

Ramamma Vs. Subbarami Reddi

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Court : Chennai

Decided On : Mar-31-1920

Reported in : (1920)ILR43Mad824

Judge : John Wallis, Kt. C.J. and ;Krishnan, J.

Appellant : Ramamma

Respondent : Subbarami Reddi

Judgement :

John Wallis, C.J.

1. This is an appeal from a decision of the District Judge of Nellore giving the plaintiff a decree in a suit brought by her to enforce the provisions of a will made in her favour by her deceased husband dealing with properties which at the time when he made the will and at the time of his death were the joint family properties of himself and his infant son. The learned District Judge has held that the provision made by the testator for his wife would have been a proper provision for him to make during his lifetime, that such a disposition of joint family properties during his lifetime would have been good, and that, if he could make such a provision during his lifetime, he could equally make it after his death, and he has relied on the decision of Sadasiva Ayyar and Spencer, JJ., in Patra Chariar v. Srinivasa Chariar I.L.R.,(1917) Mad., 1122, which as I shall point out presently, is distinguishable from the present case. Mr. A. Krishnaswami Ayyar, for the appellants, has

contended that it is now settled law that a co-parcener cannot devise joint family property by will because on the date of his death when the will takes effect, there is nothing for the will to operate on, as at the moment of his death his share passes by survivorship to the other co-parceners, That was very clearly laid down in *Vittla Butten v. Yamenamma* (1874) 8 M.H.C.R., 6 where it is said, at page 12

that the will in the case referred to cannot take effect. At the moment of death, the right of survivorship, is in conflict with the right by devise. Then the title by survivorship, being the prior title, takes precedence to the exclusion of that by devise.

2. It has been contended before us, and certain general dicta of the Privy Council have been referred to, to the effect that testamentary capacity is co-extensive with the right of making gifts inter vivos. That that principle has not a universal application is shown by the decision of the Privy Council in *Lakshman Dada Naik v. Ramachandra Dada Naik* (1874) 8 M.H.C.R., 6 , which expressly approved the decision of the Madras High Court to which I have just; referred. At that time the view that prevailed in the Madras High Court was that a co-parcener might during his lifetime make a gift of his undivided share (a view which has since been overruled) and the Madras High Court held in *Vittla Butten v. Yamenamma* (1874) 8 M.H.C.R., 6 , that in spite of that he could not. dispose of his undivided share by will. The Privy Council in *Lakshman Dada Naik v. Ramachandra Dada Naik* (1881) I.L.R. 6 Bom., 48 (P.C.), says at page 62, with reference to the case:

Its reasons for making the distinction between a gift and a devise are that the co-parcener's power of alienation is founded on his right to a partition; that that right dies with him: and that the title of his co-sharers by survivorship resting in them at the moment of his death, there remains nothing upon which the will can operate. This principle was invoked in *Suraj Bunsu Koer v. Sheo Proshad Singh* I.L.R.(1880) , Cal., 148 and was fully recognized by their Lordships.

3. This principle has already been applied to a case exactly such as the present by *Muttusami Ayyar, J.* in *Lakshmi v. Subramanya* I.L.R., (1889) Mad., 490. At page 492, the learned Judge says:

It is conceded that where a Hindu father disposes by will of ancestral property, the disposition is inoperative as against his son, but it is argued that when the disposition made is in the nature of a provision for the maintenance of the testator's widow, the will is valid. I am unable to adopt this view. The ground on which a will in regard to ancestral or joint family property was found to be invalid in the case of *Vittla Butten v. Yamenamma* (1874) 8 M.H.C.R., 6 is that directly the testator dies the co-parcener's right of survivorship takes effect and that a testamentary disposition cannot be permitted to prevail against that right. In the absence of the testamentary power, the contention that that power was exercised for the purpose of making a provision for the support of the testator's wife could not, in my opinion, validate the will.

4. I respectfully agree with these observations of this distinguished Hindu Judge which, in my opinion, are conclusive of the present case.

5. With regard to the more recent decisions of this Court, beginning with *Kudutamma v. Narasimha Charyulu* (1907) 17 M.L.J., 528, that a managing member of a Hindu family may lawfully make certain gifts of ancestral properties to the female members of the family, I may merely point out that it is quite a different thing to say that he may do so during his lifetime and to contend that he may do so by a will operating after his death. Where he does so during his lifetime, he is acting as manager and as representative of the family. If he is to make such gifts by will to operate after his death, he is assuming a function which really belongs to the surviving co-parceners, and he is purporting to exercise powers and perform duties which have devolved upon, them, and it seems to me that if we were to admit the principle contended for, it might have vary far-reaching results.

6. As regards the decision in *Patra Chariar v. Srinivasa Chariar* I.L.R.(1917) , Mad., 1122 , I may observe that none of the authorities which I have cited are referred to there. Further, the case is distinguishable on the facts. In that case the alienation in favour of the daughter was made by the father with the consent of his adult son who was his co-parcener and also with the consent of the testator's wife who was the mother of an infant co-parcener. We have no doubt been referred to certain cases in which the Privy Council have suggested that a will which would

otherwise be invalid might become operative by virtue of the consent of those co-parceners, but no such question has actually come before them for decision. Looking at the matter on principle, it might seem that a will made by one co-parcener with the assent of all the other co-parceners would be like a settlement or family arrangement between all the co-parceners to take effect from the death of the co-parcener who was the testator, unless that co-parcener in the meantime revoked it. It is not necessary to consider that question in the present case. After hearing very fully the arguments, I am satisfied that the Privy Council has never had to consider either that question or the question now actually before us. As I have said, the question of consent does not arise in this case, where the only members of the family were the testator and an infant son. In such a case, I do not think an alienation of this kind can be supported on the ground that the father must be taken to have consented to his own alienation in his capacity of guardian to his minor son.

7. We must, therefore, modify the decree by declaring that the will in so far as it contains dispositions in favour of the plaintiff is inoperative. The parties have left it to us to say on the materials before us what we think is a reasonable rate of maintenance, and I think that Rs. 30 a month is a reasonable sum, and that amount is payable by the defendants from 1st January 1916.

8. The parties are not agreed as to the provision to be made for the residence of the widow, which is the subject of the eighth issue. Therefore, before disposing of the appeal, we must ask the Court below to return a finding upon that subject within two months; seven days will be allowed for filing objections. Fresh evidence may be taken.

9. As regards the second issue, it has been found in favour of the plaintiff and therefore the decree will be modified by giving the plaintiff the jewels--items 1 and 2.

10. Maintenance will be charged upon a sufficient portion of the joint family properties to be determined by the Court below. A finding should be returned on this point also.

11. Costs reserved.

Krishnan, J.

12. I entirely agree with the learned Chief Justice in the order that he has just proposed in this case. He has dealt so fully with all the authorities that have been cited before us that it is quite unnecessary for me to go over them again. With all respect to the learned Judges who decided *Patra Chariar v. Srinivasa Chariar* I.L.R.,(1917) Mad., 1122, it seems to me that their decision is open to question. I was at first inclined to think that this question should be referred to a Full Bench for a final settlement, but as pointed out by the learned Chief Justice, the present case is distinguishable from that case, on the ground that in that case the consent of the adult co-parcener was obtained, and the decision was to a great extent based upon that consent. Such a consent is absent in the present case. I also agree with the learned Chief Justice that the testator in this case cannot be treated as having acted as the guardian of his infant son, and given consent to the arrangement made by himself in favour of his widow. He did not purport to act as his minor son's guardian with reference to his will, and to infer from the fact that he was the legal guardian of his son when he made the will, that he gave consent to the provisions in it as such guardian, will be, it seems to me, to introduce an unwarranted fiction into the case. This case being distinguishable from *Patra Chariar v. Srinivasa Chariar* I.L.R.,(1917) Mad., 1122, we need not express a final opinion about it. As regards the other points in the case, I entirely agree with the learned Chief Justice and have nothing further to add,

13. [The lower Court reported that the parties had filed a compromise petition and a petition for leave to enter into a compromise on behalf of the minor first appellant]. Their Lordships thereupon delivered the following:

JUDGMENT

14. We sanction the compromise as beneficial to the minor.

15. In the result we reverse the decree, and pass a fresh decree directing the defendants to deliver up to the plaintiff jewels forming items 1 to 10 of F Schedule

to the plaintiff, or pay their value Rs. 1,800 and awarding to the plaintiff maintenance at 30 rupees per mensem from 1st January 1916 to be charged on the properties mentioned in the compromise, and further awarding her the provision for residence contained in the compromise. Parties will pay and receive proportionate costs throughout on the value of the properties claimed under the will.

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