

VICKRAM BAHL & ANR. VS SIDDHARTHA BAHL & ANR.

INTRODUCTION:

In the present case one Late Wing Commander N.N. Bahl and Mrs. Sundari Bahl (defendant no. 2) executed a joint will dated 31.03.2006. Mr. N.N. Bahl predeceased Mrs. Sundari Bahl. As per the clauses of the will, after the demise of one spouse, the entire suit property is to rest with the other spouse and no one else shall have the right or interest in the share of the deceased share and after the demise of both of them, their eldest son, grand-daughter (daughter of eldest son) and younger son will be the absolute owners of their respective share as detailed therein. Their eldest son with his daughter filed a suit thereby seeking relief of permanent injunction against his mother and younger brother from dispossessing them from their respective share of the suit property as per the said will.

FACTS OF THE CASE:

The house was the joint property of Wing Commander N.N. Bahl and defendant no. 2 Sundari Bahl , in which they have ½ undivided share and each being the owner of each and every portion thereof, and neither being capable of willing away any portion and capable of bequeathing his/her undivided share and language used in the document was making it clear that both Wing Commander N.N. Bahl and Sundari Bahl had made a joint declaration regarding the subject house and thereby leaving no room for any doubt as to the agreement arrived at between them as to how the said house has to be owned after the demise of both of them.

By the said document, they made the surviving spouse the sole owner of the property and capable of bequeathing different portions thereof. The document dated 31st March, 2006 contains the agreement and therefore no outside evidence is required. Moreover, the document was a will, interpretation governed by the provisions of Indian Succession Act, 1952, there was no uncertainty regarding agreement between both of them and no oral evidence was required under purview of Section 91 and 92 of Indian Evidence Act, 1872. Once such agreement is found and Will is found in respect of joint property and Will of Wing Commander N.N. Bahl and defendant no. 2 Sundari Bahl is contained in the same document, the same qualifies to be a mutual will.

ISSUES RAISED:

- (i) Whether, or not the undisputed document dated 31st March, 2006, qualifies as a mutual will and if so, the effect thereof?
- (ii) Whether, or not Section 14(1) of the Hindu Succession Act, 1956 will have an effect on such bequeathal?

ANSWERS FOR ISSUES:

1. In the light of first issue the question is whether the plaintiffs during the lifetime of defendant no. 2 could claim any right or cause of action whereof accrued to them. As per the said judgment, on demise of Wing Commander N.N. Bahl, the subject house is held by defendant no.2 Sundaribahl in trust of the plaintiffs and defendant and the plaintiffs, as the beneficiaries of the said trust, would have a cause of action. Moreover, from the pattern of previous judgments, it is evident that the rights in the favor of the ultimate beneficiary under the mutual will are crystallized on the demise of either of the executants and during the lifetime of the other executants of the mutual will. Defendant no.2 during her lifetime cannot sell, transfer, alienate or otherwise deal with property so as to deprive the plaintiffs of what has been devised in their favor under the mutual will of their parents and they have a cause of action to restrain defendant no.2 from doing so. Though the plaintiffs during the lifetime does not have any right of ownership or any other rights over the portion ultimately bequeathed to them but in the absence of any right found in favor of defendant no.2 to so dispossess the plaintiffs, the plaintiffs are entitled to permanent injunction against dispossession also.

2. With regard to the second issue applicability of Section 14(1) of Hindu Succession Act, 1956. It was held that it is mandatory for the Hindu female to plead the subject property was bequeathed to her in lieu of a pre-existing right and since in the present case defendant no.2 Sundari Bahl has not pleaded so, she cannot claim her absolute right under Section 14(1) of the Hindu Succession Act, 1956.

RULE APPLIED:

Will means a legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death. It includes codicils and every writing making a voluntary posthumous disposition of property. It is a testamentary instrument by which a person makes disposition the property, to take the effect after his death, and which in its own nature, is ambulatory and revocable during his life. Thus, a will can be changed by the executants as and when he so likes. It is a secret and confidential document which the executants are never ordered to produce.



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A will is mutual when testators confirm upon each other reciprocal benefits, constituting the other as legatee meaning when the executants fill the roles of both testator and legatee towards each other. But where the legatees are different from the testators, there can be no mutual will. A mutual will is a mode of disposition to certain beneficiaries by two persons. It is also called reciprocal will and is generally founded on contract for their execution. A joint mutual will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual will, and there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual wills but one single document. Its purpose is to ensure that property passes to the deceased's children rather than to a new spouse if a living spouse remarries after the death of the other. Mutual wills agreements are often used by spouses with children from prior marriages, as there is concern that one spouse may change his/her will to cut out the other spouse's child/children out of the ultimate entitlement. Without mutual wills agreements, either spouse may subsequently change their agreement, which would defeat the concept of leaving his/her estate to the surviving spouse and then to their child/children.

Under the Indian Succession Act, 1925 there is mention of only two kinds of will: privilege wills and unprivileged wills. Although there is not any mention of joint wills and mutual wills but it has impact on testamentary succession under all personal laws in India. The law of joint will and mutual will is not codified and there are many interpretations to it.

1. [KRISHNA KUMAR BIRLA VS RAJENDRA SINGH LODHA]¹

In this case, the court was concerned whether the mutual will creates any caveat able interest in favor of the named executor in probate proceeding. It was held that (i) a will is revocable in nature, (ii) mutual will may be contained in joint wills or a single document, (iii) if the survivor, whether or not, after taking any actual benefit under the arrangement, alters his will, his personal representative takes the property which is subject to the agreement, upon the contract, (iv) a joint mutual will becomes irrevocable on the death of one of the testators, if the survivor has received any benefits under the mutual will and when the arrangement takes the form of two simultaneous wills but one single document there is not any requirement of a specific contract prohibiting revocation, (v) if one single document is executed by two persons using expressions like "our will", "our property", then it is strong evidence that the will can only be revoked by mutual consent.

2. [KUPPUSWAMI RAJA VS PERUMAL RAJA]²

¹ Civil Appeal o. 2277 of 2008

² AIR 1964 Mad 291



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The same was held in this case that they will become irrevocable on the death of one of the testators, if the survivor had received any benefits under the mutual will and there need not be any specific contract prohibiting the revocation when the arrangement takes the form of not

Two simultaneous wills but one single document. If one single document is executed by two persons and the language used in the document is like “our will”, “our property”, it is strong evidence of the intention that it can only be revoked on mutual consent. In case of mutual will, if one person who carries out his/her part of the contract into execution, the court will not permit the other to break the contract.

3. [SHIV NATH PRASAD VS STATE OF W.B.]³

It was held that (i) “mutual wills and secret trusts” are doctrines evolved in equity, to overcome the problems of revocability of Wills and to prevent frauds, (ii) the doctrine of mutual will states that two persons agree to dispose of their assets and execute will in pursuance of such agreement, on the death of the first testator, the property of the survivor testator, the subject matter of the agreement, is held on an implied trust for the beneficiary named in the wills, (iii) since will is inherently irrevocable the second testator may make some changes in his/her will, but if he/she does so, his/her representatives will take all the assets under trust, (iv) the rationale behind imposing such trust is to prevent the second testator from committing a fraud by going back on his/her agreement with the first testator, (v) if the second testator on the death of the first testator take benefit while failing to observe the agreement, in such cases the instrument itself is evidence of the agreement and the person who dies first, does by his act carry the agreement on his part into execution, (vi) if the second testator refuses then he/she is guilty of fraud and can never release themselves to become a trustee.

4. [DR. K.S. PALANISAMI VS HINDU COMMUNITY IN GENERAL AND CITIZENS OF GOBICHETTIPALAYAM & OTHERS]⁴

In relation to the conflict whether the first will was a joint will or mutual will, the Supreme Court explained the principles to distinguish between joint will and a joint mutual will. The Supreme Court came to the conclusion that the First Will is a 'joint and mutual' Will, as pursuant to the First Will, both husband and wife agreed to devote their properties for carrying out charities and mutuality to this extent was apparent in the First Will. The Supreme Court consequentially held that the First Will was clearly irrevocable after the death of the husband;

³ CrI. Appeal No. 182 of 2006

⁴ Civil Appeal No. 5924 of 2005



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however given that the First Will expressly granted '*absolute*' right to the survivor to enjoy the properties, the alienation of the properties cannot be bad in law, unless the alienation is held to be in complete breach of object of trust and fraud on trust.

ANALYSIS:

Historically, the mutual wills were used in blended families to provide benefits to the surviving spouse and to ensure that the property remains in the will maker's bloodline. There will be cases where this strategy works and is appropriate but this notion is evolving. There are not single blended family but multiple blended family with second, third and fourth marriages. Doctrine of mutual will was originated from the case *Dufour vs Pereira* (1769). Following characteristics of mutual will were drawn for general understanding:

Mutual will arose when two persons agree on some common terms and make a will regarding the same and also agrees that it will cannot be revoked and will always remain unaltered.

The mere making of simultaneous will and similarity of terms is not enough to establish necessary agreement. A will is revocable, but revocation of mutual will create certain obligations. It's been established that a contract between persons to make corresponding wills will give rise to certain obligations when one acts on the faith of such agreement and dies leaving his will unrevoked so that the other party takes his property under their charge. It is a fact that he cannot be forced to make and leave an unrevoked document and if he dies leaving a last will containing certain provisions which are not according to his interest or agreement still it will be considered valid. The survivor becomes a constructive trustee and the terms of the trust are those of the will which he undertook will be his last will.

When the survivor is left with the whole estate or residue state, the purpose is to enable them to be the absolute owner during their life, for the property passed to them. But when they die, he is to bequeath what is in their estate in manner it was agreed upon. The advantages are: (i) it provides structure and certainty which means implementing mutual wills will provide benefit to the current spouse and preserve assets for their children may be from previous relationship, (ii) asset protection in a succession law context means keeping it in the family, ultimately the children will be benefitted from it, (iii) peace of mind that they will still be able to look after their family, (iv) transparency. Mutual wills are basically common estate planning tool where couples agree to leave all or most of their property to the surviving spouse which is then conferred upon their children as irrevocable gifts. The survivor will not be permitted to defeat the agreement by revoking his/her will after the death of the other spouse. It is made sure by creating a constructive trust on the survivor's estate for the benefit of those who are to be



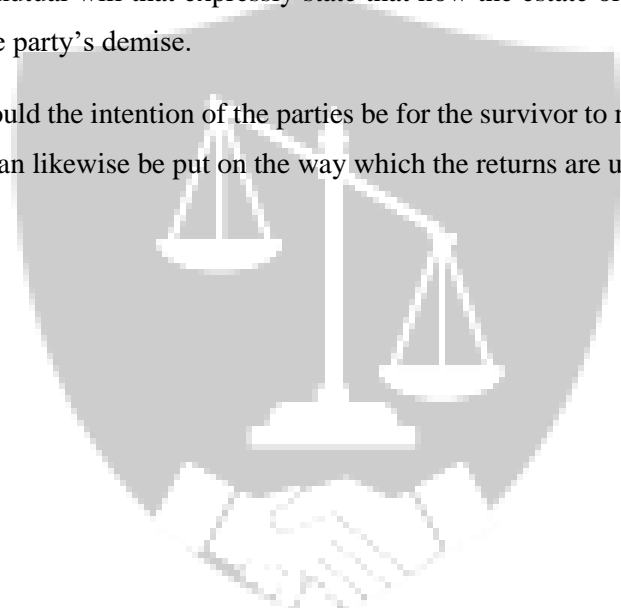
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benefitted under the agreement. The most important prerequisite is that there can be an agreement between who made wills. It has been repeatedly insisted that it should contain the agreement that it cannot be revoked.

CONCLUSION:

Drafting mutual wills can be potentially risky or uncertain. Even if it appears iron-clad, the parties still have some other course of action through which they venture beyond the defined parameters. Therefore, the safest way to preserve family assets and make sure that it eventually goes to the intended beneficiary would be to execute a mutual will that expressly state that how the estate or certain high value assets are disposed of after one party's demise.

In the other opinion, should the intention of the parties be for the survivor to manage the property as he regards fit, limitations can likewise be put on the way which the returns are used.



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