
(1948) 03 MAD CK 0004
In the Madras High Court

D. Gnanambal and Another	APPELLANT
Vs	
Sreemathi Meenambal Sundaram and Others	RESPONDENT

Date of Decision : 18-03-1948

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 45 Rule 1

Citation : (1948) 61 LW 628 : (1948) 2 MLJ 202

Hon'ble Judges : Govindarajachari, J

Bench : Division Bench

Judgement

Govindarajachari, J.—This is an appeal against the judgment of Chandrasekhara Aiyar, J., in an originating summons converted into a suit.

2. One Dr. Doraiswami Pillai died on 26th January, 1930, after having executed a will dated 9th September, 1929. Probate was issued to

Nagammal, the widow of the testator and the sole executrix under his will. It is unnecessary to set out the terms of the will in any detail. By

paragraph 7 of the will the testator bequeathed the house described as ""Meena Lodge"", No. 3, Audiappa Mudali Street, Vepery, to his daughter

Meenambal Animal for a one-fourth share, the remaining three-fourths share being bequeathed to his sons Ramalingam, Gopa-laswami,

Arunachalam and Rathnam and another daughter Gnanambal Animal for their absolute use and benefit. Meenambal is the plaintiff in the suit.

Nagammal is the first defendant while Gnanambal, Rathnam, Ramalingam and Gopalaswami are respectively the 2nd, 3rd, 4th and 5th defendants.

Arunachalam survived the testator but subsequently died and defendants 6 to 11 are his legal representatives. The first defendant supported the originating summons while the third defendant opposed it.

3. The clause in the will bequeathing the house to Meenambal and to the testator's other children is declaredly subject to the limitations specifically

mentioned later in the will. These limitations were occasioned by two considerations. At the time of the execution of the will the daughter

Meenambal was unmarried and provision had, therefore, to be made for her education, maintenance, etc. Provision had also to be made for the

maintenance of the testator's widow, Nagammal. In a desire to make this two-fold provision the testator gave directions in the subsequent

sentences in paragraph 7 of the will as to how the property was to be managed and enjoyed. Without setting out these provisions with any

particularity it may be stated that there were four contingencies which the testator thought of. The first contemplated the period during which

Meenambal may remain unmarried, Nagammal being alive. Another contingency was that Nagammal may die and Meenambal may still remain

unmarried. A third possible situation was that Meenambal may get married during the lifetime of Nagammal while the fourth contingency would

arise after the death of Nagammal and the marriage of Meenambal.

4. It is common ground that Meenambal was married before the filing of the suit. It is also admitted on both sides that the state of things which

existed at the time when the originating summons was filed, that is to say, the period after the marriage of Meenambal and during the lifetime of

Nagammal, corresponds to the third of the contingencies mentioned above. The concerned clause of the will provided that after Meenambal's

marriage the house should be let by Nagammal and that the rents should be divided by giving Meenambal one-fourth share and distributing the

remaining three-fourth share among the five other children and the widow. After giving these several directions for the management and enjoyment

of "Meena Lodge" during the four stages or periods already enumerated the testator provided in a separate sub-paragraph of clause 7 for the sale

of the house and distribution of the sale proceeds. This sub-paragraph may be set out in full:

Again if the joint ownership and enjoyment become at any time impossible I direct my executor or executors during the said time shall cause the

said "Meena Lodge" to be sold away for the highest price and the proceeds thereof shall be similarly distributed among my said children and that

they shall thereafter become the absolute owners of their several shares above mentioned.

5. The discussion before us principally centred round the construction of this provision. We may now state how the construction of this clause becomes material for the disposal of the appeal.

6. The contention of Mr. Viswanatha Sastri the learned advocate for defendants 2 and 3 who have filed this appeal is that in an originating

summons the learned Judge had no power to direct, as he has done, a sale of the house. It is argued that the learned Judge should have first

decided whether the executrix Nagammal has power to sell under the clause which has been quoted and that it is only if the executrix has such

power that the Court may order a sale. In support of this argument Mr. Viswanatha Sastri relied on a decision in *In re Robinson Pickard v.*

Wheater (1885) 31 Ch. D. 247 in which it was held by Pearson J. that under Rule 3(f) of Order 55 of the Rules of the Supreme Court

corresponding to Order 45, Rule 1(f) of the Original Side Rules of this Court the Court can approve of a sale only when the executors or trustees

of a will or deed to which the originating summons relates could have made one themselves. Order 45, Rule 1 of the O.S. Rules of this Court runs

as follows:

The executors or administrators of a deceased person, or any of them, and the trustees under any deed or instrument or any of them, and any

person claiming to be interested in the relief sought as creditor, devisee, legatee heir, or legal representative or a cestui que trust under the trusts of

any deed or instrument, or as claiming by assignment or otherwise, under any such creditor or other person as aforesaid, may take out, as of

course, an originating summons returnable before the Judge sitting in Chambers for such relief of the nature or kind following, as may by the

summons be specified and the circumstances of the case may require, (that is to say), the determination without an administration of the estate or

trust, of any of the following questions or matters:

(e) Directing the executors, administrators, or trustees to do or abstain from doing, any particular act in their character as such executors,

administrators or trustees;

(f) The approval of any sale, purchase, compromise or other transaction and,

(g) the determination of any question arising in the administration of the estate or trust.

If the executrix has no power to sell it must be taken under the ruling in *In re Robinson Pickard v. Wheeler* (1885) 31 Ch. D. 247 that it is not competent to the learned Judge to make the order now under appeal.

7. The real question, therefore, is whether the will provided for a sale of the house by the executrix in the circumstances existing on the date of the

suit. The learned Judge has not considered this "aspect of the case and has not recorded his opinion. But we have had a full discussion as to the

true interpretation of the relevant clause and notwithstanding some obscurity in its language we have come to the conclusion that there is power in

the executrix to sell and that it is now exercisable. It will be noticed that after providing for several contingencies in the first sub-paragraph of

paragraph 7 of the will the testator goes on in the 2nd sub-paragraph to provide that if the joint ownership and enjoyment becomes at any time

impossible his executor or executors should cause the house to be sold. There is no reason why full effect should not be given to the words "'at any

time'" and why this clause should be read only as applying to the last of the contingencies contemplated by the will, namely, the marriage of

Meenambal and the death of Nagammal. The very fact that the testator directed his executrix to sell the house is some indication that the power is

exercisable during her lifetime and is therefore not restricted to the fourth stage which, as a matter of fact, arises only after the death of the

executrix. Mr. Viswanatha Sastri laid some emphasis upon the direction in the clause that the proceeds of the sale shall be distributed among the

children of the testator and argued that since the widow of the testator is not to participate in the distribution there is an indication that the sale

should take place at a time when the widow is no longer alive. This argument is answered by the provision at the very commencement of the will

whereby the devisees of the house are the testator's children alone to the exclusion of the widow. It is quite probable therefore that if the house

came to be sold the testator intended that the sale proceeds should be distributed among the devisees alone and that his widow should have no

share in them. The enjoyment of a portion of the rent of the house in certain contingencies by his widow is no doubt provided for but that

enjoyment can be had only when the house is not sold. Moreover the right of enjoyment reserved to the widow in those contingencies cannot be terminated without her concurrence because the direction to sell is only to the executrix and it is only if the executrix is willing to sell the property and thereby extinguish her right of enjoyment, that the sale can take place. We have, therefore, no doubt that the clause empowering the executrix to sell the property is a clause which cuts across the preceding sentences and the several contingencies contemplated therein. If the executrix has power to sell, the technical objection as to the maintainability of the originating summons disappears.

8. It is not now disputed that owing to the many and frequent quarrels between the executrix and the legatees which the learned Judge has described, joint ownership and enjoyment of the house has become impossible.

9. As has been pointed out by Mr. Jagannatha Das learned advocate for the executrix, Meenambal as a devisee under the Will can, under Clause

(e) of Rule 1 of Order XLV of the O.S. Rules, ask for a direction to the executrix to do a particular act, namely, to sell the property. That in fact is

what she asked for. It is not denied that the executrix can seek the approval of the Court to any contemplated sale which may be either by private

treaty or by public auction so that if the executrix could have filed an application under Order XLV, Rule 1(f) there can be no objection to an

application being made by a legatee for a direction that the executrix should sell the property.

10. The originating summons presumed a power in the executrix to sell the property in the circumstances existing at the time of its institution. This

power no doubt is denied by defendants 2 and 3 but even if there is any question as to whether the executrix has the requisite power or not the

determination of this question will legitimately fall under Clause (g) of Rule 1 of Order XLV of the O.S. Rules.

11. Whichever way we may look at it, therefore, there is in our opinion no objection to the first prayer in the originating summons. We are now

confining ourselves merely to the direction which the learned Judge has given in regard to the sale of the property. It is unnecessary for us to say

whether and how far the other prayers in the originating summons fall within the scope of an application made under Order XLV, Rule 1.

12. It has, further, been pointed out by Mr. Jagannatha Das that the proceeding is maintainable also u/s 302 of the Indian Succession Act which provides that where Probate or Letters of Administration in respect of any estate has or have been granted under the Act the High Court may, on application made to it, give to the executor or administrator any general or special directions in regard to the estate or in regard to the administration thereof. This provision too would prima facie seem to be applicable, but it is unnecessary to rest our judgment on Section 302 of the Indian Succession Act as in our opinion the first prayer in the originating summons falls within the proper scope of an application under Order XLV, Rule 1 of the O.S. Rules.

13. The result is that the appeal fails and is dismissed with costs.