

(1909) 12 MAD CK 0020
In the Madras High Court

Minakshi Ammal	Vs	APPELLANT
Visvanatha Aiyar		RESPONDENT

Date of Decision : 09-12-1909

Acts Referred:

Citation : (1910) ILR (Mad) 406 : (1910) 20 MLJ 339

Hon'ble Judges : Arnold White, C.J;Krishnaswami Aiyar, J

Bench : Full Bench

Judgement

Arnold White, C.J.—In this case one Sub-bier and one Sesha Amtnal who were the father and the mother of the defendant in the suit and

the grandfather and grandmother of the plaintiff (the plaintiff being the son of the defendant) made a joint will in December 1897.

2. In the year 1899 the testator died. In the year 1904 the testatrix executed a gift to her daughter, the defendant, of the amount which the plaintiff

in the present suit claims he is entitled to recover from the defendant as a legacy bequeathed to him by the will.

3. Now if the testatrix's will is irrevocable, and that is the view taken by the District Judge, the plaintiff is entitled to succeed.

4. If, on the other hand, the testatrix's will is "" revocable "" it must be taken that it had been duly revoked or superseded by the gift in 1904 to the defendant and the plaintiff is not entitled to succeed.

5. That was the view taken by the District Munsif who dismissed the suit.

6. The will is to this effect. It recites that the testator and the testatrix have no male heirs and have only female heirs and that they have made the

arrangements set forth in the will so that their daughters and their heirs may have no misunderstandings after their death in respect of the Immovable

and moveable properties possessed by them. Then the will proceeds to refer to properties of the value of Rs. 800, which belonged to the testator,

and to property of the value of Rs. 1,200 which belonged to the testatrix making Rs. 2,000 in all. Then the two properties are dealt with together.

Out of the Rs. 2,000 one daughter is to take Rs. 800 and pay Rs. 400 to another daughter. The eldest daughter is to take Rs. 1,200 and out of

that pay Rs. 400 to another daughter's son. Then the will further provides that the heirs of the eldest daughter--the eldest daughter being the

mother of the plaintiff--shall perform the funeral ceremony and that the eldest daughter shall pay Rs. 400 to the plaintiff after the funeral ceremonies.

We will take it that the plaintiff fulfilled the condition precedent as regards the performance of the funeral ceremonies. If, therefore, the disposition

under the will is irrevocable he is entitled to recover this Rs. 400.

7. The law with regard to the question we have to decide is laid down in Theobald on Wills, 6th Edn., p. 17--""Persons may make joint wills which

are, however, revocable at any time by either of them or by the survivor."" * * ""A joint will may be made to take effect after the death of both

testators; and if the joint will is not a disposition by each testator of his own property but a disposition of joint property after the death of the

survivor, the will cannot be proved till the death of the survivor."" * ** * It seems that two persons may agree to make mutual wills which remain

revocable during the joint lives of either with notice to the other, but become irrevocable after the death of one of them if the survivor takes

advantage of the provisions made by the other. A similar statement of the law is to be found in Williams on Executors, 10 Edn., p. 94, and in

Jarman on Wills, 1893, 5th Edn, Vol. I, page 27.

8. With regard to the authorities, so far as I am aware, the only authority which can be said in any way to support the contention advanced by the

plaintiff, who is the respondent before us, is a judgment of Lord Camden which is very shortly reported in a case in Chancery decided so long ago

as 1769 (Dufour v. Pereira (1769) Dick. 419. That case, however, was discussed and distinguished in the later case of Walpole v. Orford (1797)

30 Eng. Rep. 1076 and the decision in that case is clearly against the plaintiff's contention that the will is irrevocable. The Privy Council case

Denyssen v. Mostert (1872) L.R. 4 P.C. 236 is an appeal from the Cape of Good

Hope, and it turns at any rate to some extent on questions of Roman and Dutch Law. So far as I know, there is nothing in that case which helps the contention put forward on behalf of the plaintiff. But the most recent and, as it seems to me, the clearest exposition of the law on this question is that given by Lord Barnes (Sir Gorell Barnes as he then was) in the case of *Stones v. Hoskins* (1905) P. 194 he says:--""It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor has taken a benefit by that death, the view is perfectly well formed that the survivor cannot depart from the arrangement on his part, because by the death of the other party the will of that party and the arrangement have become irrevocable, but that case is entirely different from the present, where the first person to die has not stood by the bargain and her "mutual" will has, in consequence, not become irrevocable."" By the ""mutual will "" he means the will made by the survivor. ""The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death.

9. Applying that principle to the facts of the case before us, we have to see whether it can be said that the survivor has taken a benefit. It was suggested that she took a benefit by the death of the co-testator. That may be. It may be that, in that case, if the wife died first, the husband took a benefit, and if the husband died first, the wife took a benefit; but the benefit so taken was under the ordinary law and not under the provisions of the will. As I understand the will, there is nothing which gives the surviving testator or testatrix a benefit on the death of the testator or testatrix who predeceases.

10. No doubt the object of the will was to give the issue certain advantages. These advantages would accrue to the issue on the death of both the testator and the testatrix and not before. But we should be extending the equity doctrine if we were to hold that it applied to an advantage of that sort. The advantages contemplated by the doctrine and recognized in the cases apparently is a benefit or an advantage obtained by the survivor under the provisions of the will. Now, I do not think it possible to say that that happens in this case. I must hold that in my judgment the District

Munsif is right and the District Judge is wrong. I come to this decision with some reluctance, but the law seems to me to be so clear that I can

come to no other conclusion. The result is that the decree of the lower appellate Court is set aside and that of the District Munsif restored with

costs throughout.

Krishnaswami Aiyar, J.

11. I agree with the learned Chief Justice. The suit is to enforce a legacy. A will was made by the plaintiff's grandparents. It is called a mutual will.

So far as one can see from the language of the instrument, it really is a will by two persons, each of his or her own property; but the dispositions

are contained in one paper. In this case no agreement or arrangement between the testator and the testatrix is alleged, and in none of the cases that

have been discussed by the learned Chief Justice was it held competent to any person to set up that the will was irrevocable in the absence of a

plea that there was an arrangement between the persons who made their wills that each should stand by the other.

12. Now, as I have already said, the dispositions contained in this will are dispositions by each of his or her own property, and as the plaintiff has

not started his case with any allegation of an arrangement between the two, it seems to me that the plaintiff is bound to fail on this very ground. But

assuming that there was an arrangement to be implied from the language of the instrument, even then it is clear on the authorities that it cannot be

said that the wills are irrevocable. For, it is plain upon the cases that have been discussed that, in order that the will should be irrevocable, it is

necessary that the person attempting to revoke it should have received a benefit under the will of the other.

13. Now in this case if the wife died first I think it would be impossible to contend that the husband would succeed to the properties. She disposed

of the properties after the death of the husband, it is true, in favor of her daughters and the plaintiff a daughter's son. But so far as any intermediate

estate is concerned, that is the estate undisputed of by the will, it will pass under the law of intestacy to the daughters and not to the husband. It

may be that, so far as the husband is concerned, if he dies first, his life estate will pass to the widow, but it pass as not under the terms of the will

but under the law of intestacy. But, so far as I have been able to understand the

authorities, it is only in cases where a benefit is received by a mutual testament under the terms thereof that he or she can be said to be precluded from revoking the will. I come, therefore, to the conclusion that the will is really superseded by the gift which the testator has made. The gift deals with properties which are dealt with by the will and if all the properties dealt by this will are disposed of by this gift there is no property left upon which the will could operate. The second appeal must therefore be allowed, the decree of the District Judge reversed, and that of the District Munsif restored. The plaintiff must pay the costs throughout.