
(1995) 07 KL CK 0044
In the High Court Of Kerala
Case No : A.S. No. 119 of 1987

T.A. Dakshayani and Others

APPELLANT

Vs

U.P. Balakrishna Nair and Others

RESPONDENT

Date of Decision : 21-07-1995

Acts Referred:

Succession Act, 1925 — Section 106, 107
Trusts Act, 1882 — Section 82

Citation : (1995) 07 KL CK 0044

Hon'ble Judges : K.G. Balakrishnan, J;B.N. Patnaik, J

Bench : Division Bench

Advocate : V.R. Venkatakrishnan and K.M. Sathianath, for the Appellant; P.N.K. Achan (Senior Advocate) and T. Sethumadhavan, for the Respondent

Judgement

K.G. Balakrishnan, J.—Defendants 1 and 2 in O.S. 105 of 1982 on the file of Sub Court, Manjeri are the appellants. First respondent herein filed the suit for partition of the plaint schedule properties consisting of landed property, bank deposits and movable items. The suit was decreed in part. That is challenged in this appeal. The respondent has filed a cross objection against the decision of the court below so far as it is against his contentions. Plaintiff is the son of deceased Gopalakrishnan Nambiar through his first wife by name Narayani. Narayani died and thereafter Gopalakrishnan Nambiar married one Sarojini Amma and the first defendant is the daughter of Gopalakrishnan Nambiar through his second wife. Second defendant in the suit is the uncle and guardian of the first defendant. Gopalakrishnan Nambiar, died on 24-3-1982. After the death of Gopalakrishnan Nambiar plaintiff filed the suit alleging that the entire properties belonged to his father Gopalakrishnan Nambiar and he was entitled to get one-half share in the property. Defendants 1 and 2, the appellants herein contested the suit and alleged that Gopalakrishnan Nambiar had executed the will on 17.11.1971 and the plaintiff was aware of the will and he filed this suit only to harass the defendants. These appellants also contended that the plaintiff was having no right over the movable items and the bank deposits. These appellants further

contended that defendants 3 and 4 were unnecessary parties as they were residing in the house only as tenants. After the filing of the written statement, plaintiff amended the plaint and contended that the will executed by deceased Gopalakrishnan Nambiar was not a true and genuine document and that the bequeath made in favour of minor daughter was not in favour of the first defendant but in favour of another child born to Gopalakrishnan Nambiar through the second wife. Court below framed several issues and found that the will executed by Gopalakrishnan Nambiar was a true and genuine document. It was held that the minor child referred to in the will was none other than the first defendant. It was further held that by Ext. B3 will the legatees acquired right over the plaint schedule property as tenants in common and on the death of one of the legatees the rights reverted back to the testator and thus the plaintiff was entitled to 1/4 share over the plaint schedule immovable property.

2. Appellants herein contended that by Ext. B3 will the legatees acquired the property as joint tenants and, therefore, u/s 106 of the Indian Succession Act on the death of one of the legatees before the death of testator the other legatee, namely, the first defendant became the full owner of the property. The contention of the appellants is that by Ext. B3 will the legacy was given jointly to first appellant and deceased Sarojini Amma and on the death of Sarojini Amma it did not revert back to testator, but the first appellant Dakshayani takes the whole legacy. First respondent-plaintiff disputes this proposition and contends that there was no joint tenancy but distinct shares were given to Sarojini Amma Dakshayani Amma and therefore, on the death of Sarojini Amma before the death of testator so much of the legacy granted to her reverted back to the testator and the first respondent was thus entitled to get share in the property.

3. The crucial question to be considered in this appeal is whether Section 106 or 107 of the Indian Succession Act is applicable to the facts of this case. It is useful to extract Sections 106 and 107 of the Indian Succession Act:

106 - Legacy does not lapse if one of two joint legatees dies before testator. - If a legacy is given to two persons jointly and one of them dies before the testator, the other legatee takes the whole.

107. Effect of words showing testator's intention to give distinct shares. - If a legacy is given to legatees in words which show that the testator intended to give them distinct shares of it, then, if any legatee dies before the testator, so much of the legacy as was intended for him shall fall into the residue of the testator's property.

Section 106 of the Indian Succession Act is applicable in a case where there was joint tenancy. Whenever legacy is given to persons jointly and one of them happens to die during the lifetime of the testator the other legatee takes the whole. In the case of a joint tenancy, there must be unity of possession, unity of interest, unity of title and the unity of time regarding the commencement of such title. But in the case of tenancy in common there is no such unity of possession

or unity of interest or unity of title. When the legacies are given to several persons as tenants in common, the aggregate fund is to be divided among them in equal shares and if any of them dies before testator, what was intended for the deceased legatee will lapse into residue.

4. It is generally held that if the grant is to persons who are incapable of forming joint Hindu family in India, the donees take the property as tenants in common. It has been held by an early decision of the Privy Council in *Bahu Rani V. Rajendra Baksh* (AIR 1933 Pri Cou 72) that:

the principle of joint tenancy is unknown to Hindu law except in the case of the joint property of an undivided Hindu family governed by the Mitakshara law which under that law passes by survivorship.

That was a case in which grant was made to two brothers, and the question as to whether the grants were made to the two brothers severally or as members of a joint family. It was held that, "prima facie a gift to a member of Joint Hindu family is his separate property and will only become joint family property when it descends to his sons, unless he himself has made it joint family property by throwing it into the common stock". This observation of the Privy Council was approved by the Supreme Court in *Boddu Venkatakrishna Rao and Others Vs. Shrimati Boddu Satyavathi and Others*, and similar observations were made by the Judicial Committee in *Jogeswar Narain Deo v. Ram Chand Dutt* (1896 23 Ind App 37). Therefore under normal circumstances, if the bequeath is in favour of two persons, it is presumed that they take only as tenants-in-common. But, if there are clear and distinct words to the effect that the testator intended that there shall be joint tenancy then, of course, the legatees will take the property as joint tenants. Here, the relevant words in the will reads as follows:

(To my wife Sarojini Amma, aged 31 and 10 months old daughter Dakshayani alone shall keep in possession and enjoy the property after paying customary dues and land tax and they shall have right of assignment of the property.)

5. From the words extracted above, it cannot be said that there was a joint tenancy. It is not mentioned that they should enjoy the property jointly and that there is no unity of interest or unity of title in respect of the property bequeathed in favour of Sarojini Amma and Dakshayani. It is to be presumed that distinct shares have been given to both the legatees. Under such circumstance, it is to be held that the legatees took the property as tenants-in-common.

6. As regards interpretation of the will it has been held by the learned author O.R. Marshall in his book "Theobald on Wills" (at paragraph 1148) that:

The court leans towards a tenancy in common, and will prefer it when there is a doubt, or when the testator has given the legatees a choice between a joint tenancy and tenancy in common. So in several cases where there have been such words as "jointly and equally" the courts have held the gift a tenancy in common.

In the present will there are no words indicating the creation of a joint tenancy. So, we are of the view that its Section 107 of the Indian Succession Act that is applicable and not Sec. 106 of the Act as contended by the appellants. So, on the death of Sarojini Amma, the property devolved on the testator and formed of the residue of the testator's property as envisaged under Sec. 107 of the Indian Succession Act and, therefore, the plaintiff - first respondent was entitled to get 1/4th of the property comprised in plaint, second schedule.

7. The plaintiff had also sought for partition of the movable items mentioned in plaint third schedule. The third schedule consists of five items of fixed deposits. Originally, there was only one item and the subsequent four items were included in the plaint by way of an amendment. Except items 1 and 2 deposits, the other three deposits are in the name of the first appellant herein who was a minor at the time of the deposit. The court below allowed partition of all the items included in the plaint third schedule on the ground that, there was no presumption of advancement in favour of the first appellant by an instrument in writing, and therefore, these deposits should be deemed to be the property of deceased Gopalakrishnan Nambiar.

8. The counsel for the appellants disputes this proposition. Sec. 82 of the Indian Trusts Act, says that "whether a property is transferred to one person for consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing such consideration". This section has application only in a case where consideration is paid by one person and the property is obtained in the name of another and the person who paid the consideration had no intention to confer any benefit to the person in whose name the property is purchased. Under the English Law, there is a presumption of advancement in favour of the person in whose name the property was obtained. It is true that normally there is no presumption of advancement under Indian Law. But, however, the person in whose name the property is obtained can successfully prove that there was a gift in his favour. So the crucial question is whether the person who provided the consideration had any intention to confer any benefit on the person in whose favour the property is obtained. Our attention was drawn to some of the decisions but these decisions cannot be squarely applied to the facts of the present case. They are all cases where the property is obtained in joint names.

9. *P. Narayana Menon v. P. Bhageerathi Amma* (1985 K.L.J. 34) was a case wherein the deposit was made by a person of his money in the name of himself and his wife on condition that it is payable to either or survivor. The court held that in such cases, without any declaration of trust, there is a resulting trust in favour of that person who had the beneficial ownership of the amount in the absence of any contrary intention or unless it is proved that actual amount of gift was intended. This was based on the principle that there is no presumption of advancement under Indian Law. In *Padmanabhan Bhavani and Others Vs.*

Govindan Bhargavi and Another, also the deposit was made by a Hindu of his money in the joint name of himself and his wife. The court held that there was no gift in favour of the wife.

10. In the instant case, deceased Gopalakrishnan Nambiar made three deposits in the name of his minor daughter. Gopalakrishnan Nambiar had extensive landed property and he was owning a tile factory and a theatre. There is not even a suggestion that he made this deposit in the name of his minor daughter for the purpose of evasion of tax or to screen them from his creditors. Gopalakrishnan Nambiar had his own deposits in various financial institutions. Items 3 to 5 deposit are in the name of first appellant. From the nature of the transaction, it is clearly discernible that deceased Gopalakrishnan Nambiar intended that this deposit shall be a benefit in favour of the first appellant. Therefore, it is not possible to assume that there was a resulting trust and that the plaintiff was entitled to inherit one half of the same as property of deceased Gopalakrishnan Nambiar. We hold that the plaintiff was not entitled to get one-half of the properties mentioned as items 3 to 5 in plaintiff third schedule. Of course, the plaintiff is entitled to get share in the movable items mentioned in 4th schedule. In the result, we modify the preliminary decree and hold that the plaintiff second schedule properties shall be divided into four equal shares and one such share will be allotted to the plaintiff with mense profits, the quantum of which will be decided in the final decree. Items 1 and 2 in plaintiff third schedule shall be divided into two equal shares and one such share will be allotted to plaintiff. Items 3 to 5 mentioned in plaintiff third schedule are not liable to be partitioned. The various movable items mentioned by the Commissioner in the C-1 report are liable to be partitioned into two equal shares, and one such share will be allotted to the plaintiff. The cost of the will shall come out of the estate.

The A.S. is disposed of as above.