

(1925) 11 MAD CK 0063
In the Madras High Court

Ammakannammal and Another

APPELLANT

Vs

V.K. Damodara Mudaliar and Others

RESPONDENT

Date of Decision : 30-11-1925

Acts Referred:

Citation : AIR 1928 Mad 66

Hon'ble Judges : Kumaraswami Sastri, J

Bench : Division Bench

Judgement

Kumaraswami Sastri, J.—This is a suit by the plaintiff for a declaration that the deed of trust executed by her on the 11th March 1920 in favour of the defendants was obtained by fraud and misrepresentation and is inoperative, for setting aside the trust deed on the ground that she was not competent to create the trust, for possession of the suit house and mesne profits. The plaintiff died pending suit leaving a will and the executor under the will has been brought on record.

2. One Venkatarama Mudali, the husband of the plaintiff, who was the last male holder of the property mentioned in the plaint, died on the 1st October 1891 leaving the plaintiff his widow and two daughters Rathnakshi and Ponnammal. He left a will dated the 12th July 1889 as to the genuineness of which there is no dispute as both parties rely on that will in support of their case. " The will after setting out the title of the testator to the property proceeds as follows:

Therefore, after my lifetime, my elder daughter Rathnakshi Ammal, wife of the deceased Duraisamy Mudaliar of Adambakkam, shall take into her possession the aforesaid immovable property and the other moveables and after meeting the expenses for tax and repair out of the rental income derivable from the said house, shall maintain with the remaining income, my wife and her mother Ammakannammal, as well as herself. Further if my younger daughter Ponnammal, the wife of Kunnathur Ganapati Mudaliar, finding it inconvenient to live with her husband who has taken a second wife should come away to (live with) her who is her sister and with her mother, she (my elder daughter) shall

protect the said Ponnammal also without giving any differential treatment. Besides as I have no other male or female issue than the said two daughters as the said Rathnajoshi Ammal has now lost all (possibility of having) issue and as the said Ponnammal has had no issue till now, Rathnakshi shall arrange that, after the death of my wife and my daughters the whole of my said property shall be taken and enjoyed by the issue of the said Ponnammal if the latter happens to bear issue in the future. If the said Ponnammal does not happen to have any such issue, my wife and Rathnakshi Ammal jointly or the survivor after the death of either of them may make arrangements such that such of them as they choose may get and enjoy (properties). My ordinary household sundry articles shall also be provided for in the same manner. But any arrangements made by my wife, and Rathnakshi Ammal jointly, or by one of them on surviving the other, and providing for persons of their choice taking and enjoying the property, shall take effect after the deaths of wife and my two daughters. Such is the will which, having-been written to my dictation and found to be correct on being read out (to me), I make and leave, willingly and of my own free will.

3. Rathnakshi died issueless on the 7th October 1915 and Ponnammal died issueless on the 5th January 1918. On. the 25th October 1916, Ammakannammal executed a deed of gift in respect of the house mentioned in the plaint in favour of the trustee of a temple in Chintadripet. It will be noted that this deed was executed during the life time of Ponnammal but after the death of Rathnakshi. On the 11th March 1920 the plaintiff executed another deed in favour of the present defendants whereby she after reciting that the deed of 1916 was not acted upon arranged for the performance of the trust mentioned therein through the defendant. She then filed the present suit on the 15th March 1924 in forma pauperis to set aside the deed of trust. After filing the suit she executed a will dated the 18th March 1924 whereby she gave the properties to the grandson and granddaughter of her husband's brother. Probate was granted of this will which has been filed as Ex. A in the suit. The contention of the legal representative of the plaintiff is that under the terms of the will of the plaintiff's husband she had no power to execute the deed of trust during her lifetime and that consequently the will executed by the plaintiff takes effect as being executed in pursuance of the power conferred upon her by the, will of her husband.

4. A question was raised as to whether the legal representative of the deceased plaintiff can continue the suit in forma pauperis. I am clearly of opinion that he can and I think the decision in *Sivagami Ammal v. Gopalaswami Odayar* A.I.R 1925 Mad. 765, *Perumal Goundan v. Thirumalarayapuram Jananukooladhana Sekhara Sangha Nidhi* [1918] 41 Mad. 624, *Mary Ann Bill, In re* [1884] 7 Mad. 390, and *Mahomed Eshav chowdry v. Kurim Bux* 3 W.R. 20, support this view. I am unable to agree with the decision in *Dawu Bai, In the matter of* [1894] 18 Bom. 237 As in the case of a next friend or guardian of a minor, the question as to whether the legal representatives of a [deceased plaintiff can continue the suit in forma pauperis depends not on the property possessed by the legal representative of the next friend or guardian personally in their own right. They

are two different persons in the eye of law and it seems to me there is no justification for holding that the legal representative of the deceased plaintiff should not be allowed to continue the suit as a pauper.

5. The more important question in this case is as to whether having regard to the terms of the will of Venkatarama Mudali, Ammakannammal had power during her lifetime to create the trust and divest herself of the trust property. I have already set out the will in extenso. The position at the testator's death was that he had a widow and two daughters. The elder daughter Rathnakshi was herself a widow and therefore not in a position to leave any legitimate issue. Then there was the younger daughter Ponnammal whose husband had taken a second wife but who had the possibility of having legitimate issue. The testator intended that if Ponnammal had any issue, the property should be taken by her issue. There was no difficulty there as to his intention. Under the will he directed that his daughter Rathnakshi should take possession of the properties and should out of the rents and profits maintain herself and Ammakannammal and Ponnammal if she should join them and that the parties should go on maintaining themselves without disposing of any of the properties during their lifetime and the will gave the survivor liberty to leave the properties to such person as she liked. I do not think that an estate was conferred by this will upon Ammakannammal. She had only the right to be maintained out of the estate during her lifetime. Rathnakshi is clearly under the will the executrix by implication. The properties were to vest in her;" she was to take possession of the properties, she was to maintain her mother and sister and if her sister Ponnammal had no issue, she alone or jointly with her mother had the power to leave the properties to whomsoever she or they liked. Under these circumstances the question arises whether Ammakannammal had the power to create the trust in favour of the defendants as evidenced by the deed dated 11th March 1920. I do not think she had for the following reasons. First of all no estate was in my opinion given to her which she could transmit. She had only the right to be maintained out of the estate. Secondly the clause in the will,

but any arrangement made by my wife and Rathnakshi Ammal jointly, or by one of them on surviving the other, and providing for persons of their choice taking and enjoying the property shall take effect after the deaths of wife and my two daughters,

clearly contemplates that the persons exercising the power either jointly or singly could only exercise it so as to take effect after their death and that they could not during their lifetime divest themselves of the estate or make an absolute alienation of the estate.

6. The question as regards the exercise of such a power has been the subject of controversy. The vakil for the plaintiff has referred to *Thorley v. Thorley* 10 East 438; *Archibald v. Wright* [1840] 9 Sim. 161, and *Freeland v. Pearson* [1867] 3 Eq. 658;. Reference has also been made to *Parwell on Powers* p. 69, 3rd edition. These cases support the contention of the plaintiff. Reference has been made by

Mr. Sivaprakasa Mudaliar for the defendant to *Humble v. Bowman* 47 L.J. Ch. 62; where Hall, V.O., dissents from the view taken in *Freeland v. Pearson* [1867] 3 Eq. 658. If it is remembered that in the present case no estate was, in my opinion, given to Ammakannu Ammal and that there is, an express prohibition to the exercise of the power so as to take effect during the lifetime of the persons exercising it, *Humble v. Bowman* 47 L.J. Ch. 62 is clearly distinguishable. Hall V. C. in the above case, distinctly refers to there being no provision whereby the power was to be exercised only by will and not by gift inter vires I think the present case falls clearly within the ruling in *Thorley v. Thorley* 10 East 438; *Archibald v. Wright* [1840] 9 Sim. 161 and *Freeland v. Pearson* [1867] 3 Eq. 658.

7. It seems to me that it would defeat the entire object of the testator if it is held that either Rathnakshi or Amma kannu Ammal could during their lifetime transfer the property absolutely so as to vest it in third persons. In the view I take the deed of the 11th March 1920 was beyond the scope of power of Ammakannammal and that her will of the 18th March 1924 which is within the scope of her power under the will of her husband would take effect.

8. It follows that the plaintiff will be entitled- to a decree for possession of the property mentioned in the plaint, the deed of trust dated 11th March 1920 being invalid.

9. Reference has been made by both sides to the deed dated 25th October 1916 but I think it is unnecessary "to deal with it any further than to state that both sides have argued that that deed is not operative though for different reasons, the plaintiff's case being that it was fraudulently obtained from her and the defendants" case being that it was not acted upon. Neither party relies on the deed. As regards mesne profits, I do not think the plaintiff is entitled to any mesne profits. The deed was a deed executed by the plaintiff herself and so long as the. trustees acted under that trust until revoked there is no question of mesne profits.

10. As regards costs, I think this is a case in which the taxed costs of both the parties should come out of the estate, as it was Ammakannammal's action that brought about the whole trouble. The plaintiff and the defendants will be entitled to their taxed costs out of the estate. The defendants will be discharged on passing their accounts. The plaintiff will pay the institution fee due to Government.