
(1963) 07 MAD CK 0062
In the Madras High Court
Case No : Second Appeal No. 1449 of 1960

C.D. Sankara Narayanan

APPELLANT

Vs

The Egmore Benefit Society (Third Branch) Ltd. and Others

RESPONDENT

Date of Decision : 29-07-1963

Acts Referred:

Trusts Act, 1882 — Section 10, 3

Citation : AIR 1964 Mad 256 : (1963) 76 LW 785

Hon'ble Judges : Kunhamed Kutti, J

Bench : Single Bench

Advocate : T.R. Arunachalam and N.K. Pattabhiraman, for the Appellant; U. Somasundaram and P. Kothandaraman, for the Respondent

Final Decision : Dismissed

Judgement

Kunhamed Kutti, J.—The plaintiff is the appellant in this second appeal. In O.S. No. 477 of 1949 on the file of the City Civil Court, Madras, he sued for a declaration of his title to, and partition of, his one-fifth share in the suit properties. That suit was decreed declaring his title to one-fifth share and directing partition and allotment of the said one-fifth share in final decree proceedings on his producing the probate of the Will executed by his grandfather, Rajagopala Mudaliar. In appeal, the first Additional Judge set aside the said decree and dismissed the suit.

2. To appreciate the controversy between the parties, it is necessary to state the brief facts. The suit property originally belonged to Rajagopala Mudaliar. He executed a sale deed Ex. B-1 in favour of his wife Ammakannu Ammal, the tenth defendant, on 6-4-1910. Thereafter, a certificate was issued by the Tahsildar of Madras to the tenth defendant as owner of the property and she is said to have mortgaged the property to the Mylapore Hindu Permanent Fund with rental agreements in 1914 and 1925 as per Ex. B-3 to B-6. While so, Rajagopala Mudaliar executed a Will as per Ex. A-1 on 30-11-1929, by which he bequeathed inter alia the suit property to the male issues of his sons Devaraja Mudaliar and

Govindaraja Mudaliar (defendants 3 and 4) in equal shares with rights of sale, subject to a life interest in favour of his wife, the tenth defendant, who was appointed executrix under the will. In 1932, the tenth defendant executed a mortgage as executrix in respect of a property, devised under the will and in 1933, to a notice sent by defendants 3 and 4, she caused a reply to be sent to their counsel as per Ex. A-5 stating that except a house and ground in Kancheepuram, all other properties left by Rajagopala Mudaliar were his self-acquisitions and have been disposed of by him under his Will appointing her as the sole executrix. In this notice, it was further stated that their claim to suit property No. 7 Malleswara Koil St. Mylapore, was untenable and fanciful. Subsequent to this reply, however, tenth defendant executed a settlement deed in favour of Devaraja Mudaliar and Govindaraja Mudaliar and their sons as per Ex. B-9. This was on 22-1-1935. On 7-10-1935, defendants 3 and 4 partitioned the property and in January 1936, third defendant and others executed a mortgage in favour of one Kalyani Ammal and her husband as per Ex. B-II. On even date, the fourth defendant also executed a mortgage deed in favour of Kalyani Ammal and her husband. But subsequently he executed two other mortgages as per Ex. B-16 and B-17 in favour of the Egmore Benefit Society. In 1941, a suit appears to have been filed on the mortgage. Pursuant to the decree in this suit, property was sold by E. P. 1459 of 1948 and was purchased by the first defendant on 14-7-1949 as per the sale certificate Ex. B-14. Meanwhile, the fourth defendant had executed a sale deed in favour of the second defendant as per Ex. B-19 dated 13-3-1939. But we are now concerned only with the question whether Rajagopala Mudaliar having made over the suit property in favour of his wife as per the sale deed, Ex. B-I, was competent to include the said property in his will and whether the tenth defendant having accepted the Will and entered upon management as executrix, was entitled to ignore the disposition as per the Will and assert her title as the vendee. The trial court was inclined to view Ex. B-I as a nominal transaction. According to the trial court though the sale deed in question had stood in the name of the tenth defendant, Rajagopala Mudaliar did not make any distinction between this property and his other properties and had freely made use of the suit property for the purpose of the family, in its opinion right from Ex. B-I down to the mortgage deed Ex. B-5, the property had been dealt with by the parties for the purpose and benefit of Rajagopala Mudaliar. The learned appellate Judge, however, was not inclined to share this view. In his judgment, he has adverted to the transactions entered into by the tenth defendant in her own right as vendee of the property and in paragraph 19, he observes:

"Right from the date of B-I, whenever a registered document was executed in respect of the suit property Ammakannu Ammal was a party to the document. The burden of proving that Ex. B-I is a Denarni transaction is on the plaintiff and the plaintiff has not discharged it. The fact of the husband joining the wife in a few mortgages should not lead to the inference that the wife had no right to the property. It may as well be that by way of abundant caution against possible

future claims creditors might have insisted the husband and the children to join in those documents. Such a theory is not improbable in view of the fact that Ex. B-31 shows that one of the creditors wanted the husband and the adult sons of Ammakannu Ammal to state that they had no claims on the property, which they did. In the absence of any evidence, it is wrong to assume that Rajagopala Mudaliar had any motive to keep away the property from his brother or for transferring it in the name of his wife. If the recitals in Ex. B-31 at least to the extent to which it is proved by D. W. 2 is taken into consideration, it shows that Rajagopala Mudaliar informed the Mylapore Permanent Fund in 1925 that the property did not belong to him but that it belonged to his wife."

He followed up these observations with the finding that in the absence of evidence, the trial court was not justified in coming to the conclusion that Ammakannu Ammal (tenth defendant) executed Ex. B-9 to satisfy her sons. According to him the long course of conduct of tenth defendant dealing with the property on the basis that she had right to it, only showed that the settlement deed Ex. B-9 was not a surprise move made by her; so that he disagreed with the trial court and held that Rajgopala Mudaliar could no longer be deemed to be the owner of the property. He also negated the claim of the plaintiff under the will holding that Rajagopala Mudaliar had no right to deal with the property. It seems to me that the view taken by the learned Additional Judge was justified having regard to the course of conduct of Rajagopala Mudaliar and tenth defendant.

3. But the learned counsel for the appellant argued that since tenth defendant had entered upon management as executrix under the Will, she was in the position of a trustee and Section 10 of the Trust Act precluded her from setting up a title to the trust property adverse to the interests of the beneficiaries, the plaintiff being a beneficiary. This contention is not tenable for the obvious reason that where a property not belonging to a testator is included in a Will, the executor or the executrix as the case may be, cannot be deemed to have been constituted a trustee as regards his or her obligations towards the beneficiary in respect of that property, as, in law, nothing shall authorise a testator to bequeath property which he could not have alienated inter vivos.

4. Venkanna v. Achanna, AIR 1949 PC 61 relied on for the appellant in this connection is distinguishable on facts. It was a case from Fiji and related to a transfer inter vivos. The question for determination was whether the transfer of a piece of land in favour of the appellant was made by way of an outright sale, so that ha was the beneficial owner or whether it was made by way of security due upon terms which in effect made the appellant a trustee for respondent. Their Lordships held that having accepted the trust, he cannot be allowed to allege an absolute title regardless of the trust and such an allegation or assertion might amount to fraud.

5. The case in Pazhaniandy Tarakan Vs. Murukappa Tarakan and Others, had laid down the same principle that when a plaintiff accepted a trust and acted upon it,

he is estopped from disputing the trust and would be guilty of breach of trust in suing in his own capacity as being solely entitled to the property. Neither of these cases is authority for the position contended for by the appellant, seeing that the property belonged to the executrix.

6. In *N. Namberumal Chetti Vs. Veeraperumal Pillai and Others*, a Bench of this court held that an executor who entered upon his duties as such is estopped from pleading immunity from his obligations as executor on the ground that no probate has been obtained by him. Here again, the question is when the property has been found not to belong to a testator, a probate at all is necessary though the property is within the city. The property in dispute was one in respect of which Rajagopala Mudaliar was incompetent to make a disposition under his will. Under the sale deed executed by him, it belonged to the tenth defendant and the learned appellate Judge has found that Ex. B-I is not a nominal or benami transaction. The conduct of Rajagopala Mudaliar himself confirmed the title which he passed to tenth defendant and the fact that he chose to include the property in his Will by itself could not take away or extinguish her title; nor in the circumstances can the tenth defendant's entering on her duties as executrix disentitle her to assert her own right. Her assertion in the reply notice Ex. A-5 does not satisfy the requirements of an estoppel. Subsequent to Ex. A-5 she entered into a settlement deed which shows that despite the Will she dealt with the property as her own.

7. Taking all these circumstances into consideration, I am satisfied that the view taken by the appellate court is the correct view and there is no reason to Interfere with its decision.

8. The appeal has, therefore, to fail and the same is dismissed with costs to respondents. One set No leave.