

(1974) 03 MAD CK 0051
In the Madras High Court

A. Rangaswami Pillai

APPELLANT

Vs

A. Subramania Pillai and Others

RESPONDENT

Date of Decision : 13-03-1974

Acts Referred:

Evidence Act, 1872 — Section 13(a)
Trusts Act, 1882 — Section 82

Citation : (1974) 2 MLJ 442

Hon'ble Judges : V. Ramaswami, J

Bench : Division Bench

Judgement

V. Ramaswami, J.—The second defendant is the appellant. The first respondent-plaintiff filed a suit for partition and allotment of 1/3 share in the suit properties which consisted of six schedules. The suit was decreed only in respect of the plaint A-schedule properties and even in respect of the same the plaintiff was held to be entitled only to a 1/4 share and not 1/3 share as claimed in the plaint. The suit in respect of the properties mentioned in the other schedules was dismissed. Since in this appeal by the second defendant, the decree granted in favour of the plaintiff in respect of item 1 of the plaint A schedule alone is disputed, we need notice only the facts relating to that item and the respective contentions of the parties.

2. The plaintiff, defendants 1 and 2 and one Chockalingam Pillai are the sons of one Arthanatha Pillai through his third wife. He had a son by name Soundararajan by his first wife and another son by name Mathuranayagam by his second wife. On 22nd August, 1921 (Exhibit B-52), item-1 of the plaint A-schedule was purchased in the name of Nagammal, the third wife of Arthanatha Pillai. Arthanatha Pillai executed a Will (Exhibit A-I) dated 13th July, 1927, and died in the year 1928. Under this Will he treated the property purchased in the name of his third wife Nagammal as his self-acquired property and made certain bequests in respect of the same, which will be noticed in detail while considering the respective cases of the parties. Nagammal died on 18th December, 1961, leaving a Will dated 15th July, 1953 (Exhibit B-2). Under this Will, she purported

to deal with this item of property as if it was her own and in respect of which she had absolute powers of disposition. The case of the plaintiff was that this item is the self-acquired property of his father Arthanatha Pillai, and that under his Will (Exhibit A-I) dated 13th July, 1927, he is entitled to a 1/3 share. It was stated that Chockalingam Pillai, one of the sons of Arthanatha, relinquished his rights in respect of the same under Exhibit A-10 dated 21st April, 1937 and that therefore his legal representatives, defendants 14 to 16, are not entitled to any share in the same. The second defendant, claiming an absolute title to the entirety of this item under the Will of Nagammal, resisted this claim of the plaintiff. It was also contended by him that the property was not the self-acquired property of Arthanatha Pillai, that his father Arthanatha had no right of disposition over the same and that therefore the plaintiff had no right to claim any share in respect of this item relying on the Will (Exhibit A-I). He further contended that the consideration for the same had not been proved to have been paid by his father and that in any case even if consideration had been paid by Arthanatha Pillai there was no evidence to show that he did not intend by such payment to benefit his third wife Nagammal. Alternatively he contended that even under the Will, Nagammal obtained an absolute estate and that therefore she was entitled to dispose of the same in any manner she liked and that the plaintiff had no claim for a share in respect of the same. Even if the Will is construed as not conferring an absolute estate in favour of the sons of Arthanatha and is a conditional bequest and the conditions not having been satisfied, the plaintiff and the other sons are not entitled to any share in the same except the second defendant. The trial Court held that the property was purchased by Arthanatha benami in the name of his wife from and out of his own income and that it was purchased by him in the name of Nagammal for the benefit of Nagammal and her sons and not Nagammal exclusively. The learned Subordinate Judge also found that the Will executed by Nagammal had not been proved and that she had also no disposing power over this item of property. In respect of the plaintiff's case that Chockalinga, one of the sons, had released his right over the same and that therefore the plaintiff was entitled to a 1/3 share in the suit item, the trial Court held that the release deed executed _ by Chockalinga was a sham and nominal document and that therefore the legal representatives of Chockalinga were also entitled to a share. In that view, the trial Court decreed the suit declaring that the plaintiff, the first defendant and the second defendant are each entitled to 1 /4 share and the legal representatives of Chockalinga the remaining 1/4 share.

3. In this appeal Mr. M. S. Venkatarama Iyer, learned Counsel for the appellant, first contended that the sale-deed dated 22nd August, 1921 (Exhibit B-52) is not a benami transaction, that apart from the self-serving statement in the Will executed by Arthanatha Pillai, there is no evidence to show either that the consideration was paid by Arthanatha or that the property was the self-acquired property of Arthanatha. The first question, therefore, that arises for consideration is as to who provided the consideration for the sale deed (Exhibit B-52) dated 22nd August, 1921. The recitals in the sale deed itself are not of much

assistance. The consideration for the sale was a sum of Rs. 3,400, out of which a sum of Rs. 2,600 was reserved for the purpose of discharging two earlier mortgages over the property. The document further states that the balance of Rs. 800 was paid in cash. But, in his Will dated 13th July, 1927, Arthanatha Pillai had stated that he purchased that property with his own money but in the name of his wife and that it was his self-acquired property. The learned Counsel for the appellant characterised this document as a self-serving statement which could not be relied on to find that the consideration for the sale was provided by him. Clause (7)1 of Section 32 of the Evidence Act, is to the effect that a statement made by a person, which is contained in any deed, will or other document which relates to any such transaction as is mentioned in Section 13, Clause (a), is a relevant fact and therefore admissible in evidence. But, the learned Counsel contended that the statement contained in the Will itself would not be admissible in evidence as the Will cannot be stated to be a transaction as is mentioned in Section 13, Clause (a). In other words, the phrase "which relates to any such transaction" , according to the learned Counsel, qualifies the "deed, will or other document" referred to in Clause (7) of Section 32. We are unable to accept this contention of the learned Counsel. u/s 13, where the question is as to the existence of any right, any transaction by which the right was created, claimed, modified, recognised, asserted or denied or which was inconsistent with its existence, is a relevant fact. Now, in the instant case, the question is whether the property was purchased by Arthanatha out of his own funds but in the name of his wife Nagammal and Arthanatha had any right over the property. That such a right was vested in Arthanatha was claimed by him in his Will (Exhibit A-I.) The phrase "which relates to any such transaction"" , in our opinion, qualifies the word "statement" in Clause (7) of Section 32. The "transaction" referred to in Clause (7) would, in the instant case, therefore, have reference to the sale deed dated 22nd August, 1921 and since Arthanatha had asserted his right with respect to that transaction in his Will dated 13 th July, 1927, that statement is a relevant fact and is admissible in evidence. But, what effect we have to give to that statement will have to depend on the other facts and circumstances in this case. That statement itself may not be conclusive evidence that the property is the self-acquired property of Arthanatha or that he provided the consideration for the sale. But, in the instant case, we have the unique fact of absence of any other contrary evidence than that found in the Will of Arthanatha himself. In fact, certain of the statements of the other sons of Arthanatha go to confirm his statement that it is his self-acquired property. Exhibit A- 42 dated 28th January, 1928 is a release deed executed by the two sons of Arthanatha through his first and second wives in favour of Nagammal and her sons and in this there is a reference to Arthanatha Pillairs Will dated 13th July, 1927 and by that document they have released all their rights in respect of the suit property. Exhibit A-10, the alleged release deed executed by Chockalingam Pillai in favour of Nagammal and his brothers, also refers to the Will executed by his father and he has released his rights in respect of the suit property for a consideration of Rs. 2,000 . This is a registered document. Though this itself is challenged as a sham

and nominal document, not having any effect, so far as this recital is concerned, we do not think there is any reason for not relying on the same. Exhibit A-2 is another important document which is a mortgage deed executed by Nagammal, the plaintiff, the first defendant and Chockalinga in favour of the Thanjavur Permanent Bank Limited, Thanjavur, mortgaging the suit items and claiming title in respect of the same under the Will executed by Arthanatha. Nagammal did not rely, in support of her title to the same, on the sale deed dated 22nd Aug st, 1921. These facts in a way corroborate the statement given by Arthanatha in his Will that the property was purchased by him out of his own funds in the name of his wife. Though there is no direct evidence relating to the motive for purchasing this property in the name of his third wife, the reason is not far to seek. It is seen from the recitals in his Will that Arthanatha and his brothers continued to be members of a Hindu undivided family until about the year 1926 and his sons through the first and second wives were not living with him and they were living with their respective mothers in their respective grand-mothers" houses, without caring for the father. In these circumstances, it may be reasonable to assume that he purchased the property in the name of his wife in order to take it out of any possible claim by his own brothers or the sons by the first and second wives.

4. It is next contended by the learned Counsel, relying on Section 82 of the Indian Trusts Act, 1882, that Arthanatha intended to provide the consideration for the benefit of his wife and that therefore the property was the absolute property of Nagammal. Section 82 of the Trusts Act provides that where property is transferred to one person for a consideration paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration. According to the learned Counsel, the payment of consideration alone will not prove a resulting trust, but it must also be proved that the person who provided the consideration did not intend to pay or provide such consideration for the benefit of the transferee and the onus is on the person who asserts that such person did not intend to pay or provide such consideration for the benefit of the transferee and not on the transferee himself, to show that the person did intend to provide the consideration for his or her benefit. He also relied on the provisions of Section 81 in support of the construction placed by him on Section 82. We are unable to agree with this contention of the learned Counsel. When once it is proved that the consideration was provided by a person other than the transferee and it is claimed that the person who provided the consideration did not intend to provide such consideration for the benefit of the transferee, the onus is on the transferee to show that the person who provided the consideration did intend to provide the consideration for his or her benefit. The question that will have to be considered after finding that the consideration was provided not by the transferee but the by other person, is as to whether such other person did intend to provide the consideration for the benefit of the transferee and not whether such person did not intend to benefit the transferee. This could be

arrived at both from the language of Section 82 itself and from the general principles of evidence and onus of proof. It is now well-settled that in Indian Law the English rule as to presumption of advancement has not been adopted. Therefore, once it is found that the consideration has been provided by the husband, there being no presumption of advancement, it will have to be proved by the person claiming to be the transferee that the consideration was provided for her benefit. But, Section 82 recognises that money might have been contributed by another towards a purchase with the intention of giving the beneficial interest to the person in whose name the purchase is made. The fact to be proved being a positive issue that the person intended to give the consideration to benefit the transferee, the issue cannot be put in the negative form so as to make the person who provided the consideration to show that he did not intend to provide such consideration for the benefit of the transferee. This is the ratio, in our view, of the decision in Chittaluri Sitamma and Anr. v. Saphur Sitapatirao and Ors. 1. ILR (1938) Mad. 220; (1938) 2 M.L.J. 606 : (1938) 46 L.W. 651 : AIR 1938 Mad. 8 where the learned Judges held:

It is true that in the Indian law the English rule as to presumption of advancement has not been adopted, but Section 82, Trusts Act, as well as the observations of the Judicial Committee in Mt. Bilas Kunwar v. Desraj Ranjit Singh ILR (1915) All. 557 (1915) 42 I.A. 202 : AIR 1915 P.O. 96 : (1915) 29 M.L.J. 335. recognized that money may have been contributed by another towards a purchase with the intention of giving a beneficial interest to the person in whose name the purchase is made. The relationship of husband and wife between the person who contributes the money and the person in whose name the sale" is taken will be a very important factor in determining whether the transaction was really meant for the benefit of the wife or not.

The onus is, therefore, on the second defendant to prove the the consideration was provided by his father to benefit his wife.

5. The learned Counsel relied on certain recitals in Exhibit A-1, the Will executed by Arthanatha, as supporting his case that he intended to benefit his wife Nagammal. In particular, he relied on the recitals to the effect that his wife Nagammal is to take the property and maintain his children as he was doing himself. He also relied on the recitals in Clause (9), (10) and (11), which are to the effect that she is to be in possession, receive the income and maintain the children. He also contended that the recitals relating to the disposition in favour of his sons, do not in any way detract from the absolute grant made in favour of Nagammal and those recitals are only precatory or pious wish and not binding or obligatory conditions. We are unable to agree with this construction of the learned Counsel. Though in Clause (8) the testator stated that his wife Nagammal is to take the property and maintain his children, the later clauses in the document show that he did not intend to confer an absolute estate on his wife. In Clause (13) it is stated that she had no power either to alienate or otherwise encumber the property. Even with reference to the income and other

outstandings, it was stated that she had only a right to receive the income for the purpose of maintaining his children and she had no power of her own to receive them for any other purpose without the consent of the testator's brother, one Viswanathan Pillai. There were also dispositions of specific amounts for marriage expenses out of the income from the property in favour of all his children including the sons by the first and second wives. There was the further disposition that after the lifetime of his wife Nagammal, such of those persons who were disciplined, obedient and supporting Nagammal during her lifetime should inherit the same in proportion to their respective shares in the joint family. We are unable to agree that this bequest in favour of the testator's sons was either precatory or not obligatory. A reading of the entire Will and the various clauses therein shows that the testator intended to give a life estate in favour of his wife Nagammal and even there with some restrictions on the income from the properties and the remainder in favour of such of those sons who conformed to the conditions prescribed therein. We are, therefore, of the view that neither Nagammal was the true owner of the property, nor did her husband intend to provide the property for her benefit. The property was purchased by Arthanatha out of his own funds in the name of his wife and he continued to be the real owner of the property. Being a self-acquired property, there is no dispute that he had a disposing power and therefore the disposition under Exhibit A-I Will was valid.

6. The next question that arises for consideration is as to whether the plaintiff and the other sons have satisfied the conditions prescribed in the Will of Arthanatha in order to enable them to inherit the property. The learned Counsel for the appellant submitted that the recitals in the Will (Exhibit B-2) executed by Nagammal show that the first defendant and Chockalinga were not entitled to inherit the property as they have not conformed to the conditions prescribed in the Will of the testator. In this regard, one other question which arises for consideration is as to whether the due execution of the Will (Exhibit B-2) had been proved in this case. u/s 63 (c) of the Indian Succession Act, a Will shall be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator. Therefore, proof of due execution requires that either one or more of the attesting witnesses should prove the execution by the testator and the attestation by each of them. This is also the ratio of the judgment of a Division Bench of the Bombay High Court in *Roda Framroze Mody Vs. Kanta Varjivandas Saraiya*, . The Will (Exhibit B-2,) was attested by P.W. 2 and one Swaminatha Iyer. Of course, P. W. 2, in cross-examination, admitted that Nagammal signed the Will and he attested the document. But, he did not speak to the attestation of Swaminatha Iyer or Swaminatha Iyer having seen the executant sign the document. The second defendant himself admits in his

evidence that Swaminatha Iyer was alive; but he had not been examined. He gave the explanation that since P.W. 2 had turned hostile against him, he did not risk examining the other attester though he would say that there is no enmity between him and the other attester. Of course, he had stated in his evidence that the scribe read over the contents to his mother and she signed thereafter and that P.W. 2 and Swaminatha Iyer were present and they attested the Will. But, it was suggested to him in cross-examination that these witnesses did not attest the document at the same time, and that at the time when P.W. 2 attested, the other attesting witness was not present. There was no suggestion to P. W. 2 that the attestation of Swaminatha Iyer was also made at the time when P. W. 2 attested the document and both the attesting witnesses knew the execution by the testator. We are, therefore, of the view that the due execution of the Will had not been proved.

7. Even so the learned Counsel for the appellant contended that though the Will could not be relied on as evidencing any disposition, for claim of title under the same, the recital could be relied on as a statement made in a document within the meaning of Section 32 (7) of the Evidence Act. We think that the learned Counsel is well -founded in this contention. The document may fail as a Will for want of proof of due execution as provided u/s 63 (c) of the Indian Succession Act. But, still, if the signature of the executant is true, it would be a document signed by the person, though it would not have the effect of a Will. The statements in such a document would be statements made by a deceased person relating to a transaction as is mentioned in Section 13, Clause (a) of the Evidence Act. We are, therefore, of the view that the recitals in the document itself could be relied on except for the purpose of claiming title under the same. Even so, we are unable to accept the contention of the learned Counsel that the recitals in any way prove that the plaintiff, the first defendant and Chockalinga had not complied with the conditions prescribed under the Will of Arthanatha in order to succeed to the pro-parties. We proceed on the basis that the conditions prescribed in the Will of Arthanatha, viz., that only such of those sons who are disciplined, obedient and supporting the mother should succeed to the property, are clear, unequivocal and certain and, therefore, valid conditions. Exhibit B-2 states that the first defendant had borrowed money from Nagammal on certain promissory notes to the extent of Rs. 4,400 and had not returned the money. The second son Chockalinga had executed a release deed for a consideration of a sum of Rs. 2,000. Though that consideration was not paid, there was a direction in the Will to pay that amount to Chockalinga, with a charge over the properties for payment of the same. The Will further states that on 31st January, 1940 she purchased some house property and that has to be taken by the plaintiff and the present disputed item was given to the second defendant. These recitals do not show that she had any grievance against the sons or that they did not comply with the terms and conditions of the Will of Arthanatha. What seems to have weighed in her mind for giving the property in favour of the second defendant was that the plaintiff had been given a house, the first defendant had the benefit

of the moneys advanced by her under the promissory notes and Chockalinga would be getting Rs. 2,000 under the Will itself and that would be a fair and equitable distribution of the properties available with her. Far from supporting the claim of the appellant that the other sons had not complied with the terms and conditions of the Will, the recitals themselves show that they have strictly complied with the terms and conditions. If that be so, it could not be contended that she had disposing power over the disputed property except as provided under the Will of Arthanatha. In this connection, we also consider that the finding of the lower Court that Exhibit A-10 release deed executed by Chockalinga was a sham and nominal document and was not given effect to, is correct and has to be upheld. Admittedly, the sum of Rs. 2,000 recited as the consideration for that release had not been paid as late as 1961, though the release deed itself is of the year 1937. The Will executed by Nagammal also provided for payment of this sum of Rs. 2,000 with a charge over the suit properties. This will not be enough to give effect to that document itself, for the value of Rs. 2,000 in 1937 would not be the same in 1961, Except the statement that he had executed a release deed, nothing is stated about his conduct and submissive nature, so as to disentitle him from inheriting the property as per the Will of his father. We, therefore, hold that Chockalinga also was not disentitled. We, accordingly confirm the finding of the Court below that the plaintiff, the first defendant, the 2nd defendant and the legal representatives of Chockalinga, viz., defendants 14 to 16, are entitled to inherit 1/4 share each in the disputed item.

8. The result is, the appeal is dismissed with costs (one set) and the judgment and decree of the lower Court are confirmed.