Subba Reddi (Minor) by Next Friend Lakshmammal Vs. Doraisami Bathen and ors. and

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Court : Chennai

Decided On : Mar-12-1906

Reported in : (1906)16MLJ491

Appellant : Subba Reddi (Minor) by Next Friend Lakshmammal

Respondent : Doraisami Bathen and ors. and ;papammal and ors.

Judgement :

Subrahmania Aiyar, J.

1. There is no dispute that the all estate which Chenga Reddi left and which has been disposed of by his will, relied on by the plaintiff, was his self-acquisition. By the will he distributed the property in certain proportions among his two wives, his two daughters by the first wife, his sister, his brother's son, his brother's daughter who is the plaintiff and certain others. It was executed on the 7th March 1900 seven days before the death of Chenga Eeddi. The 7th defendant, the posthumous son of Chenga Eeddi by his second wife, the 6th defendant, was born on the 19th November 1900. The finding is to the effect that Chenga Eeddi, from the time of the execution of the will up to his death, was unaware that the 6th defendant was enciente.

2. The question for determination is whether the birth of the 7th defendant had the effect of revoking the will as contended by Mr. Sundara Aiyar on hisobehalf.

3. Whatever may have been the view held by Vijnaneswara, the great authority of the School cf Hindu Law followed in this Presidency, as to the interest devolving on a son by his birth in all the property held by his father, it must now be taken that a son by his birth acquires no sort of interest in so much of the property possessed by the father as is his self-acquisition. This is the basis of the ruling that a father can validly will away his self-acquired property even as against his male issue. The decision to be giveti, therefore, in the present case, ought in no way to conflict with the recognition of this power of testamentary disposition on the pare of the owner of such property. The ruling, finally upholding the power, was given only so late as 1898 in liao Balwant singh v. Rani Kishori and of course the whole law of wills among Hindus is of recent origin being mainly a development by judicial decisions of the Hindu Law of Gifts. The reason for such development was, of course, the necessity felt for making this part of the personal law of - Hindus suitable to the modern exigencies of their society. It is, therefore, certainly right that the Courts should in administering it, have due regard to the presumable intentions of testators generally viewed in the' light of deep-rooted sentiments prevalent among that community. in respect of the claims of male issue on their fathers. This is not a novel view and in support of the Courts deferring to such considerations in the matter, it is sufficient to point out that in laying down that a

widow prima facie takes only a limited interest under a grantor devise by her husband, the Courts were altogether influenced by the fact that the general feeling of the community is against women being given absolute powers of alienation and thus being enabled to divert the devolution of the property from the family. Bearing, therefore, in mind the extreme importance attached to the existence of male issue by every Hindu on religious and other grounds and the unlikelihood as a rule of a Hindu father contemplating the total disinheritance of his son even with reference to his self-acquired property, it would seem to be quite a reasonable doctrine to lay down that in circumstances like those of the present case the will is revoked in point of law by the birth of the male issue to the testator subsequent to the making of the will.

4. No Indian authority directly supporting such a view was, however, cited; nor I am aware of any; but this lack of precedent is not surprising since, as already stated, the Hindu Law of wills is of very recent growth. What we have to consider here is whether the view I have just stated ought not tO be uplield with reference to the rules of law adopted in analogous cases by systems of jurisprudence of which the law of wills formed an integral and long established part. In the great work of Burge on Colonial and Foreign Laws (Vol. IV, p. 510 etseq) will be found' an excellent account of these rules under several such systems and from that chiefly, I take the following.

5. As may be rgadily understood the Romans were the first to deal with the problem, and according to them the birth of a child after the testament had been made and for which the father had not provided had the effect of annulling the testament however formally it had been made (p. 510). The jurisprudence of Holland gave a similar effect to tlae birth of a child after a testator had made his testament, and the law of Spain also adopted the same' srule (p. 512). Pothier and other French jurists held that ' if a person make his testament in ignorance of his wife's pregnancy and there is afterwards a uhild born, the testament would be set aside on the presumed intention of the father that he would not have made the bequests in his testament if he had believed he should have had a child' (p. 512). In England, the Ecclesiastical Courts at an early'' period adopted a modified rule and laid down that birth of a child conjointly with marriage revoked a will of personal estate. The ground of the rule was that such a change in the testator's circumstances and situation afforded a presumption that he could not intend that the disposition of his property previously made by him should continue unchanged (p. 513). The rule was afterwards extended to devises of freehold estate. This rule of English' Law in so far as it requited the existence of both the elements--marriage and birth of issue - formed the subject of vigorous protest by Fonblanque in his treatise on Equity, Vol. 2, p. 353, note b. After a close examination of the grounds of the doctrine this distinguished author arrived at the conclusion that there was nothing in English Common Law to warrant the requisition of both the elements 'and that, as a matter of sound reasoning, either should suffice for the purpose of revoking the testament. With the advent of English Law in America, the doctrine of implied revocation found its way there also. The learned author Burge summarises the law as it stood about 1836 in 17 of the States. Among these, Lousiana was the only State where the doctrine found no place whatever, but even there it has been otherwise since the enactment of the Civil Code of that State. See 1698. Sachet v. Stephens' 3 L.A. 271 C.D. Vol. 49 587(a). In South Carolina the will was revoked by marriage and subsequent birth of a child. In all the remaining states the birth of a child either after the death of the father or during the lifetime of the father but subsequent to the will imuaired the testament either wholly or to the extent of the share the child could be entitled to in case of intestacy, if it was left unprovided for. This rule was in four of these States subject to the qualification that the absence of

reference to the child in the will was unintentional. (For like information as to the law 'Subsequent to 1836 in seven of the states enumerated by the author and in three more not mentioned by him, see Century. Digest, Vol. 49, pp. 585-590).

6. The indubitable conclusion suggested by the preponderance of authority according to the review of the laws of the different countries, as above is that the birth of issue after the making of a will has a decided controlling effect on its validity, and if such issue be left unprovided for thereby, the testament does not operate as against them if but for it they would be heirs to the property and if it does not appear that the omission to provide for them was intentional. The circumstance that statutory provisions dealing with the present matter, where they exist, present differences of outline, should not obscure the truth that the substance of the doctrine made its appearance in Rome and elsewhere as a matter of unwritten law and that its adoption by the different countries was because of its inherent good sense and propriety in connection with family life. This is pointed out with force and neatness in Young's appeal (decided by the Court of Pennsylvania) thus: - 'If the testator's circumstances be so altered that new moral testamentary duties have accrued to him subsequent to the date of the will such as may be presumed to produce a change of intention, this will amount to an implied revocation. Now it matters not whether it be said that this principle was derived from the Roman Law or from our human instincts of justice. Certainly it is now a legitimate element of our Common Law and we would not have received it but for those instincts. The Romans received it before us because they were before us and because they too were human'. If such be the effect of these instincts on the rules of law among people with whom, in the words of Professor Dicey, 'freedom of testamentary disposition has become a part not my of their law but so to speak of their social morality,' it would seem not to be right to act otherwise with reference to a community in which the law of wills is in its early stage of growth and among the members where of parental feeling is in no way less cordial. The application to the present case of the uoctrine of implied revocation would seem to be quite just since the 7th defendant who would have been heir but for the will has been left completely unprovided for and' it does not appear that his father would have made the dispositions contained in the will had he believed he would have had a son.

7. If as against this it be urged that the Indian Succession Act has not provided for implied revocation of the kind under consideration, the answer must be that it is the province of the Courts, in deciding cases new in the instance as is the present, to apply recognized principles of general law bearing on the matter leaving it to the legislature to change the law if it should deem fit to do so. Here I may cite a passage from an author already cited. Fon-blanque on Equity - as showing that in applying the doctrine of revocation in a case like the present, we would not overstep the limits permitted to us by law. Referring to the argument that it is for the legislator or politician alone to make either marriage or birth of child singly a ground for revoking a will, the author observes at p. 361: - 'I should submit that its adoption by the Judge would not be a stretch of those powers and sound discretion which are confided to him in the administration of justice.'

8. Even in the view that the conclusion I have arrived at is open to no question whatsoever, it would seem that legislative action is desirable, as, for example, in regard to the nature and extent of proof to be adduced as, to the father's intention, if any, to exclude the issue born after the date of the testament. The objection to allowing extrinsic evidence in regard to such a matter received support not only from general considerations, but also from the opinions of eminent English Judges, 'Eyre

L., C.J., Lord Kenyan, Justice Buller and others cited by Burge at p. 516. To obviate all difficulty as regards this, the proper course would in my judgment be to proceed on the lines of the Civil law 'which prevailed both before 'and after the Justinian Legislation. See Hunter's Eoman Law 4th Edn. pp. 775, 777, 779 - and lay down that the intention to exclude must appear in the testament itself where it is in writing. To enact such an inflexible rule would, of course, be in keeping with the spirit of that law relating to wills in that it favours the observance of strict formalities as to execution, revocation, etc., and the example set by some of the American statutes as stated in Burge attest the wisdom of such legislation in this country.

9. I trust, I may add, that this is not the only point connected with the law of Hindu wills which has of late come under my* observation as requiring the attention of the legislature. I refer to what transpired A langamonjori Babee Sonmoni Dabee I.L.R. 8 C. 637 where Wilson, J.'s decision that Act XXI of 1870, so far as it went, abolished the doctrine of the Hindu law that gifts to unborn persons were invalid, was overruled on appeal. In the Appellate Court it was acknowledged that the difficulty in construing the act was due to the legislation having been by way of reference to the provisions of an enactment not contemplated by its framers to be applicable to Hindus. Whether the decision of the Appellate Court was right has been doubted and, but a short time ago, my learned colleague shared in that doubt (see Yethirajulu Naidu v. Mukunthu Naidu I.L.R. M 367). Assuming, the interpretation of the Act by Wilson, J. was erroneous, it is obvious that the rule of the Hindu Law referred to should without delay have been abolished. Undoubtedly that rule has no foundation in any religious tenant of the people nor is it the Dutcorne of any social condition peculiar to them. It is but a technicality due to the notion that an inheritance cannot be in abeyance. Once the power of testament to the extent it has been conceded to a Hindu is recognized by the law it is but right and expedient that it should not be affected by a mere artificial rule such as that mentioned which tends in such cases but to nullify testator's proper disposition. The power should only be subject to the rules against perpeiuities which in England as well as in this country (as for instance, in the Transfer of Property Act) are enforced on necessary grounds of public policy. Unless this and other essential improvements have' been introduced, it cannot, with reference to this branch of the Indian law, be said0 that the salutary principle enunciated by. Lord Cottenham that too strict an adherence to forms and rules established under very different circumstances should be avoided and that the law to be administered by the Court, should be adopted to 'the' actual needs of the society, has been fully given effect to.

10. Be this as it may, for reasons stated in the former part of this judgment, I hold that the will of Chenga Eeddi became in consequence of the birth of the 7th defendants revoked in Law. I would therefore set aside the decrees of the lower Court and dismiss the suit, directing, however, the costs of the parties to be bonne by the estate.

Moore, J.

11. We are asked in this second appeal to hold that the fact that the testator's wife after his death gave birth to a son has the effect of revoking his will which it may be mentioned deals with self-acquired property only. I cannot find any authority for the proposition that by the birth of a posthumous son a Hindu's will is revoked. Such authority, if it exists, must be either in Hindu Law in its integrity or in modifications of that Law brought about by decisions of Court of Law or legislation. As Hindu Law

proper, that is, Hindu Law before it was modified by Courts of Law or legislation knows nothing of wills, it is clear that no authority for the proposition now advanced can be found in it. It is admitted that no decision of any Indian Court of Law or of the Judicial Committee of the Privy Council in any appeal from an Indian Court can be quoted in support of this proposition. The effect of legislation regarding Hindu wills remains to be considered. Section 56 of the Indian Succession Act (X of 1865) provides that every will shall be revoked by the marriage of the maker. This section has not been made applicable to Hindu wills by. Section 2 of Act XXI of 1870, and Section 3 of the same Act has the following proviso : 'Provided that marriage shall not revoke any-such will or codicil.' The effect of those provisions of law is to lay down clearly that the English law as to revocation of a will by the marriage of the testator does not apply to the. will of a Hindu. There is, it is admitted, no provision either in the Hindu Wills Act or any other Legislative enactment that the birth of a posthumous son revokes the will of a Hindu. I must hold that there is no authority for the proposition advanced on behalf of the appellant and would accordingly dismiss this second appeal with costs.

12. Under Section 575 of the Civil Procedure Code, the Judgment of Moore, J., prevails and this second appeal is dismissed with costs.

13. In S.A. No. 81 of 1904 : - For the like reasons as are recorded in the Judgment in Section A. No. 82 of 1904, this second appeal ;s dismissed with costs.