IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-CW-41-2020

1 Laximibai Narayan Prabu
(now deceased) through her legal
representatives

a) Prashant Narayan Prabhu
and his wife

b) Mrs. Anuja Prashant Prabhu

Both residing at Chaudi, Opp.
Vijaya Pharmacy, Canacona, Goa
403702.

c) Smt. Jaya Arvind Kamat and her
husband

d) Arvind G. Kamat

Both residing at C33, Gitanjali Jai,
Bhawani Mata Road, Amboli,
Andheri (W), Mumbai.

e) Smt. Samiksha S. Bhende & her
husband

f) Sadashiv Bhende

Both residing at S-5 Star
Apartments, Colmorod, Navelim,
Salcete, Goa.

g) Mrs. Siya V. Dangui and her
husband

h) Vivek Dangui

Both residing at 2nd floor, Anita
Apartments, Gawaliwada, Fatorda,
Margao, Goa 403602.

The petitioners no.(c) to (h) represented by their attorney petitioner no.1.

.... Petitioners

Versus

1 Medha Nagesh Prabhu,

Residing at Mastimol, Sheler, Canacona, Goa.

2 Mr. Ramnath Damodar Prabhu

3 Smt. Sushma Rajesh Mhambre & her husband

4 Shri Rajesh Mhambre

Respondents 1-3 residing at 252/B/2, Opp. Gauns Hospital, Alto Duler, Mapuca, Goa 403507.

Corrections carried out as per order dtd. 07.11.2020 in STA No.1655/2020.
Sd/-
PS

5 Rajesh Nagesh Prabhu ~~& his wife~~

6 Mrs. Pratibha Pradeep Prabhudessai,

Both residing at Mastimol, Sheler, Canacona, Goa & her husband

7 Pradip Gopal Prabhudesai

Residing at Mastimol, Sheler, Canacona, Goa.

8 Anita Nagesh Prabhu

Both residing at Mastimol, Sheler, Canacona, Goa.

Corrections carried out as per order dtd. 07.11.2020 in STA No.1655/2020.
Sd/-
PS

~~10~~ 9 Prakash Damodar Prabhu and his wife

~~11~~ Smt. Rekha Prakash Prabhu

10 Both residing at G-1, Ramakant Apartments, Opp. Pharmacy College, St. Inez, Panaji-Goa 403001.

Corrections carried out as per order dtd. 07.11.2020 in STA No.1655/2020.
Sd/-
PS

11 Medha Nagesh Prabhu, Residing at Mastimol, Sheler, Canacona – Goa.

12 Dr. Sadanand Damodar Prabhu & his wife

13 Mrs. Neeta Sadanand Prabhu
Both residing at 3rd floor Sapana Plaza, A.D'Costa Raod, Margao, Goa.

14 Umesh Damodar Prabhu & wife

15 Smt. Milan Umesh Prabhu
Both residing at 6/71/2 First floor, Savitrivishva, Near Maruti Mandir, Mala, Panaji, Goa – 403001.

16 Dinesh Damodar Prabhu & wife

17 Smt. Madhubala Dinesh Prabhu

Both residing at 206 B Versova, Rajkmal Co-op. Housing Society, Off Yari Road Versova, Andheri West Mumbai 400 061.

18 Mrs Suvarna Suhas Keni & her husband

19 Suhas Keni

Both residing at Kolsar, Galgibaga, Post Sadolshem, Canacona, Goa.

20 Mrs. Suchan Sanjay Keni & husband

21 Sanjay Keni
Both residing at Kolsar, Galgibaga,
Post Sadolshem, Canacona, Goa.

22 Prafulla Balaji Angle,

Residing at Flat No.SS 3, Moonlight Apartment, new Chowgule College Road, Agali, Margao Goa.

23 Balaji Anant Angle (since deceased) through his legal representatives

i) Sanjay Balaji Pai Angle & wife

ii) Mrs. Sanjana Sanjay Pai Angle

Residing at Flat No.SS 3, Moonlight Apartment, new Chowgule College Road, Agali, Margao Goa.

iii) Mrs. Maya Amol Pai Angle & her husband

iv) Amol Keshav Pai Angle Both residing at Orel, Assolna Salcete, Goa.

v) Mrs. Sangeeta Shirish Shenvi Priolkar and her husband

vi) Shirish Balkrishna Shenvi Priolkar (since deceased)

Both residing at flat No.F2, 1st floor, Building no.3-B, Kurtarkar Nagri, Near Forest Office, Ponda, Goa – 403401.

Corrections carried out as per order dtd. 07.11.2020 in STA No.1655/2020.
Sd/-
PS

a) Smt. Sangeeta Shirish Shenvi Priolkar, daughter of Balaji Anant Angle,major in age.

b) Miss Sharvya Shirish Priolkar d/o. Late Shirish Priolkar, aged 21 years.

c) Mast. Saish Shirish Priolkar s/o. Late Shirish Priolkar, aged 15 years.

All R/o. Flat No.F2, 1st Floor, Building No.3-B, Kurtarkar Nagri, Near Forest Office, Ponda, Goa 403 401.

…..... Respondents

Shri M. B. D'Costa, Senior Advocate with Ms. K. Betquecar, Advocate for the petitioners.

Shri S. G. Desai, Senior Advocate with Ms. S. Shelke, Advocate for the respondent nos.1,5,6, 7 & 8.

Shri Sudin Usgaonkar, Senior Advocate with Ms. Tanvi Kamat Ghanekar, Advocate for the Respondents No.9,10,12 to 17.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 19 OCTOBER 2020

JUDGMENT :

Introduction:

Many years ago, a young couple gifted a few items of immovable property to their two sons, who were toddlers then. Their daughter, the eldest of the three children, was not taken into reckoning. Later, the couple went on to have six more children. Now, as the couple are no more, the succession has opened up. And that has led to inventory proceedings among the siblings. Seemingly, the gift deed confers on the two sons absolute rights over the property, but it also contains a reversion clause.

2. So the question is, have the donees become the absolute owners of the property with rights of alienation or has the property reverted to the parental estate to be partitioned among all the nine children and their branches?

Facts:

3. Damodar Prabhu and Satyabhama were husband and wife. The first had one daughter and two sons. In May 1936, the parents gifted some property to their two sons: Narayan and Ramnath. After this gift of property, the parents had six more children: five sons and one daughter.

4. After the death of Damodar Prabhu and Satyabhama, the succession opened. Over time, Narain, one of the donees, has also died. In

the inventory proceedings, the heirs of Narain applied under Article 2107 of the Portuguese Civil Code for choosing one of the properties. That was in December 2010. Later, through an order, dated 25 November 2011, the trial court allowed that application. And, it seems, it has disposed of the inventory proceedings by drawing the final chart of partition. The other donee, Ramnath, did not exercise his option. So he appealed to the District Court in Regular Civil Appeal No. 203/2012.

5. The issue before the District Court was this: when a gift is made to two donees, can one of them be stopped from exercising the option conferred by Article 2107 of the Civil Code—that is, to choose an asset to be allotted to him—merely because the other donee has not exercised that option? In June 2013, the District Court, South Goa, Margao, allowed the appeal. In fact, the District Court remanded the matter to the trial court. This time, the legal representatives of Narayan came to this Court in the second appeal.

6. Through its judgment, dated 21 December 2017, this Court disposed of the second appeal with the following direction:

> "Therefore, even though I am not inclined to interfere with the impugned judgment and Order, it is made clear that when the learned Civil Judge will decide the Inventory Proceedings, as per law, all contentions of the parties as regards the legal position including the one raised by the Appellant in the Second Appeal will be considered by the learned Civil Judge. Since the learned District Judge has found that the matter needs to be reconsidered by the learned Civil Judge as per the law and in view of what is submitted by the learned counsel for the parties, it is obvious that the landed Civil Judge will decide the Inventory Proceedings independently, uninfluenced by what is observed by the learned District Judge in the impugned order".

7. Thus, leaving all issues open, this Court remanded the matter to the trial court. In February 2019, the surviving donee, Ramnath, also

joined the legal representatives of the Narayan, in exercising "the right of pre-emption". In other words, both the branches applied under 100 of the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012.

8. Through its Order, dated 2 February 2019, the trial Court allowed the application. Then, Prakash, the Original Interested Party No. 10, appealed to the District Judge, South Goa. Through Order, dated 28 February 2020, the Ad Hoc District Judge, South Goa, allowed the appeal. Aggrieved, the branch of Narayan filed this writ petition under Article 227 of the Constitution.

Submissions:

9. Heard Shri M. B. Da Costa, the learned Senior Counsel for the petitioners; Shri S.G. Desai, the learned Senior Counsel for the respondents no. 1,5,6, 7 & 8 ; and Shri Sudin M.S. Usgaonkar, the learned Senior Counsel counsel for the respondents no.9,10,12 to 17.

Discussion:

10. Let us preface our discussion with two observations: (a) this petition is under Article 227 of the Constitution; (b) this is second-round litigation. That said, though the dispute has reached this Court in an interlocutory adjudication, it presents a pivotal issue, and that concerns the gift deed. Rather, the nature of the gift deed is at the core of the controversy. And the shares of all parties to the inventory proceedings depend on the scope of the gift deed.

11. Indeed, the dispute earlier reached this Court in a second appeal. But, then, the issue was whether it is mandatory for both the donees to apply together under Article 2107 of the Portuguese Civil Code, 1867, to choose properties. This Court, as we have already noticed, left all issues open and remanded the matter. Thus, the nature of the gift deed has come

to be decided only after this Court remanded the case.

12. Indisputably, the nature of a document, especially a conveyance, is a matter of the conveyor's intention. And that intention is a matter of interpretation. An issue of interpretation presents a question of law. Here, the gift deed is the pivot around which the rights of all the parties revolve. To contextualise the rival contentions, let us note how the parties differ in their treating the gift deed as to its scope or sweep.

The Core Controversy:

13. The donees contend that the gift is permanent and irrevocable. On the other hand, the other siblings argue that the gift lasted only during the donors' lifetime. According to them, not only the recitals in the gift deed but also the surrounding circumstances amply demonstrate the donors' intention.

14. Odd as it may sound, the gift was in 1936. By then, the parents had three children: one daughter and two sons. The parents gifted a substantial part of their property to the then young sons—just toddlers. After that, the parents had six more children. If the gift is permanent and irrevocable, seven children out of nine stand deprived of that part of the parental property. But I hasten to add that if the gift deed unambiguously establishes the donors' intention, the consequences, however inequitable, are of no consequence. The Court, as well as the parties, should defer to the wish of the donors. Let us see what the document denotes.

The Scope of Adjudication:

15. As I gather from the rival submissions and the impugned Order, the respondents have contended that the donees' application for selection would be correct if the Gift Deed had been operative. Because of the reversion clause, the Gift became extinct; the gifted property reverted to

the mass of inheritance of the deceased parents. The appellate Court has also held there is no Will, so Article 1866 is not at all attracted. What applies, instead, is Article 1473 of the Portuguese Civil Code.

16. The appellate Court has noted that there is a clause of reversion. It can be in the donors' favour or any other person's. The donors have indicated no other person. So, it has concluded that the reversion is in the donor's favour, and this is obvious from the wording of the gift deed. Indeed, the parents gifted the property to their two sons "pure[ly] and irrevocably". That property was from their disposal quota, which they could freely deal with. That said, their disposal of the property was with a clause of reversion. And the parents have reserved no right because "they possess more properties for their maintenance". After this disposition by gift, the parents went onto have six more children.

17. Let us come to the operative part of the gift deed. The donors declare thus:

> "That the donors do hereby cede, transfer unto donees all dominion, right, action, mandate, title and possession, which the donors have to the properties and fractions of the properties hereby gifted to the donees for them to have, hold and possess the same as their own, making its registration and other decorations in the competent offices".

The Intricacies of Interpretation:

18. *Odger's Construction of Deeds and Statutes*[1] speaks of how a deed is to be construed and understood. According to Odger, the law is anxious to save a deed if possible. If by any reasonable construction, the intention of the parties can be arrived at and that intention carried out consistently with the rules of law, the court will take that course.

1Fifth edition, on page 54.

19. Here, the disposition is a gift. But the gift has been burdened with reversion. That reversion creates a legal fiction. That is, to apply reversion, we should treat the deed of gift as if it were a testamentary disposition. If we take this legal fiction to its logical end and treat the gift as a testamentary disposition, section 88 of the Indian Succession Act mandates how the inconsistency in, say, a Will should be treated. According to this provision, "where two clauses of gifts in a Will are irreconcilable, so that they cannot possibly stand together, the last shall prevail".

20. Section 88 of the Indian Succession Act ought to have made our task easy. In the gift deed, the latter part declaring the donees as the absolute owners must have been accepted. But, all is said and done, we should not forget two things: All the construction and interpretation of deeds of documents the learned author Odger spoke about, and section 88 of the Indian Succession Act declared are in the backdrop of the Common Law. Here, we must apply, if ever, the rules of interpretation as applied under Civil Law.

The Civil Law Concepts:

(a) The Concept of Ownership:

21. At the outset, let us note that Civil Law is more than Roman Law; as a branch of law, it is nation-specific. It is the codified *ius communium*, founded on the bedrock of Roman Law. Strictly speaking Roman Law as such has ceased to exist. What we have is the Civil Law, permeating, chiefly, continental Europe with subtle national variations. For our purposes, however, let us use both the terms—the Roman Law and the Civil Law—interchangeably.

22. As W. W. Buckland and Arnold D. McNair describe in *The*

Roman Law and the Common Law: A Comparison in Outline[2], the Roman law gives us a conception of *hereditas* as an entity, almost a person. The rights and obligations of the deceased person vest in it, and it in turn transmits them to the *heres*, who in turn is a universal successor[3]. As Black's Law Dictionary[4] defines, *hereditas* under the Roman law is an inheritance by universal succession to a decedent. This succession applies whether the decedent died testate or intestate, and whether in trust (*ex fideicommissa*) for another or not. According to Buckland *et al*[5], our law, that is Common Law, knows nothing of *hereditas* as an entity, or of the *heres* as universal successor, though the executor or administrator under the property legislation bears a superficial resemblance to him. The primary function of the Roman Will is the appointment of a successor: that of our Will is to regulate the devolution of property[6]. This *heredetas*, as if it were a legal entity, takes care of post-mortem disposition of the property.

23. The classical jurists had an extremely concentrated notion of ownership, that is to say, although they recognised that various people could own the same thing in common at the same time, they attempted no division of ownership as such. This excluded, for instance, anything like feudal tenure, under which the ownership of land could be split up between landlord and tenant; even regarding leases, the landlord was full

2W. W. Buckland and Arnold D. McNair, The Roman Law and the Common Law: A Comparison in Outline (Cambridge Un, 2nd ed. Digital version 2008) Given the intricacy of and our unfamiliarity with the Roman Law, I have extensively quoted from this book. At places, I have supplied italics to the extracted portions. It is only to emphsise their relevance to our discussion.

3Buckland Roman and Common Law xvii

4(Thomson Reuters, 11 ed. 2019)

5. (n.2)

6Ibid, xvii

owner, and the tenant had only the benefit of an obligation. Similarly, it excluded anything like a doctrine of estates, whereby the ownership of land could be divided regarding time, the tenant for life being no more owner than the reversioner, nor the reversioner than the tenant for life: in Roman law, if the technique of usufruct was adopted, the reversioner was full owner subject to an encumbrance in the hands of the usufructuary, and even if the device of *fideicommissary* substitution was employed, *each successive holder was regarded as full owner*[7].

24. Finally, there could be no distinction between the legal and equitable estate. The owner's powers of management from his rights of enjoyment, and vest the former in a trustee, and the latter in a beneficiary[8]. As soon as it became the law that in a *fideicommissary* substitution, the prohibition against alienation that was imposed upon each successive holder operated *in rem* and not merely *in personam*. So each subsequent holder could undo any alienations made by his predecessors. *Then although each successive holder is called an owner, it is clear that the ownership was really divided between them in respect of time.* Similarly, *if a specific object was settled by way of* fideicommissary *substitution, each successive holder was regarded as full owner of it, though forbidden to alienate it and bound to leave it on his decease in accordance with the terms of the fideicommissum.* (emphasis mine) Whatever was the position in the classical law, his ownership came in the end to be terminable; for no alienation by him could have any effect for a longer period than his own life[9]. Certainly, the notion of making someone the owner of a thing and binding him by an

7Ibid, 81-82

8Ibid

9Ibid, 94

obligation to use it in a certain way is not un-Roman. The *fidei commissum* was obviously such an institution.

(b) Heres, Heir, Executor, Administrator, Will:

25. The 'heir' of our law no doubt derives his name from the Roman *heres*, but the two words have very different meanings. The *heres* was for Justinian the representative of the deceased, to whom passed all the liabilities which survived the death and all the rights which, surviving the death, were not transferred by direct legacy to other persons. And it was indifferent whether he derived his title from the rules of succession on intestacy or from a will. Our 'heir' throughout the greater part of our legal history has been simply the person who succeeded to the descendible real property of the deceased under the rules of succession on intestacy[10].

26. So, too, a will is not the same thing in the two systems. With us a will is essentially an instrument, to be operative only on the death of the maker and revocable till then, regulating the devolution of property. It usually nominates a personal representative, an executor, but it need not do so: the provisions of the will can be carried out by an administrator appointed for the purpose by the court[11]. But the Roman will, while it might and usually did contain gifts of property and other analogous provisions, need not contain them: its primary purpose, perhaps at one time its only purpose, was the appointment of the 'universal successor', the personal representative, the *heres*. And a will which did not do this in clear terms was a nullity. To sum up, our executor and administrator resemble the Roman *heres* much more than does our heir[12].

10Ibid, 147

11Ibid

12Ibid, 148

The Construction of Deeds in Roman Law:

27. In Rome, as with us, the law of wills and succession in general is very bulky, much of the discussion being on questions of interpretation and construction of inept words used by the testator[13]. This is all the more remarkable as the Roman law was without the complications and difficulties of interpretation due to our highly sophisticated real property law. *In Roman law, as in ours, wills are construed according to the testator's intent. But there are differences between the two systems on the evidence the Court can receive in proof of the intent.* The governing principle of our law in the matter is that the intent is to be gathered from the will itself, the whole will, not the individual proposition. In particular, where the will is clear, no extraneous evidence is admissible to vary it. It is true that there are limitations to this. Evidence is admitted against the will where it is shown —for example, that clauses have been improperly introduced into it against the intent of the testator: they must be struck out of the probate, even if they affect the sense of the remaining words, but the right words cannot be substituted for them[14].

28. At first sight, the Roman principles seem much the same. There are many texts which lay down the rule or imply it, that the will is to be interpreted by the will, the whole will and nothing but the will. *There are also many texts which lay it down that to determine in which of admissible senses a word is used, we may look at the circumstances, the testator's habits and knowledge.* On the other hand, *there are many texts which give the power to cite extraneous evidence in a wider field and in nearly every case this doctrine seems*

13Ibid, 159

14Ibid, 161

to have been introduced by interpolation[15].

29. So too we are told that the insertion or omission of a condition where this was intended can be made good. It is clear that where such a difference had occurred, the matter could be set right by external evidence. And also the errors leaving the sense clear were immaterial[16].

30. Both systems of law provide, indeed the rule is probably Roman in origin, that of two repugnant provisions, the second prevails. But for this, there must be a real repugnancy. Thus, if in a will there is a gift to A and later on a gift of the same thing to B, there is no repugnancy, for the thing may perfectly well be given to A and B. Accordingly they share. On the contrary, under the Common Law, as section 88 of the Indian Succession Act exemplifies, B excludes A. To sum up, in the *institutio* of a *heres*— that is, the designation in a will of a person as the testator's heir— that gift is preferred which is more favourable to the *heres*[17].

The Provisions in the Code:

31. The gift deed, the seed that sprouted this litigation, is in Portuguese; it was executed in 1936. A translated portion of that deed, as extracted by the appellate Court reads:

> "[T]he above named parties have stated in presence of the said witnesses that by natural love, esteem and affection, which they have to their minor sons Naraina, Damodora Porobo and Ramanata Damodora Porobo, both bachelors, residents in the same place, do hereby gift pure and irrevocably and on account of their disposal quota *which they freely can dispose of with clause of reversion and without reserving any right* as they possess more sufficient properties for their maintenance, the following properties and fractions . . ."

15Ibid, 162

16Ibid

17Ibid, 164-65

(italics supplied)

32. The above-extracted portion of the gift deed establishes these factors: (a) the gift is "pure and irrevocable"; (b) the gift is from the donors' "disposal quota"; (c) the parents "freely can dispose of" the property; (d) that disposal is "with clause of reversion"; (e) and "without reserving any right" in the donors' favour. The parents supplied a reason why they did not intend to reserve any right: "they possess more sufficient properties for their maintenance".

33. In the gift deed, there are two seemingly contradictory assertions by the donors: one is that the disposal is with a clause of reversion, and the other is that the donors are not reserving any right for themselves. Added to this is that the gift is irrevocable. Irrevocable it was because the donors did not revoke the gift deed during their lifetime. Then, the conflict remains between these two: "with clause of reversion" and "without reserving any right". Do these assertions contradict each other? We shall answer.

34. In the deed, physically and narratively the clause of reversion stands mentioned first, followed by non-reservation of rights. The parties are, indisputably governed by the Portuguese Civil Code, and that Code speaks of what amounts to a reversion of rights in a disposition, say, a gift. In fact, Article 1473 of the Portuguese (Indian) Civil Code holds the key. Let us examine Article 1473 of the Code:

> "The donor may stipulate reversion of the gifted thing, as much in his favour, as in favour of any other persons in accordance with Article 1866 onwards".

35. Article 1473 speaks of a donor's right to have in his favour the reversion of the gifted thing. The reversion is not only in his favour but also in any other person's favour. But how should this device of reversion

be effected? To provide that mechanism, Article refers to the provisions of Article 1866 onwards. We will consider Article 1866, which corresponds to Section 181 of the Goa Succession, Special Notaries and Inventory Proceeding Act, 2012. Article 1866 reads:

> "[T]he testamentary disposition whereby any heir or legatee is entrusted with preserving and transmitting the inheritance or the legacy on his death to a third party, is called fideicommissary substitution or *fidei commissum*".

36. In the first place, Article 1866 of the Code refers to testamentary disposition, not disposition *inter vivos*. But the Legislature by reference incorporates or inserts into a gift under Article 1473, a mechanism which is peculiar to the testamentary disposition and which is otherwise unavailable for *inter vivos* transactions under the Civil Law.

Analyses:

37. Let us not forget in the case of succession, the Goan territory is still governed by Civil Law—the Portuguese Code, to be precise. For section 5 of the Goa, Daman and Diu (Administration) Act, 1962, has continued all the laws in force immediately before the appointed day in Goa, Daman and Diu. So, to appreciate why the Legislature telescoped the devolution mechanism of testamentary disposition into an *inter vivos* disposition, that is a gift, we should refer to the property law under the Civil Law, ever so briefly.

38. W. W. Buckland *et al.*, have treated to a detailed analysis the twin concepts of "ownership in future" and "terminable ownership". They note that there was nothing in Roman theory to prevent the creation of ownership to begin in the future, provided the right form of conveyance was used. Under the Roman Law or Civil Law, *traditio* as a device was not limited and could be used for almost all purposes with the same

practical effect[18]. *Tradio*, as defined by Black's Law Dictionary, is "the simple delivery of a piece of property by one person to another with the intention of transferring ownership".

39. About the gift as a means of property disposition, Buckland *et al.* note that even "in a case of simple gift that seems to be considerable difference" between the Roman Law and Common Law. According to them,

> "It was not possible, as it is with us, to create *inter vivos*, by the same transaction, a further interest to begin at the expiry of the life interest. *It could indeed be done by will, but the difference in conception leads to a noticeable difference in terminology*. If a testator gives a life interest to A and the property, subject to this life interest, to B, then under our terminology, A, the life tenant, has the corporeal hereditament, and B has an incorporeal hereditament. But in Roman law the life tenant has only a *res incorporalis*: B has the *res corporalis*. It begins at once. B is regarded as being in possession, since A's life interest, being incorporeal, is not susceptible of possession[19].
>
> (italics supplied)

40. As seen from the above legal analysis, we may conclude that it is not possible to create *inter vivos* a life interest and future interest successively through the same document. Such a mechanism of devolution can be only through the testamentary method. That is why, as I understand, Article 1473 incorporates by reference the method of the disposition from Article 1866. So, we must read Article 1473 with Article 1866 and apply the consequences together.

41. We accept that under Article 1473, the donor may stipulate

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18Ibid, 91

19Ibid, 93-94

reversion of the gifted thing. If stipulated, the gifted property becomes fideicommissary substitution or *fidei commissum*, as described in Article 1866. Literally, *fidei commissum* means "a testamentary disposition or bequest in the form of a request instead of a command to the heir"[20] To elaborate, we may note that the *fideicommissum* was a disposition whereby a testator made an informal request to a person (*fiduciarius*) to convey a benefit from the estate to a third party (*fideicommissarius*). Such a request could be included in a will or in a codicil and was directed at a recipient of a benefit from the inheritance, for example, a testate or intestate heir or legatee[21]. Originally, a *fideicommissum* only placed a moral obligation on the *fiduciarius* to carry out the wishes of the testator as a matter of trust (*fiducia*). However, in the time of Augustus it became legally enforceable with an extraordinary procedure that took place before a specially appointed praetor known as *praetor fideicomissarius*[22].

42. In contrast to legacies that could only burden heirs, a variety of persons could be burdened with a *fideicommissum* such as intestate heirs, legatees, *fideicommissarii*, and debtors of the testator—in short, anyone who obtained a benefit from the estate[23].

43. We may further note that virtually anything could be the object of a *fideicommissum* as long as it was in *commercio*, including particular objects, rights, and even the entire estate or a large portion thereof. In this respect, a distinction was made between two types of *fideicommissa*: the

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20Oxford Latin Dictionary, 2nd ed. OUP, UK 2012

21(n2) 126

22George Mousourakis, Fundamentals of Roman Private Law (Springer-Verlag, Berlin, Heidelberg 2012) 305

23Ibid

fideicommissum rerum singularum, that is a *fideicommissum* concerning one or more assets of the estate, which approximated the legacy; and the *fideicomissum hereditatis*, in terms of which an heir (called *heres fiduciarius*: fiduciary heir) was requested to transfer a whole estate or a portion thereof to a third person. In the latter case, the *fideicomissarius* became either successor to the entire inheritance or co-successor with the fiduciary heir.

44. As per Black's Law Dictionary[24], *fideicommissary* substitution is equivalent to "substitution", a word of art, in common law having many shades of meaning. But we will confine to what that expression amounts to in the *Civil Law*. The same lexicon describes the word does:

> "6. *Roman Law:* A testator's designation of a person to whom the property was to be given by the person named as an heir, or by the heir of that person. FIDEICOMMISSUM. 7. *Civil Law:* the designation of a person to succeed another as beneficiary of an estate, usually involving a fideicommissum.

45. Merriam-Webster Dictionary defines "fideicommissary substitution" as (1) the substitution under Roman and Civil Caw of another heir or donee by a *fidei commissum* or direction that the original heir or donee at his death or upon some stated event or condition, transfer the inheritance or gift or a part thereof to the substituted heir or done; (2) a gift of property under Roman and Civil Law by will or gift *inter vivos* wherein the donee (as an heir of the testator or an heir of such person) is directed and under a duty to transfer the property to another or other persons designated as donees. The second part of the definition fits in with the case before us.

46. Corbett, Hahlo, Hofmeyer et Khan in *The Law of Succession of*

24(n4)

South Africa[25] holds that an obligation upon the fiduciary to pass on the property in question to the fideicommissary is of the essence of a *fideicommissum.* If the testator confers upon the person to whom the property is initially bequeathed, or entrusted, an unfettered discretion as to whether to pass it on or not does not create a valid *fideicommissum.* But on the other hand, where the will obliges him to pass on the property but vests him with a discretion merely as to the manner and time of doing so or as to the choice of persons to whom it is to be passed on, there is a valid *fideicommissum.*

What is Fideicommissum or Fideicommissary Substitution?

47. A *fideicommissum*, according to LexisDigest[26], is a legal institution, where the owner of a property transfers his property to another person, subject to it being transferred from that person to yet another person at a later stage. Usually, a *fideicommissum* (condition) is created in a will, according to which property is first bequeathed to one person and then to someone else. That is, in such a case, the heir (known as the *fiduciarius*, that is, the bare dominium owner) inherits the property, and it is transferred to him/her, on condition that he/she will transfer it to someone else at a given stage. Later, the proprietary right of the *fiduciarius* is ended (after the lapse of a stipulated period, or when a condition has been met) and the property is transferred to the *fidei commissarius* (the sequential owner).

48. A typical example would be where a testator provides in his will that his farm should go to his son A, on condition that the farm goes to A's son B upon A's death. In this example, the testator, therefore, creates a

25(1980) 269-270

26http://www.ghostdigest.com/articles/what-is-a-fideicommissum/52218

fideicommissum with regard to his farm; A will then be known as the *fiduciarius*, while B will be known as the bare dominium owner. A fideicommissum (condition) does not necessarily only have to be created in a will, but it can also be found where, for example, the property is donated[27]. Let us see what happens when 'A' passes away. When A passes away, his executor will have to transfer the farm to B, in terms of the *fideicommissum* condition and not according to A's will. The will doesn't even have to be lodged. Because it is transferred according to the *fideicommissum* condition, reference must also be made to the condition in the causa[28].

49. That is, under Article 1866, in relation to Article 1473, the legatee must be read as donee. This donee must preserve the gifted property and transmit it to a named third party. This accepted, the next question crops up: when should this transmission take place—after the death of the donor or the donee? Had it been confined to Article 1866 alone, this question would have been otiose. It is because the disposition under a will takes place only after the death of the testator. The legatee, then, will enjoy the property during his lifetime. On his death, the property reverts to the third-party mentioned in the will.

50. On the contrary, in a disposition *inter vivos*, say a gift, the transfer of property is instantaneous. Here, we need not digress into the question of acceptance. Suffice to note that, through a gift, the property gets transferred to the donee during the donor's lifetime. If we apply Article 1866 to a transaction under Article 1473, that is gift; the testator becomes donor, and legatee the donee. If we apply *fideicommissum*

27Ibid

28Ibid

vocabulary here, the done is the bare dominium owner and from him whoever gets the property is the sequential owner.

51. That said, in this case, the deceased parents were the donors. Though they mentioned reversion in the gift deed, that mention has not been explicit whether the reversion is in their own favour or a third party's favour. The appellate Court has observed that the gift deed "specifically mentions the clause of reversion [but] without reserving any right by the donors". That is, the "donors had gifted their disposable portion in favour of the donees but with the right of reversion and not by reserving any right for themselves". This, according to the appellate Court, indicates that there was a reversion of the property after the death of the donors. And the option of choosing the gifted properties would lie only if there was no reversion.

52. The pertinent question—whether the reversion takes place after the death of the donor or the donee—still remains to be resolved. True, the appellate Court has resolved the issue in favour of the donors' remaining legal heirs, other than their two sons, who were the donees.

53. In the inventory proceedings, the petitioners—that is, the surviving done and the branch of the deceased done—applied under section 100 of the Goa Succession, Special Notaries and Inventory Proceedings Act, 2012. It was to choose a property which is gifted to them from the inheritance. When the trial Court allowed this application through its Order, dt.20th February 2019, the other siblings and their branches assailed that before the appellate Court. Then the appellate Court reversed that decision.

54. Let us examine section 100 of the Act 2012. This provision deals with the situation where the value of the gifted assets exceeds the value of

donee's share in the inheritance. In that eventuality, the done shall return the excess in kind. The donee, thus, may choose from amongst the gifted properties those that are necessary to make up his share in the inheritance and the encumbrances on the gift. As a result, the donee does not have the right to take part in the licitation of the properties, which he has to return to the other co-heirs. Amongst the gifted properties, if there is any property which is physically indivisible and which in its totality does not fit in the donee's share, it shall be collated in kind, and the donee may take part in the licitation subject to section 427.

55. Unambiguous as section 100 is, for a donee to invoke this provision, the gift must be absolute. That is, there should be no clause of reversion circumscribing the gift. Unless this threshold is passed, the donee no longer remains a donee; instead, he becomes a part of the successors. Here, the trial Court has held that the reversion as contemplated under Article 1866 does not affect the gift as provided under Article 1473. The appellate Court has reversed that finding.

56. So as we have noted above, all depended on the nature of the gift deed. We have, as part of our discussion, noted the differences between the Roman or Civil Law and Common Law as to the gift, succession, and testamentary disposition. Let us summarise them:

(a) Here, the parties are governed by succession under the Civil Law.

(b) Conceptually, succession—testamentary or intestate—differs in the Civil Law and the Common Law.

(c) Under the Common Law, the rights and liabilities of a propositus do not independently exist; they can only be traced to the successors or inheritors as their own rights by operation of law. But

in Roman Law, the rights and obligations of the deceased person vest in *hereditas*, "an entity, almost a person".

(d) The primary function of the Roman Will is to appoint a successor; under the Common Law, that of the Will is to regulate the devolution of property.

(e) The division of ownership under Roman Law is less pronounced. So there exists no distinction between the legal and equitable estates.

(f) Even with limited ownership, each successive holder is called an owner; the ownership, in fact, stands divided between them "in respect of time".

(g) If a specific object was settled by way of *fideicommissary* substitution, each successive holder was regarded as full owner of it, though forbidden to alienate it and bound to leave it on his death in accordance with the terms of the *fideicommissum.*

(h) It is not possible to create inter vivos a life interest and future interest successively through the same document under the Roman Law. So comes the combination of Articles 1473 and 1866.

(i) The Legislature by reference incorporates or inserts into a gift under Article 1473 a mechanism which is peculiar to the testamentary disposition under Article 1866. It is otherwise unavailable for *inter vivos* transactions under the Civil Law. So, we should read Article 1473 and Article 1866 together.

(j) Under Roman Law, to determine what a word denotes in a deed, we may look at the circumstances, the testator's habits, and knowledge.

For this, we may cite extraneous evidence in a wider field.

(k) There is more interpretative freedom under the Roman Law than in Common Law.

(l) "The insertion or omission of a condition where this was intended can be made good".

(m) Unlike section 88 of the Indian Succession Act, under the Roman Law, in a deed or document, one conflicting provision will not override the other; it is both or neither.

57. In the light of the settled principles of the substantive law of succession and the adjectival aspects of interpretation, I must hold that the gift deed refers to absolute ownership as successive ownerships in respect of time. So the donors' ceding and transferring unto donees "all dominion, right, action, mandate, title and possession" does not militate under the Roman Law against the concept of limited ownership or *fide commissum*. Similarly, the disposal "with clause of reversion" and "without reserving any right" is an accepted Romanic legal practice of *fide commissum*.

When does the reversion take place?

58. Finally, we should answer this question, too. The appellate Court has held that the reversion takes place on the donor's death. If we examine Article 1473, it emerges that the donor may stipulate reversion in his favour or in a third party's favour. And this reversion must be in accordance with Article 1866 onwards. Though the provisions from Article 1866 onwards in Chapter V of the Code govern the reversion, here the other provisions assume no importance.

59. On a deeper analysis, the process of reversion takes place in, at

least, three forms: On the date specified in the deed; on the eventuality of an event specified in the deed happening; and on the death of the heir who holds the property *fide commissum*. Here, no date was specified. No eventuality was prescribed. And no third party was mentioned. Nor has the donors stipulated reversion in their favour. In fact, the disposition was without reserving any right in the donors' favour. But the gift deed does contain the expression "with clause of reversion".

60. Then, we must apply the statutory scheme rather than the donors' unavailable intention. Article 1866 mandates that the heir or legatee must preserve and transmit the inheritance or the legacy "on his death to a third party". Here, the third party is the body of successors as a whole, for Roman Law abhors intestacy or vacuum in devolution. That said, the two sons are the joint donees, and one of them died. As the limited estate (if we can use that expression) remained in their hands indivisible, one donee's death has opened up or triggered the reversion. Thus, the reversion completed, the donees, too, stand to take the benefit of the donors' estate as their heirs, of course, along with others.

61. So I concur with the conclusions the appellate Court has arrived at, though I do differ as to the reasons it supplied to support those conclusions.

As a result, I dismiss the Writ Petition. No order on costs.

DAMA SESHADRI NAIDU, J.

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