1928.

Present : Garvin and Drieberg JJ.

PARAMANATHAN *et al.* *v.* SARAVANAMUTTU.

121—D. C. (Inty.) Trincomalee, 63.

Joint will—Dispositions by two spouses—Massing of property—Benefit under will—Survivor's right of free disposition.

Where a joint will made by two spouses contained the following clauses :—

(3) All property movable as well as immovable now belonging and which may hereafter belong to me the said S. T., after my death, shall devolve on my wife N., subject to the stipulation which I have made hereby.

(5) In case my wife N. shall predeceaso me the said S. T., the property of all description, movable and immovable, which shall lawfully belong to me according to this last will and by right of being married to her, after my death shall devolve in equal half shares on her heirs and mine.

(6) The entire movable and immovable property of all description and of whatsoever kind now belonging and which may hereafter belong to me the said N., shall wholly devolove on my lawful husband S. T. after my death. In case of my husband predeceasing me, I shall have and retain all the property movable and immovable belonging to me according to this last will and by right of being married to him without subjecting them to mortgage, *otti*, transfer, gift, or other deeds and shall enjoy solely the income and profits thereof, but after my death such property shall devolve in equal half share on his heirs and mine.

Held, that the property of the spouses had not been consolidated for the purpose of a joint disposition and that the surviving husband was free to make a new disposition of his property by will.

APPEAL from an order of the District Judge of Trincomalee. By his last will of January 11, 1923, one Tampar left all his property to the appellants and appointed 1st appellant executor, to whom probate was granted on June 30, 1924. Tampar and his wife Nakamuttu, who predeceased him, were married in community of property and they made a joint will on October 17, 1896. The 1st, 2nd, 3rd, and 4th respondents, who are the heirs of Nakamuttu, say that the joint will disposed of the common estate on the death of the survivor by which a half devolved on the heirs of Nakamuttu and the other half on the heirs of Tampar. Tampar proved the will of Nakamuttu in case No. 378, obtained probate, and admittedly remained in possession of the whole estato until his death in 1923.

The learned District Judge held that the disposition made as to the devolution of the entire estate on the death of Tampar was not revocable by him after the death of Nakamuttu, and entered decree declaring the respondents entitled to a half share of Tampar's estate.

Hayley, K.C. (with *N. E. Weerasooriya*), for appellants.

H. V. Perera (with *Rajapakse*), for respondents.

September 24, 1928. DRIEBERG J.—

The appellants are the respondents to a petition of August 27, 1927, by the respondents to this appeal.

By his last will of January 11, 1923, Tampar left all his property to the appellants, who are his nephews, and appointed the 1st appellant executor. Probate was granted to the 1st appellant on June 30, 1924.

Tampar and his wife Nakamuttu, who predeceased him, were married in community of property and they made a joint will on October 17, 1896. The 1st, 2nd, 3rd, 4th, and 6th respondents, who are the heirs of Nakamuttu, say that this will made a joint disposition of the common estate on the death of the survivor, by which a half was to devolve on the heirs of Nakamuttu and a half on the heirs of Tampar. The appellants are heirs of Tampar, but it does not appear that they are the sole heirs.

Tampar proved the will of Nakamuttu in case No. 378, obtained probate, and admittedly remained in possession of the whole estate until his death on January 13, 1923.

When the 1st appellant applied for probate of Tampar's will of January 11, 1923, the 2nd, 3rd, and 4th respondents, acting also for the 6th respondent, opposed it on the ground that under the joint will they were entitled to a half of the estate as the heirs of Nakamuttu. Their objection was that probate should not be granted. What they should have asked was that the joint estate as it existed at the time of Nakamuttu's death should be administered in terms of the joint will. Their application was held not in order and probate was allowed.

On January 31, 1927, the 1st appellant filed his final account, and on August 27, 1927, the respondents petitioned the Court for a citation on the appellants to show cause why they should not be declared entitled as heirs of Nakamuttu to a half share of the property held and possessed by Tampar at the time of his death.

1928.

DRIEBERG A.J.

Paramanathan v. Saravanamuttu

Two questions were dealt with at the inquiry on this petition. One was whether the respondents should not establish their right by a separate action, and the other whether the joint will became irrevocable by Tampar accepting benefit under it on the death of Nakamuttu.

On the first point the learned District Judge held, and, I think, rightly, in favour of the respondents. In fact this matter should have been decided on the first petition of the respondents in 1923. Those proceedings were initiated to administer the estate of Tampar according to the provisions of his will of January 11, 1923. The respondents' claim was in effect that it should be administered according to the terms of another testamentary disposition. This matter of difference should have been then decided and administration of the estate directed accordingly.

On the second point the trial Judge found that the disposition made as to the devolution of the entire estate on the death of Tampar was not revocable by him after the death of Nakamuttu as he had accepted benefit under her will, and he entered decree declaring the respondents as heirs of Nakamuttu entitled to an undivided half share of Tampar's estate. The appellants appeal from this order.

The material parts of the will are as follows :—

1. We, Sinnakuddi Tampar and his wife Nakamuttu, residing at Nachchikuda, attached to Tampalakam pattu, Trincomalee, both by the exercise of our own discretion at this occasion of our being of clear sense and sound memory do make last will and testament as follows.

2. The medical expenses, funeral, and *antiyeddi* expenses to be incurred for us both the said Sinnakkuddi Tampar and his wife Nakamuttu, all lawful debts due and owing to others by us, and all expenses to be defrayed for establishing and proving this last will shall be paid out of our estate.

3. All property movable as well as immovable now belonging and which may hereafter belong to me the said Sinnakkuddi Tampar, after my death, shall devolve on my wife Nakamuttu, subject to the stipulation which I have made hereby.

4. The stipulation made by me, to wit, the movable and immovable property which shall devolve on my wife Nakamuttu, she shall take charge of and shall enjoy the income and profits, but shall not have any right whatever to subject the same to any mortgage, *otti*, or other bonds, or to alienate by transfer, donation, or other deeds.

5. In case my wife Nakamuttu shall predecease me the said Sinnakkuddi Tampar, the property of all description movable and immovable which shall lawfully belong to me according to this last will and by right of being married to her, after my death, shall devolve in equal half share on her heirs and on mine.

6. The entire movable and immovable property of all description and of whatsoever kind now belonging and which may hereafter belong to me the said Sinnakkuddi Tampar's wife Nakamuttu, shall wholly devolve on my lawful husband Sinnakkuddi Tampar as his own after my death. In case of my husband predeceasing me I shall have and retain all the property movable and immovable belonging to me according to this last will and by right of being married to him without

subjecting them to mortgage, *otti*, transfer, or gift or other deeds and shall enjoy solely the income and profits thereof, but after my death such property shall devolve in equal half share on his heirs and on mine . . . .

I have numbered the clauses of the will to facilitate reference. The survivor was appointed executor or executrix.

The rule in *Dennyssen v. Mostert*[1] is that a mutual will which disposes of the joint property of the survivor, the property being consolidated into one mass for the purpose of a joint disposition of it, becomes irrevocable by the survivor if he has accepted some benefit under it. When these two conditions are not present the mutual will operates as the will of the first dying and the survivor will be free to make another disposition by will.

Now the disposition of the common property must be the joint act of the two parties and it must dispose of the property on the death of the survivor. Grotius (II. 15, 9—Herbert's translation) says :—

> "When the spouse who dies first has bequeathed any benefit in favour of the survivor, and has afterwards limited the disposal of the property in general after the death of such survivor, then such survivor, if he accepts such benefits, may not afterwards dispose of his or her share by last will in any manner at variance with the will of the deceased."

In *The Receiver of Revenue, Pretoria v. Hancke and Others*[2] Solomon J.A. explained the principle underlying this rule in these words :—

> "It will be seen, therefore, that the will is one which in the words of the Privy Council in the case of *The South African Association v. Mostert* 'disposes of the joint property after the death of the survivor or, as it is sometimes expressed, where the property is consolidated into one mass for the purpose of a joint disposition of it.' and in such circumstances the weight of authority is to the effect that each spouse must be taken to have dealt with the whole of their common property with the consent of the other. The will of the first dying, therefore, purports to dispose not only of his own share but also of the share of the survivor. And that apparently is the view which commended itself to the Privy Council inasmuch as the judgment in Mostert's case treats such a mutual will as standing on the same footing with a will made by one spouse with the authority of the other."

[1] *(1872) L. R. 4 P. C. 236.* [2] *(1915) A. D. 64, at p. 77.*

He then proceeds to explain the apparent anomaly of the first dying disposing of the property of the survivor on the death of the latter on the well recognized rule of the Roman-Dutch law, which adopted the rules of the Roman law on the subject, that a testator may bequeath not only his own property but also property belonging to others, and the heir was then obliged to purchase and deliver it or, if it could not be bought, to give its value to the legatee ; that when this is done in the case of a joint will of spouses the survivor must be regarded as giving his consent to such disposition by joining in it and the further condition of his accepting benefit under it renders the will irrevocable by him, see pages 77 and 78. [1]

In this case Nakamuttu and Tampar made no disposition of the joint property on the death of the survivor : Nakamuttu in her will (clause 6), for there are two separate wills though embodied in one document, bequeathed her share of the common estate to Tampar " as his own after my death " ; Tampar for his part in clause 5 devised the share derived under his wife's will and his own half, which he described as " by right of being married to her," equally to his and her heirs. What takes the case out of the principles on which irrevocability is based is that this disposition of the survivor Tampar is his own disposition and not that of him and his wife Nakamuttu.

Each spouse made two distinct dispositions, first of his or her property in the event of dying first and another in the event of his or her surviving the other ; there is no massing of the property of each and no joint disposition by both spouses of the common property or any part of it on the death of the survivor.

Tampar, therefore, though he took benefit under the will of his wife, was free to dispose of his own share and what he derived from her by her will.

We, therefore, set aside the order appealed from. The respondents will pay the appellants the costs of this appeal and of the proceedings in the lower Court.

GARVIN J.—I agree.

Appeal allowed.

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[1] *(1915) A. D. 64, at pp. 77 and 78.*