JITENDRA SHARMA
SENIOR ADVOCATE
SUPREME COURT OF INDIA

Phones Chmb. : 3382271, 3387304
Resi. : 6491567, 6498651
Fax : 91-11-6494145

17, LAWYERS CHAMBER
SUPREME COURT
NEW DELHI-110001

May 26, 2004.

OPINION

In re :

INTERNATIONAL ROERICH CENTRE.

Dr. Svetoslav Roerich, the famous painter of Russian origin was an Indian citizen and lived in the city of Bangalore, India till his death. On 19th March, 1990. Dr. Roerich executed a document in English language at Bangalore with the title, **"Archives and Heritage of Roerich for the Soviet Roerich Foundation at Moscow."** In this document Dr.. Roerich declared that an important collection of paintings of his father, mother, brother and of his own have been in his possession in India all these years and that he has an absolute right of ownership and title to those and has a right to dispose off or deal with them in any manner he may deem fit. In view of his desire that the heritage of Roerichs is preserved for postarity, he decided to hand over some of those paintings to "Soviet Roerichs Foundation" hereinafter referred to as the "SRF" which was sponsored under Order No. 950 dated 4th November, 1989 of the Council of

Ministers of USSR. The paintings that he wished to hand over to the Soviet Roerichs Foundation were 288, out of which 163 were his own paintings and 125 were the paintings of his father. These paintings were already with the Ministry of Culture of the USSR and were detailed in the Annexures to the said document. Other selected paintings were also listed in the Annexures to the said document. Dr. Roerich also handed over some of the important collections which were listed in the Annexures to the SRF as represented by Dr. Ludmila Shaposhnikov and Mr. Sergei Zhitanen, who were appointed as "executors and trustees responsible for the preservation of the collection."

Dr. Roerich retained his right of ownership over the paintings during his life time and also retained his right to take back any of the articles at any time from the SRF. Dr. Roerich further stated that **"after my life-time it shall belong absolutely to the Soviet Roerichs Foundation"** and declared that he has not made any disposition or alienation or created any kind of charge over these properties (paintings) to fulfill the objects of the Foundation and his wish covered under the said document.

This document was executed at Bangalore on 19th March, 1990 and bears the signatures of two attesting witnesses namely Mr. Anthony De Costa and Mrs. Mary Joyce Poonacha.

A "Will" has been defined in sub-section (h) of Section 2 of the Indian Succession Act, 1925, hereinafter referred to as the "Act" as under:

"Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

Paragraph 5 of the 19th March documents is as under:

"That I have absolute right of ownership over the properties mentioned in Annexures during my life-time and I preserve my right to take back any articles of my choice at anytime from the Soviet Roerichs Foundation and that all the items listed in the Annexures shall remain with the Soviet Roerichs Foundation and after my life-time it shall belong absolutely to the Soviet Roerichs Foundation."

IN TESTIMONY WHERE OF
I ATTEST AND SIGN
WITH MY OFFICE SEAL

DIPANKAR DAS ADVOCATE
Reg. No. - 916
Approved by
Govt. of India
Notary Delhi

Valid Out-Side India

This paragraph is a clear indication that while in his life-time Dr.Roerich retained absolute right of ownership over the properties including the right to take back any of those articles at anytime, he bequethed these articles, after his death, to the Soviet Roerich Foundation. It is this stipulation that "after his life time" it shall belong to the Foundation which makes it a testamentary succession and makes his intention in respect of his said property which he desired to be carried into effect after his death.

Thus it is a document of testamentary disposition of property of the testator, which in other words is a **WILL.**

The Section 74 of the Act specifically lays down that, **"it is not necessary that any technical words or terms of art be used in a Will, but only that the wording be such that the intention of the testator can be known therefrom."**

Section 63 of the Act stipulates Rule for the execution of a Will and states as follows:

"Every testator,....., shall execute his Will according to the following rules"-

(a) The testator shall sign or shall affix his mark to the Will,.....

(b) The signature.....shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the ..... the testator sign.....

.....and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

The Document executed on 19th March 1990 clearly complies with the requirements of Section 63 of the Act.

I am therefore of the opinion that the document executed by Dr. Svetoslav Roerich on 19th March, 1990 would constitute a **"Will"** as defined under sub-section (h) of Section 2 of the Indian Succession Act, 1925. It also complies fully with the requirements for execution of a Will as stipulated in Section 63 of the Act. Moreover the intention of the testator

are clear and can be known from the wordings of the document, as per the mandate of Section 74 of the Act.

Later during his life time Dr. S. Roerich on 22nd October 1992 wrote, in Russian, the following document:

> **"I, Dr. Svetoslav Roerich, residing at the state of Tataguni, Kanapura Road, Bangalore, Karnataka, South India./ Honorary President of the International Roerich Center in Moscow, having transferred to the Soviet Roerich Fund in 1990 the heritage of my parents. N.K. Roerich and E.I. Roerich, acknowledge that the International Roerich Centre established on my initiative, is the assignee of the Soviet Roerich Fund."**

This document is signed by him and has been attested by a Notary Public at Bangalore where as an Indian citizen, he was residing.

Dr. Roerich has clearly stated that the International Roerich Centre "is the assignee of the Soviet Roerich Fund." The question for consideration is whether the document dated 22nd October, 1992 constitutes an assignment.

What is an "assignment"? Various law and other dictionaries have defined the term as under:-

1. Collins Concise Dictionary (Revised Third Edition, 1995) as "something that has been assigned, such as a mission or task" and

(a) "the transfer to another of a right, interest or title to property (b) the document effecting such a transfer."

II. New Lexicon Webster's Dictionary (Revised Edition 1987) as "transference of property or a right"(b) "the document by which this is done"

III. Stroud's Judicial Dictionary of Words and Phrases (Fourth Edition – 1971) deals with "Assigns" and notes " 'assign' does not mean 'heir': it means a person substituted for another by an act of some kind or other". An heir takes *vi legis* but everyone who takes by an act e.g. a deed or will, of a prior owner is his assign.

IV. Jowitt's Dictionary of English Law (Second Edition – 1977) deals with "A ssign – Assignment" as (a) "to assign generally means to transfer property, especially personal estate: (b) in its more special sense, to assign to transfer personal estate, or chattels real or certain rights in real or personal estate. The term is especially applied to.....personal property..... The word 'assign' is a proper technical operative word, but any expression showing an intention to make a complete transfer will constitute an assignment."

V. Black's Dictionary of Law (Fifth Edition) defines it as "a transfer or making over to another of the whole of any property, real or personal, in

possession or in action, or of any estate or right therein. It includes transfers of all kinds of property. The transfer by a party of all of its rights to some kind of property usually intangible property such as rights in a lease, mortgage.....' Tangible property is more often transferred by possession and by instruments conveying till such as a deed or a bill of sale."

In India principles of English legal system and terms are generally followed. The Supreme Court of India defines 'assignment' as "means the transfer of the claim, right of property to another" in the case of Commissioner of Gift Tax –Versus- N.S. Chettiar as reported in 1971 (2) Supreme Court Cases 741 at page 746.

In the case of Oberai Forwarding Agency -Versus- New India Assurance Co. Ltd. & another as reported in 2000 (2) Supreme Court Cases 407 the Supreme Court of India was considering a distinction between 'subrogation' and 'assignment' in the context of the position of an insurance company after having paid the claim to an insured. Relying heavily on a text book on Insurance Law the Supreme Court observed as under:-

"The distinction between subrogation and assignment is explained in the standard text book Insurance Law by Mac Gillivray & Parkington (7th Edn.)

" 1131. Difference between subrogation and assignment.- Both subrogation and assignment permit one party to enjoy the rights of another, but it is well established that subrogation is not a species of assignment. Rights of subrogation vest by operation of law rather than as the product of express agreement. Whereas rights of subrogation can be enjoyed by the insurer as soon as payment is made, as assignment requires an agreement that the rights of the assured be assigned to the insurer. The insurer cannot require the assured to assign to him his rights against third parties as a condition of payment unless there is a special clause in the policy obliging the assured to do so. This distinction is of some importance, since in certain circumstances an insurer might prefer to take an assignment of an assured'' rights rather than rely upon his rights of subrogation. If, so for example, there was any prospect of the insured being able to recover more than his actual loss from a third party, an insurer, who had taken an assignment of the assured's rights, would be able to recover the extra money for himself whereas an insurer who was confined to rights of subrogation would have to allow the assured to retain the excess.

1132. Another distinction lies in the procedure of enforcing the rights acquired by virtue of the two doctrines. An insurer

exercising rights of subrogation against third parties must do so in the name of the assured. An insurer who has taken a legal assignment of his assured's rights under statute should proceed in his own name....."

" By the first clause the second respondent assigned and transferred to the first respondent all its rights arising by reason of the loss of the consignment. It granted the first respondent full power to take lawful means to recover the claim for the loss, and to do so in its own name. If it were a mere subrogation, first, the word "assigned" would not be used. Secondly, there would not be a transfer of all the second respondent's rights in respect of the loss but the transfer would be limited to the recovery of the amount paid by the first respondent to the second respondent. Thirdly, the first respondent would not been titled to take steps to recover the loss in its own name; the steps for recovery would have to be taken in the name of the second respondent. Thus, by the first clause there was an assignment in favour of the first respondent."

" The second clause, undoubtedly, used the word "subrogate", but it conferred upon the first respondent "the same rights" that the second respondent had "in consequence of or arising from the said loss or damage", which meant that the

transfer was snot limited to the quantum paid by the first respondent to the second respondent but encompassed all the compensation for the loss. Even by the second clause, therefore, there was an assignment in favour of the first respondent."

Considering all the facts and circumstances of this matter I am of the view that even after he had handed over possession of the paintings and other articles to the Ministry of Culture of the USSR he retained his right of ownership over the said collection. That right of ownership included his right to take back the paintings and other articles at anytime. He then decided to transfer and hand over all these paintings and articles to the Soviet Roerich Foundation. This was done to preserve and maintain the collections of paintings and other heritage of Roerichs for scientific and cultural work. He stated all these facts in his Will dated 19th March, 1990.

Later it appears that Dr. Roerich felt that the International Roerich Centre, which was established on his initiative may be able to carry out his wishes better. He therefore assigned those paintings and articles to the International Roerich Centre and declared it to be the assignee of the earlier Soviet Roerich Foundation.

The document executed by Dr. Roerich on 22nd October, 1992 is a deed of assignment in favour of the International Roerich Centre.

It may be further contended that the document of 22nd October 1992 is also a Codicil to the Will dated 19th March, 1990. The codicil does not go contrary to the original Will. It is more in the nature of taking note of subsequent developments i.e. establishment of the International Roerich Centre on his own initiative. The words used by him in the codicil are clear.

A codicil has been defined in Section 2(b) of the Indian Succession Act, 1925 hereinafter called the Act as under:

> **"codicil" means an instrument made in relation to a Will, and explaining, altering or adding to its dispositions, and shall be deemed to form part of the Will;**

By this document dated 22nd October, 1992, Dr. Roerich is only altering to his disposition as to who will inherit the paintings and other articles after Dr. Roerich's death. The provisions of Section 82 of the Act are clear that the meanings are to be derived from the whole Will. Moreover Section 87 makes it very clear that as far as possible the intention of the testator are to be given effect to.

It is thus clear that the document of 22nd October, 1992 is an assignment as it transfers possession and gives the right to possession of the paintings to the International Roerich Centre in place of Soviet Roerich Foundation. Additionally it is also a codicil as it alters the Will dated 19th

March, 1990 and as an assignee of Soviet Roerichs Foundation, the International Roerich Centre would inherit the paintings from the ownership of Dr. Roerich by virtue of the Will read with the Codicil.

In conclusion my opinion is:

(a) that the document of 19th March, 1990- executed by Dr. Svetoslav Roerich at Bangalore, India constitutes a Will under the provisions of the Indian Succession Act, 1925;

(b) that the document of 22nd October, 1992 signed by Dr. Svetoslav Roerich constitutes as assignment in favour of International Roerich Centre; and

(c) that the document of 22nd October, 1992 may also constitutes a Codicil to the Will of March 19,1990 as it seeks to alter the disposition mentioned in the said Will.

Jitendra Sharma

(Jitendra Sharma)
Senior Advocate

SIGNATURE ATTESTED

Mr. Mikhail Rapnikov,
Attorney at Law,
Moscow.

Valid Out-Side India

IN TESTIMONY WHERE OF,
I HAVE HEREUNTO SET
MY HAND AND AFFIXED
THE SEAL, NEW DELHI, INDIA
ON 26.05.2006.

Solemnly affirmed before me

ATTESTED
26.05.06

DIPANKAR DAS
ADVOCATE
NOTARY PUBLIC
REGD. NO. 916
GOVT. OF INDIA
14, LAWYERS CHAMBERS
SUPREME COURT OF INDIA
NEW DELHI

NOTARIAL

MY COMMISSION EXPIRES ON.... 8th Sept 2005.