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(1988) 08 KL CK 0045

High Court Of Kerala

Case No: S. A. No. 319 of 1983

Abdul Kadir Rawther — APPELLANT

Vs

Hameedamma — RESPONDENT

Date of Decision: Aug. 19, 1988

Acts Referred:

- Evidence Act, 1872 - Section 68
- Transfer of Property Act, 1882 - Section 3

Citation: (1988) 2 KLJ 477

Hon'ble Judges: S. Padmanabhan, J

Bench: Single Bench

Advocate: T. V. Ananthan, for the Appellant; M. V. Ibrahimkutty, A.K. Jagadeeshchandran Nair, for the Respondent

Final Decision: Dismissed

Judgement

S. Padmanabhan, J.
Deceased Mouthali Rowther had his wife, five sons and five daughters including plaintiff and defendant. He o\\vned 2 acres 19 cents of landed property including plaint schedule 5 cents. In 1962 ne executed and registered Ext. A1 will bequeathing properties in favour of five SOBS and two daughters as well as in favour of some of the grand children. A life estate was created in favour of the wife also. Plaint, schedule Scents was given to the plaintiff and a larger area was given to the defendant. Both of them accented and acted upon the document after the death of the father". The suit for declaration of title and recovery of possession was resisted by the defendant on the ground that the will is invalid. The contention was negatived and the* suit was decreed by both the courts. Defendant appealed. Invalidity of the will is raised on the ground (hat it exceeded the permissible one third and the heirs have hot given consent after the death of the testator. It is also stated that the will has not taken effect. But I do not think that there is any force in the contention that the will has not taken effect. By Ext.A4 the appellant accepted the will and derived benefits under it. By Ext. A2 plaintiff purchased the life estate of the

mother overthe suit property and came by possession. There is evidence of acceptance by other heirs also. Execution of the Will is not disputed and it is further amply proved by the evidence also. Section 68 of the Evidence Act may not strictly apply to a Mohammad en will. A Mohammaden will need not be in writing. It ''can be verbal also. Even if it is in writing it does not require to be signed. Even if signed it does not require attestation. That does not mean strict proof is not required in case of dispute. When execution is admitted and contents of the will are not in dispute the question of genuineness cannot be challenged especially when that fact is also proved. Therefore the only question that remains to be considered is the validity.

2. In this case the bequest was to heirs and those who are pot; heirs. Under Mohammedan Law a bequest to heirs Is. not valid unless the other heirs consent to the bequest after the death of the testator. But even without the consent of all the heirs, a single heir or more than one could consent so as to bind his or their share. Bequest to persons who are not heirs impermissible to-the extent of one third of the assets from the surplus after payment of the funeral expenses and: debts even without consent of the heirs. At least two third of the assets must be therefor the heirs to inherit after death of the testator. The principle behind is that a testator cannot bequeath his properties so as to disinherit his heirs without their consent after his death. That means no bequest of a Mohammaden could take effect to any extent if it is in favour of his heirs, and no bequest in favour of strangers could take effect for more than one third, unless consented to by the heirs after his death. In this case the bequest is in favour of heirs and strangers and it is for the whole assets of the testator. Then except for the bequest limited to one third of the assets of the testator in favour of strangers, consent of the heirs after the death of the testator is necessary to validate the same. Absence of such consent is the plea. If there is absence of consent the bequest will abate ratably. In deciding, whether a person is or not an heir, the crucial time is net the date of execution of the will; but the time of testator''s death. Though creation of a life estate is not repugnant to the Mohammadan Law, the interposition of a life estate under a testamentary bequfft'' roust be deemed to be a testamentary disposition of the entire property to the exclusion of the legal heirs and as such an independent disposition of the property to the exclusion of the heirs. Therefore, in such a case also it is necessary to prove, for the validation of the bequest, that the disposition of the He estate was consented to by the heirs after the'' death of the testator. Otherwise the legacy will abate rateably because that is the legal effect when the bequest exceed the legal limit and heirs refuse consent. (See Anarali v. Omar Ali (AIR (38) 1951 Calcutta 7).

3. In the first place the invalidity of Ext. Al will is a contention not available to-the appettanti I have earlier stated even a single heir could consist to the well as to bind his share of the estate. A person who accepts the will and derives be offence out of it is estopped from turning round, and reprobating for the put-pose of challenging validity of the will. He who accepts the will and. gets the advantage of the bequest cannot say that so far as another legatee is concerned the will is invalid. One cannot approbate and

reprobate-at the same time. (8ee>Wali Mohammsd v. Daulat-uw-"issa (AIR 1917 Oadfc 326). In this cast the will is not challenged by anybody other than the appellant who accepted" the same by Ext. A4 and dealt with the property allbtted to him. In fact under the will he got more properties than what he would have obtatnedif the deceased died intestate.

4. Whether the heirs consented to the bequest after the death of the testator is a, question of fact in which an acid test or hard and fast guidelines cannot he provided. Each case will depend upon its facts. Consent need not be E express. It can be inferred from circumstances and conduct also. Even though the consent required is after the death of the testator, when alone the will takes effect; the conduct of the heirs during the life time of the testator with the knowledge of the disposition under the will could also be taken as a relevant factor in appreciating the state of affairs after his death to consider whether the bequest was consented to. Consent during the life time of the testator with knowledge of the request coupled with long silence after the death of the testator without claiming as heir must lead to the presumption of consent. Consent proved to have been given before death of the testator may hold good even after death if it is not revoked expressly or by necessary implication by conduct or otherwise. Passive acquiescence with knowledge of the disposition also can give rise to a presumption of consent. Such acquiescence can be inferred from long silence by heirs who could have otherwise claimed as heirs (see Anarali Tarafdar"s case AIR (38) 1951 Calcutta 7.) But IzzulJabbar Khan Azizul Jabbar and others v. Chairman, District -Council KucheryWard Sooni District, Chhindwara and others (AIR 1957 Nagpur 84) has laid down a conservative test in this respect. That decision said that it would be impossible to imply consent of the heirs unless it is shown that they knew of the will and its contents and deliberately stood by and allowed the will to take effect. Something more than inacton, say by permission with knowledge was insisted in the said decision. In substance what is held by both decisions is the same. It is the satisfaction of the court regarding consent from the circumstances that is relevant. Judicial wisdom and experience alone could guide the court.

5. Explanation I to the definition of "notice" in the interpretation clause in S. 3 of the Transfer of Property /"Act was unsuccessfully canvassed in order to bring out notice to the heirs on account of the fact that Ext Al is a registered document. Registration of a document relating to immovable property operates as notice only when it is required by law to be registered and accordingly it has been registered. "Notice is implied only to persons acquiring such property or any part thereof or share or interest in it. That is because notice includes not only actual knowledge but possibility of it but for wilful abstention from enquiry or search which he ought to have made as a person interested in the property or his negligence which alone deprived him of the knowledge. Normally as a prudent man such search or enquiry is expected: Will is not a document required by any law to be registered. So also will is not a transfer within the meaning of the Transfer of Property Act. Therefore the said provision by itself is not sufficient to infer notice even though it could also bs taken as one of the circumstances (see Asharfi Devi and others v.

Prem Chand and others- A. I. R. 1971 Allahabad 457).

6. In this case among the ten children only seven were provided under the will. Three daughters were not provided. Ext. Al shows that they were not given legacies because they were sufficiently provided for otherwise. This fact is pot disputed. The registered will was in 1962 and the testator died in 1973. In the absence of Ext. Al the three daughters ought to have claimed their shares as heirs. They have not done so after the expiry of 15 years Ext. A9 shows that on the basis, of the will mutation was effected long back. The legatees are in possession also. Plaintiff accepts the will. Appellant accepted it under Ext. A4. Exts A7 and A8 show that the will was accepted by two other sons. The evidence of PWS 2 and 3 establish the lact that the two remaining sons also accepted he disposition under the will. Ext A6 shows that one daughter accepted the wilt Another daughter to whom Rs. 450 was directed to be given under the will received the same. Evert though receipt was during life time of the testator, it implies knowledge ot the will. Her silence for long 15 years after the testator"s death is presumptive proof of consent. There is thus nothing wrong in presuming that the legacy was accepted by alt the heirs after the death of the testator. It has also to be remembered that but for Ext. At will plaintiff would have got more than the plaint schedule 5 cents. There is therefore no scope for interference in second appeal. On other aspects covered by the decrees there was no challenge also.

The sceond appeal is there"fore dismissed with costs.