[LORD CHOEN, LORD KEITH OF AVONHOLM, MR. L.M.D. DE SILVA]

1960
Jul. 27

ZALIHE VELI AND OTHERS
*v.*
SEVIM ISMAEL AND OTHERS

ZALIHE VELI SUING AS NEXT FRIEND AND NATURAL GUARDIAN OF HER MINOR CHILDREN, ISMAEL NEVZAT, ISMAIL EFF. AND ANOTHER, *Appellants,*

*v.*

SEVIM ISMAIL AND OTHERS, *Respondents.*

(*Privy Council Apeeal No. 32 of 1959*).

*Administration of Estates—Hotchpot—Intestacy—Property given by way of advancement to predeceased child—Whether it should be brought into account by children of recipient upon distribution of intestate's residuary estate—"Share"—Meaning—In one context it may mean a fraction or proportion of a whole.—In another the amount taken as a share, or the portion—The Wills and Succession Law, Cap. 220, sections 44, 46, 49, 51 and Schedule 1.*

*Note:* Those Sections and the Schedule are fully set out in the judgment of their Lordships.

This is an appeal from the judgment of the Supreme Court in Civil Appeal No. 4264, reported in this volume, *supra* p. 8, by the respondents in that appeal. A person died in 1954 intestate leaving a widow, several children and the children of a predeceased son. On the question whether in reckoning the share of the grandchildren in the intestate's estate, property given by the intestate to their father by way of advancement or under marriage contract should be brought into account, the Privy Conneil, affirming the judgment appealed from,—

*Held :* (1) The Supreme Court came to the right conclusion *viz.* that in estimating the share of the grandchildren, the property received from the deceased by their predeceased father by way of advancement or under marriage contract should be brought into account. The question is void of authority and turns wholly upon a construction of the relevant sections.

(2) "Share" in one context may mean a fraction or proportion of a whole. In another context it may mean the amount taken as a share, or the portion. The two meanings may be found in Section 44. Under s. 44 (a) "share" indicates the fraction to which a widow is entitled. In the proviso to section 44, however, the word "share" would seem to refer more naturally to the amount taken as the widow's portion. In section 46 and the First Schedule "share" would seem naturally to refer to the proportion to which the beneficiaries are entitled.

(3) For the present purposes sections 49 and 51 are the more material sections. Their Lordships would read "share" in section 49 as referring to the amount taken under the statutory distribution, so that a child (or children) of a person who has died in the lifetime of the deceased is entitled only to the amount that his father would have taken if he had survived the deceased. If matters had stood there, no difficulty would arise, for the child's portion would merely be calculated on the fractional basis which applied to his father. But section 51 comes into play. Under that section a child of the deceased who survived his parent would have to bring into account "in reckoning his share" any property received from the deceased in the matters specified. "Share" here clearly refers to the amount taken as a share and not to any fraction which may form the basis of calculation.

(4) It is contended, however, for the appellants that they take not as representing their father but in their own right, and that it is only sums that they receive from the deceased that have to be brought into account in computing their share. As they received no property from the deceased they are entitled to the fraction of the estate to which their father was entitled without any deduction. This contention has great force and attractiveness if section 51 is construed in isolation. But in their Lordships' view that is not the proper approach. The sections must be read as a whole. It is not possible to know what the appellants' father would have taken as a share without assuming that he had survived his father and applying the rule laid down by section 51. Under section 49 the appellants are entitled "only to the share which their parent would have taken if he had survived the deceased". As has already been said "share" cannot be read here as meaning merely a fractional part. Therefore the appellants must bring into account what their father received from the deceased.

(5) This view is supported also by the fact that in section 44(a) a child of the deceased is treated as represented by his descendants.

(6) English law has no application to this case.

*Appeal dismissed.*

The facts sufficiently appear both in the judgment of the Supreme Court (*supra*) and in that of the Privy Council, delivered by :

LORD KEITH OF AVONHOLM : This appeal raises a short point on the construction of the Wills and Succession Law, Cap.220 of the Laws of Cyprus with reference to rights in the succession of one Ismail Kadri Bey domiciled in Cyprus.

Ismail Kadri Bey, hereafter referred to as the deceased, died in the year 1954. He was survived by his wife and by

four children, Sevim, Kadri, Mensur and Eminé and predeceased by, a son Nevzat. Nevzat had two children Ismail and Nahide, who survived the deceased, and by their mother as their next friend and natural guardian are plaintiffs in this action and appellants before their Lordships' Board. The dispute is whether in estimating their share in the statutory portion and in the undisposed portion, if any, of the deceased's (their grandfather's) estate they are bound, in a question with the surviving children of the deceased (the defendants), to bring into account property of the value of £1,650 received from the deceased by their father by way of advancement or under marriage contract. The District Court held that they were not. The Supreme Court reversing this decision thought they were.

The question turns on the proper construction of certain provisions of the Wills and Succession Law, Cap. 220. Section 2 defines "statutory portion" as "that part of the movable property and immovable property of a person which he cannot dispose of by will" ; and "undisposed portion" as "the whole or the part, as the case may be, of the disposable portion which has not been disposed of by will ".

The sections of the Law material to the appeal are the following :

> "44. Where a person dies leaving a wife or husband, such wife or husband shall, after the debts and liabilities of the estate have been discharged, be entitled to a share in the statutory portion, and in the undisposed portion if any, as follows, that is to say—
>
> If the deceased has left besides such wife or husband—
> (*a*) any child or descendant thereof, such share shall be the one-sixth of the statutory portion and of the undisposed portion, but if there be more children than five (whether they be living or represented by descendants) then it shall be a share equal to the share of one of such children.
>
> " Provided that where the deceased has left more than one lawful wife, the share given to the wife under the provisions of this section shall be divided equally between such wives".
>
> "46. Subject to the provisions of this Law as to the incapacity of persons to succeed to an estate and subject to the share of a surviving wife or husband of the deceased, the class of person or persons who on the death of the deceased shall become entitled to the statutory portion, and the undisposed portion if any, and the shares in which they shall be so entitled, if more than one, shall be as set out in the several columns of the first Schedule to this Law:

Provided that persons of one class shall exclude persons of a subsequent class."

"*By the First Schedule.*

*Succession of the Kindred*

| *Class* | *Persons Entitled* | *Shares* |
|---|---|---|
| 1. First class | 1 (*a*) Legitimate children of the deceased living at his death ; and | 1 (*a*) In equal shares. |
| | (*b*) descendants, living at the death of the deceased, of any of the deceased's legitimate children who died in his lifetime". | (*b*) in equal shares *per stirpes.* |

. . . . . .

"49. Where in this Law it is provided that any class of persons shall become entitled to the statutory portion and the undisposed portion *per stirpes*, it means that the child of any person of the defined class who shall have died in the lifetime of the deceased and who, if he had survived the deceased, would have become entitled on the death of the deceased to a share in the statutory portion, and the undisposed portion if any, shall become entitled only to the share which the parent would have taken if he had survived the deceased."

"51. Any child or other descendant of the deceased who becomes entitled to succeed to the statutory portion, and to the undisposed portion if any, shall in reckoning his share bring into account all movable property and immovable property that he has at any time received from the deceased—

(*a*) by way of advancement ; or

(*b*) under a marriage contract ; or

(*c*) as dower ; or

(*d*) by way of gift made in contemplation of death:

Provided that no such movable property or immovable property shall be brought into account if the deceased has left a will and has made therein specific provision that such movable property or immovable property shall not be brought into account."

In their Lordships' view the Supreme Court has reached the right conclusion. The question is void of authority and turns wholly upon a construction of the relevant sections. "Share" in one context may mean a fraction or proportion of a whole. In another context it may mean the amount taken as a share, or the portion. The two meanings may be found in section 44. Under (*a*) "share" indicates the fraction

to which a widow is entitled. In the proviso, however, the word "share" would seem to refer more naturally to the amount taken as the widow's portion. In section 46 and the First Schedule "share" would seem naturally to refer to the proportion to which the beneficiaries are entitled. For present purposes sections 49 and 51 are the more material sections. Their Lordships would read "share" in section 49 as referring to the amount taken under the statutory distribution, so that a child (or children) of a person who has died in the lifetime of the deceased is entitled only to the amount that his father would have taken if he had survived the deceased. If matters had stood there, no difficulty would arise, for the child's portion would merely be calculated on the fractional basis which applied to his father. But section 51 comes into play. Under that section a child of the deceased who survived his parent would have to bring into account "in reckoning his share" any property received from the deceased in the matters specified. "Share" here clearly refers to the amount taken as a share and not to any fraction which may form the basis of calculation. It is contended, however, for the appellants that they take not as representing their father but in their own right, and that it is only sums that they receive from the deceased that have to be brought into account in computing their share. As they received no property from the deceased they are entitled to the fraction of the estate to which their father was entitled without any deduction. This contention has great force and attractiveness if section 51 is construed in isolation. But in their Lordships' view that is not the proper approach. The sections must be read as a whole. It is not possible to know what the appellants' father would have taken as a share without assuming that he had survived his father and applying the rule laid down by section 51. Under section 49 the appellants are entitled "only to the share which their parent would have taken if he had survived the deceased". As has already been said "share" cannot be read here as meaning merely a fractional part. Therefore the appellants must bring into account what their father received from the deceased.

This is substantially the view taken by the Supreme Court, and in their Lordships' view they were right. It is supported also by the fact that in section 44 (*a*) a child of the deceased is treated as represented by his descendants.

In the course of the argument some references were made to English law, but in their Lordships' view English law has no application to this case.

For these reasons their Lordships will humbly advise Her Majesty to dismiss the appeal. The appellants must pay the costs of the appeal.

*Appeal dismissed with costs.*