ALLAHABAD HIGH COURT

Bhawani Prasad

Vs.

Surendra Bala

First Appeal No. 223 of 1949. against decision of Dist. J. Agra,

(R.N. Gurtu and D.N. Roy, JJ.)

JUDGMENT

Gurtu, J.

1. This is a first appeal which arises out of a petition for the grant of letters of administration to the applicants, namely, Surendra Bala and Suresh Chandra who are respondents in this appeal, or for probate. The petitioners stated in their petition that Pandit Kuar Lal and his wife Smt. Ram Pyari duly executed a will dated the 15th of November, 1941, in respect of property owned by them. This will was duly registered on the 17th of November, 1941. Pandit Kuar Lal, who was the husband of Ram Pyari, died on the 18th of January, 1942 at Firozabad, and Smt. Ram Pyari died on the 11th of December, 1945, at Agra. The petitioners claimed to be legatees under the said will and entitled to obtain letters of administration.

2. We may note that in the first instance the petitioners merely prayed for the grant of a probate, but ultimately by an amendment an alternative prayer for the grant of letters of administration to the petitioners was made. Notices were issued and a caveat was filed by one Pandit Bhawani Prasad, who is the appellant here. Pandit Bhawani Prasad is the brother of Pandit Kuar Lal. Surendra Bala is the niece of Smt. Ram Pyari, and Suresh Chandra is Surendra Bala's son.

3. Shortly put the position taken up by Pandit Bhawani Prasad the appellant, was that the aforesaid will dated the 15th of November, 1941, stood revoked by a deed of gift dated the 14th of November, 1942 executed by the surviving Mst. Ram Pyari, after the death of her husband, in favour of Bhawani Prasad. The caveator inter alia pleaded that Smt. Ram Pyari was the owner of the house devised by the will, which was her stridhan property, and she was also the owner along with Kuar Lal of the deposits on which the will also operates.

4. On these pleadings the parties went to issue.

5. The court below found that the will in question has been established as being the duly

executed last will and testament of the executants Kuar Lal and Ram Pyari, and was brought into existence without coercion or undue influence. It found that the petition was not barred by Order 2, Rule 2, C. P. C., or by estoppel. It also held that the will dated the 15th of November, 1941, could not in law be deemed to have been revoked by the deed of gift dated the 14th of November, 1942, in favour of Bhawani Prasad and others.

6. In this appeal by Bhawani Prasad only one matter was raised before us, namely, that the learned probate court had erred in holding that the will did not stand revoked by the deed of gift.

7. We may mention that the view taken by the court below on the question of revocation was that the will in question, being a joint will, could not be cancelled by one executants alone (relying upon the judgment of Lord Camden in the case of *Dufour v. Pereira*[1], the Court gave a decision against revocation. It observed that the wife had proved the will after the death of the husband and had obtained benefit there under and that, therefore, it was not in any case in her power by making another will to revoke the will which she had executed along with her husband.

8. The contention rightly advanced before us by learned counsel for the appellant was that the case cited by the learned court below and the cases which follow that case were cases where the will in question was the result of some sort of a contract and the mutual devices in favor of the husband by the wife and in favor of the wife by the husband were the result of a reciprocal arrangement; and the contention was that in the present case there was no evidence whatsoever that there was any reciprocal arrangement which led to the drawing up of the will of Kuar Lal and his wife Ram Pyari on the 15th of November, 1941. It was also contended that no arrangement could he spelled out from the language used in the will aforesaid.

9. On the other side, the contention has been advanced that there was evidence of circumstances to establish an arrangement and that the language of the will itself showed that the will came into existence as a result of an arrangement between Kuar Lal and Smt. Ram Pyari. We think it is necessary to quote in extenso the will in question which is as follows :

> "We Pandit Kunwar Lal son of Pandit Bhagwan Singh and Mst. Ram Pyari alias Chandra Prabha wife of Pandit Kunwar Lal aforesaid, caste Brahman, resident of qasba Firozabad, district Agra, do declare as follows :

I, the executant No. 2 am the owner in possession without the participation and interference on the part of anybody, of a pucca built house, bounded and specified as below, by virtue of purchase of a sale deed executed and registered on the 16th of August, 1899 at No. 181, on page 28, Volume No. 35 of register No. 1. Besides this some money belonging to us the executants, is deposited in the Co-operative Bank Jarauli and in the Jwala Bank. We the executants have no male or female issue and as we have become old, there is no hope of having any issue in future. Life is uncertain and this world is transitory and it is not known when the soul will depart from

the body. Musammat Surendra Bala Devi is the daughter of the own brother of me, executant No. 2, whom we executants Nos. 1 and 2 have brought up and maintained from her childhood as our own daughter. Suresh Chandra is the natural son of Musammat Surendra Bala aforesaid. The aforesaid persons render services and try to

[1](1769) 21 ER 332). In Dufour's case, (1769) 21 ER 332

please us in our old age with much regard and affection and we have every hope that they would continue to render services and will try to please us the executants in future also in the same manner. We the executants are much pleased with their services and pleasant manners and we appreciate from our heart the obedience and love them very much. For these reasons we the executants desire that after our death the said persons should enter in possession of our movable and immovable property of every description together with the house mentioned above and the cash deposited in the Banks and of all sorts of property - movable and immovable which exists now or may come into existence in future. There should be some formal writing so that there may be no trouble in future and the aforesaid persons may not be put to expenses and trouble. Besides this I, the executant No. 2 executed and completed a will on 5th July, which was registered on the 8th of July 1941 at No. 11 on page 18 of volume 7 of register No. 3. On account of certain happenings, I executant No. 2 felt the necessity of amending the said will and I do amend it. Now, we, the executants after full deliberation without any compulsion or coercion on the part of anybody and without having been administered any drug and with the consultation of our well-wishers and legal advisers while in a sound state of body and mind, and of our free will and accord do make a will to the following effect :

> (1) We the executants shall remain in absolute possession and enjoyment without the participation or interference on the part of anybody of our movable and immovable property of every description together with the above mentioned house during our life-time, and nobody shall have any right of interference or obstruction.
> (2) In the event of the natural death of anyone of us, the executants, at any time the surviving executant shall enter in possession of the movable and immovable property of the deceased executant and shall be the owner of the movable and immovable property and the cash left by him having the right of appropriation with life interest only.
> (3) After the death of both of us the executants, Musammat Surendra Bala wife of Subodh Chandra and Suresh Chand son of Pandit Subodh Chandra, caste Brahman at present residing in Qasba Firozabad, district Agra, shall be the owner of the entire movable and immovable property of all sorts, belonging to us, together with the cash and the above mentioned house. They shall enjoy all sorts of proprietary rights and power in our estate without the participation of and interference on the part of anybody and nobody shall have any right of interference or obstruction. If, perchance anybody brings a claim as against the said persons, his claim shall be considered null and void in the face of this document.
> (4) Nobody except us, the executants, shall have any right to amend or cancel this will."

10. We may now mention that the petitioners, the respondents, claimed under the will and that

therefore they are necessarily bound by the recitals in the will. It will be observed that the will states that the wife Ram Pyari is the owner in possession without the participation and interference on the part of anybody of the pakka built house which has been devised. In regard to the money held in deposit in the two named Banks, the statement is that the money belongs to "us the executants". Thereafter the will sets out that the executants have no male or female issue; and then the will says that Surendra Bala Devi the niece of Ram Pyari and Surendra Bala Devi's son Suresh Chandra were rendering services to both the executants and trying to please them, and that both the executants were very pleased with the aforesaid two persons and for that reason they desired that after "our death the said persons should enter in possession", of all property covered by the will. Then the document refers to a previously executed will of Mst. Ram Pyari of the 5th of July, 1941. Then the dispository clauses which we have already quoted are found in the will. It will be observed that by one and the same clause namely clause 2, in the event of the natural death of either, the survivor would get a life interest in the deceased's property "left by him having the right of appropriation with life interest only". Then by clause (3) "After the death of both....... the executants, Surendra Bala and Suresh Chandra (the petitioners) shall be the owners of the entire moveable and immovable property" covered by the will. The last clause 4 indicates that the executants would have the right to amend or cancel the will, but nobody else will have that right.

11. It will thus appear from the will that both the executants were devising the property of which each was the owner, in the first instance to whosoever survived, and thereafter both of them were devising the property "belonging to us" to the petitioners. We have already mentioned that there is an assertion of absolute ownership in the house in question made by Smt. Ram Pyari, and an assertion made by both executants that the deposits in the Banks named constituted money "belonging to us the executants". It is obvious that the will recognises that the money deposits were held as deposits in common. Each person recognises that the other is also a co-owner thereof. In the absence of any specification in regard to the share of each, it must be taken that each conceded that the other held a moiety. The items aforesaid, according to the will, would remain in the absolute possession and enjoyment of the executants during their life-time, and thereafter would be disposed of in the manner already indicated.

12. Now on the language of this will, although there is no doubt that there is a devise by the husband to the wife and by the wife to the husband of her interest, the devise being limited to a life interest, there is nothing to show that the devise of one was made in consequence of an agreement between them, and that the consideration for one devise was the making of the other. There is undoubtedly a devise by each to the other, but there is no evidence that the devise was based on reciprocity, in other words, that the mutuality of the devise was as a result of a reciprocal arrangement. There is nothing to indicate that there was any sort of pre-arrangement that if the husband did what he is shown to have done, the wife would do likewise, and vice versa. On the contrary, sub-clause (4) shows that the executants reserve the power to amend or cancel this will.

13. Some argument was raised in regard to this clause, and whereas on the part of the petitioners-respondents it was said that the meaning of this clause was that the amendment or cancellation of the will had to be a joint amendment or cancellation and that the power to cancel or amend was exhausted immediately one or other of the executants died; on the other hand it was contended that in the absence of clear words indicating that the reserved power could only be exercised jointly, while both the parties were alive and not thereafter, the reservation of the power of revocation must be taken to be by both, whether the one or the other was dead. We have considered the matter carefully and have come to the conclusion that the exercise of the power reserved by clause (4) is not made dependent by this clause on the co-existence of both the executants, and that clause (4) does not imply that one executant, without the other or after the death of the other, could not effect a revocation so far as his own part of the will was concerned. No doubt by clause (3) ultimately the direction of the benefit of both the husband's disposition and the wife's disposition is the same, namely, that the property is to go to Smt. Surendra Bala and to Suresh Chandra, but the will does not show that they had agreed to treat the property of each as joint property belonging to both when they executed the will. It may be observed that, whether the husband died first or the wife died first, the devise to Surendra Bala and to Suresh Chandra would have a dual nature. It would partly be devise to them after the intervention of a life estate, and it would be partly a devise to them of an immediate estate. We do not consider that the interest of Surendra Bala or Suresh Chandra became so vested that it was not open to either of the two executants to divest them by an act inter vivos or by will which would show that the disposition which they had made by this will of 15-11-1941, stood revoked.

14. We will now refer to certain bits of evidence which have been placed before us. The learned counsel for the respondents first invited our attention to the fact that Smt. Ram Pyari on 4-7-1941, executed a document Ex. A4 being a will, which will she subsequently revoked or cancelled by the will of which letters of administration are being sought. It was contended that the fact that this previous will of 4-7-1941, had been cancelled subsequently showed that there must have been some sort of an arrangement between the husband and the wife which led to its cancellation; and we are asked to infer that an arrangement that the husband would benefit the wife and the wife would benefit the husband and that both will benefit the petitioners to this case and that the will of 4-7-1941, of Ram Pyari would be cancelled, was made. This contention is based upon the recitals in the deed of gift executed by Smt. Ram Pyari dated 14-11-1942. In that deed of gift Smt. Ram Pyari has set out the circumstances under which the will of her husband and of herself dated 15-11-1941, came into existence. What she says is as follows:

> "Sometime ago J. the executant at the instigation of others executed a will dated 4th July and registered on 8-7-1941 Ex. No. 11 at page 18 of Book No. III volume 7 in favour of Musammat Surendra Bala and Suresh Chandra with respect to the house aforesaid unknown to my husband and other members of my family, but according to legal advisers certain defects had remained in the will aforesaid for removal of which I, the executant, as

> directed by Musammat Surendra Bala, Suresh Chandra and Subodh Chandra conveyed their wishes and disclosed everything done at that time to my husband.
> He was very much displeased on coming to know of it and did not at all agree with me.
> But when I insisted and the abovenamed persons exercised pressure my husband aforesaid without the knowledge of his own brother Pandit Bhawani Prasad mentioned above executed another will cancelling the will aforesaid, with respect to the house mentioned above and the cash deposited in the Co-operative Bank, Janauli and the Jwala Bank, Firozabad dated 15th November and registered on 17th November, 1941 Exhibit No. 17 at pages 26 and 27 of Book No. III, volume 7 in favor of Musammat Surendra Bala and Suresh Chandra aforesaid. But Pandit Kunwar Lal aforesaid husband of me, the executant was very much displeased on account of all these documents and proceedings which he had taken at the instigation of others and at my insistence."

15. It will be observed from the aforesaid quotation from the deed gift itself that Smt. Ram Pyari says that the husband had executed the will of which administration is here sought and dated the 15th of November, 1941, at the instigation of others and at the insistence of Smt. Ram Pyari, she says that this caused the husband much grief and he died in consequence. Although it is stated that she insisted on the husband making that will and the petitioners also instigated the husband to make the will, it is not said that the husband executed the will in the terms that he did on the understanding and on the arrangement that she in her turn should also execute the will in the terms in which she has executed the will, i.e. under reciprocity of promise. The tenor of the deed of gift shows that what was being sought to be established by Smt. Ram Pyari was that whatever the husband had done, he had done under coercion and not of his own free will. That might have had some effect on the question whether under the circumstances he could be said to have had a free disposing mind. But it does not establish that he bargained with his wife that he would only agree to make a will in the terms in which he has made it, provided she made the will in the terms in which she has made it. If the wife acted of her own free will so far as her dispositions were concerned without her action being the result of an agreement with her husband, then even though she has conferred the same type of benefit on the husband as the husband has conferred on her, it would not follow that the arrangement was reciprocal. In point of fact the document does not say that the husband made any demands upon the wife at all as to the way in which she would devise her property. On the contrary, what is suggested is that the husband was being coerced and acted under insistence. In the absence of anything express in the deed of gift indicating a prearrangement leading up to the execution of the will in question we do not think that the aforesaid contents of the deed of gift established that there was a preceding arrangement.

16. Learned counsel for the petitioners-respondents also invited our attention to the deposition of Ram Chandra Paliwal. In his examination-in-chief Ram Chandra Paliwal said as follows :

> "They (meaning the husband and wife) both said that Suresh, etc. had served them well, so they were going to leave their house and other property to Suresh .... I think they

> called me that day simply to inform me about the arrangements so that there should not be any dispute later. They did not mention when the will was executed. ......At first Kuar Lal told me about the arrangements, then his wife told me the same thing."

It is not evident from what has been quoted above whether it was Ram Chandra Paliwal's inference that an arrangement had been made; or whether the executants said that they had come to a mutual reciprocal arrangement which was embodied in the will. It should be noted that, according to Ram Chandra Paliwal, both husband and wife said that Suresh, etc. had served them well, so that apparently both were individually satisfied with these persons and therefore it was not a case where the one person was wishing to make a devise in favor of Suresh Chandra and others, because the other person had been served well by Suresh and others.

17. One other sentence from the evidence of Suresh Chandra has been brought to our notice by learned counsel for the petitioner. It is to the following effect :

> "They took legal advice before executing this will. The previous will executed by Ram Pyari was revoked by the will Ex. C-1."

We do not think that the sentences quoted mean that legal advice was taken because the husband and the wife wanted to come to a bargain in regard to the contents of the will. Legal advice may have been taken merely in regard to the legal requirements of a duly executed will.

18. Then our attention was drawn to a sentence in the evidence of Kishan Lal which was :

> "Monday she went against her husband's wishes."

We think that this sentence, far from showing that there was an arrangement, would seem to suggest that she was a strong willed woman who would take her own line of action and would not enter into an arrangement with her husband with regard to what she intended to do, though she might have exercised an influence on the husband to make him fit in with her wishes. But an arrangement cannot be said to come into existence unless both parties fit in with each other's wishes and the action of one is done in consideration of the other. We are therefore of the view that upon the evidence placed before us and upon the language of the deed we cannot say that this will of 17-11-1941 sprang from any reciprocal arrangement between the husband and the wife. From what we have said it is apparent that the view that we are taking is that in fact this document of will dated 17-11-1941 really contains two wills, one by the husband and one by the wife, and that the one will was not executed in consideration of the execution of the other or as a part of a bargain. In this view of the matter it would be open to the wife to revoke "her" will. It would not be open to the wife to revoke the will of her husband. In the view that we take, the fact that the wife has benefited from the will of the husband would not destroy her power of revoking her own will because we have held her will to be quite an independent transaction. Therefore it

follows that the deed of gift cannot be taken to have revoked the will of the husband, but only the will of the wife. Consequently the will in question will still operate according to its tenor so far as it is the will of the husband and so far as ft disposes of the half share in the two banking accounts.

19. We may now refer to some of the authorities that have been cited before us. The first case to which our attention was invited was the case of *K. Govindan Kaimal v. T. T. Lakshmi Amma*[2], We need not set out the will which arose for interpretation in that

[2] AIR 1959 SC 71

case. It has been quoted in the judgment of their Lordships of the Supreme Court. The point for determination in that case was whether one of three executants of the will in question dated February 10, 1906, became entitled under the will to the properties which were the subject matter of dispute in that case. Their Lordships of the Supreme Court interpreted the will and held according to the head note : That under the will all the three testators did not become joint owners of all the properties on which it operated. There were three executants of the will. Each of them possessed properties, which were his or her self-acquisitions. They also owned some properties which they had jointly acquired, but their title to such properties 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.

20. The head note continues : In the present case, the legatees who were intended to take were the same persons, and it was for that reason that the three testators instead of each executing a separate will jointly executed it. It was nevertheless, a will by which each testator bequeathed 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 died. The will did not refer to any joint properties of the testators but to properties jointly acquired by them. They would hold these properties as tenants-in-common, and their share therein would devolve as their separate properties. The terms of the will were clear, and the subsequent conduct of the parties sought to be relied on must be disregarded as wholly inadmissible. 'The will was what it purported to be a will, and nothing else.' It did not confer any rights inter se on the testators; it only vested the title to the properties disposed of by it in the legatees on the death of the testators. In this view, the will must be held to be a testamentary disposition by the three testators of their properties operating on the death of each testator on his properties, and was in effect, three wills combined in one. A joint will, though unusual, is not unknown to law.

> 'The will could not be construed as a mutual will. 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. We will now end the question from the headnote. The underlining (here in ' ') is ours.

21. It will be observed that it is the mutuality, based upon a reciprocity of benefits, which makes a will mutual. Reciprocity of benefit means that there has been a bargain to give and take. Therefore, in our view, it is essential, for a will being considered mutual, that there should be reciprocal benefits. 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 bequests of one to the other have to be interdependent. In other words, the one bequest must have been caused by an agreement that the other bequest will be made. We have no doubt that the word "reciprocal" used by their Lordships of the Supreme Court in the case cited above has been used in the sense that the word "reciprocal" is used in the Contract Act and in the Law of Contract as implying the moving of consideration from both sides.

22. In *Gray v. Perpetual Trustee Co*[3]*.,* it was held that the fact that a husband and wife have simultaneously made mutual wills giving each to the other with life interest with similar provisions in remainder is not in itself evidence of an agreement not to revoke the wills. In the absence of a definite agreement to that effect as was observed there is no implied trust precluding the wife from creating a trust, even though her husband has died and she has taken the benefits conferred by his will. In our view it makes little difference whether the will of the husband and wife are by two separate documents, or by the same document. It would be a matter of interpretation of both wills or of one will and of the evidence led to show whether there was an implied agreement not to revoke or an implied agreement to create a trust.

23. We have already indicated that we take the view that in this instant case no implied agreement not to revoke or create a trust has been revealed by the circumstances, the language of the will or by the evidence adduced. In point of fact we have held that there was no agreement on the face of the document of will at All. But, on the contrary, relying upon clause (4), we are of opinion that the power to revoke stood expressly reserved to each executant independently.

24. We may mention that Gray's case, (1928 AC 391) (supra), refers to the judgment of Lord Camden in the case of (1769) 1 Dick 419. It has been pointed out in *Gray's case*[4]*,*

> "that in *Dufour v. Pereira* the conclusion reached was that if there was, although it was a fact which had in itself to be established by evidence in point of fact an agreement come to that the wills should not be revoked after the death of one of the parties without mutual consent, they were binding. That they were mutual wills to the same effect was at least treated as a relevant circumstance, to be taken into account in determining whether there was such an agreement. But the mere simultaneity of the wills and the similarity of their terms do not appear, taken by themselves, to have been looked on as more than some evidence of an agreement not to revoke. The agreement, which does not restrain the legal right to revoke, was the foundation of the right in equity which might emergeand in such cases the whole of the evidence must be looked at".

It was further pointed out in Gray's case, 1928 AC 391 that it was upon this ground that Lord Loughborough in the later case of *Lord Walpole v. Lord Orford*[5], dismissed the claim founded upon the principle of Lord Camden's judgment, holding that no sufficiently definite agreement had been proved.

25. *In Re Oldham; Hadwen v. Myles*[6], the authorities on the point were considered, and a conclusion was arrived at that the mere fact that two wills were made in identical terms did not of necessity imply any agreement beyond that so to make

[3]1928 AC 391 [5](1797) 3 Ves 402 : 4 R. R. 38
[4]1928 AC 391 [6]1925 Ch 75

them. In Oldham's case, 1925-Ch 75, upon the evidence it was found that it had not been made out that there was any sufficient evidence of any further agreement.
The House of Lords affirmed the view taken by Astbury J., *in Re Oldham*[7],

26. It is not necessary in view of the fact that (1769) 21 ER 332 supra, has been subjected to judicial examination and explanation to examine that case over again.

27. Suffice it to say that on an examination of the authorities hereinbefore mentioned it is established that without a reciprocal arrangement, it is open to a person to revoke his own will, even though he obtains the benefits in the identical terms in which he has bestowed them on another party who has made a will in his own favor.

28. We are therefore of the view that the will dated the 15th of November, 1941, stood revoked in so far as the dispositions made by Smt. Ram Pyari were concerned, but that it remained effective so far as the dispositions made by Pandit Kuar Lal in respect of his share in the deposits standing in his and in his wife's names in the Cooperative Bank, Jarauli, and in the Jwala Bank are concerned.

29. The will in relation to the personal property of Smt. Ram Pyari having been revoked by her by the deed of gift Ex. A-8, letters of administration can only be granted in respect of the personal property of Kuar Lal. In this view of the matter the appeal is partly allowed. It is directed that the letters of administration granted by the court below will be operative with respect to half the deposits in the two Banks held in the name of Kuar Lal and his wife. In other words, the letters of administration will now relate only to the estate of Kuar Lal. We order therefore that the formal letters of administration, if already granted, will be amended and a note to this effect will be made. If formal letters of administration have not already been issued, then at the time of issue a note will be made as aforesaid in the grant. In the circumstances parties will bear their own costs throughout.

30. Learned counsel says that as a consequence of our order he would be entitled to a refund of court-fee paid in respect of the assets of Smt. Ram Pyari also. He will be entitled to make an application for refund to the court below which will consider the prayer in the light of the legal position.

31. In consequence of our order the administration bonds already ordered to be executed will necessarily be reduced in amount according to the value of the estate of Kuar Lal.

Appeal partly allowed.

[7]1925-Ch 75