Mani Mani And Ors vs Mani Joshua on 21 March, 1969

Equivalent citations: 1969 AIR 1311, 1969 SCR (1) 71, AIR 1969 SUPREME COURT 1311

Author: A.N. Grover

Bench: A.N. Grover, J.C. Shah

PETITIONER:
MANI MANI AND ORS.

Vs.

RESPONDENT:
MANI JOSHUA

DATE OF JUDGMENT:
21/03/1969

BENCH:
GROVER, A.N.
BENCH:
GROVER, A.N.
SHAH, J.C.

CITATION:
1969 AIR 1311 1969 SCR (1) 71
1969 SCC (1) 824

ACT:
Indian Succession Act (39 of 1925), s. 180-Election-Scope of.

HEADNOTE:
By a settlement deed of 1935, the owner of certain properties settled three items of property on his wife and two sons, the first appellant and respondent one item for each. Mutations were effected of the properties so settled in favour of the donees. Thereafter, he had executed three wills. In his last will and testament, there are two recitals that he had cancelled the previous settlement deed and wills and that the last will was to be the only document which should govern the disposition of his properties. The testator, by that will, also purported to give to the respondent five items of property. Those five items did not include the item settled on the respondent in 1935, but

included certain properties which had been settled in 1935 on the wife and the first appellant. The testator further stated that the entire residue was bequeathed to the first appellant, but did not state specifically that he was giving away to the first appellant the property which he had settled on the respondent in 1935. After the death of the testator the respondent filed a suit claiming the item settled on him in 1935, on the basis that he had a -right under the will to get the five items bequeathed to him thereby, in addition to the item settled on him in 1935, because, by reason of the. settlement in his favour it could not form the subject matter of the bequest in favour of the first appellant.

On the question whether by accepting the benefit under the will by taking the five items bequeathed to him thereby, the respondent exercised his right of election and precluded himself from asserting any right to the item settled on him in 1935.

HELD : Under s. 180f the Indian Succession Act, if a legatee has been given any benefit under a will and his own property has also been disposed of by that very will, the legatee must elect either to confirm such disposition or to dissent from it, and in the latter case, he must relinquish all his claims under the will if he choose to retain his own property. The presumption being that a testator intends to dispose of only his own property, general words will not usually be construed so as to include a particular property over which he had no disposing power, unless, such an intention appears on the face of the will either by express words or by necessary implication. [78 B-C]

In the present case, the terms of the will indicate, that the testator thought he could revoke the settlement deed and treat it as -non-existent, and that he meant to dispose of the entire estate including the properties which had been the subject matter of the settlement of 1935. The respon- dent, therefore, was put to election and could not claim the property settled on him in 1935, if he wished' to take the benefit under the will. [76 C-D, 77 A-C, 79 G]

Miller v. Thurgood, 10 L.T.R. 255, Whitley v. Whitley, 54 E.R. 1104; Re. Allen's Estate, Prescott v. Allen & Beaumont, [1945] 2 All. E.R. 264; and Re : Booker, Booker v. Booker, 54 L.T.R. 239, 242, referred to.

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JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 683 of 1966. Appeal by special leave from the judgment and order dated January 3, 1965 of the Kerala High Court in Appeal Suit No. 86 1960.

S. V. Gupte and A. S. Nambiar, for the appellants. Sarjco Prasad, P. Kesava Pillai, M. R. K. Pillai and Lily Thomas, for the respondent.

The Judgment of the Court was delivered by Grover, J. This is an, appeal by special leave from a judgment of the Kerala High Court by which the suit instituted by the respondent for recovery of properties described in Schedule A of the plaint and for mesne profits etc. was decreed in reversal of the decree of the trial court, dismissing the suit.

Uthupu Mani who died in the year 1943 had three sons. The eldest son Uduppu died sometime between 1929 and 1935. The second son Joshua is the respondent herein, the appellants being the' third son Mani Mani and Mariamma their mother and the widow of Uthupu. Uthupu left some daughters also and appellant No. 3 Mani Achamma is one of the daughters. The controversy in the suit out of which the appeal has arisen was confined to a residential house in an area of 10 cents in Kottayam town. This property along with several other properties originally belonged to Uthupu who made certain settlements followed by wills. The first settlement was made in the year 1102 ME corresponding to 1927 AD when Uduppu was alive and Mani Mani was not born. On October 9, 1935 by means of another registered document (Exh. A) called Udampady Uthupu settled properties thus: Those comprised in A Schedule were given to Mariamma, in B Schedule to Joshua and in C Schedule to Mani. The Schedules Contained the following properties :

> "To Mariamma (A Schedule) Building constructed as Hall and the Cart-shed on 2 cents.
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> To Joshua (B Schedule) Storied building and 30 cents garden land. To Mani Mani (C Schedule) Four rooms facing West and 36 cents of garden land."

It appears and it has been so found that mutations were effected of the properties so settled in favour of the donees. Later on Uthupu executed a will which he put in an envelope and deposited it in the office of the District Registrar, Kottayam in January 1943.

He executed a second will in April 1943 and kept it in custody of the District Registrar. He executed a third will (Exh. 3) on May 31, 1943 which was his last will and testament. In this will he made a mention of the two settlements and the two previous wills and declared that the last will would be final and operative. His other declarations and statements in the will (Exh. 3) will be presently considered as the entire controversy in the present litigation centers on a correct assessment and appraisal of their true scope and effect. It may be mentioned that by this will he left five items of properties to Joshua. These items included the properties in C Schedule which had been given to Mani by the settlement of 1935 and the cartshed oil two cents of land contained in Schedule A which had been given to Mariamma by that settlement. There was no specific mention in the will (Exh.

3) to the B Schedule properties which had been settled on Joshua in 1935.

In 1955 Joshua filed a suit laying claim to the B Schedule properties settled on him in the year 1935. His case was founded principally on the allegation that B Schedule properties which had been

settled on him in 1935 vested in him by virtue of the settlement and he was the owner thereof and that the five items of properties which were left by the will (Exh. 3) were quite independent of and separate from the aforesaid B Schedule properties. In other words he asserted that he had a right under the will to get the five items bequeathed to him therein in addition to the B Schedule properties which had been settled on him in the year 1935 and which could not form the subject matter of any bequest by Uthupu by reason of the said settlement. The position taken up on behalf of Mariamma, Mani etc.-the defendants--was that the plaintiff had accepted the benefit under the will by taking the five items of properties bequeathed to him thereby which included the properties originally allotted under the settlement of 1935 to Mariamma and Mani. He had thus exercised his right of election to take the properties under the will and was precluded from asserting any right to properties given to him under the settlement of 1935.

A number of issues were framed on the pleadings of the par- ties. The main question for consideration, however, was whether the settlement of 1935 had been given effect to and whether the plaintiff's suit merited dismissal on account of the applicability of the doctrine of election embodied in s. 180 of the Indian Succession Act. The trial court held that the settlement of 1935 had been given effect to and mutations had been duly made in the revenue register in accordance with the settlement deed. It was found that the plaintiff had obtained title to and possession of the SupCI/69-6 suit properties comprised in B Schedule in the settlement of 1935. The suit was dismissed on the ground that the will (Exh. 3) clearly showed that the testator purported to cancel the arrangement by the deed of settlement of 1935 and had made bequests under the will to the plaintiff of some of the properties which had been settled on Mariamma and Mani in the year 1935. This attracted the rule contained in S. 180 of the Succession Act and since the plaintiff had elected to accept the benefit under the will he was not entitled to claim any right on the basis of the deed of settlement of 1935.

The High Court acceded to the argument pressed on behalf of Joshua who was the appellant before it that on a proper reading of the will it could not be held that the testator professed to dispose of the suit properties which had been gifted to the plaintiff by means of the settlement deed of 1935. The High Court was influenced by the fact that there was no specific mention of these properties in the will and according to it mere general words of disposition could not be taken to contain -an intention to deal with the properties belonging to a third party, namely, the plaintiff. The following part of the judgment may be reproduced :

> "Having due regard to these passages in the various text-books based upon judicial decisions and which have been placed before me by Mr. T. S. Krishnamoorthy lyer and Mr. M. U. Issac in my view, the decision rendered by the teamed Subordinate Judge that section 180 of the Indian Succession Act applied and that the appellant has elected to take the benefit under the will and therefore he cannot claim any further benefits on the basis of Ex. A, cannot certainly be sustained. So far as I could see, there is no specific disposition of the property already given to the plaintiff under Ex. A, by the father in Ex. 3. No doubt the father has dealt with an item which was given under Ex. A to the first defendant and a part of the item given to the 2nd defendant under Ex. A in Ex. 3. If at all the question of the doctrine of ,election and

> the applicability of section 180 of the Indian Succession Act comes into play, in my view, the election will really have to be made, not, by the plaintiff, but by really defendants one and two."

As the applicability of the doctrine of the rule of election will depend on a correct and true reading of the will (Exh.

3) we proceed to notice the main recitals and other prominent features to be found in it. The testator in the very beginning referred to the two settlements made by him in the years 1927 and 1935 and the two wills executed by him in the year 1943 which were deposited with the District Registrar, Kottayam. He said that by the first will which he had executed he had invalidated the two deeds of settlement. He then made the second will as he thought that some changes were necessary. The third will, (Exh. 3), was made because he felt pity for Joshua whom he had apparently left no or very little property by -his previous wills. This is 'what the testator said "But, since there originated in me an idea, on seeing the desperate look and repentant attitude of my son Joshua, that it is highly necessary to nullify certain historic statements made in the previous will and also to alter the conditions, such as share of my assets will not be given to Joshua and to his children in case he begets any, laid down by me owing to the ill-will I had towards Joshua, the eldest among the male children I have at present and towards the members of his wife's house because of certain reasons which I don't now purport to describe herein, this will is executed again afresh; and this alone will come into force after my life-time."

He further said that he had seven children alive at the time when the will was made, namely two sons and five daughters out of whom two were married. He directed that after his death his wife Mariamma would take +,he entire income from his properties for meeting family expenses and payment of revenue dues etc. Then he made dispositions about payments in cash on the occasion of the marriages of his other daughters, with the exception of Achamma, who was described to be weak in health, and in his opinion, should not contract matrimony. An amount of' Rs. 3,000/- was to be deposited in her name which she was entitled to withdraw if she was married. During the period she remained unmarried she was entitled to take interest on that deposit for personal expenses. He gave other directions about arrangements for her residence etc. in case she remained un- married. Then he proceeded to make the provision about bequests in these words :

> "Though I had provided in my previous will that my eldest son Joshua shall have only some right in the nature of a life interest over my assets in respect of some petty items of profits;..... Therefore I have forgiven him and I hereby allow him to enjoy for ever the immovable properties described hereunder; and my younger son Mani Mani shall alone be the sole heir of the remaining entire assets belonging to me. But, my two sons shall become entitled to the properties allotted to them only after my two daughters are married and the deposit is made in Achamma's name and all the litigations in which I am a party are ended; and till that time my wife Mariamma shall take and conserve all the profits as described above in the status of an undivided family."

The only other declaration or statement in the will which deserves notice is the following "This will is executed by resolving as these and totally changing all the deeds registered by me prior to this and the Wills kept in custody; and this Will alone shall, unless 1 act otherwise, be and ought to be in force in future. "

> Now it is quite clear that the testator was somehow under the impression that he was competent to cancel and revoke not only the previous wills but also the two settlements including the one made in the year 1935. It appears that although by the registered deed of 1935 he had gifted certain properties to his wife and two sons he thought that he could undo what he had done by making a will by which he left virtually no property to Joshua since he was annoyed with him. That is apparently the reason why he clearly stated in the will (Exh. 3) in the very beginning that he had executed a will "on 9th Makarom this year in accordance with law, invalidating the above two deeds."

He relented in favour of Joshua and that is the reason why he made the will (Exh. 3) but his state of mind continued to be the same, namely, he considered that he was fully competent and entitled to cancel all previous settlements and wills and start, as if it were, on a clean slate. The detailed bequests which he made (Exh. 3) indicate that he meant to dispose of the entire estate including the properties which had been the subject matter of the settlement made in the year 1935. There are two strong indications in the will (Exh. 3) of his having dealt with the entire property which he thought he could dispose of or in respect of which he could make bequests and leave legacies on the footing that no title had passed to any of the donees under the settlement of 1935. The first is the recital both in the beginning and towards the concluding part of Exh. 3 that he had cancelled the previous settle- ments and wills and that the only document which would govern the disposition of properties would be Exh. 3. Even if it be assumed, as has been suggested, by learned counsel for Joshua -respondent-that the declaration about invalidating the two deeds of settlement was confined to the first will executed in January 1943, the statement made towards the conclusion of the will (Exh. 3) leaves no doubt that the testator sought to revoke not only the previous wills but also the registered deeds which clearly meant the deeds of settlement executed in 1927 and 1935 respectively. The second significant fact is that the testator purported to give to Joshua five items of property which included certain properties which had been given by the settlement of 1935 to Mariamma and Mani. If the testator did not want to make any disposition of those properties which formed the subject matter of gift in 1935 there was no reason why he should have given to Joshua properties which had been gifted to Mariamma and Mani. All this could have happened only if the testator was treating the settlement of 1935 as non-existent having been revoked by him. We are satisfied that a correct reading of the will (Exh. 3) yields the only result that the testator Uthupu treated the entire properties which had formed the subject matter of gift or otherwise as his and which could be disposed of by him as he liked. The High Court was in error in disagreeing with the trial court on this matter. The argument of learned counsel for the respondent is that the testator predominently intended to make better provision for Joshua with whom he had been annoyed for various reasons and whom he had left comparatively less or no_ property by the wills executed prior to Exh. 3. It is suggested that the testator could not have intended to have taken away what had already been gifted to Joshua in the year 1935 of which mutation had taken place and possession had passed. It is

further pointed out that the testator did not specifically say that the properties which had been gifted to Joshua in 1935 were now being left by the will (Exh. 3) to Mani. A great deal of reliance has been placed on Ike statement in the text books on which the High Court relied and certain decisions for the view that no case for election can arise where the testator does not dispose of the properties in question specifically and has merely used general words of devise. In such circumstances, it has been stated, the testator should be taken to have disposed of only that property which was his own and which he was entitled to deal with and bequeath in law. It is urged that, in the present case, the testator had already made a valid and legal settlement in 1935 of the suit property. He could not have thus dealt with or bequeathed that property and in the absence of express and specific mention in Exh. 3 that he was doing so the rule of election would not be attracted. The circumstances in which election takes place are set out in s. 180 of the Indian Succession Act. According to its provisions, "where a -person by his will professes to dispose of some-

thing 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." The English law, however, applies the principle of compensation also to election. It means the electing legatee has to compensate the disappointed legatee out of the property given to him. As pointed out in the Indian Succession Act by N. C. Sen Gupta, p. 295, the rule which has been embodied in s. 180 does not recognise the principle of compensation. Under its provisions if the legatee has been given any benefit under the will and his own property has also been disposed of by that very will he must relinquish all his claims under the will if he chooses to retain his property. It is not disputed, in the present case, that if the testator has, by Exh. 3, disposed of the property which had been gifted to Joshua the rule embodied in s. 180 would become applicable and Joshua cannot take the property which had been gifted to him if he has chosen to retain the property bequeathed to him by the will. The question is whether the testator having omitted to state in Exh. 3 that he was giving away the properties which had been gifted to Joshua in the year 1935 to Mani to whom only a residuary bequest of the entire remaining assets had been made the principle of election will become inapplicable. Our attention has been invited on behalf of Joshua to the following observation of the Master of Rolls in Miller v. Thurgood (1) :

> "If a testator, having an undivided interest in any particular property, disposes of it specifically, and gives to the co-owner of the property a benefit under his will, the question of election arises. But if he disposes of it, not specifically, but only under general words, no question of election arises."

But as pointed out in para. 1097, p. 592, Halsbury's Laws of England, Vol. 14, in order to raise a case of election under a will it must be clearly shown that the testator intended to dispose of the particular property over which he had no disposing power. This intention must appear on the face of the will either by express words or by necessary conclusion from the circumstances disclosed by the will. The presumption, however, is that a testator intends to dispose of his own property and general words will not usually be construed so as to include other property. In Whitley v. Whitley(1) the wife of the testator was entitled to a share of the produce of the R. estate, which had been directed to be sold. By (1) 10 L. T. R. 255.

(2) 54 E. R. 1104.

his will the testator gave all "his share, estate and interest" in the R. estate to his daughter and benefit out of his own estate to his widow. It was held that the will raised a case for election as against the widow. The Master of the Rolls (Sir John Pomilly) said that the testator intended to dispose of the property by will which was not his but belonged to his wife and she having taken and enjoyed the benefit provided for her under his will must be considered as having elected. The property, must, therefore go as if it had been the testator's property. This case illustrates how the rule of election has been applied where, even though, general words had been used but by necessary conclusion from the circumstances disclosed by the will it was interred that the testator intended to dispose of the property which belonged to his wife and not to him. According to the footnote in Halsbury's Laws of England, Vol. 14 (supra), in the case of a will one may even gather an intention by the testator to include property belonging to another in a gift of residue for it is necessary to construe a will as a whole. Reference has been made to Re Allen's Estate, Prescott v. Allen and Beaumont(1), where a gift of the "residue of my property" was construed as the residue of the testatoes ostensible property. A fairly strict approach in such cases has been indicated by Chitty J., in Re Booker, Booker v. Booker(2) in these words :

> .lm15 " A great safeguard in applying that doctrine is this-that you are not merely to strain words to make them include
>
> -that which does not belong to the testator; but you must be satisfied beyond all reasonable doubt that it was his intention to include that which was not his own, and that you cannot impute to him after having read his will any other intention."
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> It is thus necessary to look at the will and read it carefully which has been done by us and we have no, manner of doubt that Uthupu, the testator, intended to include properties gifted to Joshua by the settlement of 1935 in the bequest which he made to Mani of the entire residue. Joshua was thus put to election and could not claim those properties if he wished to take the benefit under the will. In the result -the appeal is allowed and the judgment of the High Court is set aside and that of the trial court restored with costs in this Court.

V.P.S. Appeal allowed.

(1)[1945] 2 AII.E .264.

(2) 54 L. T, R. 239, 242.