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A Study to Analyse the Concept of Joint Wills in India

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ABSTRACT

It is important to note that no particular statute in the Indian legislature denotes the concept of joint wills and its applicability, thereby, a study which clearly expresses, with the help of precedents, as to the meaning of joint wills, its applicability and differences from similar kind of wills which can indicate towards monumental changes in the execution of a testator's will is very important. This particular research paper aims to establish that. Further, this paper extensively analyses the landmark judgment of Dr. K.S. Palanisami (Dead) vs. Hindu Community in general and Citizens of Gobichettipalayam and Others, which in detail deals with joint wills and how the right of alienation works in such cases. This case also lays down significant points of differences between mutual wills and joint wills which can be conferred from the intent of the testators, because such a distinction helps in clear understanding of both these types of wills and identifying them. Such identification helps in establishing applicability of an array of rules, subject to the type of will.

Keywords: Joint wills, Indian Succession Act 1925, Joint and Mutual wills.

I. INTRODUCTION

Under the Indian Succession Act of 1925, a will is a legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death.² There are various kinds of wills that exist, for example simple wills, testamentary trust wills, living wills, etc. Joint will is another such kind of will which is created and executed by two or more testators.

Further, this paper extensively analyses the landmark judgment of Dr. K.S. Palanisami (Dead) vs. Hindu Community in general and Citizens of Gobichettipalayam and Others³, which in detail deals with joint wills and how the right of alienation works in such cases. This case also lays down significant points of differences between mutual wills and joint wills which can be

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² Section 2(h) of Indian Succession Act 1925

³ Civil Appeal No. 5924 of 2005

conferred from the intent of the testators, because such a distinction helps in clear understanding of both these types of wills and identifying them. Such identification helps in establishing applicability of an array of rules, subject to the type of will.

After an analysis of the various judgments mentioned, certain recommendations as to framing and drafting of joint wills have been mentioned so as to avoid issues arising after the death of testators which leaves it to the interpretation of courts and indulgence of legal issues. A will clearly indicating the intent of the testators is most likely to stand in court in its true virtue and not remain subject to various kinds of interpretations, especially because in these cases the rights of the legatee get tampered with, which goes against the intent of the testators.

II. AIMS AND OBJECTIVES

Following are the aims and objectives of this research study:

- The foremost aim of this study is to analyse the validity of joint wills in India.
- Further, the study also aims to establish the stance of alienation as to joint wills.
- Furthermore, a very important distinction between joint wills and mutual wills has been made in this paper.

III. RESEARCH OBJECTIVES

Research objectives revolves around the various variables to be established in a research study also with the purpose the study wishes to accomplish.

Following are the research objectives of this study:

- To analyse the concept of joint wills and the mode of its emergence in India.
- To study the application of right of alienation by the surviving testators of joint wills.
- To analyse whether surviving testators can alter their will.
- To further analyse the various judgements with respect to joint wills which give precedents to the functioning of joint wills in India.

IV. RESEARCH QUESTIONS

Following are the research questions for this study:

- Whether the concept of joint wills is applicable in India.
- Whether the right of alienation exists with respect to joint wills.
- Whether the surviving testators can alter the joint will in their lifetime.

V. RESEARCH METHODOLOGY

Following is the step by step process adopted for the purpose of the research for this study:

- Step 1: First and foremost, the various legislations which lay down laws regarding the application of wills and its implementation is to be studied.
- Step 2: Then, various judgements of the courts in the matters relating to joint will is to be analysed to better understand the aspects of joint wills in India.
- Step 3: Further, research is to be done with respect to the rights of alienation of the testators and the rights of the person in whose interest such joint will is made.
- Step 4: Then, the establishment of the various aspects of joint will and the related statistics are to be studied to provide a proper understanding on the subject.
- Step 5: After such analysis, conclusion to the study as to the application of joint wills and certain suggestions about the same are made.

VI. WILLS

The ancient Hindu texts make no mention of the concept of wills. The properties moved as per survivorship in the families. It was after partition, when people started to acquire personal property, the need for wills was recognized.⁴ It was mentioned in the case of Lord Penzance in *Leimage vs. Goodban*⁵, “A will is an instrument by which a person makes a disposition of his property to take effect after his decease and which is in its own nature ambulatory and revocable during his life.”⁶ Further definitions of will includes- “A will is the aggregate of man’s testamentary intentions so far as they are manifested in writing duly executed according to the statute.”⁷

Section 2(h) of the Indian Succession Act 1925 states: “Will means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death.”⁸

With respect to the definition, following are the integral characteristics of a will:

1. It should be a “legal declaration” of the intent of the testator/testators.
2. Such declaration must be about the property of the testator.

⁴ *Jatindea Mohan Tagore vs. Gyanedea Mohan Tagore*, 9 Beng LR 377

⁵ 14 C.W.N. 174

⁶ *Lord Penzance in Leimage vs. Goodban* 14 C.W.N. 174

⁷ *Sagar Chandra vs. Digambar*, 14 C.W.N. 177

⁸ Section 2(h) of the Indian Succession Act, 1925

3. Such declaration must be in line with the desire of it to be executed after his/her death.

The intention of the testators, as mentioned in point 1, should be expressed in a clearly in order for it to be properly given effect to.⁹ There are various kinds of wills, one of which is joint wills. This paper specifically deals with joint wills, and its distinction from mutual wills. Since so much of importance has been laid towards the intent of the testators, and it has been understood that intent is the most essential aspect of wills, the further analyses of the paper will enumerate the importance of such intent even further.

VII. JOINT WILLS

There is no specific legislation in India which specifically deals with joint wills. The same can be construed by a series of definitions which have been referred to by the Supreme court in various judgments, the same has been reiterated while discussing the different between joint wills and mutual wills. The validity of joint wills was recognised in *Meenakshi Anmol v. Vishvanatha Iyer*¹⁰.

In *Narayani and Anr. V. Sreedharan*¹¹, the Kerala High Court explained joint wills as- "*A joint Will is a single testamentary instrument constituting or containing the Will of two or more persons based on an agreement to make a conjoint Will. Two or more persons can make a joint Will, which if properly executed by each so far as his property is concerned is as much his Will. That will come into effect on his death.*"

The minimum number of testators required for a joint will is two, where any number of people can form joint wills for the maximum number.

A joint will can be revoked by the testators, either during their lifetime or after the death of one of them. Ancestral property cannot be devolved by a joint will in the coparcenary property.¹²

The testators of a joint will leave their property and assets acquired throughout their lifetime, in favour of the legatee.

VIII. LANDMARK JUDGMENT AND ANALYSIS

Case- *Dr. K.S. Palanisami (Dead) vs. Hindu Community in general and Citizens of Gobichettipalayam and Others*, Civil Appeal No. 5924 of 2005.

Brief Facts- Mr. Palaniappa Chettiar and his wife Rangammal owned a lot of properties in

⁹ *Sethurayas v. Subbulakshmi* (1939)

¹⁰ AIR 1947 Pat. 449

¹¹ AIR 2012 Ker 72

¹² "Is it possible to make a joint will with another person?", Ipleaders Blog, last visited 18 September 2020 <https://blog.ipleaders.in/possible-make-joint-will-another-person/>

Gobichettipalayam Taluk, they both executed a Will on 27.9.1968 which enlisted that their relatives were not fit to enjoy the property, and that on the death of any one of them, survivor shall enjoy the entire property. Further, the will also enumerated various charities to be carried out from the income from these properties. For that purpose, a trust was created to handle the proceeds with respect to charities. After the death of Palaniappa, Rangammal moved to alienate 10 properties by various sale deeds, which include properties both in her name and in her deceased husband's name as well. Rangammal further made her own will on 27.11.1980. The issue in this case was whether Rangammal had the power to alienate the properties or not. With one side contending that it was a joint will and hence, primarily the properties were left in the favour of the survivor, whereas the other side contended that the will was joint and mutual, hence Rangammal was only entitled to enjoy the proceeds from such properties and not alienate them, since that in their opinion, goes against the will.

Contentions- An appeal was filed in the Supreme Court against the judgment of the Madras High Court, which held that Rangammal, wife of the deceased Palaniappa Chettiar, didn't have the right to alienate the properties, and such alienation made by her after the death of her husband would be null and void.

The appellants argued that:

- The will in question in this judgment is not a joint and mutual will, but a joint will only. They also mention that upon the reading of the will, it can be deduced that after the death of one of the parties, the survivor had an absolute right over the properties and thereby, Rangammal is entitled to exercise such powers after the death of her husband.
- They further argued that there are two pre-conditions for a will to be a mutual will, i.e., the survivor must receive benefit from the deceased testator and there must be an agreement that the testators shall not revoke the mutual will- are not followed in the making of the will in this case. Thereby, the survivor of this will has absolute right to alienate properties.
- Further, it was argued that the words used in the will indicate towards the absolute title of the survivor, and emphasis was laid on the words "carva-cutantiram" (Tamil language), which indicates that absolute interest to be in the favour of the survivor.
- The decision of the trial court, which was also upheld by the High Court, that the will made by the wife after the death of her husband was suspicious, since it wasn't created in favour of the relatives, but towards people who offered their valuable service to the appellant in her old age. They argued that the first will specifically mentioned that no

interest is to be foregone in the favour of the relatives, further, the reading of the will of the wife indicates that it is not an unfair or unnatural instrument, as argued by the respondents.

The respondents argued that:

- The respondents seemed to be of the opinion that the will is a mutual and joint will, because the will was executed by husband and wife with mutual agreement and one mind.
- They further argued that the intent of both the parties towards creating a charitable trust was shown in the will, and this Will was executed by the parties. Thereby, the revocation of the will by Rangammal after the death of her husband cannot be done.
- They further argued that she had no rights of alienation, and allowing so would defeat the purpose of the earlier will made by the husband and wife. And they further contended that Rangammal was entitled to only hold and enjoy the properties for life, but not alienate.

Decision- The court heard both the sides and framed several issues for the purpose of answering the questions raised in this case. The relevant issue with respect to this paper is- Will Dated 27.9.1968 (The first will made by both the husband and the wife)- Joint will or joint and mutual will?

- The court first reiterated the features of both these types of wills. In relation to joint and mutual wills, the court said that the origin of the same in Roman Dutch Law and with passage of time it was also accepted in the American and English courts. Further, the court referred to the case of Privy Council, *Sreemutty Soorjeemoney Dossee vs. Denubundoo Mullick*¹³, laid down rules of construction of a will wherein they indicated that the intent of the parties making the will is very important to understand the nature of rights being advocated to the survivors. If the intent of the testators is not clear, then the surrounding circumstances are to be studied. The will needs to be read in its entirety to understand the intent of the testators.
- For the purpose of this issue, the Supreme Court moved to ascertain the intent of the testators by referring to the primary document in question here, the first will. The will mentioned that on death of either of the parties, the survivor shall enjoy “absolutely

¹³ 1854-57 6 MIA 526

with all the rights". The High Court held that the meaning of the word "absolutely" is limited in this case since it understood the primary intent of the testators to be charities.

- But the court in this case, referred to another part of the will to establish circumstance, which mentioned as to sale, and hence deletion of properties from the list of properties. Thereby, it was not against the intent of the testators to sell the properties, since it has not been expressly mentioned in these lines as to whether the same does not include alienation, because a plain reading of the entirety of it suggests so.
- Thereby, the Supreme Court held that the will was framed in a manner that intended to give the survivor the absolute rights as to the properties. The intention of the parties as to using proceeds of the properties towards charities was not defeated by the survivor throughout her life time, even after alienation of certain properties. This intention is subject to the absolute rights given to the survivor.
- The court further held that it was a joint and mutual will, with the absolute rights of the survivor because the primary intent of the testators as to charities was not defeated by the survivor.
- Thereby, the alienations done by the survivor was held not to be null and void.

IX. DIFFERENCE BETWEEN JOINT WILLS AND JOINT AND MUTUAL WILLS:

In the case of Dr. K.S. Palanisami (Dead) vs. Hindu Community in general and Citizens of Gobichettipalayam and Others¹⁴, the Supreme Court engaged in a discussion to analyse and lay down the differences between joint will and mutual will.

They referred to the following definition: "1-011. Persons may make joint wills which are revocable at any time by either of them or by the survivor. A joint will is looked upon as the will of each testator, and may be proved on the death of one. But the survivor will be treated in equity as a trustee of the joint property if the equitable doctrine of mutual wills applies. Under this doctrine there must be an agreement for the survivor to be bound by the arrangement between them; but the mere fact of the execution of a joint will is not sufficient to establish such an agreement for the survivor to be bound. If this doctrine applies, a legacy to a legatee who survived the first testator, but predeceased the second, does not lapse. Where a joint will is followed by a separate will which is conditional on a condition that fails, the joint will is not revoked even though the subsequent separate Will contains a revocation clause. 1-012. The term "mutual wills" is used to describe joint or separate wills made as the result of

¹⁴ Civil Appeal No. 5924 of 2005

an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. The agreement is enforced after the death of the first to die by means of a constructive trust. There are often difficulties as to proving the agreement, and as to the nature, scope, and effect of the trust imposed on the estate of the second to die. The revocable nature of the wills under which the interests are created is fully recognised by a probate court; but in certain circumstances equity protects and enforces the interests created by the agreement despite the revocation of his will by one party after the death of the other without having revoked his will, i.e. the survivor's property will be affected by the trust imposed so as to give effect to the agreement.”¹⁵

Halsbury's Laws of England defines joint wills as well as mutual wills in the following manner:

“Joint Wills. A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, and disposing either of their separate properties or of their joint property. It is not, however, recognised in English law as a single will. It is in effect two or more wills, and it operates on the death of each testator as his will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own will and on the death of the survivor, if no fresh will has been made, it is admitted to probate as the disposition of the property of the survivor. Joint wills are now rarely, if ever, made.”¹⁶

“Mutual wills. Wills are mutual when the testators confer on each other reciprocal benefits, which may be absolute benefits in each other's property, or life interests with the same ultimate disposition of each estate on the death of the survivor. Apparently, a mutual will in the strict sense of the term is a joint will, but, where by agreement or arrangement similar provisions are made by separate wills, these are also conveniently known as mutual wills. Wills which by agreement confer benefit on persons other than the testators, without the testators conferring benefits on each other, can also be mutual wills. Where there is an agreement not to revoke mutual wills and one party dies having stood by the agreement, a survivor is bound by it.”¹⁷

Further, in the 1769 English case of *Dufour vs. Pereira*¹⁸, a will was jointly executed by a husband and wife. The explanation laid down by Lord Camden in this case confers that mutual wills indicate the intent of all the parties who mutually bind themselves to the will. Thereby, such an intent can be altered, or one party can revoke it, but after consultation with the other parties. The court was of the opinion, in this case, that a mutual will cannot be revoked after

¹⁵ Theobald, *Wills* (Sweet & Maxwell), 19th Edition (P. 1-011,1-012)

¹⁶ Halsbury's Laws of England, 5th Edition Vol. 102 (P.9)

¹⁷ Halsbury's Laws of England, 5th Edition Vol. 102 (P.10)

¹⁸ 1769 21 ER 332

the death of one of the parties because the trust laid down on the survivors is binding and is of the nature of a contract, since the consent was free while executing a will. The court held that it cannot allow the survivor to act against the clauses of the contract.

In the case of *Dilharshankar C. Bhachecha vs. The Controller of Estate Duty, Ahmedabad*¹⁹, a joint will was executed by husband and wife. This was in regard of a Bungalow, the wife died first, after the death estate duty was paid, on her part in the estate. After 10 years, the husband died and the issue before the court was whether estate duty was payable on half of the estate or the entirety of it, in the case of husband having only limited share or becoming full owner. The Revenue Authority claimed that by way of a joint will, the husband became the full owner of the property and had all the rights as to the property where the argument of the other side was that the husband had no right of alienation because the will was joint and mutual and so, only half of the property was his and the estate duty is payable on the same. The High Court held that since there was no separate contract which mentioned that the survivor can not revoke the Will or not alienate the property, the survivor shall have absolute interest in the property.

Thereby, the difference between joint wills and mutual wills relies highly on the intent of the testators.²⁰ If the intent so mentioned is not clear, then the surrounding circumstances, as mentioned in the will, is studied upon by the court to put itself in the shoes of the testators to ascertain the intent.

X. SUGGESTIONS

After the analyse of various cases of joint wills and mutual wills, it is essential to understand the problematic areas as to the application of such wills after the death of one or all of the testators, especially if the same is done in the favour of a legatee who ends up losing out on the assets because of legal disputes which arise from unclear drafting of such wills.

- First and foremost, a distinction as to whether a will by two or more testators is a joint will or a mutual will is very important.
- Secondly, whether the surviving testator would have absolute rights in the property/properties or not.
- Thirdly, whether the surviving testators have a right of alienation of properties or not.

¹⁹ 1986 AIR 1707

²⁰ “India: Supreme Court Rules on Right of Alienation in a Joint and Mutual Will”, Khaitan & Co., Mondaq Limited, last visited 21 Sept 2020 <https://www.mondaq.com/india/wills-intestacy-estate-planning/599488/supreme-court-rules-on-right-of-alienation-in-a-joint-and-mutual-will>

- Fourthly, whether the surviving testator can revoke the joint will and make a separate will after the death of the other testator or not.
- Lastly, it is understood that a distinction between joint will and mutual will makes the points following that very easy to answer, but a specific and distinct mention of the same would help in avoiding any kinds of confusions at the time of execution because the intent might not be clear. And in testamentary matters, the parties formulating the will agreement might not be alive to explain their intent and thereby, such needs to be clearly indicated.

XI. CONCLUSION

This research study primarily deals with the concept of joint wills. The reason why such a study is important is because no statute under the Indian jurisprudence talks about joint wills specifically, the establishment and application of joint wills finds recognition from various judgements of High Courts and the Supreme Court. Thereby, a thorough analysis as to the same would help.

There are various aspects of joint wills and its application which may seem confusing, like the rights of various parties involved. This is because each case of joint will is different from another and has different contractual elements. In such a case, it is very important for each party of a joint will, i.e., all testators and the legatee in whose interest such a will is made is aware about their rights.

Further, this paper has laid down various aspects as to how joint wills and mutual wills are different and how such a difference makes room for distinct types of rights allotted to the parties of the will.

Furthermore, this paper also lays down suggestions as to drafting of a joint or mutual will to ensure that there is no ambiguity as to the application of such wills and the rights surrounding the same.
