
(1974) 12 MAD CK 0017
In the Madras High Court

Arumugham Chettiar and Others

APPELLANT

Vs

A. Vallinayagam Pillai

RESPONDENT

Date of Decision : 20-12-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 96

Succession Act, 1925 — Section 138

Transfer of Property Act, 1882 — Section 28

Citation : (1975) 88 LW 461 : (1975) 2 MLJ 46

Hon'ble Judges : P.R. Gokulakrishnan, J

Bench : Division Bench

Judgement

P.R. Gokulakrishnan, J.—Defendants 1 to 3 are the appellants. The suit was for partition and separate possession of the plaintiff's one third share in the plaint schedule properties and for mesne profits.

2. The case of the plaintiff was that one Thiruvengadathammal got the suit properties under a will dated 25th January, 1925, that Thiruvengadathammal executed a will on 13th June, 1931 giving a life-estate in the plaint schedule properties to her daughter-in-law Sivagnanathamal, wife of Manickavasagam Chettiar and the vested remainder to her three sons, viz., Surianarayanan Chettiar, Ammugham Chettiar and Kasiviswanathan. Arumugham Chettiar is the first defendant and Kasiviswanathan is the second defendant. Minor Chelli Manickathammal, daughter of the second defendant, has been impleaded as the third defendant. According to the will of Thiruvengadathammal, marked as Exhibit A-2 in the case, Sivagnanathamal had to enjoy the properties without any power of alienation till her lifetime and after her lifetime, her three sons should take the properties absolutely. The plaintiff obtained a decree against Surianarayanan Chettiar for Rs. 1,580.97 with future interest and costs in O. S. No. 157 of 1940, on the file of the Court of the District Munsif, Ambasamudram. The plaintiff filed E. P. No. 297 of 1949 and attached the undivided one-third share of the vested remainder belonging to the judgment-debtor Surianarayanan Chettiar and brought it for sale. The plaintiff-himself became the auction-

purchaser in the Court-auction held on 10th March, 1950 and the same was duly confirmed, and a sale certificate was issued to the plaintiff on 15th April, 1950. The plaintiff obtained symbolic delivery through Court under Order 21, Rule 96, CPC on 4th May, 1950. Ever since, the plaintiff has been in possession of the undivided one-third of the vested remainder of Surianarayanan Chettiar. Surianarayanan Chettiar died on 29th October, 1946. The life-estate holder Sivagnanathammal died on 6th March, 1966, and on her death the plaintiff is entitled to possession of one-third share in the properties. Since the first and second defendants, have taken possession of the whole of the plaint schedule properties, the plaintiff came forward with the suit.

3. Defendants I and 2 contended that Surianarayanan Chettiar and defendants 1 and 2 were not given vested remainder. Surianarayanan Chettiar pre-deceased Sivagnanathammal and so he was not entitled to one-third share. The contingent right was not liable to be attached, and the delivery proceedings were not valid and binding on the defendants. In O. S. No. 357 of 1940, Surianarayanan Chettiar's heirs were not impleaded. The defendants were not aware of the suit O.S. No. 357 of 1940 and delivery proceedings. Subsequent to the death of Sivagnanathammal, the defendants have become entitled to the suit properties and they have been in enjoyment thereof. The income from the suit lands will be 38 kottahs of paddy, and not 50 kottahs as claimed by the plaintiffs. The lands were leased out to Pandara Kudumban during the life-time of Sivagnanathammal, and the said Pandara Kudumban was cultivating the lands. The second defendant settled his properties on his daughter, the third defendant. The third defendant adopted the written statement of defendants 1 and 2. On the pleadings and on the evidence on record, the trial Court held that life interest was given to Sivagnanathammal under Exhibit A-2, that Surianarayanan Chettiar and defendants 1 and 2 were given the vested remainder under the will Exhibit A-2 and that therefore the plaintiff is entitled to partition and separate possession of a one-third share in the properties. Aggrieved by the decision of the trial Court, the defendants preferred an appeal to the Sub-Court, Tirunelveli. The lower appellate Court held that Surianarayanan Chettiar got vested remainder under Exhibit A-2 and not a contingent interest in the suit properties, and that Sivagnanathammal never took absolute estate under the will Exhibit A-2.

4. Aggrieved by the decision of the Courts below, the defendants have preferred this second appeal. Thiru T.R. Mani, the learned Counsel appearing for the appellants, submitted that an absolute right was granted to Sivagnanathammal and as such the subsequent bequest to Sivagnanathammal's sons is void under the rule of repugnancy. The learned Counsel also contended that a gift over has been given to the children of Sivagnanathammal and therefore until succession opened the share of Surinarayanan Chettiar cannot be determined and that since Surinarayanan Chettiar predeceased Sivagnanathammal the plaintiff cannot have any right in the suit properties.

5. In support of his contention, Thiru T.R. Mani relied upon a passage in "Mulla

on Transfer of Property Act", sixth edition page 156, where in paragraph 4 it is stated:

A conditional limitation is a condition of defeasance, which terminates the interest of one person and invests another person with it. But if an estate is given to a named donee in terms which confer an absolute estate, and then a further interest is given merely after or on termination of that donee's interest and not in defeasance of it, the further interest will be void for repugnancy.

and submitted that as per Exhibit A-2 Sivagnanathammal was given absolute right and any subsequent terms or condition in Exhibit A-2 can be ignored by Sivagnanathammal. In this connection he also sought to his aid section II of the Transfer of Property Act, which runs as follows:

Where, on a transfer of property, an interest therein is created absolutely in favour of any person, but the terms of the transfer direct that such interest shall be applied or enjoyed by him in a particular manner, he shall be entitled to receive and dispose of such interest as if there were no such direction,

and also Section 138 of the Indian Succession Act, which runs as follows:

Where a fund is bequeathed absolutely to or for the benefit of any person, but the will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the will had contained no such direction.

On the strength of the above, T.R. Mani wanted this Court to infer that absolute right has been conferred upon Sivagnanathammal in respect of the suit properties. According to him, as per the recitals in paragraph 6 of Exhibit A-2 the plaintiff properties were absolutely given to Sivagnanathammal and any subsequent directions in the will as if the sons of Sivagnanathammal can enjoy the property, can be ignored as repugnant under the doctrine of repugnancy.

6. The learned Counsel also cited, in support of his submission, the decision in Govindaraja Pillai and Others Vs. Mangalam Pillai and Another, wherein it is observed:

The more difficult question is whether the subsequent clause should be deemed to be a mere repugnant condition imposed on the estate so created or makes the absolute estate primarily granted subject to defeasance in the event of the contemplated contingency. The distinction between a repugnant provision and a defeasance provision is sometimes subtle, but the general principle of law seems to be that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clause would be repugnant to the absolute grant and therefore void...

I have been taken through Exhibit A-2 the will dated 12th June, 1931 created by Thiruvengadathammal. It is clear from paragraph 6 of the will that the suit

properties have been absolutely given to the sons of Sivagnanathammal with a right to Sivagnanathammal to enjoy for life only the income from the properties without in any way encumbering the same. Thus, it is clear that the argument advanced by T.R. Mani as though absolute right has been given to Sivagnanathammal and that the subsequent direction in the will is repugnant, cannot at all be sustained.

7. T.R. Mani relies upon Section 28 of the Transfer of Property Act, which is analogous to Section 131 of the Indian Succession Act and also cited *Sri Subramaniaswami Temple v. Ramaswamai Pillai* (1950) 1 M.L.J. 300 : (1950) 63 L.W. 193 : AIR 1950 P.C. 32, and contended that the will Exhibit A-2 conferred absolute right in respect of the suit properties in favour of Sivagnanathammal. In view of my finding that Exhibit A-2 never created an absolute right in favour of Sivagnanathammal in respect of the suit properties, I do not think it is necessary to consider the above provisions of law and the case-law.

8. In *Poomalai Ammal (died) and Others Vs. Subbammal and Others*, , cited by Thiru T.R. Mani, the learned Counsel for the appellants, it has been observed:

The intention of the settlor has to be ascertained by a reading of the document as a whole and if there is any ambiguity one can look to the circumstances under which the document came to be executed and also, if necessary , to the subsequent conduct of the parties which might throw some light on the intention of the settlor.

In the same very decision, it has also been held:

The absence of words conferring powers of alienation in the document does not make any difference as there are words of sufficient amplitude to confer an absolute estate on the settlee.

Thus, in the light of my above conclusion as regards the effect of the recitals in Exhibit A-2, the decision in *Poomalai Ammal (died) and Others Vs. Subbammal and Others*, , supports the case of the plaintiff, rather than of the defendants.

9. According to T.R. Mani, as per the recitals in Exhibit A-2 the gift is to a class of persons, that is, to the sons of Sivagnanathammal and also to the grandsons of Sivagnanathammal through her sons; and he wanted the Court to infer the above from a reading of paragraphs 2 and 6 of Exhibit A-2 with special reference to the words in paragraph 6.

10. The decision cited by the learned Counsel reported in AIR 1949 64 (Federal Court) which is a decision of the Federal Court of India, clearly states:

Now all the authorities agree, that in construing a will the cardinal maxim to be observed is that the Court should, in all cases, endeavour to ascertain the real intention of the testator. The intention means the intention which the will itself by express words or by implication declares, and the primary duty of the Court is to ascertain from the language of the entire document what the intentions of the

testator are.

It is clear from the will Exhibit A-2 that the intention of the testator is not to create absolute right in respect of the suit properties in favour of Sivagnanathammal, but to create a vested right in favour of Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan.

11. Thiru T.R. Mani, on the basis of Section 60 (m), Civil Procedure Code, contended that the attachment made by the plaintiff was ineffective since no attachment could be made on the expectancy of succession by survivorship or other merely contingent or possible right or interest. In this connection he relied on AIR 1939 6 (Privy Council) As I have already observed, there is no question of expectancy of succession by survivorship or other merely contingent or possible right or interest in relation to Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan. On the other hand, a vested right was created absolutely on Surianarayana Chettiar, Arumugham Chettiar and Kasiviswanathan under Exhibit A-2, itself.

11-A. Thiru T. R. Srinivasa Ayyar, learned Counsel appearing for the respondent, rightly contended that from a reading of Exhibit A-2 the intention of the testator is clear and there is absolutely no ambiguity in absolute right having been created in favour of Surianarayanan Chettiar, Arumugham Chettiar and Kasiviswanathan and a life-interest in favour of Sivagnanathammal. The terms of paragraph 6 of the will Exhibit A-2 are absolutely unambiguous, and there is no basis in the contention put forth by the learned Counsel for the appellants. Thiru T. R. Srinivasa Ayyar would distinguish the words "occurring in paragraph 6 of Exhibit A-2 and the Words occurring in paragraph 8 of Exhibit A-2, and submitted that the above words in paragraph 6 do not convey the meaning of conferring any right absolutely, while those used in paragraph 8, above extracted, convey the meaning of conferring absolute right. I am in complete agreement with the interpretation given by Thiru T. R. Srinivasa Ayyar.

12. Thiru T. R. Srinivasa Ayyar also brought to my notice that nobody has got the sale set aside or questioned the sale from the year 1949 and as such it is too late for the appellants to agitate the matter which has become final already. Although this cannot be a legal argument, the long silence for over a decade only reveals the lack of bona fides on the part of the appellants.

13. On the above discussion, I find that no ground is made out for interference in this second appeal, with the concurrent findings of the Courts below.

14. In these circumstances, the second appeal is dismissed. No costs. No leave.