
(1990) 05 KL CK 0008
In the High Court Of Kerala
Case No : S.A. No. 241/85

Mathew

APPELLANT

Vs

Vasudevan and Another

RESPONDENT

Date of Decision : 29-05-1990

Acts Referred:

Citation : (1990) 05 KL CK 0008

Hon'ble Judges : K.P. Balanarayana Marar, J

Bench : Single Bench

Advocate : M.V. Joseph and M.V. John, for the Appellant; V. Sankara Menon and C.K. Aravindaksha Menon, for the Respondent

Judgement

K.P. Balanarayana Marar, J.—The question that arises in these second appeals is whether the Will executed by 2nd Defendant and her husband is a Joint Will or a Mutual Will.

2. Two properties were bequeathed by 2nd Defendant and her husband Kuttappu as per Will, dated 21st February 1956, of which one stood in the name of the 1st executant and the other in the name of the 2nd executant. The properties were divided and shown in three schedules and allotted to three children viz. Kochuparu, Meenakshi and Vasudevan respectively. Kuttappu died in 1962. Thereafter 2nd Defendant executed a mortgage in favour of 1st Defendant in respect of one of the properties (the property which stood in her name) for a consideration of Rs. 15,000 First Defendant obtained a decree on the strength of the mortgage in O.S. 269/1975 before Sub Court, Ernakulam. The property was proclaimed for sale in execution of the decree. That necessitated the three suits O.S. Nos. 612/1978, 210/1979 and 576/1979 before the Munsiff's Court, Ernakulam by the three legatees. A declaration was sought for that the Plaintiff in each of those suits is the absolute owner of the property mentioned therein and that 2nd Defendant had no authority to encumber the property since the Will was irrevocable. First Defendant contended that the Will can take effect only after the death of 2nd Defendant and that she had every right to encumber the

property belonging to her. The suits were jointly tried and as per a common judgment the suits were dismissed. Appeals were preferred against the judgment and decree in O.S. No. 612/1978 and O.S. 576/1979 as A.S. Nos. 153/1982 and 167/1982 before Sub Court, Ernakulam. Plaintiff in O.S. No. 210/1979 did not prefer any appeal. As per a common judgment the appeals were allowed and the declaration sought for was granted and 1st Defendant was enjoined from proceeding against the properties in execution of the decree in O.S. No. 269/1975 of Sub Court, Ernakulam. Hence these second appeals by 1st Defendant. These second appeals were admitted on the following substantial questions of law:

(1) Is not a Joint Will revocable at any time by either of the testators during their lifetime or after the death of one of them by survivor ?

(2) On the facts of the case revealed from Ext. A-I is the right of the surviving testator lost to dispose of the property described in Ext. A-I ?

3. It is urged by Sri M.V. Joseph, learned Counsel for Appellant, that the Will Ext. A-I is a joint will simpliciter whereby the two testators had bequeathed their individual properties. He contended that the two testators were at liberty to cancel or alter the Will during their life time or by the survivor after the death of one of them. On the other hand, it is contended on behalf of the contesting Respondent that Kuttappu and his wife had executed the Will understanding that the document should take full effect according to the terms thereof and that it could not be revoked or altered by the survivor after the death of one of them. It is therefore contended that 2nd Defendant was not competent to encumber the property as if it belonged to her.

4. The point that arises for consideration is whether Ext. A-I purports to be a Joint Will executed by Kuttappu and his wife 2nd Defendant whereby the rights of Kuttappu alone had devolved on the beneficiaries consequent to his death or whether Ext. A-I is a mutually reciprocal Will irrevocable by the survivor after the death of one of the testators.

5. The law relating to Joint Wills and Mutual Wills is stated in Halsbury's Laws of England, 3rd Edn. Vol. 39 at pp. 846 and 847:

Joint Wills.-A Joint Will is a Will made by two, or more, testators contained in a single document, duly executed by each testator and disposing either of their separate properties, or of their joint property. It is not, however, recognised in English law as a single Will. It is in effect two or more Wills; it operates on the death of each testator as his Will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own Will and on the death of the survivor, if no fresh Will has been made, it is admitted to probate as the disposition of the property of the survivor.

Mutual Wills.-Wills are mutual when the testators confer upon each other reciprocal benefits, and these may be absolute benefits in each other's property,

or they may be life interests, with the same ultimate disposition of each estate on the death of the survivor. In practice the several Wills which constitute a Joint Will are mutual but the reciprocal benefits can be given by separate Wills, and these are known as Mutual Wills. Where there is an agreement not to revoke Mutual Wills and one party dies having stood by the agreement, a survivor is bound by it.

Paragraph 1289 contains the following passage:

Mutual Wills may be made, either by a Joint Will or by separate Wills, in pursuance of an agreement that they shall not be revoked; such an agreement may appear from the Wills, or may be proved outside the Wills, but it is not established by the mere fact that mutual benefits are given. If no such agreement is shown, each party remains free to revoke his Will, if there are separate Wills, or to revoke the Joint Will, so far as it disposes of his property, and the fact that one party has died without revoking the disposition of his property does not prevent the survivor from revoking the disposition which he has made notwithstanding that he has received benefits out of the estate of the deceased party.

The more important passage contained in paragraph 1289 reads:

If, however, the deceased has stood by the agreement and not revoked or altered his Will, the survivor is bound by it, and though probate will be granted of a later Will made by him in breach of the agreement, since a court of probate is only concerned with the last Will, yet the personal representatives of the survivor hold his estate in trust to give effect to the provisions of the Joint Will or Mutual Wills.

6. The American law on this aspect is stated in section 7-B of Vol. 57 of American Jurisprudence thus:

A Will jointly executed by two testators or one or two separate Wills containing reciprocal provisions and provisions for the benefit of third persons effective upon the death of the surviving testator, which in a fruition of a contract between the testators, cannot be revoked to the detriment of the third persons, by the survivor after the death of the other testator and the acceptance of benefits derived from the Will of the other which conformed to the contract without committing a breach of contract, at least not from the view point of the Court of Equity. The surviving testator having accepted the benefits of a Will jointly executed by him and Anr. and containing reciprocal provisions cannot repudiate the contract by which the Will was made so as to affect the disposition made by the Will for the benefit of third persons upon the death of the surviving testator. The rule is that where separate Wills executed in pursuance of a valid contract, between the parties, provide for a life estate to the survivor, with certain remainders over the survivor, having probated the Will of the deceased testator and accepted the benefits thereunder, cannot abrogate or repudiate the contract to the injury of the remainder man by revoking his own Will.

7. Mutual Wills are also called Reciprocal Wills. The adjective "mutual" or "reciprocal" is used to denote the contractual element which distinguishes it from a Joint Will. Mutual Will is a Will executed by two or more persons which are reciprocal in their provisions and executed in pursuance to an agreement between them. The agreement may be to dispose of the property in favour of each other or to third persons in a particular manner. In some cases there may be a common intention on the part of the testators. In order to create a mutual Will two conditions are to be satisfied according to Halsbury. They are: (a) the surviving testator must have received certain benefits under the Will, and (b) there should be some agreement anterior to the execution of the Will that the testators will not revoke the Mutual Will. Theobald is also of the same opinion. In his Treatise on Wills, 14th Edn. pp. 27-28 it is stated:

There must be evidence of an agreement to create interests under the Mutual Wills which are intended to be irrevocable after the death of the first to die.

The learned author also says that the agreement must be precise to be enforced by the court.

8. About Joint Wills and Mutual Wills Jarman in his Treatise on Wills at p. 41 of Vol. I, 1951 Edn. says thus:

Joint Wills are revocable at any time by either of the testators during their joint lives, or, after the death of one of them, by the survivor.

Mutual Wills are recognised by the Roman-Dutch law which is in force at the Cape of Good Hope, Ceylon etc. A Mutual Will is regarded as being in effect two separate Wills, in which the disposition of each testator is treated as applicable to his share of the joint property. Instruments of this nature are unknown to the testamentary law of this country, and with us the term "Mutual Will" is generally applied to the case of two persons making a Will by which each leaves all his property to the other.

9. A Will is mutual when two testators confer upon each other reciprocal benefits and there is an agreement that neither of the testators shall have power to revoke and the surviving testator has received benefits from the deceased testator under the Mutual Will. On the other hand a Joint Will is a Will made by two or more testators in respect of their separate properties or joint properties, in which case the fact that one party had died without revoking the Will will not prevent the survivor from revoking the disposition made by him. In other words, the Will will take effect on the death of one of the testators as far as the properties left by him.

10. The leading case in England is *Dufour v. Pereira* (1769) 21 E.R. 332. A Mutual Will was executed by a husband and wife. After the death of the husband the wife proved the Will and afterwards executed Anr. Will revoking the Mutual Will. It was held that the wife had no authority to revoke the Mutual Will. Lord Camden who delivered the judgment held:

It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation. But I cannot be of opinion that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by Anr. Will.

It was held that Mutual Will is a contract between the parties which cannot be rescinded except by the consent of both. It was also held that the first that dies carries his part of the contract into execution. Lord Camden posed a question whether the court will afterwards permit the other to break the contract and answered in the negative. It was observed that the wife had taken the benefit of the bequest in her favour by the Mutual Will whereby she had confirmed it. It was held that the last Will of the wife, so far as it breaks in upon the Mutual Will, is void.

11. The canon applied by Lord Camden in (1769) 21 E.R. 332 was adopted in subsequent decisions. After consideration of those decisions the Madras High Court has summarised the position under the English Law in paragraph 24 of the decision in *Kuppuswami v. Perumal* AIR 1964 Mad 291 thus:

From the above discussion of the relevant cases, it will be clear that under the English law in order to render Mutual Wills irrevocable, both the conditions must be concurrently satisfied; (a) the surviving testator must have received benefits from the deceased under the Mutual Will and (b) the Mutual Wills should have been executed in pursuance of an agreement that the testators shall not revoke the Mutual Wills. Such an agreement not to revoke the Wills may either appear from the Wills themselves or may be proved outside the Wills.

12. Joint Wills and Mutual Wills, though unusual, are not unknown in this country though decided cases on the subject are very few. The earliest is the one in *Meenakshi Ammal v. Viswanatha Iyer* ILR 33 Mad. 406. In that case a husband and wife executed a Will in regard to their properties. After the death of the husband the wife executed Anr. Will containing provisions entirely different from the earlier Joint Will. The question arose whether the Will executed by the wife was valid. In the facts of that case it was held that the Will executed by the wife was valid since she did not get any benefit out of her husband's property under the earlier Will, but she obtained the same in her own right as heir of her husband. The law was stated thus:

Where two persons agreed to make Mutual Wills and one of them dies, the survivor can revoke his Will unless he has taken some benefit under the Will of the deceased testator.

13. The next decision is the one reported in *Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others*, . In that case three persons by name Kunhan Kaimal, Kesavan Kaimal and Thayi Ammal executed a Will. After the death of the other two, Kesavan Kaimal executed a Will by which he made an entirely different disposition of the property. It was contended that the earlier

Will was a Joint Mutual Will and as such the third surviving testator had no authority to execute a new Will. The Supreme Court held that the Will in question was only a Joint Will and not a Mutual Will. In paragraph 6 of the judgment it was held that the title of the testators was as tenants in common and not as joint tenants, each of them would have been entitled to execute a Will of his or her properties, and if that had been done, the legatees named therein would undoubtedly have been entitled to those properties. It was held that the Will was one by which each testator bequeathed the properties belonging to him or to her, and therefore on the death of each testator, the legatees mentioned in the Will would be entitled to the properties of the testator who dies. The contention that the Will might be construed as a Mutual Will was repelled by the Supreme Court by holding:

A Will is mutual when two testators confer upon each other reciprocal benefits as by either of them constituting the other his legatee, that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a Mutual Will.

14. The question was considered in the decision of the Allahabad High Court in *Bhavani Prasad v. Surendra Bala* AIR 1960 AIL 126. That was a case of a Will executed by a husband and wife which contained a clause that nobody except the executants shall have any right to amend or cancel the Will. While interpreting the clause contained in that Will it was held that it is the mutuality, based upon a reciprocity of benefits, which makes a Will mutual. Reciprocity of benefits means that there has been a bargain to give and take. It was also observed that it does not suffice to make a Will mutual if one party independently makes a bequest to the other and the other party independently makes a similar bequest to the first party. The bequest of one to the other has to be interdependent. It was therefore held that the survivor was entitled to revoke his own Will even though he had obtained benefits under the Will. The Will in that case was construed to be a Joint Will which had become effective as far as the dispositions made by the deceased testator.

15. The Madras High Court had occasion to consider this question in the decision in *Kuppuswami Raja and Another Vs. Perumal Raja and Others*, . After an elaborate discussion of the English and American Law on the question the Madras High Court had laid down the law thus:

...But after a careful consideration of all the aspects of the matter, we are inclined to take the view that a Joint Mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the Mutual Will, and that there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous Mutual Wills but one single document. In fact in some of the cases referred to above this aspect that if the two testators had executed one single document as one single Mutual Will the position may be different is actually adverted to. In our opinion, if one

single document is executed by both the brothers using the expressions "our property" "our present wishes" "our Will" and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent.

16. Now we come to the decision of this Court in *Janaki v. Krishnan and Ors.* (1964) 1 K.L.R. 4. That also was a case where a Joint Will was executed by a husband and wife in respect of their individual properties. The Will contained a clause that if or whenever the testators both agree to do so they shall have full right to revoke or modify the Will, but if they do not so agree, its provisions shall be final and shall take effect. Interpreting this clause this Court held that the effect of this clause is to curtail or to take away the inherent power of revocation which a testator has in respect of his own Will. In that case there was a revocation of the Will by the wife after the death of the husband. It was found that there was an agreement not to revoke or modify the earlier Will except by the makers of the Will jointly. It was further found that 1st Defendant, the survivor had also accepted the benefits of the disposition by the deceased.

17. The latest decision is *Om Parkash Agarwal and Others Vs. Giri Raj Kishori and Others*, . That also was a case of a Joint Will executed by a husband and wife. It was provided that the testators would continue to be joint owners of the land, bungalow and blocks etc., and shall be jointly entitled to the rents and income from the said land and blocks and the user and rent of the bungalow. After the death of one of them the survivor shall become the owner. The disposition in favour of the grand-children will take effect after the death of the survivor. Interpreting this Will the Supreme Court held:

Therefore it is clear that the ownership which the joint executants contemplate was the user during the lifetime and entitlement to the rents and "Income of the same. It is this ownership which was to pass on the death of either of them to the survivor and the Will thereafter goes on to say that the provisions hereinafter contained shall become effective after the death of the survivor of us.

It was held that the gift of the property to the three grandchildren as owners in full sense is to take effect on the death of the survivor of both the executants. It was also held:

It is clear that the property was intended to be kept in tact for the enjoyment of the ultimate legatees and during the lifetime to either of them the property would not in any way be parted with or diminished.

It was found that there is a definite agreement not to revoke the Will by one of the executants after he or she has received the benefit under the Will on the death of either of them. In that case the husband has received the benefit under the Will of the wife. The Supreme Court held that the husband could not have during his lifetime parted with the property i.e., he did not have the disposing power over the properties in question after the death of the wife.

18. Before applying the principles to the facts of the present case it is necessary to refer to the clauses contained in the Will Ext- A-I. The relevant clauses are set out hereunder:

The properties described in this Will were acquired with our joint funds. Item 1 was acquired in the name of first executant and item 2 in the name of second executant and as such the properties belonged to us and are possessed and enjoyed by us.

We intent to settle the properties on our three children. The properties are divided and shown in three schedules. The properties in A schedule are bequeathed to Kochuparu and B schedule to Meenakshi and C schedule to Vasudevan.

They shall enjoy the properties after our lifetime. Till our death we will possess these properties and enjoy the same. After the death of both of us (***)

the properties are to be possessed and enjoyed by the respective beneficiaries. If during our lifetime we desire that the disposition in the Will has to be revoked or modified, we will have every right to do so and the Will can take effect only after our lifetime (***)

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19. On a careful analysis of the clauses in the Will extracted above, there is no difficulty in finding that the testators intended to create a mutual reciprocal Will by which the properties are to devolve on the beneficiaries only after the death of both the testators. The document presupposes a union of minds of the spouses. It has to be inferred that there had been an exchange of ideas between them. The main scheme of the arrangement is that the properties of both the husband and the wife had to be pooled together and dealt with as a whole. The Will contains a recital that the properties were acquired out of the funds from their joint exertions - The idea was to enjoy the properties by the testators during their lifetime. There is no provision regarding the mode of enjoyment after the death of one of them. It is impossible to carry out the scheme of the testators if after the death of one of them the survivor was in a position to revoke the Will or modify it. Granting of such a power to the survivor would completely defeat the very purpose for which the two testators executed the Will viz. to settle all their properties on their three children. The testators together could have modified or cancelled the Will during their lifetime if they so desired as stipulated in the document itself. The clause "if we desire during our lifetime to revoke or modify the Will, we have every right to do so" can in the context mean only revocation or modification during the lifetime of both. To enable the survivor to revoke the Will will cut at the root of the agreement between the testators that the revocation can be done only during their lifetime and that too by both of them together. There is no indication in the Will to suggest that the survivor is clothed with any power to revoke or modify the Will. To give such a power to the survivor will invite unjust results. There is, therefore, sufficient

indication in the Will to suggest that there had been an agreement between the testators to treat the entire properties as one integral whole belonging to both which they wanted to dispose of in favour of their children in a particular manner. The testators were therefore aware of the restriction they had imposed upon themselves that the Will cannot be cancelled except during their lifetime and that too by their mutual consent. The intention on the part of the testators to make such a disposition has been clearly manifested by the recital in the Will that it was executed for the future well-being of the children and for the proper enjoyment of the properties after the death of the testators.

20. On the question as to whether 2nd Defendant had obtained any benefit under the Mutual Will, it is pointed out that she had obtained rights to possess the property during her lifetime, the devolution to take place only after her death. In view of the specific recital that the testators are entitled to keep possession of the properties and enjoy the same during their lifetime and, in the absence of any clause, conferring right on the legatees on the death of one of the testators, the survivor has every right to possess the properties bequeathed under the Will during his or her lifetime and on his or her death alone the disposition takes effect - That 2nd Defendant had been in possession of the properties after the death of her husband and that she was taking the income thereof is not disputed. Both the conditions viz., (1) the surviving testator must have received some benefits from the deceased and (2) there should be an agreement anterior to the execution that the testators will not revoke the Will are therefore satisfied In the present case. The Will Ext. A-I is therefore irrevocable and 2nd Defendant who had survived her husband is not competent to revoke or modify the disposition contained in Ext. A-I.

21. The Will Ext. A-I contains clauses more or less similar to the clauses contained in the Will considered by the Madras High Court in *Kuppuswami Raja and Another Vs. Perumal Raja and Others*, . The Will in that case contained a recital "We are entitled to revoke or alter this Will during our lifetime. This Will will not be valid if during our lifetime any of us gets male or female children. The Will contained expressions like "our property", "our present wishes", and "our Will" It was held that if one single document is executed by the brothers using these expressions and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent. Similar expressions are seen used in Ext. A-I. The principle enunciated in the Madras decision squarely applies to the facts of this case.

22. The Will construed by this Court in 1964 (1) K.L.R. 4 contains more or less identical provisions. Interpreting those provisions this Court held that the effect of Clause (ii) of the Will in that case referred to earlier is to curtail or take away the inherent power of revocation which the testator has in respect of his own Will. In that case also it was held that there was an agreement not to revoke or modify the Will except by the makers of the Will jointly. The survivor viz., the 1st Defendant therein had also accepted the benefit of disposition by the deceased.

Since both these elements were present it was held that the 1st Defendant was not competent to revoke or modify the Will to any extent by making a contrary disposition. I am in complete agreement with the view expressed and hold that Ext. A-I is a Mutual Will and that second Defendant is not competent to revoke or modify the same.

23. The Will which came up for consideration before the Supreme Court in *Kochu Govindan Kaimal and Others Vs. Thayankoot Thekkot Lakshmi Amma and Others*, contained a recital that in the event of the testators effecting transfers or alienations either jointly or severally till their death, the beneficiaries shall have the right and freedom only in respect of the remaining items of properties to the exclusion of those items of properties included in the above transactions. No right was also conferred on the testators inter se. In that view it was held that the Will must be held to be a testamentary disposition by the three testators of their properties operating on the death of each testator of his properties. It was observed that in effect it was three Wills combined in one. The principle enunciated therein is not applicable to the present case.

24. Attention was also drawn to the decision of this Court reported in. 1988 (2) KLT S.N. 25 CNo. 41 (*Kurien George v. Federal Bank Ltd.*) in support of the contention that Ext. A-I is a Joint Will, The parents of the 1st Defendant in that case had executed a Joint Will bequeathing all their properties to Defendants 2 and 3. On the death of the father the mother executed a gift in favour of the 2nd Defendant in respect of the jenm right over item No. 2. The court below held that the Joint Will must be deemed to have been revoked by executing the gift. On appeal this Court held that the Will can speak only from the date of death of the testator or testatrix and that notwithstanding the Will the testator or testatrix have the right to deal with the property. One of them viz." 1st Defendant's mother had exercised her right and gifted the property to the 2nd Defendant. It was held that that will only render the Will ineffective in regard to that right and that it will not amount to revocation of the Will executed by 1st Defendant's father in regard to his leasehold right. The question as to whether the Will contained any clause conferring reciprocal benefits or whether the survivor has obtained any benefit under the Will were not considered in the above decision. The various recitals in the Will are also not "seen to have been perused in detail. This decision is therefore of no help to the Appellant.

25. Here is a case where the 2nd Defendant has not purported to alter the disposition made in the Will whereas she had only encumbered one of the properties by borrowing an amount of Rs. 15,000. It may be contended that she has got a life interest over the properties and that she has obtained a benefit under the Will to enjoy the properties during her lifetime. Whatever rights created by her should come to an end by her death so that the properties should devolve on the beneficiaries free of any encumbrance created by her - The question whether the mortgage could have been enforced against the life interest does not now arise since 2nd Defendant died during the pendency of the second

appeal.

In the result the second appeals are dismissed, but in the circumstances without costs.

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