

Paru Kutty Amma and ors. Vs. Chettath Navoth Lakshmi Amma and ors.

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Court : Chennai

Decided On : Jul-24-1953

Reported in : AIR1954Mad556

Judge : Krishnaswami Nayudu, J.

Acts : [Succession Act, 1925](#) - Sections 180; [Transfer of Property Act, 1882](#) - Sections 35

Appeal No. : Civil Revn. Petn. No. 1003 of 1951

Appellant : Paru Kutty Amma and ors.

Respondent : Chettath Navoth Lakshmi Amma and ors.

Advocate for Def. : M.K. Nambiar, ;P.S. Menon, ;P.B. Menon and ;C. Vasudeva Mannadiar, Advs.

Advocate for Pet/Ap. : K. Kutti Krishna Menon and ;V. Balakrishna Eradi, Advs.

Disposition : Revision allowed

Judgement :

ORDER

Krishnaswami Nayudu, J.

1. The petitioners are the plaintiffs in O. S. No. 60 of 1948 instituted by them for partition of the suit properties alleged to be tarwad properties.

One Sankaran Nair was the karnavan of the tarwad, whose widow and children are defendants 7 to 14. Sankaran Nair died on 26-7-1948, He executed his last will and testament on 20th September 1944. In and by the said will he dealt with the suit properties as his own private acquisitions and purported to deal with them by bequeathing them not only to his widow & children but to the plaintiffs and other defendants in the suit who are all members of the tarwad, the plaintiffs belonging to one tavazhi.

In the suit the plaintiffs contest the genuineness and validity of the Will, their case being that Sankaran Nair was very old, weak In body and in mind and was completely under tile influence of his wife and children, that, moreover, all the properties dealt with by the will were tarwad properties and he had no right to make a testamentary disposition in respect of the same and that the persons under the will do not get any interest in the properties. The prayer in the plaint is one for partition of the properties on the basis of their being tarwad properties.

Defendants 7 to 10, the widow and some of the children of Sankaran Nair, filed interlocutory application No. 682 of 1951 in the court of the Subordinate Judge of Ottapalam purporting to be under Section 35 of the Transfer of Property Act, Sections 180, 181 and 189 of the Indian Succession Act and Section 151, C. P. C. for directing such of the parties including the plaintiffs as get a benefit under the will to make an election and signify their intention to confirm the will or dissent from it. it was urged before the lower court that if the plaintiffs wished to impeach the will, as they have done, they must relinquish the benefit they get under it and should not be allowed to approbate and reprobate, that is, to question the genuineness of the will and its validity and, at the same time, if it is eventually found that the properties are not tarwad properties, take the benefit of its provisions by asking for the legacies.

The learned Subordinate Judge allowed the petition directing the plaintiffs and others, who get a benefit under the will and are not under any disability, to make an election. The present revision petition is against that order.

2. The circumstances under which an election could be asked to be made are provided for in Section 180 of the Indian Succession Act, which is as follows :

'Where a person, by his will, professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will.' Section 182 makes it clear that the provisions of Section 180 would apply whether the testator did or did not believe that which he professed to dispose of by his will to be his own. Section 181 lays down that, 'An interest relinquished in the circumstances stated in Section 180 shall devolve as if it had not been disposed of by the will in favour of the legatee, subject, nevertheless, to the charge of making good to the disappointed legatee the amount or value of the gift attempted to be given to him by the will.'

Section 189 imposes a time limit which the election has to be made and it provides :

'If the legatee does not, within one year after the death of the testator, signify to the testator's representatives his intention to confirm or to dissent from the will the representatives shall, upon the expiration of that period, require him to make his election; and, if he does not comply with such requisition within a reasonable time after he has received it, he shall be deemed to have elected to confirm the will.'

Section 35 of the Transfer of Property Act is in the same terms as the provisions of the Indian Succession Act on the subject of election and that section makes these provisions applicable to transfers 'inter vivos'.

The following is Illustration (1) to Sections 180, 181 and 182 of the Indian Succession Act :

'The farm of Sultanpur was the property of C. A bequeathed it to B, giving a legacy of 1000 rupees to C. C has elected to retain his farm of Sultanpur, which is worth 800 rupees. G forfeits his legacy of 1000 rupees, of which 800 rupees goes to B, and the remaining 200 rupees falls into the residuary bequest, or devolves

according to the rules of intestate succession, as the case may be.'

The language of Section 180 and the Illustration shows that a person, whose property has been disposed of by the testator by bequeathing it to another, -- the will providing for a benefit to that person, who was the owner of the property, -- should elect to confirm such disposition of his property, in which case he would be entitled to the benefit. But, if he chooses to dissent from it and claims the property as his, he shall not be entitled to the benefit provided for under the will.

In the present case, certain members of a tarwad have instituted the suit for partition of certain properties claiming them to be tarwad properties, but which have been treated as the self-acquisitions of Sankaran Nair and dealt with under the will, whereunder the testator has conferred benefits on those persons who claim them as tarwad properties. In case the plaintiffs succeed, then there is no question of any benefits arising under the will, since they will be entitled to their rightful share in the properties by virtue of their being members of the tarwad; taut, in the event of the court holding that they are not tarwad properties and find the will to be genuine, then the question of the plaintiffs claiming their legacies under the will would arise, and the question then would be whether the plaintiffs would be disentitled from claiming the benefits by reason of their having taken a stand in the suit against the will. It would, therefore, in the first instance, be rather premature to consider whether the principle of election could be invoked at this stage of the proceedings. The rights of the testator's representatives to put the plaintiffs on election could only arise after the decision as to who is the owner of the properties, which are the subject-matter of the will and the suit -- whether it is Sankaran Nair or the tarwad. In that view, I am of opinion that the petition filed for calling upon the plaintiffs to make an election is premature and on that ground alone should have been dismissed.

3. It is, however, necessary to consider whether the principle of election could at all be applied to the facts of the present case. The English law of election is the same as that provided for in Section 180 of the Indian Succession Act. In -- 'Douglas Menzies v. Umphelby', 1908 AC 224 (A), Lord Robertson refers to the principle of election as being the same as the doctrine of approbate and reprobate

and observes as follows at page 232:

'In considering the merits of the decision appealed against, it is well to remember what is the doctrine of approbate and reprobate Invoked by the appellant. Although the name is different, the principle -- as was laid down by Lord Eldon in -- 'Ker v. Wauchope', (1819) 1 Bligh 1 (B), is the same as that of the English law of election. It is against equity that any one should take against a man's will and also under it. This rests on no artificial rule, but on plain fair dealing. If any one has the right by law to take a share of a testator's estate, which the testator has not given but has otherwise disposed of, that person takes it against the will and cannot go on to found on the will and claim its benefits.'

In -- 'Pitman v. Grum Ewing', 1911 AC 217 (C), Lord Atkinson quotes with approval the passage Just now cited from the judgment in -- '1908 AC 224 (A). The principle as observed by Lord Eldon which is also quoted by Lord Atkinson, is that it is well settled that no person can accept and reject the same instrument. It is further observed by Lord Eldon that:

'If a testator gives his estate to A, and gives A's estate to B, Courts of Equity hold it to be against conscience that A should take the estate bequeathed to him and at the same time refuse to effectuate the implied condition in the will of the testator. The courts will not permit him to take that which cannot be his but by virtue of the disposition of the will, and at the same time to keep what by the same will is given or intended to be given to another person.'

Lord Atkinson also quoted with approval the following passage from Lord Cairns in -- 'Codrington V. Codrington', (1878) LR 7 HI 854 (D) :

'By the well-settled doctrine which is termed in the Scotch Law the doctrine of 'approbate' and 'reprobate' and in our Courts more commonly the doctrine of 'election' where a deed or will professes to make a general disposition of property for the benefit of a person named in it, such person cannot accept a benefit under the instrument without at the same time conforming to all its provisions and renouncing every right inconsistent with them.'

What is meant by election as provided under Section 180 of the Indian Succession Act -- which is the same thing as the Scottish law of 'approbate' and 'reprobate' and the English doctrine of Election -- is that a person cannot prefer to accept a benefit and refuse to be bound by the other provisions of the will. A person, who wants to get a benefit under the will, must conform to the entire provisions of the will and thus give effect to the intentions of the testator. It is not open to a person who accepts a benefit under the will to defeat the testator's intentions with reference to some of the provisions of the Will. The doctrine of election would therefore apply only when a person, who gets a benefit under the will, takes up an inconsistent position with reference to the other parts of the same document.

To attract the application of the doctrine of election there must be two sets of properties, one to which the testator is entitled and the other to which the person who gets a benefit is the owner and it is then that the owner legatee is put to the necessity of election as to whether he would accept his gift in which case he should allow his property bequeathed by the testator to devolve in the manner provided by the testator. The essence of the doctrine therefore is that a person cannot affirm and at the same time dissent from the same document, accept one part and reject the other, receive the benefit provided and refuse to give full effect to it. It is not a principle which is peculiar to English or Scottish or any other law but is based on a rule of justice that a person shall not at the same time affirm & disaffirm the same transaction affirming to the extent of the benefit provided and disaffirming in so far as it is to his prejudice. The affirmation and disaffirmation must be with reference to the same transaction or instrument.

4. I am unable to see how the doctrine of election can be Invoked by the respondents in a suit instituted for partition claiming the entire properties dealt with under the will as tarwad or family properties over which the testator had no absolute powers of disposal. The suit is not for recovery of a legacy under the will of Sankaran Nair. Nor is there a prayer in the plaint that in case the will should be found to be genuine and otherwise valid and the properties are held to be the self-acquisitions of Sankaran Nair and not of the tarwad, the plaintiffs should be entitled to have their legacy given over to them. But it is a simple suit for partition on the basis that the properties are tarwad properties. In no view can the doctrine

of election be invoked in such circumstances. Even if there is a prayer for recovery of the legacies in the event of the court holding that the properties are not tarwad properties but the properties of Sankaran Nair over which he had powers of disposal, that would only amount to an alternative relief, which is permissible in law.

Such suits are very common as, for example, suits by a son in a Hindu family where the father has executed a will disposing of the properties as his self-acquisitions, the son claiming them as joint family properties, for a share in the joint family properties while contesting the will, or in the alternative, asking for recovery of his legacy in case the properties are found to be self-acquisitions of the father. Though the causes of action may be inconsistent, they can form the basis of alternative reliefs. The result of holding otherwise would be that if a member of a joint family considers that the properties disposed of under the will by the manager or another member of the joint family are joint family properties and he fails to establish the same, he would become disentitled from claiming any legacy which might have been provided for under the will. That will be putting a premium upon bringing into existence of wills which are neither genuine nor valid, and it would become impossible for any person who happens to be a legatee under the will to contest its genuineness and validity without the risk of losing the legacy.

5. The decision in -- 'Rajamannar v. Venkata-krishnayya', 25 Mad 361 (E) may be cited in support of this position. In that case plaintiff sued for the recovery of Rs. 10,000 bequeathed to him by his brother, a contention was raised that, inasmuch as he supported the suit of another brother for partition claiming the properties conveyed under the wills as family properties, he was estopped from claiming the legacy. The learned Judges observed as follows :

'The last contention is that the plaintiff is estopped from claiming the legacy under the Will as he has disputed the validity of the will, and has elected to take the sum of Rs. 10,000 as a debt due to himself, and not as a legacy. What happened was that in a suit brought by a brother of the plaintiff claiming his share in the testator's estate as family property the plaintiff supported his brother and also claimed a

share. It was then decided that the property was the sole property of the deceased, and that neither plaintiff nor his brother had a right to share therein. We do not see how the plaintiff's right to the legacy is affected thereby. Having had to bow to the decision that he had no independent right in the testator's property, he now seeks that he may recover what the testator gave him out of that property. There is no estoppel. And as to the alleged election, if he had agreed to accept the money as in repayment of a debt, and had actually so received it, he could not of course claim the same amount once again as a legacy. Having however failed to obtain it as a debt he is entitled to get it as a legacy. We accordingly decide on the first question that the suit as brought is maintainable, and is not barred by limitation.'

A further question arose in that case since the executors contended that Rs. 10,000 given by the testator was not a legacy but a debt and that by reason of lapse of time it became barred by limitation. The learned Judges held that it was not a debt but a legacy and that the claim was also not barred by limitation.

6. There is therefore no scope for applying the doctrine of election to suits of the nature covered by this proceeding. The civil revision petition is allowed with costs to be paid by respondents 1 to 4.

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