

(1964) 08 KL CK 0016

In the High Court Of Kerala

Case No : A.S. No's. 397 and 465 of 1962

Balakrishna Warriar and Others

APPELLANT

Vs

Sreedhara Warriar and Others

RESPONDENT

Date of Decision : 12-08-1964

Acts Referred:

Hindu Succession Act, 1956 — Section 8
Succession Act, 1925 — Section 81

Citation : (1964) KLJ 929

Hon'ble Judges : M.S. Menon, C.J;M. Madhavan Nair, J

Bench : Division Bench

Advocate : P. Kochukrishna Pillai, Joseph Madathil in A.S. 397/62, T.S. Krishnamoorthy Iyer in A.S. 465/62, for the Appellant; T.S. Krishnamoorthv Iyer, P.C. Chacko For Respondents 1 and 5 in do, P. Kochukrishna Pillai For Respondents 1 to 4 in do, for the Respondent

Judgement

Madhavan Nair, J

1. The 1st defendant and the 1st plaintiff are brothers. The 4th defendant is their sister. The 7th defendant is the husband of the 4th defendant; and defendants 2, 3 and 5 are their children. The 6th defendant is the daughter of the 5th defendant. They belong to. The community normally follows the Marumakkavazhi system of succession, except when a member marries in the "Kudivaippu" form, taking the wife to the husband's house to reside there permanently, in which case he will be entitled to claim partition, and succession to him will be under the Makkavazhi system. The plaint includes five Schedules of properties : Schedules A and B enumerate tarwad properties; Schedule E properties that belonged to the tarward, but have been, subsequent to the date of Ext. P2, exchanged for properties shown in Schedule D; and Schedule C describes the properties acquired in the name of the defendants, which the plaintiffs claim to have been out of tarwad funds.

2. On 8-3-1125 Ext. P2 was executed by the tarwad allotting plaint B schedule

properties to the 1st plaintiff for his maintenance, with a recital therein:

It provided also for the 1st plaintiff's borrowing Rs. 5000/- on mortgage to put up a house in item 1 thereof and for his residence in the tarwad house with the other members till the house is put up. On 13-1-1126, the 1st plaintiff married the 2nd plaintiff; and on 29-8-1126 he completed the construction of a building on plaint B Schedule item 1, and celebrated the house-warming and the "Kudivaippu" of his wife therein, having invited the 1st defendant thereto by Ext. D4 letter dated 26-8-1126. Plaintiffs 3 and 4 are the children of that marriage.

3. The original claim in this suit is for partition of 1/3 share of the properties in the plaint Schedules A, B, C and D to the plaintiffs. Subsequent to the institution of the suit, the 1st defendant died on 27-11-1959. His heirs, under the Hindu Succession Act, are the 1st plaintiff and the 4th defendant. The plaint has therefore been amended to include a claim for a moiety of the 1st defendants share in the properties.

4. Defendants 1, 2 and 4 had filed a joint written statement in which they denied the validity of the Kudivaippu of the 2nd plaintiff as she was big with child at the time and had in her possession properties obtained in partition of her natural tarwad, the plaintiffs' right to enforce partition, and the plaint C schedule properties enuring to the tarwad. When plaint was amended, defendants 2 and 4 raised a further contention that the 1st defendant had, by his Will, Ext. D40, dated 23-11-1959, disinherited the 1st plaintiff.

The 7th defendant contended Ext. P2 to be a deed of partition, not of maintenance arrangement.

5. The Subordinate Judge found the 2nd plaintiff's Kudivaippu valid, Ext. P2 a deed of partition, and C Schedule properties not to belong to the tarwad and therefore dismissed the suit. A.S. No. 397 is by the plaintiffs; and A.S. No. 465 by defendants 2 and 4.

6. Ext. P2 recites itself to be an arrangement for maintenance and all the provisions therein are in tune with that recital. It is conceded by counsel for the respondent that but for the clause quoted above, it can be a maintenance arrangement only. Defendants 1, 2 and 4 did not plead Ext. P2 to be a partition; on the other hand their case is that the Kudivaippu conducted by the 1st plaintiff being invalid he has no more than a right of maintenance in the tarwad. The contention that Ext. P2 is a deed of partition emanated from the 7th defendant who was no party to Ext. P2 and is no member of the tarwad. Nonetheless, the Subordinate Judge has found it correct, the only basis therefore being the clause therein quoted above. That clause does not refer to a separation of the 1st plaintiff from the tarwad all that it says is that, in case the 1st plaintiff marries in the Kudivaippu form, his wife and children should succeed only to the properties allotted to him for maintenance. That does not spell out a separation of the 1st plaintiff from the family-fold. (The other plaintiffs came to be attached to the 1st plaintiff only subsequent to Ext. P2). If Ext. P2 is to savour a partition, it should

have concerned the separation of the 1st plaintiff, and not what his heirs might take after his death. As there is nothing in Ext. P2 purporting to separate the 1st plaintiff from the tarwad, the finding of the Subordinate Judge that it was partition of the plaintiffs from the tarwad has to be vacated.

7. The testimony of P.W. 2, a retired Division Inspector of Schools and a prominent member of the community, shows clearly that "Kudivaippu" need not be soon after the marriage, but may be years afterwards. He has given instances among the Variyars of "Kudivaippu" made after birth of children of the marriage, a prominent instance thereof being that conducted in 1100 by Shri M.R. Madhava Variyar, who was a leading Advocate and a prominent journalist. D.W. 3 has also sworn that Shri M.R. Madhava Variyar conducted the Kudivaippu of his wife after their first child was born. P.Ws. 3, 4 and 5 have sworn to the custom, giving several instances of Kudivaippus made after birth of children. We have therefore to accept the finding of the court below that according to the custom of the community neither the length of interval after the marriage nor pregnancy would affect the validity of a Kudivaippu. Nor does the fact that the "Kudivaippu" was not made in the ancestral tarwad house appear material. Ext. P2 being a maintenance arrangement, the properties allotted thereunder to the 1st plaintiff continued to be tarwad properties and therefore the building put up thereon was not an alien house. Under Ext. P2 the 1st plaintiff was to reside separate in a house to be put up by him in one of the properties set apart for his enjoyment. The essence of a "Kudivaippu" being the habitation of the wife in the husband's house, the Kudivaippu performed in the house put up by the husband on a tarwad-property has to be found proper and lawful. The fact that the 2nd plaintiff had obtained her share from her natural tarwad before she was taken in her husband's house by Kudivaippu cannot be of any evil consequence. If a woman can enter the husband's family, bedecked with gold and jewels obtained from her natural tarwad, one cannot find any disability in her doing so possessed of immovable properties got therefrom.

We therefore accept the finding of the Subordinate Judge that the 2nd plaintiff's Kudivaippu in the 1st plaintiff's house was valid.

8. That a member of a Variyar tarwad, married in the Kudivaippu form, is entitled to claim partition per stirpes has been found by the court below and is not in dispute before us. That position appears well-settled by decisions. Vide: Easwara Warriar v Parukutty warasiaru (1955 KLT 495) and Rama Warriar v Chakrapani Varrieru (1955 KLT 566). It follows that the 1st plaintiff is entitled to a 1/3 share in all the properties of the tarwad.

9. Ext. D40 purports to be a Will executed by the 1st defendant on 23-11-1959, four days before his death, in favour of defendants 2 to 5, in these terms (translated):

The Will executed the 23rd day of November 1959 in favour of (the defendants 2, 3, 4 and 5) by (the 1st defendant):

(After narration of the executant's titles to the properties:) Whereas, on account of my ill-health I have come to the opinion that I should in my life-time make a provision regarding my interests and assets I execute this Will out of my free will and in my full senses all the covenants herein will come to effect after my life only; and I will have during my life full power to change the whole or any part hereof or to rewrite the Will. The properties (got) under the Udampady No. 786 of 1125 aforesaid are described hereunder as Schedule A; and the properties (got) under the Will No. 6 of 1123 and the properties (got) under sale deeds and the interests under decrees and the movables as Schedule B. I have decided on account of various reasons that to my share that may devolve, under the Hindu Succession Act, on heirs claiming under me who am an undivided member of this family, my younger brother Balakrishna Variyar (the 1st plaintiff) shall have no right and I am recording the same here. Schedules of properties--(omitted).

No word of testamentary disposition of any property is found in the instrument. It purports only to disinherit the 1st plaintiff. A mere disinheritance, without a gift over, is ineffective in law; as the fixation of heirs is a matter for law, not for parties.

10. Counsel for the appellants in A.S. No. 465 characterizes Ext. D40 a Will that devises, by implication, the 1st defendant's properties specified therein to the defendants 2 to 5 in whose favour it is executed; and alternatively, that the disinheritance of the 1st plaintiff amounts to a gift of the properties to the other heir at law, the 4th defendant. No doubt, the instrument is styled a Will executed by the 1st defendant in favour of defendants 2 to 5, and contains two Schedules of properties. But, words of narration cannot do duty for operative words of disposition. To convey property, it is not enough if a donor writes a list of his properties and addresses it to the donee; he must say that he gives the properties to the donee. No such expression is to be found in Ext. D40. As observed by Subba Rao J. with concurrence of Ramaswami J. in *Dana Lakshmi Ammal v Pichayya Naidu* (A.I.R. 1953 Mad. 740): "The document is a Will if it contains specific words of request to come into effect after the death of the testator.

11. In AIR 1946 103 (Privy Council) the Judicial Committee referred to the Will executed by the Raja of Partabner in those terms:

(After reciting the ill health of the executant) Maha Vindeshri Pratap Singh is the son of Kunwar Madho Singh--one of my kinsmen--resident of Padampura, district Etawah. To-day (Kunwar Madho Singh) has given him (Maha Vindeshri Pratap Singh) to me in adoption and I have taken him in adoption. After my death, my adopted son, Lal Maha Vindeshri Pratap Singh, shall be the "gaddinashin" and the owner of my entire movable and immovable property. After my death he shall, like myself, have all the powers. Lal Maha Vindeshri Pratap Singh is yet a minor, therefore during his minority, my mother, Rani Besni Madho Kunwar, who was my guardian during my minority and who managed the entire estate very well, shall remain the guardian of my adopted son Lal Maha Vindeshri Pratap Singh and

shall manage the entire estate. I have, therefore, executed this will while in a sound state of body and mind and after full deliberation.

and observed:

The learned Subordinate Judge held that this document was not a will within the definition in the Indian Succession Act. He thought that the only operative part of the document was the appointment of a guardian and that all the rest was narrative. On the other hand, the High Court thought that the direction that the adopted son should be the gaddinashin and the owner of the entire movable and immovable property of the testator constituted a good residuary gift. Their Lordships do not doubt that these words, taken out of their context, would operate as an effective gift of the whole of the testator's property but taking the document as a whole, their Lordships prefer the view of the Subordinate Judge. It will be observed that there are no direct words of gift in the will, and that there was no object in giving to the adopted son property which he would inherit under the law, whilst the words imputing that he would take the whole estate are as consistent with mere narrative as with gift. In their Lordships' view the effect of the document is that Raja Hukum states that he is very ill, that he has taken Maha Vindeshri in adoption, that the latter will, therefore, after the testator's death, be the gaddinashin and the owner of the whole of his property, that Maha Vindeshri is a minor and, during his minority, the testator appoints his mother to be the guardian of Maha Vindeshri and the manager of the estate.

12. Counsel contends that a Court of construction shall try to avoid intestacy, and that, as the purpose of executing Ext. D40 is clear from circumstances to gift the executant's properties to defendants 2 to 5, effect must be given to it. He relied strongly on the dictum in *Bund v Green* (1879) 12 Ch. D. 819. In that precedent, the head-notes refer to "Intestacy as to Residue", and not to a testamentary disposition in the will. The statement of facts begins by saying that the testator by his will, after giving several legacies to persons named and numerous directions to the trustees whom he appointed executors of his will, has disinherited a brother, two sisters, a niece and a nephew whom he had Already provided for amply. Hall V.C. observed:

I am of opinion that according to the true construction of the will the declaration of a the testator is one which amounts to a gift in favour of those persons who take by law upon distribution of personalty under the statute, but excluding the persons specified....

The full text of the Will is not available in the report. What led the noble Vice-Chancel for to construe the Will in the way his Lordship did is not clear from the reported judgment.

Theobald on Wills, (12th Edn. paragraph 2054) adverts to that decision thus:

A direction that one of the testator's next-of-kin shall take no share in his property will not prevent him from taking his share on an intestacy. (*Ramsay v*

Shelmerdine). But a clause excluding some of the next-of-kin may be so framed as to amount to a gift by implication to the others. (Bund v Green).

And, Halsbury's Laws of England, (3rd Edition, Vol. XXXIX, page 998) states the law thus:

If the will was to have the effect of disinheriting the heir or depriving the next-of-kin (m), it was necessary for the will to show the intention of the testator to leave his property to some one else (o), in such a way that there was certainty both in the subjects and objects of the gift, and the manner in which the gift took effect (p).

and in Foot-note (m) refers to Bund v Green as laying down "A clause excluding certain of the next-of-kin may be capable of being construed as a gift to the persons entitled on intestacy, excluding the named persons."

Thus, learned authors in English law do not appear to have given full credit to the dictum in Bund v Green (1879) 12 Ch. D. 819; and, even if they had done so, we do not think that that dictum can be imported in this country.

13. In Tagore v Tagore (1872, Ind. App. (Supplemental) 47 at 64) which is a leading case on Hindu Wills decided by the Judicial Committee, it is observed:

Whilst, however, rules of detail prevailing in England are to be laid aside, there are general principles affecting the transfer of property which must prevail wherever law exists, and to which resort must be had in deciding several questions of an elementary character, which have been strongly argued in this case, and as to which there is no precise authority.

The power of parting with property once acquired, so as to confer the same property upon another, must take effect either by inheritance or transfer, each according to law.

Inheritance does not depend upon the will of the individual owner; transfer does. Inheritance is a rule laid down (or in the case of custom, recognized) by the State, not merely for the benefit of individuals, but for reasons of public policy. It follows directly from this that a private individual, who attempts by gift or will to make property inheritable otherwise than the law directs, is assuming to legislate, and that the gift must fail, and the inheritance take place as the law directs. This was well expressed by Lord Justice Turner in Soorjomonee Dossee v Denobundoo Mullick--6 Moore's Ind. Ap. Ca. 555: "A man cannot create a new form of estate or alter the line of succession allowed by law, for the purpose of carrying out his own wishes or views of policy"

Following the above dictum Radha Binode Pal J. held in Jogendranath Banerjee Vs. Makhan Lal Banerjee and Others, :

The right of a Hindu heir to take by inheritance will not be defeated simply by a provision in the will prohibiting that heir from taking. Unless and until the property is effectively disposed of by the will to others, the heir will take by

inheritance.

Mohamad Akram J. also said in that case:

In this country intestacy is the general rule and unless a valid disposition of the property in suit is proved the plaintiff is entitled to succeed by inheritance;.....

14. Mullain his Principles of Hindu Law (12th Edn. page 565) cautions:

English rules of construction have grown side by side with a very special law of property and a very artificial system of conveyancing..... It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently and speak differently from English-men.

Those words are of Wilson J. in *Ram Lal Sett v Kauai Lal Sett* ILR XII Cal. 663) whereto the learned Judge added:

Even in England no one thinks of construing a mercantile contract by the same canons as a marriage settlement. There are in some points different rules for interpreting deeds and wills--wills of realty and wills of personality, conveyances on sales, and family arrangements.

In *Bhagabati Barmanya v Kali Charan Singh* 38 I.A. 54 the Judicial Committee quoted with approval the above observations of Wilson J; and in *Venkatanarasimha Appa Row v Parthasarathy Appa Row* (411. A. 51) the Judicial Committee observed:

This fundamental principle docs not clash with the principle that the Court will not necessarily apply English rules of construction to such a will as we have here to deal with. These rules of construction amount in many cases to nothing more than saying that a special phrase which may be used in more than one sense shall prima facie be deemed to be intended to bear one particular meaning, unless from the consideration of the context or the surrounding circumstances the Court can come to the conclusion that it is there used in a different sense. In other cases the rules are the expression of such tendencies in the Court as the desire to avoid an that intestacy of the presumption in favour of immediate vesting of an estate. Such rules are purely an English product based on English necessities and English habits of thought, and there would be no justification in taking them as our guide in the case of Indian Wills.

(Emphasis added).

15. In *Kistammal and Others Vs. Saraswathi Bai Ammal* by next friend, her husband, *Bhimasena Rao*, *Wadsworth J.* has laid down the principles for construction of Indian Wills. The learned Judge observed:

Certain principles upon which a will should be construed are well settled. The first principle is that the Court should give effect to the plain meaning of the words used. Secondly, if there is any ambiguity, the Court should in interpreting the

language lean towards carrying out the known intentions of the testator as far as they can be ascertained from the recitals and from the surrounding circumstances. Thirdly, in interpreting ambiguous words the Court should bear in mind the presumption that the testator was not likely to intend to create an intestacy regarding the residue of the estate. Fourthly, the Court should not strain the language of the will either in order to give effect to the apparent intention of the testator or in order to prevent an intestacy. Finally, the Court has no power to insert in the will a disposition which is missing, however desirable that disposition may be.

Section 81 of the Indian Succession Act, XXXIX of 1925--the section applies to wills of Hindus-enacts:

Where there is an ambiguity or deficiency on the face of a will, no extrinsic evidence as to the intentions of the testator shall be admitted.

Here, in Ext. D40, the testator refers to his succession under the Hindu Succession Act. There is absolutely no mention in it that he intends to avoid the line of succession provided by that Act. All that he says is that, among the heirs who might succeed him under the Hindu Succession Act the 1st plaintiff shall not be one. He stopped with a disherison of an heir-at-law and failed to make a gift over of his properties to any other. The instrument has therefore failed its mark, as the executant, if he is to be succeeded on intestacy, must have his heirs fixed by law, not by himself. It was open to him to have provided for a testamentary succession to his properties; but he did not do so. He left the matter to be governed by the Hindu Succession Act, subject to an exception which he was incompetent to impose; for no one can be allowed to improve upon the law or to change the course of law.

16. Jarman on Wills (1951 Edn. at p. 440) gives the law thus:

...negative words do not amount to a gift; and the only mode of excluding the title of whomsoever the law, in the absence of disposition, constitutes the successor to the property, is to give it to some one else.

and at page 684:

If a testator declares that his heir-at-law shall not take any part of his real estate, or that none of his next-of-kin shall take any part of his personal estate, this is nugatory and void.

Again at page 711, the learned author continues:

The general rule is that a testator cannot by a mere declaration alter the mode of devolution prescribed by law in case of intestacy: "You cannot exclude an heir-at-law or next-of-kin but by giving to somebody else".

It is observed in 1962 Chancery 78 at 94:

The duty of the court, however, is to give effect to the intentions of the testators

as expressed in their wills and it is not entitled to give effect to intentions not so expressed. So to do would be to rewrite the will according to the court's notion of what the testator must have meant and not to abide by the expressed intentions. This may seem a hard doctrine, but to depart from it would be to allow guesswork to supplant the written word. The testator cannot be recalled from the shades to state what his meaning was-- *littira scripta manet*--he must be taken to mean what he wrote.

and in 1962 Chancery 226 at 235:

It is not the function of a court of construction to be officious in curing defects in a testator's dispositions, but merely to ascertain, as Rolphe B. once said, *quod voluit* by interpreting *quod dixit*.

Earlier, in *Abbot v Middleton* (1858) 7 H.L. Cas. 68, 114 Lord Wensleydale has spoken:

The question in expounding a will....."is not what the testator meant, but what is the meaning of his words." The use of the expression that the intention of the testator is to be the guide, unaccompanied with the constant explanation, that it is to be sought in his words, and a rigorous attention to them, is apt to lead the mind insensibly to speculate upon what the testator may be supposed to have intended to do, instead of strictly attending to the true question, which is, what that which he has written means. The will must be expressed in writing, and that writing only is to be considered.

The principles enunciated in the quotes above, we think, are of general application and must apply to the construction of all Wills. We must then accept the finding of the Subordinate Judge that Ext. D. 40 is no testamentary disposition of the 1st defendant's properties.

The 1st defendant must then be found to have died intestate and the 1st plaintiff to have inherited a moiety of his share in the tarwad properties u/s 8 of the Hindu Succession Act, 1956. On the date of his death, apart from the plaintiffs, who have become separated from the tarwad by the institution of this suit, there were seven members, defendants 1 to 6 and the child born to the 5th defendant after suit. It follows that the 1st defendant's share in the tarwad properties was $\frac{1}{7}$ of $\frac{2}{3}$. The 1st plaintiff succeeds to a moiety thereof, namely $\frac{1}{21}$ share. In the result, we affirm the findings of the court below that the 2nd plaintiff has been lawfully married in "Kudivaippu" form by the 1st plaintiff; and that Ext. D. 40 is no testamentary disposition of the 1st defendant's properties. We find Ext. P2 to be a maintenance arrangement only, and pass a preliminary decree declaring the 1st plaintiff entitled to one-third share plus one-twenty first share in all the properties of his tarwad inclusive of the properties mentioned in the plaint Schedules A, B and D. Whether all or any of the plaint C schedule properties enure to the tarwad, though in dispute, has not been adjudged by the court below. That has to be done, for which the case will stand remitted. The court below will investigate that question and enter finding within six months of

the receipt of the records there, after giving opportunity to the parties to adduce evidence thereon; and pass a supplemental preliminary decree, if found necessary. The question of mesne profits will be adjudged in the final decree. The appellants in A.S. No. 397 of 1962 must have their costs here from the respondents; and the costs in the court below from the estate. There will be no order as to costs in A.S. No. 465 of 1962.