

# SUPREME COURT OF INDIA

Dilip D.Chowdhari

Vs.

Maharashtra Executor & Trustee

C.A.No.113 of 2002

(P. Sathasivam and H.L. Dattu JJ.)

29.04.2010

## JUDGMENT

**H.L.Dattu, J.**

1. This appeal is directed against the judgment and order passed by the High Court of Bombay in Appeal No. 326 of 2000, arising out of orders passed in Originating Summons No. 871 of 1999 dated 30.4.2001 in Suit No. 3659 of 1999.

2. The facts of the case in brief are as follows:

“The suit property is a residential building known as `Vandan' having a ground and three floors situated at Ranade Road, near Shivaji Park, Dadar, Mumbai (hereinafter referred to as the `suit building').”

3. The deceased, Shri Dattatraya Raghunath Chowdhari, the testator was the owner of the suit property having purchased the same under a registered sale deed from one Shri Kihimkar out of his personal earnings. At that point of time, it had only a ground and two floors.

“The building also had two garages on the ground floor. The possession of the vacant second floor was given to the purchaser. The testator Shri Dattatraya constructed a third floor as a single unit with one common entrance, hall, toilet block, two bed rooms and a separate master bed room with toilet block attached to it. The testator had four sons-Suryakant, Ashok, Dilip (appellant) and Bapu. In addition to that the testator had one married daughter. Ashok got married in 1968. The appellant got married on 29.1.1974. Bapu was a problem child and remained a bachelor. On the ground floor there are two tenants. On the first floor there are two tenants. On the second floor there are two independent flats given out to Suryakant and his wife and Ashok and his wife respectively. The third floor was occupied by the deceased testator along with his wife Smt. Mainabai and the appellant. Bapu, who was the problem child was also given a separate room.”

4. Due to service exigencies, the appellant was required to shift to RBI official quarters at Byculla with his family. Meanwhile a second son, Kaustubh was born to the appellant on 23.11.1981. After three months, the appellant's family came back and stayed at the suit property on the third floor. The testator executed his last Will, by which right of residence was given to his wife and right of occupation was given to his four sons. Suryakant and Ashok were given an independent flat each in the second floor. One room in the third floor was given to Bapu. The rest of the third floor was kept for occupation of the testator, his wife and the appellant.

5. The Will was duly probated by the executors namely, Maharashtra Executors and Trustees Company Limited, a company formed under the Companies Act, 1956, having its registered office at Lok Mangal, 1501, Shivaji Nagar, Pune having its branch office at Bombay, (respondent no.1). According to the contents of the Will, the wife of the testator will have the right of residence in the house till her life time. In addition to that she will be entitled to 30% of the income of the movable property of the testator. The remaining 70% income of the movable property of the appellant will be divided and paid by the executors to his four sons and one daughter. The share of Bapu would go to the trust created for his benefit. The ultimate and equal beneficiaries of the suit property are the four grand children of the testator, namely, Rajesh, Arjun, Vikram and Ojas. They will be entitled to this right only when Ojas attains 21years of age. During that period, they will be entitled to only the income of the suit property. The property will overall be under the control of the trust company.

6. Shri Dattatraya Raghunath Chowdhari – the testator died on 23.02.1982. On 30.06.1997, Ojas, Appellant's son, who was born on 30.06.1976, attained 21 years of age and, accordingly, the trusteeship came to an end. As there was a dispute between the respondents and the appellants regarding the occupation of the suit building, the executors of the Will filed Originating Summons No. 871 of 1999 under Rule 238 of the High Court (Original Side) Rules. The appellant was arrayed as defendant no.5 in the said Originating Summons. The widow of the testator was arrayed as defendant no.1, whereas Suryakant, Bapu and Ashok were arrayed as defendants nos. 2, 3 and 4 respectively. The grandchildren of the testator, namely, Rajesh, Arjun, Vikram and Ojas were arrayed as defendants nos. 6, 7, 8 and 9 respectively. The daughter of the deceased, Kumudini was arrayed as defendant no. 10. The executors sought interpretation of certain covenants of the aforesaid Will and the determination of certain questions that had arisen in the administration of the Will. The executors/plaintiff stated that till 1998, there were no differences and disputes between the defendants in respect of the use and enjoyment of the property as administered by the plaintiff from time to time. The plaintiff further contended that defendant no.5 who had sometime in the year 1976, had left the suit building and gone to stay in the RBI staff quarters and upon returning insisted upon occupying and staying in the entire 3rd floor except for one room allotted to defendant no.3, wherein disputes arose between the widow of the testator and the two sons as to who should be in the exclusive and/or joint possession and enjoyment of different portions comprised in the 3rd floor.

Disputes according to the plaintiff also arose on the attainment of 21 years of age by Ojas, whereby the grand children would now become entitled to partition and division of the suit building. The plaintiff also contended that certain correspondence had ensued between defendants nos. 1, 3 and 5 on the one hand and the plaintiff on the other as the defendants nos. 1, 3 and 5 have been interpreting the clauses in the said Will in the manner suited to each one of them. The plaintiff essentially contended that disputes as between the legatees have also arisen pertaining to the scope and interpretation of the clauses of the said Will such as the sharing of the income of and from the movables, the rights of the ultimate beneficiaries regarding the partition of the property by metes and bounds and the transfer and conveyance of the said property or in terms of partition by metes and bounds to be followed by such transfer and conveyance, the period for which the defendants nos. 2 to 5 would be entitled to occupy the tenements on the 2nd and 3<sup>rd</sup> floors and the ultimate beneficial vesting of the movables. Several questions were framed for determination by the High Court. But for disposal of the appeal, it is sufficient to notice only question No. ( C ) in the Originating Summons. It is as under:

“(a) Whether it would be correct to state that the defendants nos. 1, 3 and 5 are entitled to use, occupation and residence of the 3rd floor of the building `Vandan' described in Exhibit `C' hereto in the following manner:

- (i) Defendant no.3 - Right hand side front room.
  - (ii) Defendant no.5 - Right hand side last room with a right to joint use of bath and toilet.
  - (iii) Defendant no.1 - The whole of the remaining area with a right to exclusive use of other bath and toilet.
- (b) If answer to query no. C(1) is in the negative, what is the manner in which the defendants 1, 3 and 5 are entitled to the exclusive/joint use of the areas comprised in the 3rd floor of the building `Vandan';
- (c) Whether the right of residence as conferred by the Will on the defendants nos. 1 to 5 in respect of the 2nd and 3rd floors of the building `Vandan' is inheritable co- terminus with the death of the defendant no.1 or on the attainment of 21 years of age by defendant no.9;
- (d) Whether on Mr. Ojas, i.e., the defendant no.9 attaining 21 years of age shall in any manner affect the right of residence conferred upon the defendant no.1 and defendants nos. 2 to 5.”

7. The High Court by its judgment and order dated 07.12.1999, has answered the questions raised in the suit. The Single Judge of the High Court of Judicature at Bombay concluded as regards question `A' that on the grand son Ojas, completing 21 years, no separate transfer of

property would be necessary in favour of all the four grand children and as per the Will of the Testator, the property should vest with them. As regards question `B' part (a) and (b) it was stated that the question would not arise as the answer to question `A' was in affirmative and, therefore, the occupancy rights of defendants Nos. 1 to 5 will remain intact till their death. The Single Judge further stated the answers to part (a) of question `C' in the affirmative and stated that part (b) and (c) were invalid in the light of answer to question `A'. The answer to `D' was that the share out of 70% immovable property of any of the defendants Nos. 2 to 5 and 10 in case of their death will pass on to the heirs under the Hindu Succession Act. The answer to question `E' was given in negative.

8. The appellant is mainly aggrieved by answer in the judgment to the question `C' part (a) (ii) whereby the appellant's right to use and occupy the third floor of the suit building in terms of the Will of the testator was restricted to only one right hand side last room with a right to jointly use with the wife of the testator, Ms. Meenabai Dattatraya Chowdhari, the bath and toilet. Being aggrieved by the aforesaid order of the learned Single Judge, the appellant preferred Appeal No. 326 of 2000 before the Division Bench of the High Court of the Judicature at Bombay. The Division Bench dismissed the appeal.

9. Being aggrieved by the judgment of the Division Bench of High Court dated 30.04.2001, the appellant has come before this Court seeking special leave to appeal.

10. We have heard the learned counsel for the parties and we have also perused the Will executed by the testator and the sketch of the premises which is in dispute.

11. The testator - Shri Dattatraya executed his last Will, by which right of residence was given to his wife and right of occupation was given to his four sons by giving one independent flat each on second floor to Shri Suryakant and one flat to Shri Ashok. The rest of the third floor except one room which was given to Bapu, was kept for occupation for himself, his wife and the appellant and his family. The Will specifically provides that the ultimate beneficiaries of the entire building are the four Grand sons, namely, Rajesh, Arun, Vikram and Ojas. Since the right of occupation was given to all the four sons, during their life time the Grand sons are not entitled to the joint or separate possession and only after the death of all the four sons, the Grand sons will be entitled to joint/separate possession of the suit property.

12. After the death of the testator, there was dispute between the appellant and other respondents regarding occupation of the third floor of the Suit building. It is this dispute which required the executors of the Will to file Originating Summons No. 871 of 1999 before the Bombay High Court, inter alia, seeking interpretation of certain covenants of the Will and also determination of certain questions that had arisen therein in the administration of the Will. In the High Court, both the learned single Judge and the Division Bench by adopting a highly hypertechnical approach, have given a very narrow interpretation of the contents of the Will and have restricted the appellant's right to use and occupy the third floor

of the Suit building to only one right hand side last room with a right to jointly use the bathroom and the toilet with the widow of the testator. After carefully perusing the sketch produced by the appellant before this Court, which is not disputed by the other side and also keeping in view the bare necessity of middle class family, we are unable to subscribe to the view expressed by the learned Judges of the Bombay High Court. In order to do complete justice to the parties, who are none other than the testators own sons, while setting aside the impugned judgment, we hold the first appellant has the right of occupation of the third floor of the Suit building along with wife of the testator.

13. With the above observation and direction, the appeal is allowed. In the facts and circumstances of the case, parties are directed to bear their own costs.