

**(1964) 02 KL CK 0002**

**In the High Court Of Kerala**

**Case No** : Second Appeal No's. 1279 and 1324 of 1960

R. Souri Rajalu Naidu

APPELLANT

Vs

Kothandarama Naidu

RESPONDENT

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**Date of Decision** : 19-02-1964

**Acts Referred:**

**Citation** : AIR 1965 Ker 122

**Hon'ble Judges** : Mathew P. Muricken, J

**Bench** : Single Bench

**Advocate** : T.S. Venkiteswara Iyer, for the Appellant; K. Kuthikrishna Menon and V. Balakrishna Eradi, for the Respondent

**Final Decision** : Dismissed

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## **Judgement**

K.K. Mathew, J.—These two appeals arise from L. A. O. 930/1958 and 929/1958 respectively. The question for consideration in these two appeals is the same, namely, whether respondent No. 2 or 3 in the trial court is entitled to the tenant's share of the compensation for the acquisition in respect of the properties comprised. In these two cases. Rajagopal Naidu, the father of respondents 2 and 3 had a leasehold interest in a property and portions of that property were acquired in these cases. Rajagopal Naidu had executed a will on 5th December 1947. That was an unregistered will and under that will he has devised his leasehold interest in the property to the 2nd respondent. Ex. B. 36 is that will. The 3rd respondent claimed the same property under a registered will executed by his father on 15th October 1951 and that is marked as Ex. B-37 and his case was that his father did not execute Ex. B-36, that Ex. B-36 was a concocted document and that in any event it was revoked by Ex. B-37.

2. The courts below have found that Ex. B-36 was genuine and that it was not revoked by Ex. B-37. They therefore held that the 2nd respondent was entitled to the tenant's share of the compensation. The 3rd respondent has therefore filed these appeals.

3. The decrees were challenged on the ground that the finding of the court below on the question of the revocation of Ex. B-36 by Ex. B-37 is wrong. It was argued for the appellant that the language employed by the testator in Ex. B-37 can lead only to one conclusion, namely that by Ex. B-37 the testator made a complete disposition of all his properties including his interest in the property devised under Ex. B-36. In order to decide the question whether Ex. B-37 revoked Ex. B-36 one has to look into the nature of the disposition in Ex. B-37. Ex. B-37 does not contain any revocatory clause. There is therefore no express revocation of Ex. B-36. Then, the only question is whether there was an Implied revocation of Ex. B-36. Paragraph 1 of Ex. B-37 states that the testator has 5 sons of whom the eldest son got himself separated from the joint family after taking his share in the joint family properties and that himself and the remaining 4 sons had executed a partition deed regarding the rest of the Joint family properties. Paragraph 2 states that besides the share of the testator. In the Joint family properties under the partition deed, he owns a house, a cattle shed in the family "Valapoa" and one Thodikaparamba in Attakkulangara and another Thodikaparamba with "Chamayam". No mention is made in this para about his interest in the property devised under Ex. B-36. In para 4 it is stated that all the properties belonging to the testator are bequeathed to the 3rd respondent. The language used in para 4 would indicate that the testator was disposing of all his properties both moveable and immovable. If para 4 stood by itself have no doubt that Ex. B-37 would have revoked Ex. B-36.

In Halsbury's Laws of England, 3rd Edn., Vol. 39, page 892 it is stated :

"A later will or codicil may revoke all earlier wills even though it contains no clause of revocation. It is a question of intention in each case. Where a later unambiguous will deals with the testator's entire property, it revokes all earlier wills, and, if the later will practically covers the same ground as an earlier one, it must be taken as being in substitution for it."

In "Jarman on Wills", 8th Edn., Vol. 1, page 193, It is observed :

"And a will may revoke an earlier testamentary documents, disposing of the whole of the testator's property, even although the later will does not contain an express clause of revocation, and does not dispose of all the testator's property. It is a question of construction on the terms of the two documents."

4. It was contended for the respondent that the width of the language used in para 4 of Ex. B-37 must be restricted in the context to properties mentioned in para 2. As already stated para 2 gives a statement of the properties belonging to the testator. To my mind it appears that the apparently wide language used in para 4 must receive some limitation from para 2 of the will. Mr. Venkiteswara Iyer contended for the appellant that the language of para 4 is so plain that there is no scope for restricting it to the properties enumerated in para 2. It was argued by him that the courts below went wrong in allowing their conclusions to be influenced by the oral evidence in the case to the effect that at the time of the

execution of Ex. B-37 there was a discussion about Ex. B-36, and that the interest of the testator in the property covered by Ex. B-36 was not included in Ex. B-37 after due deliberation by the testator. The lower courts based their finding that Ex. B-36 was not revoked by Ex. B-37 on the basis of this oral evidence also. Counsel submitted that the only method sanctioned by law for finding out the intention of the testator is to read Ex. B-37 and gather it from the words used in that document, and not to roam about and hunt for it in materisis de hors the instrument.

5. In this connection he drew my attention to the decision of the House of Lords in *Perrin v. Morgan*, 1943 AC 399 where Viscount Simon has said:

"The question is not of course what the testator meant to do when he made his will, but what the written words he used mean in the particular case -- what are the expressed intentions" of the testator".

Lord Romer puts the matter thus :

"To understand the language employed the court is entitled, to use a familiar expression, to sit in the testator's armchair. When seated there, however, the court is not entitled to make a fresh will for the testator merely because it strongly suspects that the testator did not mean what he has plainly said -- that he was in fact one of those persons of whom Knight Bruce, L. J. said that they spoke as if the office of language were to conceal their thoughts."

it is undoubtedly true that the intention of the testator must be gathered from the language used in the will. But when there is an ambiguity in that language extrinsic evidence can be admitted to clear up that ambiguity. It seems to me that the wide language used by the testator in para 4 is inconsistent with his intention apparent from para 2 to confine the operation of that Instrument to properties specifically referred to in para 2. The document being ambiguous in this matter it is open to a party to adduce oral evidence to show to the intention of the testator.

This question was considered in *Jenner v. Flinch*, 1879 5 PD 106. The headnote reads:

"If upon the face of a testamentary document and the facts known to the testatrix intended altogether to revoke a former will, the Court will admit oral evidence to ascertain the intention."

In the course of his Judgment, Sir James Hannen, said :

"The subject was very fully considered by Sir H. Jenner in *Ttiorne v. Rooke*, (1841) 2 Curt 799, and he came to the conclusion that where there is something on the face of the Instrument raising doubt or ambiguity as to whether it was intended by the testator to be in substitution for or addition to a previous will, the Court is justified in having recourse to external evidence to ascertain the testator's intentions. In the case before him the learned Judge thought there

was no such doubt or ambiguity, but the cases of *Methuen v. Methuen*, (1817) 2 Phill. 416 commented on and not disapproved of by Sir H. Jenner, may be referred to as showing what doubt arising on the face of the instrument, and taken in connection with the facts known to the testator, will be sufficient to justify the admission of external evidence."

6. In this connection Mr. Venkiteswara Iyer relied on the Full Bench ruling of the Madras High Court in *Panakkal Iyyapan v. Elachar Chakkunni*, 41 Ind Cas 556 : AIR 1918 Mad 759 (FB). In that case three wills were executed by a person on three different dates and the question arose whether the last of them revoked the previous wills. The language used in the last will was wide enough to take in all his properties. By that will the testator gave :

"all the rights which I have in the movable and immovable properties which I own this day and in those which I may acquire in future....."

It was held by the Full Bench that that clause operates as a revocation of the previous wills disposing of parts of his properties. Seshagiri Aiyar, J., in considering the question formulated a test as to implied revocation and that is :

"Mr. Rosario conceded that if Ext. A were the only will ever made by the testator, there can be no contention that it is not sufficient to dispose of all the properties which the testator died possessed of."

Relying on this, it was submitted that if Ex. B-37 alone were executed by the testator, the only possible construction which that instrument, would have received would be that the testator intended to dispose of all his properties, and if that be so, there could be no doubt that Ex. B-37 operated as a revocation of the previous will. In 41 Ind Cas 556 : AIR 1918 Mad 759 the words used were clear and unambiguous and admitted of no doubt that the testator intended to dispose of all his properties. But the will under consideration does not admit of that simple construction. There was no conceivable reason why the testator should have given an enumeration of his properties in para 2 except it be to confine the operation of that instrument to the properties so enumerated. The oral evidence in this case is that Ex. B. 36 was in mind of the testator at the time when Ex. B-37 was executed, and that he excluded the property devised under Ex. B-36 from Ex. B-37 after due deliberation. In this view, I think, the conclusion of the court below that respondent No. 2 was entitled to compensation, in these two cases was correct.

7. In the result, the decrees of the courts below are confirmed and these appeals dismissed. But without any order as to costs.