

A.P.P. Amina Umma and ors. Vs. A.P.P. Mammad and ors.

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Court : Chennai

Decided On : Jan-19-1955

Reported in : AIR1955Mad594; (1955)2MLJ161

Judge : Rajamannar, C.J. and ;Rajagopala Ayyangar, J.

Acts : Malabar Law

Appeal No. : Second Appeal No. 509 of 1951 and A.A.O. No. 241 of 1951

Appellant : A.P.P. Amina Umma and ors.

Respondent : A.P.P. Mammad and ors.

Advocate for Def. : N. Sundara Iyer, Adv.

Advocate for Pet/Ap. : D.A. Krishna Varior, Adv.

Disposition : Appeals allowed

Judgement :

Rajamannar, C.J.

1. The substantial question in these two appeals relates to the construction of a will dated 12-12-1922 executed by one Pottichi Kolanthan. On the date of the will, his wife, Ayeessa, and the seven children born of her were alive. The material clause of the will for the purpose of these appeals is Clause 3 which runs as

follows :

'Subsequent to my death (1) Abupaker, (2) Ameena, (3) Mammad, (4) Pathumma, (5) Ummar, (6) Alikkunhi and (7) Assan, children born to me in Ayikkarekath Pudiya Purayil Ayeessa of Taliparamba nagaram and the male and female children now bom and may be bom in future to the females among them should hold the properties mentioned in the schedule in their possession as tavazhi property with joint rights and enjoy the same as I am enjoying, with right, liberty and authority to effect alienation or transfer, but, each of them should not individually saddle the properties with debts or alienate the same.'

2. The appellants contend that under this clause, the bequest is to the tavazhi consisting of Ayeessa and her male and female children and the male and female children that may be bom in future to the females among them. The contention of the respondent, on the other hand, is that the bequest is to the seven named children of the testator who took the property bequeathed as tenants in common. Several decisions have been cited to us in which documents of gift and wills have been construed. But ultimately the decision of this case depends entirely on the language of Clause 3 of the will cited above.

3. It is now well established that apart from any presumption laid down by Section 48, Marumakathayam Act, which will not apply to this case, a person can make a gift or bequest in favour of persons constituting a tavazhi and that the property bequeathed to them will be taken by them and enjoyed as tavazhi property. The donees or the legatees are not constituted members of a tavazhi because of the gift or the bequest. The gift or bequest is made to members who actually constitute a tavazhi.

4. In our opinion, reading Clause 3 as a whole, and without leaving out of account any part of that clause, the intention of the testator appears to be quite clear that he was making a bequest of the property to the tavazhi, of which the seven named children were members. The difficulty is that they would not constitute a tavazhi except along with their mother who happened to be alive on the date of the will, and the will does not expressly name the mother as the legatee. It is contended on behalf of the appellants that to effectuate the intention of the testator, it should be

held that by implication there is a bequest also in favour of the mother, who along with the named children, would constitute the tavazhi.

It is admitted by the appellants that if the testator had expressly excluded his wife the mother of the seven children, then it would be difficult to contend that the bequest is to the tavazhi as such. But their learned counsel says that you cannot read such an exclusion into Clause 3. He also relied on the recitals in that clause which relate to the manner in which the testator intended the property to be enjoyed namely, 'as tavazhi property with joint rights', 'each of them should not individually saddle the properties with debts or alienate the same.'

Now, it is quite clear that the seven named children of the testator cannot enjoy the property with joint rights as tavazhi property, unless we hold that there is by implication a bequest in favour of the mother also with whom the children would constitute a tavazhi. Counsel for the respondent objects to this construction which he says would amount to making a new will for the testator. But we do not agree with him. The alternatives before us are either to give effect to every one of the recitals in the clause which can be done by implying a bequest in favour of the wife, or to hold that only the seven named persons take as tenants-in-common and reject the other parts of the clause as repugnant. We are clearly of opinion that the first alternative is the better.

5. As none of the decisions cited to us deals with a case exactly similar to the facts of the present one, it is not necessary to refer to any of them. It suffices to say that there is nothing in any of these decisions which prevents us from taking the view we have expressed above. On this view, the appeals must be allowed on this point.

6. Another point was raised on behalf of the appellant as regards a sum of Rs. 250 found to have been paid by defendant 3 to discharge the kozhikanam in respect of the property, item 1, dealt with by the schedule. This was undoubtedly a liability which is binding on the entire tavazhi, and if one of the members of the tavazhi has discharged this liability from his own funds, he is certainly entitled to reimbursement from the other members. We do not agree with appellants' counsel that defendant 3 is not entitled to the reservation made in his favour by the court

below.

7. In the result, the appeals are allowed, except in respect of the item of Rs. 250 paid by defendant 3, and the decree of the District Munsif of Taliparamba is hereby restored, except as regards the reservation in favour of the third defendant in respect of item 1. The appellants will have their costs in S. A. No. 509 of 1951.

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