estate, the same is to vest absolutely on such one of his sons and grandsons as he may by deed, Will or otherwise in writing appoint. The said Clause is also not void in as much as the bequest to the sons or the grandsons of the testator is not for a life time but it vests in them absolutely. The intention of the testator becomes clear in reading the next sentence which again provides that in default of such appointment to his eldest male descendants absolutely, if Hamir Chandra Vasu Mullick has no male issue the power of appointment may be exercised by him in favour of his daughters or daughters' sons.

[Para 27] [378-E, F, G]

1.2. Clause 5 of the will is not hit by Section 113 of the Indian Succession Act. [Para 45] [384-E]

Margaret Goonewardens v. *Eva Moon male Goonewardene,* AIR (1931) PC 307, held inapplicable

2.1. While making the bequest on the aforementioned terms, the limited power to transfer the said bequeathed property had also been conferred upon him. For all intent and purport it did not confer any power of absolute transfer. It, in effect and substance, merely provided for conversion of the property.

Such conversion of the property was to be made strictly in the manner as laid down therein. [Para 28] [379-A] A

2.2. It is one thing to say that non-compliance of conditions contained in Clause 6 of the Will would not invalidate the transfer, by it is another thing to say that the said provision contemplated illegality in the transaction. If the transaction is void or void able at the instance for the beneficiary to the Will, no further question need be asked. Courts in the event of its findings that the transactions are illegal, would have to proceed on the basis that the same had not taken place at all. [Para 29] [379-C, D] B

3.1. The word 'devise' in the context of clause 7 does not appear to be appropriate. The word 'devise' would *inter alia* mean a 'plan' or a 'scheme'. What probably the testator meant was to use the word 'desire' and not 'devise'. Clause 7 on a plain reading does not appear to be a clause, in terms whereof, the testator was bequeathing any property in favour of any person. It thereby merely conferred a right upon the legatee and only a desire was expressed by the testator in regard to the legatee's exercise for power of option. ?Clause 7, therefore, may not have any application for the purpose of construction of the Will. C D

[Paras 32 and 33] [379-G; 380-A]

3.2. The appellant in the copy of the will supplied to the Court had also used the word 'desire' in place of word 'device', which would also go to show that even the appellant understood clause 7 in that fashion. Clause 7 if so read, will have no application to the properties which were to be substituted in place of the immovable properties belonging to the testator. The benefit of the sale proceeds, thus, in absence of any action on the part of the legatee in terms of clause 7 shall also vest in the University. Moreover, the question as to whether the deed of sale purported to have been executed by the legatee in favour of Chamong Tea Co. Ltd. or other instruments executed by him in favour of the appellants herein are pending consideration before the High Court which may have to be determined on its own merit. In the event, the said transactions are held to be void, the question of giving any other or further effect to clause 6 of the Will may not arise. [Para 44] [384-B, C, D] E F G

4.1. It is not in dispute that Clause 12 contained in the Codicil shall prevail over the Will. Clause 12 of the Codicil did not substitute Clauses 5, 6 and 7. The Codicil was to be read as a part of the Will and by reason of the said Codicil, the said Clauses of the Will were confirmed by the testator.

[Para 34] [380-A, B] H

A 4.2. The legatee admittedly did not have any issue, nor did he adopt or appoint any person. In a situation of this nature, effect can be given to clause 12 of the will, if it is read as occurring immediately after Clause 5 of the original will. As the said clause stands on its own footing, its effect must be considered *vis-a-vis* clause 6, but the court may not start with construction of clauses 6 and 7, which may lead to a conclusion that clause 5 is also invalid. B The contingencies contemplated by clause 6 may not have any effect on clause 7, if it does not take place at all. The property which should have been purchased with the sale proceeds could have been the subject-matter of the bequest and in terms thereof the University of Calcutta became the beneficiary on the death of the original legatee. There is no reason as to why the same C cannot be given effect to. [Para 44] [383-F, G, H; 384-A]

4.3. Clause 12 does not attract Section 129 of the Act since both the clauses, i.e,. 5 and 7 are valid as observed hereinbefore.

[Para 46] [384-E, F]

D 5.1. With a view to ascertain the intention of the maker of the Will, not only the terms thereof are required to be taken into consideration but all also circumstances attending thereto. The Will as a whole must, thus, be considered for the said purpose and not merely the particular part thereof. As the Will if read in its entirety, can be given effect to, it is imperative that nothing should be read therein to invalidate the same. E

[Para 43] [383-D, E]

5.2. In construing a will, a doubt, all possible contingencies are required to be taken into consideration; but it is also a well-settled principle of law that only because a part of a document is invalid, the entire document need not be invalidated, if the former forms a severable part. F

[Para 44] [383-E, F]

5.3. Section 88 of the Act provides for a rule of construction of the Will stating that where two clauses of gifts in a Will are irreconcilable so that they cannot possibly stand together, the last shall prevail. This provision is G itself a pointer to the fact that once it is possible to give effect to both the clauses which although apparently appears to be irreconcilable the court should take recourse thereto. [Para 24] [378-C, D]

5.4. In construction of the Will for the purpose for considering the validity thereof, Court must see as the things were at the relevant time and H

not what they are today. [Para 26] [378-E] A

Margaret Goonewardens **v.** *Eva Moonemale Goonewardene,* **AIR (1931) PC 307,** *Pearley Lal* **v.** *Rameshwar Das,* **[1963] Supp 2 SCR 834 and** *Navneet Lal Alias Tangi* **v.** *Gokul,* **[1976] 1 SCC 630, relied on**

Arunkumar **v.** *Shriniwas,* **[2003] 6 SCC 98;** *Uma Devi Nambiar* **v.** *T.C. Sidhan (Dead)* **[2004] 2 SCC 321;** *Sadhu Singh* **v.** *Gurudwara Sahib Narike,* **[2006] 8 SCC 75 and** *Gurdev Kaur* **v.** *Kaki,* **[2007] 1 SCC 546, referred to** B

Halsbury's Law of England 4th Edition, Vol. 50 at pg 332, **referred to**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3374 of 2006. C

From the Final Judgment and Order dated 14.2.2003 of the Division Bench of the High Court at Calcutta, in Appeal No. 402 of 1987.

C.A. Sundram, Sr. Adv., K. Agarwal, Naveen Chawla, Shashank Kumar, Mayank Bughani and Manjula Gupta for the Appellants. D

K.K. Venugopal, Tapas Ch. Ray, Sr. Adv., Piyush K. Roy Ankur, G. Ramakrishna Prasad for the respondents.

The Judgment of the Court was delivered by

E

S.B. SINHA, J. 1. Construction/ interpretation of a Will executed by one Nerode Chandra Vasu Mullick on 04.03.1932 *vis-a-vis* certain provisions of the Indian Succession Act (for short "the Act"), viz., Sections 113, 116 and 129 falls for our consideration in this appeal which arises out of a judgment and decree passed by a Division Bench of the Calcutta High Court affirming a judgment and order dated 2.06.1992 passed by a learned Single Judge of the F said Court in Suit No. 866 of 1979 on a preliminary issue raised by the appellants therein as to whether the respondents had any locus to file the suit in question.

2. Before embarking on the said questions, we may notice the admitted fact of the matter. G

3. Appellant No. 1 is an existing company within the meaning of the provisions of the Companies Act, 1956. It claims its title in respect of the disputed premises by a lease executed by the Chamong Tea Company Limited as also purchase of a property by a deed of sale. H

4. The property in question admittedly belonged to Late Nerode Chandra Vasu Mullick. The legatee under the Will Shri Hamir Chandra Vasu Mullick through whom Appellant No. 1 claims its right, title and interest was his son.

5. The relevant clauses of the said Will are as under:

> "5. I give all my immovable properties and the said debentures in the Hooghly Docking and Engineering Co. Ltd. to my son the said Hamir Chandra Mullick to hold and enjoy the same during the term of his natural life without impeachment of waste and on the determinator of his life Estate to such one of his sons and grandsons as he may by deed, will or otherwise in writing appoint absolutely and in default of such appointment to his eldest male descendants absolutely. If my son has no male issue, the power of appointment may be exercised by him in favour of his daughters or daughters son.
>
> 6. My son may sell or convert into money any of the properties mentioned in the last foregoing clause but it will be obligatory on him to invest the entire proceed thereof in the purchase of immovable properties in Calcutta on the suburbs.
>
> 7. My son shall have the right and I devise that he should settle the said immovable properties on one of his sons for such sons life with remainder to such son's son."

6. Indisputably, the testator executed a Codicil on 4.03.1932 in terms whereof *inter alia* it was provided:

> "12. If my son has no issue, however distant or adopted son or any issue of such adopted son, my estate shall go to the University of Calcutta for advancement of learning. It is my Will and desire that the University should in that connection suitably perpetuate for the benefit of Hindus only the memory of (1) my father, Hem Chandra Vasu Mullick (2) my mother Vooban Mohini Vasu Mullick (3) my maternal grand father Narendra Kumar Dutt and (4) my maternal grandmother Golap Mohini Dutt and also use my residence no. 12, Wellington Square Calcutta as a Centre of learning to be called after my late father."

7. We may, however, mention that the said Codicil, according to the testator, should be read as a part of his last Will and testament dated 4.03.1932 and thereby he also confirmed the said Will and testament.

8. Soon after the execution of the Codicil, the testator died on 7.08.1942 leaving behind his widow, legatee and his daughter-in-law. The legatee under the Will separated from his wife. His wife is said to have remarried. Widow of the testator also passed away. Appellant No. 3 in that situation allegedly was asked to take care of the affairs of the properties.

9. An application for grant of probate in terms of the Act was filed before the original side of the Calcutta High Court and by an order dated 15.01.1943, the legatee was appointed as the sole executor and trustee of the Will. Allegedly by a registered indenture dated 27.12.1966, the legatee let out the premises in question in favour of the appellant company, a portion of the premises No. 156, Bipin Behari Ganguly Street, Calcutta (hereinafter referred to as 'the immovable property') for a period of ten years with the option to renew the same for further four consecutive periods of 10 years each in all for fifty years from the said date on the terms and conditions mentioned therein.

10. It is not in dispute that Appellant No. 1 paid unto the legatee the agreed rent till 14.07.1973. The legatee, however, purported to have conveyed a portion of the said leasehold by a registered deed of sale in favour of one Chamong Tea Company Limited, subject to the said lease granted in favour of the appellants herein.

11. Indisputably, the legatee died on 18.11.1976 without any issue. He had not adopted any son also. He had also not made any appointment in terms of the said Will.

12. Respondent University claiming its right in terms of Clause 12 of the aforementioned Codicil filed an application for grant of a Letters of Administration and by reason of a judgment and order dated 22.08.1977, the said application was allowed. It is stated that pursuant to or in furtherance of the said order dated 22.08.1977 the Registrar of the Calcutta University took over possession of the said property.

13. Three suits came to be filed thereafter. One of the suit was filed by the appellants herein which was marked as Suit No. 390 of 1978 praying for the following reliefs:

> "(a) A declaration that the plaintiff is entitled to possession and/ or to remain in possession and enjoyment of the portions of Baithakhana Bazar being premises Nos. 155, 156, Bepin Behari Ganguly Street and

A 167 Baithakhana Road Calcutta both within the aforesaid jurisdiction and described in the sketch plan annexed hereto and marked with the letter "C" and delineated in red and yellow including the right to collect rents issues and profits thereof;

(b) Perpetual injunction restraining the defendants Nos. 1 and 2 their B servants and agents from interfering with or further interfering with or continuing to interfere with or disputing or denying the plaintiff's right to remain in possession and/ or right to possess and enjoy the portions of the said Baithakhana Bazar being premises Nos. 155, 155/ 1, 155/2, 156, Bepin Behari Ganguly Street, and 167, Baithakhana Road, C Calcutta more fully described in the sketch plan annexed hereto and marked with the letter "C" and delineated in red and yellow including the right to collect rests issues and profits from the occupants of such areas in any manner whatsoever.

(c) Perpetual injunction restraining the defendants Nos. 1 and 2 from D collecting or attempting to collect the rents issues and profits from the aforesaid portions of the Baithakhana Market of which the plaintiff is the lessee.

(d) If necessary, possession of the said portions of the Baithakhana Bazar being premises Nos. 155, 155/1, 155/2, 156, Bepin Behari Ganguly E Street, and 167, Baithakhana Road, Calcutta more fully described in the letter "C" and delineated in colour red and yellow"

14. Respondent No. 1 herein also filed a suit in the original side of the Calcutta High Court on or about 15.11.1979 which was marked as Suit No. 864 of 1979 praying for the following reliefs:

F "(a) A declaration that the sale purported to have been effected in respect of premises Nos. 155,155/1,155/2, Bepin Behari Ganguly Street, Calcutta by the Deed of sale dated 29th May 1971 executed by Hamir Chandra Vasu Mullick in favour of the Chamong Tea Company Ltd. The defendant No. 1 is void or voidable and of no effect as stated G in paragraph 25 of the plaint.

(b) That the aforesaid Deed of Sale deed 29th May 1971 executed by Hamir Chandra Vasu Mallick in favour of the Chamong Tea Company Ltd. The defendant No. 1 delivered up and cancelled and/ or adjudged void as stated in paragraph 25 of the plaint.

H

(c) A declaration that the deed of lease dated 24th July 1972 in respect of premises No. 155, 155/1, 155/2, Bepin Behari Ganguly Street, Calcutta executed by the Chamong Tea Company Ltd. the defendant No. 1 in favour of Bajrang Factory Ltd. the defendant no. 2 is void or voidable and of no effect as stated in paragraph 26 of this plaint. A

(d) That the aforesaid deed of lease dated 24th July 1972 executed by the Chamong Tea Company Ltd. The defendant No. 1 in favour of Bajrang Factory Ltd. The defendant No. 2 be delivered up as stated in paragraph 26 of this plaint. B

(e) In the alternative a declaration that the said sale and said lease dated 29th May 1971 and 24th July 1972 respectively as referred to in prayers (a), (b)(c) and (d) are not valid beyond the life time of the said Hamir Chandra Vasu Mallick, deceased as stated in paragraph 25 and 26 of this plaint. C

(f) A decree for declaration that the University of Calcutta is the absolute owner of the said premises.... D

(g) Perpetual injunction restraining the defendants Nos. 1 and 2 from collecting rents, issue and profits from the tenants in occupation of the said premises

(h) perpetual injunction restraining the defendants Nos. 1 and 2 and their servants agents and assigns from transferring assigning or otherwise dealing with or taking any or any further steps or action for enforcement of the said deed of sale and deed of lease dated 29th May 1971 and 24th July 1972 respectively or any alleged right thereunder as against the plaintiff No. 1" E

F

15. It appears that the aforementioned Chamong Tea Company Limited had also filed a suit.

16. In the suit filed by Respondent University, the appellants raised two issues in regard to the validity of the Will, which are as under:

G

"(a) Whether the dispositions in regard to the residuary estate made by the said Will are void save and except the life interests given thereby to the plaintiffs and the defendant Susan Sopher.

(b) Whether subject to the life interests given in the residuary estate

H

A to the plaintiff and the defendants Susan Sopher the said Plaintiffs and the defendant Susan Sopher have succeeded to the residuary estate of the testator as on a intestacy."

17. The said issues were taken as preliminary issues. According to the appellants, the bequeath of the property in terms of Clauses 5, 6 and 7 of the B original Will, as amended by the Codicil dated 4.03.1932 was void in terms of Section 113 of the Act. The learned Judge opined:

"The right created in favour of Hamir Chandra Basu Mallick was only a life estate and his power or appointing certain specified person was in respect of the entire estate absolutely. Under the circumstances the C provision of Section 113 had no application in as much as Hamir had no choice of curtailing the interest from the remaining of the testator's interest. Hamir had no right to cut down the absolute estate as such neither the provisions of Section 113 nor Section 114 are attracted. Section 116 had no application. The right created in favour of the D University of Calcutta could only be defeated, if Hamir had any issue either natural born or adopted. Clause 12 of the Codicil should override clause 5 of the Will. The question of appointment by Hamir Chandra Basu Mallick could only arise provided he had issues either natural born or adopted. The clause 7 in the Will is only directory and not imperative. Under the circumstances there is no clause of defeasance E and the legatee as contemplated would take the entire estate of the testator is an unfetter form.

In view of the facts and circumstances of this case and in view of the various principles of law as laid down in the cases discussed above this Court is of the view that the preliminary point raised by F the defendants in the suit must be answered in the negative in as much as this Court is of the view that the University of Calcutta is entitled to file the suits and proceed with the same"

18. Aggrieved by and dissatisfied therewith, the appellants preferred an intra-court appeal before the Division Bench of the Calcutta High Court. By G reason of the impugned judgment dated 14.02.2003, the said appeal has been dismissed holding:

"After considering the respective submissions of the parties and the entire materials on record we do not find any reason to interfere with the impugned judgment and order of the Trial Court as we agree with H

the view of the Trial Court that the bequest of the property in favour of the University of Calcutta is not void and therefore the University is entitled to file the suit.

It has been rightly contended by the learned counsel appearing on behalf of the respondent, University of Calcutta, that in the matter of interpretation of the Will, the Court is required to ascertain the dominant intention of the testator on a plain reading of the will and it will also be the duty of the Court to implement such intention of the testator and if there are two clauses which might appear to be inconsistent to each other it will be the duty of the Court to reconcile the aforesaid two Clauses.

Keeping such principle of law, if we now examine the aforesaid three Clauses of the Will, Clauses 5, 6 and 7, we are of the view that Clause 5 and

Clause 7 of the Will are not inconsistent with each other.

In Clause 6 of the Will the son of the testator who was given life estate of the property was given right to sell or convert into money the property was given right to sell or convert into money the aforesaid immovable properties bequeathed to him for life but subject to the condition contained in Clause that in such event he has to invest for purchase of another immovable properties which has to be settled by the son of the testator to one of the sons of Hamir. The reference to immovable properties in Clause 7, which follows Clause 6 obviously is to the properties which Hamir was required to purchase, if he transferred the immovable properties bequeathed to him by investing the sale proceeds thereof.

We are therefore unable to accept the submission of the learned counsel appearing on behalf of the appellant that there was inconsistency between Clauses 5 & 7 and because of the same, the alter Clause will prevail."

It was furthermore observed:

"Clause 5 of the Will therefore stood modified by Clause 6 of the Codicil. On the death of the testator therefore as Hamir did not beget or adopt any son, the property will validly go to the University of Calcutta.

A We are unable to accept the contention of the learned Counsel appearing for the appellant that bequests of the property by the testator to the unborn son of Hamir subject to his life interest was void under the provisions of Section 113 of the Indian Succession Act and consequently the bequests in favour of the University of Calcutta is also void under Section 116 of the Indian Succession Act.

B

It appears to us that the bequests in favour of the unborn son of Hamir by the testator of the immovable properties was absolute and the same comprised of the whole of the interest of the testator in the property bequeathed having been devised and bequeathed absolutely in favour of them. Since the bequests therefore comprised of the C whole of the interest of the testator in the said property, such bequests will not be void. Consequently, not the provision of Section 116 of the Indian Succession Act but the provision of Section 129 of the said Act will apply and the bequests made in favour of the University of Calcutta shall take effect upon failure of the bequest made in favour D of the unborn son of Hamir."

19. Mr. C.S. Sundaram, learned senior counsel appearing on behalf of the appellants in assailing the judgment and order passed by the Calcutta High Court would *inter alia* submit:

E (i) Clause 7 of the Will being inconsistent with the stipulations contained in Clause 5 thereof would prevail thereover in view of the provisions contained in Section 88 of the Act.

(ii) Clause 7 of the Will providing for a bequest in favour of an unborn person is clearly violative of Section 113 of the Act and F in that view of the matter, the bequest which was to take effect on the failure of the prior bequest in terms of Section 129 thereof would also be void under Section 116 of the Act.

(iii) Assuming that the High Court judgment is correct, Clause 5 of the Will would be defeated by the contingencies contained therein G or by Clause 6 thereof inasmuch as in such an event, the consequences provided for under Clause 7 of the Will would take over; as a consequence whereof, Clause 5 of the Will would also be void under Section 113 of the Act.

(iv) If Clauses 5 and 7 of the Will were void, the consequences H thereof would be that the bequest under Clause 12, being

dependant on the failure of the aforesaid bequest, would also be rendered void in view of Section 129 of the Act. A

20. Mr. K.K. Venugopal, learned senior counsel appearing on behalf of the respondents, on the other hand, would submit:

(i) The principles of interpretation of the Will being to ascertain the intention of the testator are: B

(a) the court will sit on the arm-chair of the testator so as to give effect to his intention; and

(b) would implement that intention of the testator and in that process an endeavour would be made to clear the inconsistencies if any so as to see that the intention of the testator is not defeated. C

(ii) Having regard to the definition of Codicil contained in Section 2(b) of the Act, the latter will prevail and if the Codicil is read in its entirety, it would be evident that the testator clearly provided for gift to the respondent University if the legatee Hamir Chandra Mullick did not leave behind any son or had not adopted any. As admittedly, the legatee died in the year 1977 without any issue or without adopting any son or without appointing any person, Clause 12 of the Codicil would come into effect. D

(iii) Clause 6 of the Will clearly shows that merely a life interest was conveyed to the legatee inasmuch as even had he transferred the property, the same would be subject to investment of the sale proceeds in acquiring one or the other property. E

(iv) Clause 7 of the Will merely provides for an enabling clause in the hands of the legatee in terms whereof he may or may not appoint any person and only in the event such appointment is made, the desire of the legatee was to see that the same may be made in favour of his male issue. F

(v) Clauses 5 and 7 of the Will, therefore, would not be hit by Section 113 of the Act. G

(vi) Clause 7 of the Will furthermore would not operate qua the property but *qua* the option of the legatee. The Will so read, it was urged, that both clauses 5 and 7 can be given effect to as it merely provided for a just pious hope or wishful thinking on the part of the testator. H

A 21. The Act was enacted to consolidate the law applicable to intestate and testamentary succession.

22. "Codicil' has been defined to Section 2(b) of the Act to mean 'an instrument made in relation to a will, and explaining, altering or addition to its dispositions, and shall be deemed to form part thereof'.

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23. Section 82 of the Act reads as under:

> "82. Meaning or clause to be collected from entire Will The meaning of any clause in a will is to be collected from the entire instrument, and all its parts are to be construed with reference to each other."

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24. Section 88 of the Act provides for a rule of construction of the Will stating that where two clauses of gifts in a Will are irreconcileable so that they cannot possibly stand together, the last shall prevail. This provision is itself a pointer to the fact that once it is possible to give effect to both the clauses which although apparently appears to be irreconcileable the court should take D recourse thereto.

25. It is admitted that there are certain typographical errors in the said Will. While construing the said Will, therefore, we will have to take note thereof.

E 26. In construction of the Will for the purpose of considering the validity thereof, we must see as the things were at the relevant time and not what they are today.

27. By reason of Clause 5, the testator bequeathed his right, title and F interest in favour of his son Hamir Chandra Vasu Mullick *inter alia* of the immovable properties during the term of his natural life. The bequest was, therefore, not absolute. Only upon determination of his life estate, the same is to vest absolutely on such one of his sons and grandsons as he may by deed, Will or otherwise in writing appoint. The said Clause is also not void inasmuch as the bequest to the sons or the grandsons of the testator is not G for a life time but it vests in them absolutely. The intention of the testator becomes clear in reading the next sentence which again provides that in default of such appointment to his eldest male descendants absolutely, if Hamir Chandra Vasu Mullick has no male issue, the power of appointment may be exercised by him in favour of his daughters or daughters' sons.

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28. While making the bequest on the aforementioned terms, the limited power to transfer the said bequeathed property had also been conferred upon him. For all intent and purport it did not confer any power of absolute transfer. It, in effect and substance, merely provided for conversion of the property. Such conversion of the property was to be made strictly in the manner as laid down therein. As regard the purported transfer of the properties in suit by the legatee, two questions would arise:

(a) What would be the effect of non-conversion of such properties by purchase of immovable properties in Calcutta or the suburbs.

(b) Whether Clause 7 of the Will only refers to the properties so transferred only on one of the appointees of the testator.

29. It is one thing to say that non-compliance of conditions contained in Clause 6 of the Will would not invalidate the transfer, but it is another thing to say that the said provision contemplated illegality in the transaction. If the transaction is void or voidable at the instance of the beneficiary to the Will, no further question need be asked. Courts in the event of its findings that the transactions are illegal, would have to proceed on the basis that the same had not taken place at all.

30. At this juncture, this Court is not concerned with the other allegations made by the University as to whether the deed of sale executed by the legatee was invalid or not, inasmuch as the preliminary issue raised is confined to the question of validity of the will.

31. What would be the effect of a sale if the sale proceeds have not been applied for purchase of immovable property is also a question which would fall for consideration of the High Court at an appropriate stage. It goes without saying that it would be open to the High Court to consider as to whether a *suo motu* action or at the instance of the University can be taken as the conditions for grant of probate have been violated. We, however, need not apply our mind to the said question.

32. We may, furthermore, notice that the word 'devise' in the context of Clause 7 does not appear to be appropriate. The word 'devise' would *inter alia* mean a 'plan' or a 'scheme'. What probably the testator meant was to use the word 'desire' and not 'devise'. Clause 7 on a plain reading does not appear to be a clause, in terms whereof, the testator was bequeathing any property in favour of any person. It thereby merely conferred a right upon the legatee and only a desire was expressed by the testator in regard to the

A legatee's exercise of power of option.

33. Clause 7, therefore, may not have any application for the purpose of construction of the Will..

34. However, it is not in dispute that Clause 12 contained in the Codicil B shall prevail over the Will. Clause 12 of the Codicil did not substitute Clauses 5, 6 and 7. As indicated hereinbefore, the Codicil was to be read as a part of the Will and by reason of the said Codicil, the said Clauses of the Will were confirmed by the testator. In our opinion, by reason of the Codicil, the testator expressed his intention clearly to the effect that in the event the legatee does not have any issue or he does not adopt anybody as his son or otherwise C appoint a person provided for in Clause 5, the bequest would be in favour of the Calcutta University. The desire of the testator apparently was to perpetuate the memory of his ancestors. Bequest in favour of the Calcutta University was meant to achieve a particular purpose which has clearly been stated in Clause 12 of the Codicil.

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35. The principles of construction of Will are well known.

36. Lord Russell in *Margaret Goonewardens* v. *Eva Moonemale Goonewardene and Ors.*, AIR (1931) PC 307 was considering a bequest made by the testator which was in the following terms:

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> "(g) The rest and residue of my cash found in my possession at the time of my demise and also the money in deposit to my credit in my No. 1 account in the Mercantile Bank of India Limited Galle, in the Bank of Madras Colombo, in the Government Savings Bank and in the Post Office Savings Bank and the amount of my Policy of Insurance F together with the profit thereof and all other moveable property absolutely to my said wife Margaret."

37. The testator, thereafter, made a Codicil in terms whereof the pecuniary legacy to a servant in respect of certain house was made which contained these words: "Save as hereby altered or modified I hereby confirm the said G Will".

38. A question arose therein as to whether a sum of Rs. 2,14,200/- to which amount the testator became entitled to from the moneys invested on mortgage bonds or promissory notes passed under the bequest of the legacy or under the gift of all other immovable property. The Judicial Committee H

opined: A

> "....It is well settled in England that by virtue of S.34, English Wills Act, the effect of confirming a Will by codicil is to be bring the Will down to the date of the codicil and to effect the same disposition of the testator's property as would have been effected if the testator had at the date of the codicil made a new will containing the same B disposition as in the original will but with the alterations introduced by the codicil"

39. In *Pearley Lal* v. *Rameshwar Das,* [1963] Supp 2 SCR 834, Subba Rao, J. opined:

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> ".....Where apparently conflicting disposition can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would D lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus. If the construction suggested by learned counsel be adopted, in the event of his son predeceasing the testator, there would be intestacy after the death of the wife. If the construction suggested by the respondent be adopted; in the event that happened it would not bring about intestacy, as the defeasance E clause would not come into operation. That was the intention of the testator is also clear from the fact that he mentioned in the will that no other relation except his wife and son should take his property and also from the fact that though he lived for about a quarter of a century after the execution of the will, he never thought of changing the will, F though his son had predeceased his wife."

40. In *Navneet Lal Alias Rangi* v. *Gokul and Ors.,* [1976] 1 SCC 630, this Court held:

> "8. From the earlier decisions of this Court the following principles, *inter alia,* are well established: G
>
> "(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which H

A have actually been employed. (*Ram Gopal* v. *Nand Lal*)

(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (*Venkata Narasimha* v. *Parthasarathy*) and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of
B the testator, his family relationship, the probability that he would use words in a particular sense... But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. (*Venkata Narasimha* case and *Gnanambal Ammal* v. *T. Raju Ayyar*)

C (3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. (*Raj Bajrang Bahadur Singh* v. *Thakurain Bakhtraj Kuer*)

D (4) The court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently
E conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which
F does not create any such hiatus. (*Pearey Lal* v. *Rameshwar Das*)

(5) It is one of the cardinal principles of construction of wills that to the extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring
G successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (*Ramachandra Shenoy* v. *Hilda Brite Mrs*)"

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41. To the same effect are the judgments of this Court in *Arunkumar and Anr.* v. *Shriniwas and Ors.*, [2003] 6 SCC 98, *Uma Devi Nambiar and Ors.* v. *T.C. Sidhan,* (Dead) [2004] 2 SCC 321, *Sadhu Singh* v. *Gurdwara Sahib Narike and Ors.*, [2006] 8 SCC 75 and *Gurdev Kaur and Ors.* v. *Kaki and Ors.*, [2007] 1 SCC 546]. A

42. In Halsbury's Law of England, 4th Edition,, Vol. 50, at pg 332, it was stated:: B

> "The only principle of construction which is applicable without qualification to all wills and overrides every other rule of construction is that the testator's intention is collected from a consideration of the whole will taken in connection with any evidence properly admissible, and the meaning of the will and of every part of it is determined according to that intention. For this purpose, the will and all the codicils to it are construed together as one testamentary disposition, but not as one document, and the testator's intention is gathered from the whole disposition." C D

43. With a view to ascertain the intention of the maker of the Will, not only the terms thereof are required to be taken into consideration but all also circumstances attending thereto. The Will as a whole must, thus, be considered for the said purpose and not merely the particular part thereof. As the Will if read in its entirety, can be given effect to, it is imperative that nothing should be read therein to invalidate the same. E

44. In construing a will, no doubt, all possible contingencies are required to be taken into consideration; but it is also a well-settled principle of law that only because a part of a document is invalid, the entire document need not be invalidated, if the former forms a severable part. The legatee admittedly did not have any issue, nor did he adopt or appoint any person. In a situation of this nature, effect can be given to clause 12 of the will, if it is read as occurring immediately after Clause 5 of the original will. As the said clause stands on its own footing, its effect must be considered *vis-a-vis* clause 6, but the court may not start with construction of clauses 6 and 7, which may lead to a conclusion that clause 5 is also invalid. The contingencies contemplated by clause 6 may not have any effect on clause 7, if it does not take place at all. The property which should have been purchased with the sale proceeds could have been the subject-matter of the bequest and in terms thereof the University of Calcutta became the beneficiary on the death of the original legatee. We do not find any reason as to why the same cannot be F G H

A given effect to. We have indicated hereinbefore that it is possible to construe clause 7 of the will and in fact a plain reading thereof would, thus, lead to the conclusion that it merely provides for an option given to the legatee to take recourse thereto. We have also indicated hereinbefore that the term 'device' in the context of clause 7 does not carry any meaning and, therefore, the same for all intent and purport should be substituted by the word 'desire'. As a matter of fact, the appellant in the copy of the will supplied to us had also used the word 'desire' in place of the word 'device', which would also go to show that even the appellant understood clause 7 in that fashion. Clause 7, if so read, will have no application to the properties which were to be substituted in place of the immovable properties belonging to the testator. The benefit of the sale proceeds, thus, in absence of any action on the part of the legatee in terms of clause 7 shall also vest in the University. Moreover, the question as to whether the deed of sale purported to have been executed by the legatee in favour of Chamong Tea Co. Ltd.. or other instruments executed by him in favour of the appellants herein are pending consideration before the High Court which may have to be determined on its own merit. In the event, the said transactions are held to be void, the question of giving any other or further effect to clause 6 of the Will may not arise.

45. In view of the findings aforementioned, we are of the opinion that the decision relied upon by Mr. Sundaram on *Margaret Goonewardens* (supra) cannot be said to have any application in the instant case, as in view of our findings aforementioned, clause 5 of the will is not hit by Section 113 of the Indian Succession Act.

46. The submission (iv) of the appellant fails in view of the matter that Clause 12 does not attract Section 129 of the Act since both the clauses, i.e., 5 and 7 are valid as observed hereinbefore.

47. For the reasons aforementioned, there is no merit in this appeal which is accordingly dismissed with costs. Counsel's fee is quantified at Rs.50,000/-

48. We would request the High Court to consider the desirability of disposing of the suits filed by the parties hereto, as expeditiously as possible, keeping in view the fact that they are pending for more than 28 years from now.

VS. Appeal dismissed.