

(1921) 08 MAD CK 0005
In the Madras High Court

Chinnappa Pillai and Another

APPELLANT

Vs

Kailasam Pillai late a minor but now declared a major

RESPONDENT

Date of Decision : 31-08-1921

Acts Referred:

Citation : AIR 1921 Mad 532 : (1921) 14 LW 14 : (1921) 41 MLJ 661

Judgement

1. In this appeal two alleged testamentary papers of one Venkatachalam Pillai, deceased, who died on 26-8-14 are in question. They are dated

respectively 24-1-13 and 2-1-14 and are" marked as Exs. A1 and A. The latter is propounded by a minor Kailasam Pillai, son of Venkatachalam

by a concubine of his, Velliammai, by name. This, Kailasam Pillai applied to the District Court of South Arcot for leave to prove A and for the

issue to him two of the three sons of Thillainayagam Pillai brother of the testator, who was adopted into another family. The learned District Judge found for the

genuineness of both these papers, A and A1. and admitted them both to probate. He also found that the earlier will was not revoked by the later.

Letters of Administration were granted jointly to the widow of deceased (Respondent No. 2) and respondents Nos. 3 and 4.

2. Three questions are raised on this appeal.

1. The genuineness of the wills.

2. The revocation of the earlier by the later.

3. Inferential intention to revoke.

3. As to the first point, Mr. A. Krishnaswami Iyer for the appellants, the divided brother of the testator and his son, frankly stated that he could not

say the wills were forgeries, i.e., were not in the handwriting of the testator. We think it sufficient to say that we are satisfied from the evidence that

the wills A(1) and A are in the handwriting of the testator. We were then asked to refuse Letters of Administration on the ground that the history of the custody of these documents was not satisfactory and was not such as to remove all doubt as to their genuineness. The story of the concubine, who is the only witness who saw the testator write and sign the wills, is that the two wills were given to her. After the death she put them into a box and gave them to her servant from whom 5th respondent took the wills. 5th respondent is the third of the sons of Thillainayagam Pillai mentioned above. There is evidence that after cremation the 3rd and 5th defendants and one Vadivelu Pillai (P.W. 2) and Monigar Ratam Pillai (P.W. 4) met and opened the box and took out the wills and read them. The wills were actually produced by Vadivelu Pillai in the court of the District Munsif of Mannargudi in O.S. No. 47 of 1915 filed by Valliammai to recover these wills and other documents. On the other hand the 1st respondent's (1st appellant here) account is that deceased gave him a box containing mortgage and other documents and that when the testator died there was no box by his side as described by the plaintiff's witnesses. The District Judge who has examined the evidence with care has come to the conclusion that the account given by 1st appellant, cannot be accepted and a further examination of the evince does not, lead us to a different conclusion. We therefore agree with the District Judge that there is no reason why these paper writings, A and A1, should not be received as the testamentary papers of the deceased.

4. The third point was not argued and we are not prepared to say that inferential intention to revoke i.e., any. conclusive evidence of Such intention, derived from evidence of surrounding circumstances apart altogether from any inference to be derived from the provisions in the documents themselves, is in any way established. If there is in fact an intention to revoke the earlier will by the latter it must be gathered from inferences drawn from the documents themselves.

5. This leads us to the second point which was argued at length before us. A somewhat detailed examination of the two wills will be necessary."

The earlier one (A 1) was in favour of Ramasami Chetty the executor-who renounced, it begins "" As I feel weak often and as the wills previously written by me are not operative, this will containing the following dispositions

shall come into force after my life time."" The testator sets out a list of property owing or belonging to him and aggregating Rs. 18012/-. He leaves Rs. 5,000/- to Kailasam Pillai, and the interest to his mother as his guardian during his minority, Rs. 500- to Valli Animal and her daughter, Rs. 120- each annually to his wife and aunt and Rs. 2,000/- for his funerals and for Neivedyam. Out of the balance the executor is to perform abishekam, Neivedyam and Kulathali. To the wife is further given the house in Mannarkudi for life, remainder to Mottayan (3rd respondent,). Out of the balance the executor is to conduct ruiy charity he likes. The flower garden at Chidambaram is left to charity. The Rs, 5,000-due on Vartha-manam by Vadivelu Pillai is to be recovered and used for Nataraja temple if the Tiruppany work done by Vadivelu is not done in 3 years Ex. (G.) The testator adds that a copy of the will has been sent to the executor. This is denied by Mr. Ramaswamy chetty in a letter, to the vakil for Valliammai (Ex. E.)

6. The later will (Ex. A.) is also executed in favour of Ramaswami chetty and begins ""As the wills previously executed by me have not been brought Into force, all the dispositions mentioned herein shall be operative after my, lifetime"".

7. Rs. 21,504 is said to be the amount of outstandings due to the testator as detailed in the schedule. There is no schedule to the paper. This will begins with four new legacies, viz., Re. 5,000-for gilding the silver mancham in Nataraja temple ; Rs. 1,000, to Mottayan ; Rs. 500, to Sundammurthy (4th respondent) and Rs. 5,000 to Sadasivam (6th respondent).

8. The legacy of Rs. 5000 to Kailasam, interest to be paid to his mother during minority appears also in the will. The legacy of Rs. 500, to Valliammai and her daughter is omitted ; probably because in the interval between the two wills the testator had endorsed 17 pronotes in favour of the former. The legacies to his wife and aunt are the same but they are specified as to be derived from the interest on Rs, 3,000,- which after their lives is to be devoted to ""any chanty."" The amount of Rs. 2,000 for funerals etc., is reduced to Rs. 1,000- and there is no disposition of the balance as in A 1. As for the disposition of the house in this will the wife is to have "during her life-time the right only to enjoy my ancestral house".

There is no disposition of the property after this life-estate and there is therefore an intestacy as to this.

9. Further, out of the balance the executor is directed to conduct a permanent charity in Nataraja temple. A certain manai is given to the executor,

on majority to Kailasam with, the garden-presumably the flower garden given to charity in the former will. There is no mention of the amount due

on Varthamanam.

10. Thus the resemblances between the bequests in the two wills amount to this:

(i) The legacy of Rs. 5,000 to KailaSam is the same in both.

(ii) The legacies of Rs. 120, to the wife and aunt are the same, with this difference that they are directed to be paid out of interest on Rs. 3,000, in

the later will, and capital is bequeathed after their lives.

(iii) The bequest of the House to the widow for life appears in both. On this state of facts what is the law:

Williams on Executors, 10th Edition, Vol. 1 page 119 approved in many cases and also by Sir J. Hannen in *In the Goods of Petchell* L.R. 3 P. &

D. 135 says, "" But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter

expressly or in effect revoke the former, or the two be incapable of standing together; for though it be a maxim, as Swinburne says above, that no

man can die with two testaments", yet any number of instruments, whatever be their relative date, or in whatever form they may be (so as they be

all clearly testamentary), may be admitted to probate as together containing the last will of the deceased.

11. Further, Lord Penzance in *Lemage v. Goodban* (1865) L.R. 1 Pro & D. 57 said Now it was argued that in the case of more than one

testamentary paper, each professing in form to be the last will of the deceased, it is necessary for the court, before concluding that they together

constitute the will, to be satisfied that the testator intended them to operate together as such. In one sense this is true, for the intention of the

testator in the matter is the sole guide and control. But the intention to be sought and discovered, relates to the disposition of the testator's

property and not to the form of his will. What dispositions did he intend? not which, or what number, of papers did he desire or expect to be

admitted to probate - is the true question.

12. So *Dempsey v. Lawson* (1877) 2 P.D. 98 per Sir, J. Hannen. ""If it can be collected from the words of the testator in the later instrument that it

was his intention to dispose of his property in a different manner to that in which he disposed of it by the earlier document, the earlier document will

be revoked, and this, although in some particulars the later will does not completely cover the whole subject-matter of the earlier. This is what was

decided in *Plenty v. West*" (1 Roberts Eccl. 264.)

13. Therefore if we can collect from the terms of the later will an intention to dispose" of his property in a different manner from the former will, the

earlier stands revoked. The intention is to be the guide and the case last cited shows that it does not matter if the second will does not provide for

the whole subject matter of the first, e.g., the intestacy as to the house referred to above. Now, there is here no express clause of revocation. What

do the words as the wills previously executed by me have not been brought into force"" mean? A very similar clause appears in A. 1. Before

answering this question we may pause for a moment to consider the arguments of Mr. A. Krishnaswami Iyer that if the testator intended all his

prior wills to be valid, no administration ought to go on any one paper. There is no evidence as to what happened to his prior wills they may have

been destroyed. The concubine gives evidence that these two wills were given to her. She does not speak to others. It certainly looks as if A 1

was not intended to be destroyed by the testator. We must proceed on the state of things left by the testator so far as we have them in evidence.

To return to the words quoted above. They may mean merely ""as a will only operates on death and I have not yet died, my wills have as yet had

no operation."" On the other hand, they may mean ""As I have not died since I made the previous will. and consequently they have had no effect,

they are to have none but the dispositions I now make are to be operative."" If the latter is the proper meaning, which appeals to us, in our opinion

they point very strongly to an implied revocation in words. However, it is not necessary to stand on this ground alone. The resemblances in the two

wills have already been pointed out. It could hardly have been the intention of the testator that the legacies to Kailasam should be cumulative. The

same applies to the legacies to the widow and aunt, and the repetition of the disposition of the life-estate in the house to the widow has no meaning

or legal effect. As Sir F. Jeune. P. said in *Chichester v. Quartrefages* (1895) p. 186 at 189. ""It appears to me that he (testator) never could have

intended that the codicils should stand together, for the purpose only of doubling such legacies as a court of construction might hold to be

cumulative"" In In the Estate of Ann Faith Bryan (1907) P. 125 it was held that revocation must be implied from the terms of the last document as

the funeral and testamentary expenses"were provided for twice over (as in the case before us) and it was very doubtful if the legacies could

possibly be held to be cumulative when they would amount to more than the value of the estate. The case in Dempsey v. Lawson (1877) 2 P.D.

98 was quoted with approval. Here, the legacies to Kailasam if cumulative together with funeral expenses and legacies to the widow and aunt as

those to the new legatees in Exh. A would amount to over Rs. 30,000, considerably over the total value of the estate. Again, it cannot be said that

there is nothing inconsistent between the terms of the two wills: the resemblances show that if these are to be read together and taken as cumulative

they cannot be satisfied in full from the estate. The dispositions as to the balance and the flower garden are clearly inconsistent with each other.

Though the court of appeal has held that the court ""will endeavour so to read the words as to support the admissibility of both documents to

probate"" Townsend v. Moore (1905) p. 66 it seems to us impossible here to do so, and moreover the words first used in the will and discussed

above and the whole tenor of the second will seem to us to imply that the intention of the estator was that only the later will should be operative

and the prior will should be revoked. To this extent we allow the appeal. No argument has been addressed to us to show that the learned District

Judge was wrong in the. order he made respecting to whom the Letters of Administration should be issued. We therefore direct Letters of

Administration to issue with the second will only dated 2-1-14 annexed to 2nd, 3rd and 4th defendants on their executing the necessary security

bonds within 6 weeks from this date. We think that plaintiff's costs should be paid by 1st defendant. There will be no other order as to costs.