Antony Vs. Mathew and ors.

Antony Vs. Mathew and ors.

SooperKanoon Citation : sooperkanoon.com/718130

Court : Kerala

Decided On : Nov-01-1960

Reported in : AIR1962Ker48

Judge : M.S. Menon and; T.K. Joseph, JJ.

Acts : Succession Act, 1925 - Sections 70, 118 and 222

Appeal No. : O.P. No. 713 of 1959

Appellant : Antony

Respondent : Mathew and ors.

Advocate for Def. : Government Pleader and; C.T. Joseph, Adv. for 9th Respondent

Advocate for Pet/Ap. : K.P. Abraham and; K.K. Poulose, Advs.

Disposition : Petition allowed

Judgement :

M.S. Menon, J.

1. This is an application for probate under the Indian Succession Act, 1925. The testator died on 11-4-1953 leaving behind four testamentary instruments; a will dated 28-1-1952 (P.5), two codicils, one dated 26-2-1953 (P.2) and another dated

28-2-1953 (P.3), and a will dated 26-3-1953 (P.4). '26-2-1952' mentioned in one portion of Ext. P.2 is a mistake for '26-2-1953.'

2. The prior proceedings taken by the petitioner and the 6th respondent are narrated in detail in the petition before us. Those details, however, are of no consequence for a decision of the case and are hence not repeated in this judgment. We need only say that some of the aspects which fall to he considered came up For discussion in Thresia v Lonan Mathew, 1956 Ker L T 469 : ;(S) AIR 1956 Trav-Co 188) (FB).

3. The four testamentary instruments have been duly proved. The witnesses examined in that connection are Pws. 1 to 6. There is no opposition to the grant of a probate as prayed for in the petition.

4. If the Will of 28-1-1952 (P.5) and the two codicils thereto (P.2 and P.3) were the only testamentary instruments left by the deceased, the grant of probate would not have given rise to any controversy. The complication is created by Ext. P.4, the will dated 26-3-1953.

5. Bequests to charity form an essential part of both the wills, Ext, P.5 dated 28-1-1952 and Ext. P.4 dated 26-3-1953. Section 118 of the Indian Succession Act, 1925, provides :

'No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a will executed not loss than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the wills of living persons.'

Both Exts. P.5 and P.4 were deposited in pursuance of this section.

6. The testator died after the expiry of twelve months from the date of the execution of the first will (P.5) and before the expiry of twelve months from the date of the execution of the second will (P.4). It is clear that the bequests to charitable uses embodied in the second will (P.4) offends Section 118 of the Indian Succession Act, 1925, and that the petitioner has to fall back, if he can, to

the similar bequests embodied in the earlier will, Ext. P.5.

7. The second will (P.4) contains an express revocation of the earlier will and codicils. The real question for consideration is whether that revocation should be considered as absolute or conditional, conditional on the second will (P.4) proving to be as effective as the testator intended it to be.

8. The doctrine of dependent relative revocation is at least as old as the 18th century. It has been said that it was first recognised and christened by Powell in his book on Devises in 1788, and that it blossomed into full flower after the establishment of the Probate Court in England in 2857.

9. The doctrine came up for discussion before the Travancore-Cochin High Court in 1956 Ker I,T 469 : ((S) AIR 1956 Trav-Co 186) (FB) and before this court in A. S. No. 205 of 1954 (M), Jarman deals with the doctrine as follows :

'Where the act of destruction is connected with the making of another will, so as fairly to raise the inference that the testator meant the revocation of the old to depend upon the efficacy of the new disposition intended to be substituted, such will be the legal effect of the transaction; and therefore, if the will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also, and the original will remains in force. The doctrine, which has been described as somewhat overloaded with unnecessary polysyllables, applies whenever the intention to revoke a will is conditional Only and the condition is not fulfilled, and the doctrine may apply although the later Will is partially effective.'

(8th Edition, Vol. 1, p. 165) Halsbury says :

'Revocation may be relative to another disposition which has already been made Or is intended to be made, and so dependent thereon that revocation is not intended unless that other disposition takes effect. Such a revocation is known as dependent relative revocation, and if from any cause the other disposition fails to take effect the will remains operative as it was before the revocation'; and

'The question is whether the disposition revoked is intended not to operate whatever happens, or is only to be destroyed if the provisions of the substituted

instrument operate in its stead. The court must be satisfied that the testator did not intend to revoke the original Will except conditionally, in so far as the other disposition could be set up.'

(2nd Edition, Vol. XXXIV, pp. 89-90)

(10) There is an interesting account of the development of the doctrine of dependent relative revocation in (1955) 71 Law Quarterly Review 374. One of the important matters according to the author -- F. H. Newark -- which helped the development of the doctrine is the changed attitude of the courts to the heir at law. He says :

'The heir was once the darling of the law : almost every presumption was made lest he be disinherited. Accordingly it did not in earlier times seem a shocking thing if a testator after devising to A revoked the devise and devised to B and the devise to B failed, that the heir should then take. A distinct change is noticeable in the course of the eighteenth century. A testator who once devises is supposed to have resolved that his heir shall at all cost be excluded, and if a later devise fails it is better to assume that the testator would prefer a revoked earlier devise to an intestacy.'

11. The article classifies the cases in which the doctrine has been invoked by the courts into three groups :

(i) Cases where the testator has revoked a prior will because he is about to make a subsequent will,

(ii) Cases where the testator has revoked a prior will because he mistakenly believes he has made a subsequent valid will.

(iii) Cases where the testator has revoked a prior will because he mistakenly believes that the law of intestacy will effect his wishes.

We have been taken through all the four testamentary instruments and are satisfied that the doctrine of dependent relative revocation is attracted and that the case falls within the second of the three groups mentioned above.

12. In Other words, our conclusion is that probate should be granted to all the four testamentary instruments, Exts. P.5. P.2, P.3 and P.4, With the bequest in favour of the 9th respondent omitted from Ext. P.3 and the clauses relating to revocation and charities omitted from Ext. P.4 as those four instruments with the deletions aforesaid should be considered as representing the real and final wishes of the testator. The appointment of the petitioner as sole executor by Ext. P.2 and the bequest in favour of the 9th respondent in Ext. P.4 stand and we make it clear that such is the case.

13. That a probate on the lines indicated above can be granted will be clear from In the Estate of Cocke, (1960) 2 All ER 289. In that case Lloyd-Jones, J. -- after narrating the circumstances of the case -- said :

'In those circumstances, and having the support of In the Estate of Brown, (1942) 2 All ER 176, which was cited to me by counsel for the applicant, I think that it is right that I should order that both the wills should be admitted to probate as together constituting the true last wishes of the deceased with the omission from the first will of Clauses 3, 4 and 6 and from the second will of the revocation clause.'

14. The petition is allowed as above and a probate as stated in paragraph 12 is hereby granted. No costs.