Raman Nadar Viswanathan Nadar and Others

Vs

Snehappoo Rasalamma and Others

Civil Appeal No. 2467 of 1966

(J. C. Shah, V. Ramaswami-I, A.N. Grover JJ)

17.09.1969

JUDGMENT

RAMASWAMI, J. –

1. This appeal is brought by certificate from the judgment of the High Court of Kerala in A. S. No. 848 of 1962, dated March 27, 1963, reversing the decree of the Principal Subordinate Judge, Trivandrum, in O. S. No. 182 of 1957, dated May 23, 1960.

2. The father of the plaintiffs who are appellants herein was a Hindu Nadar namely Raman Nadar. He had an elder brother named Krishnan Nadar. On May 9, 1946, the said Krishnan Nadar and Raman Nadar jointly executed a deed of will Ex. P-2 in respect of the assets of Krishnan Nadar. On the date of the will, Raman Nadar had only three daughters and no sons. Krishnan Nadar died on December 5, 1947. After the death of Krishnan Nadar the appellant's mother was married to Raman Nadar, who is the father of the appellants. It is specifically provided in the will Ex. P-2 that in the event of Raman Nadar begetting a son or sons in future those male issues will succeed to the assets of Krishnan Nadar to the exclusion of the daughters. The material portion of the will, Ex. P-2, reads as follows :

> "Deed of will executed by Krishnan nadar, aged 51, son of Kaliyambi, merchant, Makkavazhi, Kuzhiamvilakathu Veettil, Melkaladi, Airanimuttam, Pakhuthy, Nellamn Adhikaram and his brother Raman son of the said Kaliyambi of do., aged 39, merchant, on 26th Madam, 1111 M. E. with their won consultation and to their entire satisfaction. Some properties have been acquired in the name of the first named and in the name of the second named out of love and affection towards him and his children, with the self-acquired money of the first named and without the income of the Tarwad properties of the first named and without the help of the other members of the Tarwad or the second named. They are held by the first named in his possession and enjoyed by him till this date. The first named has, till the end of his life, absolute freedom, authority and right to alienate (the properties) in whatever manner he likes and to execute deeds. The first named is unmarried and the second named has married Parvathy alias Snehappoo, daughter of Sarah, Maraikkamuttath Veettil, Vazhuthoor Desom, Neyyattinkara Taluk, through whom he has three daughters, Ammukutty, aged 14, Chellamma, aged 10 and Rajammal, aged 5, but no son. As the first named felt himself desirous of making during his life provisions for the devolution after his life of the movable and immovable properties belonging to him in absolute rights as aforesaid, the following provisions regarding them are made : The first named till the end of his life will have the right to pay the land revenue to

> enjoy and dispose in any manner whatsoever all the movable and immovable properties that belong or may belong to himself. After the life of the first named, all the properties above said will be taken and enjoyed by the second named maintaining his children named above and those born to him later and without alienating or wasting the properties. After the life of the second named, if he leaves behind no sons, the three daughters named above and the daughters, if any, born hereafter may enjoy all the movable and immovable properties that may be found to belong to the first named and the second named, either in common or in equal shares, effecting mutation, taking Pattahs and paying the revenue in their won names, but without making any alienation thereof. If there be sons born to the second named, they will take after the life of the second named all the movable and immovable properties of the first named and the second named and enjoy them for ever, effecting mutation, taking Pattahs and paying revenue, and with all powers of disposal; and in that event, the daughters of the second named will not have and should not claim any right and they will not get any right."

Soon after the death of Krishnan Nadar defendants 3 and 4 and the mother of the fifth defendant as plaintiffs filed O. S. No. 37 of 1124 M. E. for the administration of the estate of the deceased Krishnan Nadar. The mother of the appellants was made one of the defendants in that suit and the allegation was that Raman Nadar had contracted an illicit relationship with her and that he had executed a gift deed Ex. D-1 in her favour in respect of some of the plaint items. O. S. No. 37 of 1124 was dismissed on the ground that the plaintiffs of that suit had lost their rights under the will on the birth of a son to Raman Nadar through his second wife on February 7, 1951, during the pendency of the suit. The plaintiffs in O. S. No. 37 of 1124 filed A. S. No. 98 of 1955 against the aforesaid decree and that was disposed of by a Division Bench of the Kerala High Court on February 2, 1957. The High Court observed as follows :

> "We do not consider it proper to decide this question (of the legitimacy of the son born to the first defendant in his second marriage) in this suit. This can be gone into in a suit, if any, instituted by or on behalf of the son. The first defendant had no right to revoke the will after Krishnan Nadar's death.....The plaintiffs do not and cannot get the right to possession of the properties until after the 1st defendant's death.... but a right to maintenance from the income of the properties has been provided for the plaintiffs by Ex. A (the will) and this they are entitled to get. The first defendant is not entitled to do any act which affects this right of the plaintiffs."

The High Court remanded the suit for fresh disposal to the Additional Subordinate Judge, Trivandrum. After the suit went back on remand the Additional Subordinate Judge, Trivandrum, held that the plaintiffs were not entitled to any relief and dismissed the suit. The daughters of defendant No. 1 preferred an appeal, A. S. No. 340 of 1959 to the High Court.

3. Meanwhile the appellants instituted O. S. No. 182 of 1957 for a declaration that the first defendant had only a life estate in the properties of Krishnan Nadar with the remainder vested in them under the will referred to above. The suit was decreed by the Principal Subordinate Judge, Trivandrum, who held that the second marriage of the first defendant was legal and the sons born out of that marriage were entitled to Krishnan Nadar's property subject to the life estate of the 1sat defendant. It was further held that the daughters of the 1st defendant (plaintiffs in O. S. No. 37 of 1124), were not entitled to any right over the properties. The daughters of the 1st defendant preferred an appeal against decree of the Principal Subordinate Judge being A. S. No. 848 of 1960.

The High Court decided this appeal and A. S. No. 340 of 1957 by a common judgment on March 27, 1963, appeal A. S. No. 848 of 1960, was allowed in whole and suit O. S. No. 182 of 1957, filed by the appellant was dismissed. A. S. No. 34 of 1959, was partly allowed and appellants 1 and 2 (being the first two plaintiffs in O. S. No. 37 of 1124), were held entitled to maintenance of Rs. 50/- per head per mensem from February 18, 1957. The alienations, Exs. C, D and E were held not binding upon the plaintiffs in that suit nor to have any force beyond the life of the 1st defendant. The other prayer sought by the plaintiffs in the appeal was disallowed.

4. In dismissing O. S. No. 182 of 1957, the High Court took the view that the legal validity of the bequests in Ex. P-2 had to be ascertained as on the date of Krishnan Nadar's death which was December 5, 1947. The marriage of the first defendant took place on 14-1-1124 (corresponding to August 29, 1948) and the first child of that marriage was born on February 7, 1951. The sons of the 1st defendant born of his second wife were, therefore, not in existence at the time of the death of the testator Krishnan Nadar. Krishnan Nadar belonged to the State of Travancore and all his properties were located in that State where the doctrine of pure Hindu law reigned supreme unaffected by any legislation. The High Court held that according to pure Hindu law a gift cannot be made in favour of a person who was not in existence at the date of the gift. A person capable of taking under a will must either in fact or in contemplation of law be in existence at the death of the testator. The devise in favour of plaintiffs in O. S. No. 182 of 1957, was void as they were not born at the time of death of Krishnan Nadar. After the life estate of the 1st defendant, the daughters became entitled to the properties for their lifetime.

5. The question involved in this appeal is whether the High Court was right in holding that plaintiffs have not established their title to the disputed properties.

6. Although there is no authority in Hindu Law to justify the doctrine that a Hindu cannot make a gift or bequest for the benefit of an unborn person yet that doctrine has been engrafted on Hindu Law by the decision of the Judicial Committee. This doctrine was laid down for the first time in Tagore's case, in which it was held by the Judicial Committee that a Hindu cannot make a gift in favour of a person who is not in existence either in fact or in contemplation of law at the time the gift was to take effect. The Judicial Committee purported to base its decision on a passage in the Dayabhaga, Chapter I, verse 21 as appears from the following passage in the judgment :

> "This makes it necessary to consider the Hindu Law of Gifts during life and wills, and the extent of the testator's power, whether in respect of the property he deals with or the person upon whom he confers it. The Law of Gifts during life is of the simplest character. As to ancestral estate it is said to be improper that it should be aliened by the holder, without the concurrence of those who are interested in the succession, but by the law as prevailing in Bengal at least (1) the impropriety of the alienation does not affect the legal character of the act (factum valet), and it has long been recognised as law in Bengal that the legal power of transfer is the same as to all property, whether ancestral or acquired. It applies to all persons in existence and capable of taking from the donor at the time when the gift is to take effect so as to fall within the principle expressed in the Dayabhaga, Chapter 1, Volume 21, by the phrase 'relinquishment in favour of the donee who is a sentient person'. By a rule now generally adopted in jurisprudence this class would include children in embryo, who afterwards come into separate existence." (pp. 66-67)

But the Judicial Committee was apparently under some misconception with respect to the meaning

of the words of Dayabhaga. The whole sentence in the original is as follows :

Danehi chatenoddesh vishivrutyagdev datruvyayarat sampradanastha dravya swamitwam. (Matter in Hindi)

of which the following is the correct translation :

> "Since in a gift donee's ownership in the thing (given) arises from the very act of the donor, consisting of the relinquishment of his ownership with the intention of passing the same to a sentient being."

7. The sentence neither expresses nor implies that the "sentient being" must be in existence or be present at the time and place of the relinquishment. On the contrary the whole argument contained in pragraphs 21 to 24 of Chapter I or Dayabhaga shows that a gift is completed by the donor's act alone, the acceptance of the donee being not necessary. Indeed, in the very next passage, Dayabhaga speaks of gifts to God as showing that the validity of the gifts does not depend upon acceptance.

8. Mr. Sarjoo Prasad suggested that the matter required reconsideration. But it is manifest that the decision of the Judicial Committee in Tagore's case (supra) has stood a great length of time and on the basis of that decision rights have been regulated, arrangements as to property have been made and titles to property have passed. We are hence of the opinion that this is a proper case in which the maxim communis error facit jus may be applied.

9. The principle underlying the maxim is that "the law so favours the public good, that it will in some cases permit a common error to pass for right"; as an example of which may be mentioned the case of common recoveries in English law, which were fictitious proceedings introduced by a kind of pia fraus to elude the statute de Donis, and which were at length allowed by the Courts to be a bar to an estate tail, so that these recoveries however clandestinely introduced, became by long use and acquiescence a legal mode of conveyance whereby a tenant in tail might dispose of his lands. There is a reference made to this principle by Lord Blackburn in his speech in Charles Dalton v. Henry Angus & Co. as follows :

> "I quite agree with what is said by the late Chief Justice Cockburn (3 C. B. D. at page 105) that where the evidence proved an adverse enjoyment as of right for twenty years, or little more, and nothing else, 'no one had the faintest belief that any grant had ever existed, and the presumption was known to be a mere fiction'. He thinks that thus to shorten the period of prescription without the authority of the Legislature was a great judicial usurpation. Perhaps it was. The same thing may be said of all legal fictions, and was often said (with, I think, more reason) of recoveries. But I take it that when a long series of cases have settled the law, it would produce intolerable confusion if it were to be reversed because the mode in which it was introduced was not approved of; even where it was originally a blunder, and inconvenient, communis error facit jus.

10. The doctrine in Tagore's case (supra) has been altered three Acts, namely, the Hindu transfers and Bequests Act, I of 1914, the Hindu Disposition of Property Act of 1916 and the Hindu Transfers and Bequests (City of Madras) Act, 1921. The legal position under these Acts is that no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death. This rule, however, is subject to the limitations and

provisions contained in Sections 113, 114, 115, and 116 of the Indian Succession Act, 1925.

11. It is, however, not disputed in the present case that on the relevant date none of the three Acts was operative and the doctrine of pure Hindu Law was applicable to the Travancore State. It follows that the principle laid down in Tagore's case (supra) applied and the bequests in favour of the sons of the 1st defendant are void and of no legal consequence.

12. On behalf of the appellants it was contended that the bequest in favour of the sons of the 1st defendant was in the nature of a family provision and, therefore, fell outside the principle laid down in Tagore's case (supra). In our opinion, there is no justification in this argument. Assuming without deciding that a family provision is an exception to the rule of pure Hindu Law stated above a provision in a will whereby the testator directs that his properties after his death shall be taken by his nephews or in their absence by his nieces cannot be characterised as a family provision. The object of such a disposition is obviously not to make a family provision but to chart a course for future devolution of the testator's properties.

13. The argument was stressed on behalf of the appellants that the will Ex. P-2 was a joint will executed by Krishnan Nadar and Raman Nadar and it was designed to take effect only after the death of both the testators. As the sons of the 1st defendant must necessarily be born before that event the principle in Tagore's case (supra) was not attracted. Reference was made to the following passage from Jarman on Wills, 8th Edn. :

> "Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon his death, as if he had made a separate will. But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either. 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."

14. In our opinion there is no warrant for this argument. The will Ex. P-2 contains separate provisions regarding the devolution of the properties of each of the testators. In regard to the properties of Krishnan Nadar it devises a life estate to the 1st defendant and the remainder to his sons or in their absence to his daughters. In regard to the properties of Raman Nadar the devise is to his sons and in their absence to his daughters. It is, therefore, not possible to accept the argument that the will was intended to operate or to come into effect after the death of both the testators. In regard to Krishnan Nadar's properties the life estate devised in favour of the 1st defendant must necessarily taken effect and remain in force during the life of the 1st defendant and not after that. It is true that at the end of the will there is a clause that both the testators have the right to revoke the will during the lives and that the will taken effect only subsequent to their death. But the true intention of the testator has gathered not by attaching importance to isolated expressions but by reading the will as a whole with all its provisions and ignoring none of then as redundant or contradictory. It must, therefore, be held that as the express devise to the 1st defendant for his life is a disposition intended to taken effect after the death of Krishnan Nadar and before the death of the 1st diffident, the last clause in the will cannot be literally correct.

15. It was then contended on behalf of the appellants that in any event the High Court was in error in holding that the title of the plaint properties vested in the daughters of the 1st defendant under the terms of the will, Ex. P-2. It appears that during the pendency of the appeal defendant No. 1 Raman Nadar died on May 20, 1969 and the question, therefore arises whether the daughters are entitled to

a life interest in the plaint properties after the death of defendant No. 1. It is manifest from the will that the bequest to the daughters is subject to the prior condition that the defendant No. 1 leaves behind no sons at the date of his death. The relevant portion of Ex. P-2 states :

> "After the life of the second named, if he leaves behind no sons, the three daughters named above and the daughters, if any, born hereafter may enjoy all the movable and immovable properties that may be found to belong to the first named and the second named, either in common or in equal shares....."

The bequest to the daughters was, therefore, defeasible on the sons being born to defendant No. 1. Hence upon the death of defendant No. 1. on May 13, 1969 there was no valid bequest to the daughters. In other words there was an intestacy and the provisions of the Hindu Succession Act, 1956 (Act No. 30 of 1956) would be applicable. The sons of defendant No. 1 cannot take under the will because they were unborn on the date of the death of the testator Krishnan Nadar. The daughters also cannot take under the will as the bequest in their favour was subject to the defeasance clause. It is evident that the appellants would be entitled to their lawful share of the properties of Krishnan Nadar under the provisions of the Hindu Succession Act, 1956 and they are entitled to declaration to that effect and other consequential reliefs. But it is not possible for us to finally dispose of this appeal because there was an issue in the Trial Court as to whether the appellants were the legitimate sons of defendant No. 1. The case of the defendant 3 of 5 was that there was no legal marriage between the 1st defendant and the mother of the plaintiffs. But the assertion of the plaintiffs was that their mother married the 1st defendant after getting herself converted into Hinduism and such marriage was legally valid and the plaintiffs are the legitimate children of the 1st defendant. The Trial Court has not gone into the question nor recorded a finding as to whether the plaintiffs are the legitimate sons of defendant No. 1.

16. For these reasons we hold that this appeal must be allowed, the judgment of the Kerala High Court, dated March 27, 1963 in A. S. No. 848 of 1962, should be set aside and the appeal should be remanded to the High Court for determining the issue whether the plaintiffs where the legitimate sons of defendant No. 1 and thereafter dispose of the appeal in accordance with law.

17. Parties will bear their own costs up to this stage. The application made by the plaintiffs for the appointment of a receiver will be dealt with by the High Court.

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