KOCHU GOVINDAN KAIMAL & OTHERS

v.

THAYANKOOT THEKKOT LAKSHMI AMMA AND OTHERS

1958

October 1.

(VENKATARAMA AIYAR, GAJENDRAGADKAR and A. K. SARKAR JJ.)

Will—Jointly executed by three testators—Construction—Joint tenants or tenants in common—Claim of entire properties by survivor —Maintainability.

A will executed jointly by three persons contained, inter alia, the following recitals:—"We have hereby settled and agreed that all the moveable and immoveable properties acquired jointly and separately by us till now, and those which we may be so acquiring in future and those which have devolved on us and those which we may yet be obtaining, shall be held by us in our possession and under our control and dealt with by us as we please till our death." There were bequests in favour of certain persons and the will provided that in the event of the executants effecting any transfers or alienations of the said properties, either jointly or severally till their death, the aforesaid persons shall have the right only in respect of the remaining items of the properties. Two of the testators having died the third claimed that he had become entitled by surviorship to all the properties disposed of by the document on the footing that it was in effect a transfer of all their individual properties to themselves jointly as joint tenants.

Held, that the document was 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. The properties were held by the testators as tenants-in-common and the legatees mentioned in the will would become entitled to the properties of the testator who dies.

CIVIL APPELLATE JURISDICTION: Civil Appeals Nos. 5 and 6 of 1955.

Appeals from the judgment and decree dated September 15, 1952, of the Madras High Court in Second Appeals Nos. 2256 of 1947 and 2545 of 1948,

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arising out of the judgment and decree dated September 19, 1946, of the Court of Subordinate Judge of Kozhikode in Appeal Suit Nos. 336 and 180 of 1946, against the judgment and decree dated October 9, 1945, and June 29, 1946, respectively of the Court of District trict Munsif, Chowghat, in O. S. Nos. 131 and 158 of 1945.

B. K. B. Naidu, for the appellants.

V. Karunakara Menon and *M. R. Krishna Pillai*, for the respondents.

1958. October 1. The Judgment of the Court was delivered by

Venkatarama Aiyar J.

VENKATARAMA AIYAR J.—The point for determination in these two appeals is whether one Kesavan Kaimal who was one of three executants of a will dated February 10, 1906, became entitled under that will to the properties, which are the subject-matter of these appeals.

The will is a short one, and is as follows:

"Will executed on 28th Makaram 1081 M. E., corresponding to 10th February, 1906, jointly by Kunhan Kaimal, son of Karayamvattath Kathayakkal Kunhu Kutti Amma, Kesavan Kaimal, son of Theyi Amma and Theyi Amma, daughter of Nani Amma of Etathiruthi amsom and Etamuttan desom in Ponnani Taluk. We have hereby settled and agreed that all the movable and immovable properties acquired jointly and separately by us till now, and those which we may be so acquiring in future and those which have devolved on us and those which we may yet be obtaining shall be held by us in our possession and under our control and dealt with by us as we please till our death and that subsequent to our death, Kalliani Amma's children, Kali and Kunhu Kutty, Thona Amma's children, Parukutty, Kunhunni, Kochu Govindan and Ramar, and the children of the deceased Narayani Amma, namely, Kunhunniri, Kuttiparu and Lakshmikutty and their children and the children who may be born to them as also the children who may be born of them, shall as our heirs and legal representatives, hold the said properties in their

possession and enjoy them hereditarily in equal shares amongst themselves.

2. Except after our death, the aforesaid persons shall not lay claim to any of the properties belonging to us.

3. It is settled that in the event of our effecting any transfers or alienations of the said properties, either jointly or severally till our death, the aforesaid persons shall have the right and freedom only in respect of the remaining items of properties to the exclusion of those items of properties included in the above transactions.

4. It is hereby further settled and agreed that subsequent to our death, save our legal representatives aforesaid and such of those as may be born hereafter, no other persons shall have the right to claim to or right of entry upon the entire properties moveable and immoveable found belonging to us.

And we have signed herein in the presence of the undersigned witnesses—

(signed) Kunhan Kaimal.
(„) Kesavan Kaimal.
(„) Theyi Amma."

Of the three testators, Theyi Amma died first—the exact date of her death does not appear and is not very material—and Kunhan Kaimal died thereafter sometime in 1930. It is the case of Kesavan Kaimal that in the events which had happened, he had become entitled by survivorship to all the properties disposed of by the will, including those of Kunhan Kaimal, and on this footing he conveyed on October 14, 1938, seven items of properties, of which three belonged to Kunhan Kaimal, to one Sankarankutti Kaimal and on October 16, 1944, another three items of properties which belonged to Kunhan Kaimal, to Kalyani and Vijayan. These transfers led to the two litigations, which have culminated in the present appeals.

The legatees under the will dated February 10, 1906, instituted O. S. No. 131 of 1945 in the Court of the District Munsif, Chowghat, then in the Province of Madras, for recovery of possession of three items of properties which had belonged to Kunhan Kaimal,

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after redeeming a mortgage for Rs. 100 created over those properties on February 3, 1901. The plaintiffs claimed that on the death of Kunhan Kaimal in 1930 they had become entitled to those properties as legatees under the will. Defendants 1 to 3 represented the mortgagees. Defendant 6 was Kesavan Kaimal, and defendants 4 and 5 were brought on record as persons claiming to be entitled to the suit properties under a deed of transfer by defendant 6, dated October 16, 1944. Defendants 4 to 6 contested the suit, and pleaded that on a proper construction of the will, the properties of Kunhan Kaimal survived to Kesavan Kaimal on the death of the former in 1930, and that the plaintiffs got no title to them. This contention was overruled by the District Munsif, and the suit was decreed. There were two appeals against this decree, A. S. No. 179 of 1946 and A. S. No. 180 of 1946 in the Court of the Subordinate Judge, Calicut, the former by defendants 4 and 5 and the latter, by defendant 6. The Subordinate Judge agreed with the construction put on the will by the District Munsif, and dismissed the appeals. Against that decree, defendant 6 preferred S. A. No. 2256 of 1947 in the High Court of Madras.

Basing himself on the deed of transfer dated October 14, 1938, Sankarankutti Kaimal instituted O. S. No. 158 of 1945 in the Court of the District Munsif, Chowghat, for recovery of possession of three items of properties, of which one belonged to Kunhan Kaimal absolutely and the other two, to him and others as co-owners. In the plaint, he alleged that there was an oral lease of the properties to the first defendant and to one Kali Amma, whose legal representatives were defendants 2 and 3, that the defendants were in arrears in the payment of rent, and were disputing his title to the properties, and that he was therefore entitled to eject them. Defendant 4 is Kesavan Kaimal, the vendor of the plaintiff. The contesting defendants who were the same as the plaintiffs in O.S. No. 131 of 1945 pleaded that under the will they became entitled to all the properties of Kunhan Kaimal, that the oral lease was untrue, and that the

suit was barred by limitation. The District Munsif found all the contentions in favour of defendants 1 to 3 and dismissed the suit. Against this decree, there was an appeal, A. S. No. 336 of 1946, in the Court of the Subordinate Judge of Ottapalam, and that was dismissed, the Subordinate Judge agreeing with the District Munsif on all the issues. Against his decree, the plaintiff preferred S. A. No. 2545 of 1948 in the High Court of Madras. Both the second appeals came up for hearing before Raghava Rao J. who held that on its true construction the will operated to vest in the three testators all the properties covered by it in joint ownership, that, in consequence, on the death successively of Theyi Amma and Kunhan Kaimal, their interest survived to Kesavan Kaimal, and that the transfers made by him on October 14, 1938, and October 16, 1944, were valid. In the result, both the second appeals were allowed, the suit for redemption, O. S. No. 131 of 1945, was dismissed, and the suit in ejectment, O. S. No. 158 of 1945, was decreed. Against this judgment, the present appeals have been brought on a certificate granted by this court under Art. 136.

The sole point for determination in these appeals is whether under the will all the three testators became joint owners of all the properties on which it operated. After hearing the question fully argued, we have come to the conclusion that that is not the effect of the will, and that the judgment of the High Court *contra* cannot be supported. 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. 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 is,

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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 dies.

The contention of the respondents which has found favour with the High Court is that the will must be construed as a transfer by the several testators of all their individual properties to themselves jointly as joint tenants. That would really be a transfer *inter vivos* and not a will. The word "will" is widely known and used, and it has a well-understood significance as meaning a disposition which is to take effect on the death of a person. The executants of the will could not have therefore intended that it should operate *inter vivos*. Moreover, if the document was intended to take effect as a present disposition, it should have to be stamped under the provisions of the Stamp Act, but the will is an unstamped document.

Coming to the recitals in the will, there are no words by which the executants thereof divest themselves of their individual ownership and vest it in themselves jointly. It is said that that could be implied from the words "all the movable and immovable properties acquired jointly and separately by us till now, and those which we may be so acquiring in future and those which have devolved on us and those which we may yet be obtaining shall be held by us in our possession and under our control". We are unable to read any such implication in those words. It is difficult to imagine how properties which were to be acquired in future could form the subject-matter of a disposition *in praesenti*. On the other hand, the true purpose of this clause would seem to be to emphasise that the execution of the will does not affect the rights of the testators over their properties, and that is an indication that it is to operate as a will. The matter appears to us to be concluded beyond all doubt by the terms of clause 3, which provides that the testators could alienate the properties jointly or severally. If the properties were intended to be impressed with the character of joint property, an alienation by any

one of them singly would be incompetent. In coming to the conclusion to which he did, the learned Judge in the Court below was very largely influenced by the fact that the will dealt with, not only the separate properties of the testators but also of their joint properties, and that there was one disposition as regards all of them. But this reasoning is based on a misconception of the recitals in the will. The will does not refer to any joint properties of the testators but to properties jointly acquired by them—which is very different. They would hold these properties as tenants-in-common, and their share therein would devolve as their separate properties.

It was further argued for the respondents that it could not have been the intention of Theyi Amma, one of the testators, to benefit the legatees under the will in preference to her own son, Kesavan Kaimal, and that, therefore, it must be held that she intended that her son who was the youngest of the testators should take all the properties. But if Kesavan Kaimal could himself agree to bequeath his properties to those legatees, we see nothing unnatural in his mother also agreeing to bequeath her properties to them—they being the heirs of the testators under the Marumakkattayam Law. Learned counsel for the respondents sought to rely on the subsequent conduct of the parties as showing that they understood the will as conferring a joint estate on the testators. It was said that it was in that belief that Kesavan Kaimal was dealing with the properties of the other testators as his own, after their death. It was also said that the conduct of the other members of the tarwad, including the plaintiffs, showed that they shared that belief. And this was sought to be made out by reference to the proceedings in E. A. No. 320 of 1938 in S. C. No. 480 of 1933. The facts were that one Kunhunni Kaimal obtained a decree against Kesavan Kaimal in S. C. No. 480 of 1933, and in execution of that decree, he brought some of the tarwad properties to sale, purchased them himself and got into possession. The members of the tarwad then filed an application, E. A. No. 320 of 1938, under O. 21, r. 100, for redelivery of the

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properties to them on the ground that the decree and the sale proceedings were not binding on them, and that was dismissed. In the order dismissing the application, the District Munsif observed that under the will dated February 10, 1906, Kesavan Kaimal had the power to transfer the properties. This order was relied on in these proceedings as operating as *res judicata* in favour of the respondents; but that contention was negatived by the Courts below, and has not been repeated before us. But these proceedings are now sought to be relied on as showing that the members of the tarwad did not dispute the title of Kesavan Kaimal to the properties which were dealt with by the will.

As against this, the appellant referred us to a partition deed dated May 16, 1915, and a mortgage deed dated March 4, 1926, to both of which Kesavan Kaimal was a party, in which he and other members of the family had understood the will in question as meaning that the testators held the properties covered by the will in separate and exclusive ownership. Whatever value one might attach to the above considerations if there was any doubt or uncertainty as to the meaning of the will, when once it is held that the language thereof is clear and unambiguous, evidence of the subsequent conduct of the parties cannot be admitted for the purpose of limiting or controlling its meaning. In our view, the terms of the will are clear, and the subsequent conduct of the parties sought to be relied on must be disregarded as wholly inadmissible. We are accordingly of opinion that the will dated February 10, 1906, is what it purports to be—a will, and nothing else. It does not confer any rights *inter se* on the testators; it only vests 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 is, in effect, three wills combined in one.

A joint will, though unusual, is not unknown to law. In Halsbury's Laws of England, Hailsham's Edition, Vol. 34, p. 17, para. 12, the law is thus stated:

"A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It is not, however, recognised in English law as a single will. It operates on the death of each testator as his will disposing of his own separate property, and is in effect two or more wills". There is a similar statement of the law in Jarman on Wills, 8th Ed., p. 41. The following observations of Farewell J. in *Duddell in re. Roundway* v. *Roundway* (1) are apposite:

"....in my judgment it is plain on the authorities that there may be a joint will in the sense that if two people make a bargain to make a joint will, effect may be given to that document. On the death of the first of those two persons the will is admitted to probate as a disposition of the property that he possesses. On the death of the second person, assuming that no fresh will has been made, the will is admitted to probate as the disposition of the second person's property.....".

It was also argued for the respondents that the will might be construed as a mutual will, but that, in our opinion, is an impossible contention to urge on the recitals of the document. 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. It cannot be argued that there is, in the present case, a bequest by the testators to themselves. There is nothing in the will to support such a contention, which would be inconsistent with the position taken by the respondents that there was a settlement of the properties *inter vivos* converting separate properties into joint properties. In this view, on the death of Kunhan Kaimal his properties vested in the legatees under the will dated February 10, 1906, and therefore neither Kesavan Kaimal nor his transferees under the deeds could lay any claim to them.

(1) [1932] 1 Ch. 585, 592.

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In the result, the appeals are allowed, the decrees passed by the High Court are set aside, and those of the Courts below are restored, with costs throughout.

Appeals allowed.

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October 1.

MAHARAJ KUMAR KAMAL SINGH

v.

THE COMMISSIONER OF INCOME-TAX, BIHAR & ORISSA

(VENKATARAMA AIYAR, GAJENDRAGADKAR and A. K. SARKAR JJ.)

Income Tax—Re-assessment — Escaped income — Assessment order based on statement of law subsequently found to be erroneous— Whether assessment can be reopened—"Information", "Escaped income", meaning of—Indian Income-tax Act, 1922 (XI of 1922), as amended by Act 48 of 1948, s. 34(1)(b).

In respect of the assessment of the appellant to income-tax the Income-tax Officer excluded the amount of interest on arrears of rent received by him, in view of the decision of the Patna High Court in *Kamakshya Narain Singh* v. *Commissioner of Income-tax*, [1946] 14 I. T. R. 673, that this amount was not liable to be taxed, though an appeal against the said decision to the Privy Council at the instance of the Income-tax Department was then pending. Subsequently on July 6, 1948, the Privy Council allowed the appeal and held that interest on arrears of rent payable in respect of agricultural land was not agricultural income as it was neither rent nor revenue derived from land. As a result of this decision the Income-tax Officer took proceedings under s. 34 of the Indian Income-tax Act, 1922, as amended, and revised the assessment order by adding the aforesaid amount, on the footing that the subsequent decision of the Privy Council was information within the meaning of s. 34(1)(b) of the Act and that the Income-tax Officer had reason to believe that a part of the assessee's income had escaped assessment. It was contended for the appellant that s. 34(1)(b) was not applicable to the case because (1) the information referred to in the section means information as to facts and cannot include the decision of the Privy Council on a point of law,