

(2010) 11 MAD CK 0074

In the Madras High Court

Case No : S.A. (md) No. 747 of 2010

G. Pavunambal, G. Ramamoorthy, G. Ashok Kumar and G. Nagarajan

APPELLANT

Vs

Sharmila Devi and Dhanalakshmi

RESPONDENT

Date of Decision : 24-11-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Hindu Succession Act, 1956 — Section 8
Succession Act, 1925 — Section 109, 112

Citation : (2011) 4 MLJ 92

Hon'ble Judges : A. Selvam, J

Bench : Single Bench

Advocate : V. Chandrasekar, for the Appellant; Veera Kathiravan, for the Respondent

Final Decision : Allowed

Judgement

A. Selvam, J.—Challenge in this second appeal is to the judgment and decree dated 26.03.2010 passed in A.S. No. 29 of 2009 by the

Principal Sub-Court, Thanjavur, wherein the judgment and decree passed in O.S. No. 147 of 2007 by the District Munsif Court, Thanjavur are reversed.

2. The Respondents herein as Plaintiffs have instituted O.S. No. 147 of 2007 on the file of the trial Court for the relief of perpetual injunction, wherein, the present Appellants have been shown as Defendants.

3. The nub of the plaint is that the suit property is situated in T.S. Nos. 1516/1 and 1516/2A Karunthatangudi, Thanjavur Town and District. The

first Plaintiff is the mother of the second Plaintiff. Both of them have been enjoying the suit property as its rightful owners. The suit property is

originally belonged to one Angappa Chettiyar and he has had two wives namely Mariammal and Sengammal. During the lifetime of first wife, the said Angappa Chettiyar has married the said Sengammal as his second wife. On 25.05.1968, he voluntarily executed a will, wherein, the suit property has been shown as A-1 schedule. In the year 1979, he passed away. The said will has been executed in favour of his son Shanmugavel and the said Shanmugavel has passed away leaving behind him the present Plaintiffs as his legal heirs. The Plaintiffs have been enjoying the suit property after the demise of Shanmugavel. The Defendants are not having any semblance of right, title and interest over the same and since the Defendants have been making arrangements to grab the suit property from the Plaintiffs by way of deterring their enjoyment, the present suit has been instituted for the relief sought for in the plaint.

4. In the written statement filed on the side of the 4th Defendant and adopted by the Defendants 1 to 3, it is averred that the relationship mentioned in the plaint is correct. It is false to say that the Plaintiffs are alone absolute owners of the suit property. The first Defendant is one of the co-owners of the suit property and there is no merit in the suit and the same deserves to be dismissed.

5. On the basis of the divergent pleadings raised on either side, the trial Court has framed necessary issues and after analysing both the oral and documentary evidence, has dismissed the suit. Against the judgment and decree passed by the trial Court, the Plaintiffs as Appellants have preferred A.S. No. 29 of 2009 on the file of the first appellate Court.

6. The first appellate court, after hearing both sides and upon reappraising the evidence available on record, has allowed the appeal and thereby set aside the judgment and decree passed by the trial court and ultimately decreed the suit as prayed for. Against the judgment and decree passed by the first appellate court, the present second appeal has been preferred at the instance of the Defendants as Appellants.

7. As agreed by the learned Counsels appearing for both sides, the present second appeal is disposed of on merits at the stage of admission.

8. On the side of the Appellants/Defendants, the following substantial questions of law have been raised for consideration:

1. Whether the judgment and decree of the 1st appellate court could be

sustained in view of the Section 112 of the Indian Succession Act, which makes the bequest made by Angappa Chettiyar is void?

2. Whether the finding of the 1st Appellate court that the Plaintiffs are the absolute owners of the property as per the will dated 25.05.1968 when

Angappa Chettiyar bequeaths his property to his son for life and thereafter to his male heirs?

3. Whether the 1st appellate court is right coming into the conclusion that the Plaintiffs are the absolute owners of the property when Shanmugavelu

was not in existence at the testator's death with out leaving any male heirs?

4. When the bequest is void u/s 112 of the Indian Succession Act the decree for injunction could be sustained against the co-owner?

5. Whether the judgment and decree of the 1st appellate court could be

sustained when a bequest in favour of a person who is not in existence at the time of testator's death is void as per the cardinal rule governing

Hindu wills as embodied in Section 112 of the Indian Succession Act?

9. Before considering the divergent submissions made by either counsel, it has become shunless to perorate the following admitted facts.

10. The suit property is originally belonged to one Angappa Chettiyar and he has had two wives namely Mariammal and Sengammal. The first wife

has begotten a son by name Shanmugavel and a daughter by name Seethalakshmi. The second wife viz., Sengammal has given birth to a daughter

by name Pavunambal who has been added as the first Defendant. The Defendants 2 to 4 are the children of the said Pavunambal and her husband

Gurunathan. It is also equally an admitted fact that the said Angappa Chettiyar has executed the will dated 25.5.1968 which has been marked as

Ex.A.27.

11. The consistent case of the Plaintiffs is that on 25.05.1968, the original owner of the suit property has executed Ex.A.27 in favour of his son

born through the first wife viz., Shanmugavel and the first Plaintiff is his wife and the second Plaintiff is his daughter and the said Shanmugavel has

passed away on 05.06.1968 and the executant of Ex.A.27 has passed away in the year 1979. Under the said circumstances, the Plaintiffs are in

possession and enjoyment of the suit property as its rightful owners and the Defendants are not having any manner of right, title and interest over

the suit property and since the Defendants have been making arrangements to disturb the peaceful possession and enjoyment of the Plaintiffs, the present suit has been instituted for the relief sought for in the plaint.

12. It has been sparingly contended on the side of the Defendants that the will dated 25.05.1968 has not come into effect and the same is nothing

but a void document and therefore the first Defendant is also one of the co-owners of the suit property and the present suit has been instituted for

the relief of permanent injunction. Since the first Defendant is one of the co-owners of the suit property, the present suit is not legally maintainable

and altogether the present suit deserves to be dismissed.

13. The trial court has dismissed the suit. But the first appellate has decreed the suit as prayed for.

14. The learned Counsel appearing for the Appellants/Defendants has strenuously contended that the present case has been instituted only on the

basis of Ex.A.27, the will dated 25.05.1968, wherein, no absolute interest has been given in favour of the son of the executant viz., Shanmugavel

and the said Shanmugavel has passed away on 05.06.1968 and further in Ex.A.27, only a life estate has been given to him and the executant of

Ex.A.27 has passed away in the year 1979 and since the said Shanmugavel has passed away during the lifetime of the testator of Ex.A.27 and

since the said Shanmugavel is not a legatee, Ex.A.27 is nothing but a void document and no absolute title and interest has been created in favour of

the Plaintiffs and since Ex.A.27 is nothing but a void document, the first Defendant being the daughter of the original owner of the suit property has

also become one of the co-owners and the present suit has been instituted for the relief of permanent injunction and since the first Defendant has

become one of the co-owners of the suit property, the present suit is not legally maintainable and the trial court has rightly dismissed the suit. But

the first appellate court has erroneously decreed the same and therefore the judgment and decree passed by the first appellate court are liable to be

set aside.

15. In order to remonstrate the argument advanced by the learned Counsel appearing for the Appellants/Defendants, the learned Counsel

appearing for the Respondents/Plaintiffs has also equally contended that as per Section 109 of the Indian Succession Act, 1925, Ex.A.27 has not

become lapsed and the same has come into effect even after the demise of Shanmugavel on 05.06.1968 and the trial court has erroneously

dismissed the suit. But the first appellate court has rightly decreed the same and therefore the judgment and decree passed by the first appellate

court are not liable to be interfered with.

16. In fact, on the side of the Appellants/Defendants, a vital substantial question of law has been raised to the effect as to ""Whether the judgment

and decree passed by the first appellate court are perfectly correct in view of Section 112 of the Indian Succession Act, 1925?

17. The learned Counsel appearing for the Respondents/Plaintiffs has taken shelter under the provision of Section 109 of the said Act. Under the

said circumstances, the only legal point which has to be decided in the present second appeal is as to ""Whether Ex.A.27 has become void as per

the provision of Section 112 of the said Act or it has come into effect as per Section 109 of the said Act?

18. For considering the above legal aspect, Sections 109 and 112 of the Indian Succession Act, 1925 have to be meticulously looked into.

Section 109 of the Indian Succession Act, 1925 reads as follows:

When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime:Where a bequest has been made to any

child or other lineal descendant of the testator, and the legatee dies in the lifetime of the testator but any lineal descendant of his survives the

testator, the bequest shall not lapse, but shall take effect as if the death of the legatee had happened immediately after the death of the testator,

unless a contrary intention appears by the Will.

Section 112 of the said Act reads as follows:

Bequest to person by particular description, who is not in existence at testator's death: Where a bequest is made to a person by a particular

description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

19. For better appreciation and also for easy understanding, the provisions of both the Sections should be read together. Section 109 deals with in

respect of a bequest which has been made to any child or lineal descendent of testator and if the legatee mentioned therein dies during the life time

of testator and if any lineal descendent of the legatee survives the testator, the

bequest so created does not lapse.

20. As per the provision of Section 112 of the said Act, if any bequest is made to a particular person with a particular description and he dies

during the lifetime of testator, the entire bequest has become void.

21. In Ex.A.27, it has been clearly mentioned that the property which has been described as schedule A-1 should be enjoyed by the son of the

testator viz., Shanmugavel during his lifetime and thereafter, it should go to the male heirs of the said Shanmugavel. Admittedly the said

Shanmugavel has passed away on 05.06.1968 and further in Ex.A.27, the said Shanmugavel has not been shown as a legatee and he is nothing but

a person with a particular description. Since in Ex.A.27, the said Shanmugavel has not been shown as a legatee and he has been shown with a

particular description and he died on 05.06.1968 prior to the demise of the testator, viz., Angappa Chettiyar, it is easily discernible that as per

Section 112 of the Indian Succession Act, 1925, Ex.A.27 has become void and further the conditions mentioned in Section 109 of the said Act

are not in existence in the present case so as to attract the same. Since the conditions as well as the circumstances mentioned in Section 109 of the

said Act are not in existence in the present case, the Respondents/Plaintiffs cannot take shelter under the said Section.

22. The learned Counsel appearing for the Respondents/Plaintiffs has also taken much pain so as to accite the following decision:

23. In Bant Singh and Another Vs. Niranjan Singh (D) by Lrs. and Another, , the Honourable Apex Court has held that an entry made in the

revenue records may not be decisive as regards the status of the parties but a presumption in regard to possession can be raised on the basis thereof.

24. It is an everlasting principle of law that revenue records are not conclusive documents so as to prove title of a particular property. To put it in

short, that mutation records will not confer title. In the instant case, the aforesaid legal aspect has not come into play and therefore the decision

referred to supra is totally unwarranted to the facts and circumstances of the present case.

25. The learned Counsel appearing for the Respondents/Plaintiffs has also contended that in the residual clause of Ex.A.27, it has been clearly

mentioned that if any property is left out without mentioning in Ex.A.27, the

testator's son viz., Shanmugavel is entitled to get it absolutely and even though the said Shanmugavel has passed away prior to the demise of the testator, the Plaintiffs 1 & 2 are entitled to get the suit property as absolute owners and therefore the judgment and decree passed by the first appellate court are perfectly correct and in support of his contention, he has drawn the attention of the court to the decision reported in Uma Devi Nambiar and Others Vs. T.C. Sidhan (Dead), , wherein, the Honourable Apex Court has held that if conflicting clauses are found in a particular will, latter clause will prevail.

26. In the instant case, in Ex.A.27, there is no conflicting recital. It is true that at the end of Ex.A.27, it has been clearly mentioned that if any property is left out without mentioning in Ex.A.27, the said Shanmugavel has to get it as absolute owner and that itself will not confer title to the Plaintiffs since Ex.A.27 has become void after the demise of Shanmugavel and also in view of the provisions of Section 112 of the Indian Succession Act, 1925.

27. The present suit has been instituted for the relief of perpetual injunction. It is an admitted fact that the first Defendant is a daughter born through the second wife of Angappa Chettiyar. It has already been pointed out in many places that Ex.A.27 has become void in respect of the suit property. Since it has become void, the suit property should revert to the testator of Ex.A.27 viz., Angappa Chettiyar and he passed away in the year 1979 and prior to his demise his only son has passed away in the year 1968. As per Section 8 of the Hindu Succession Act, 1956, the Plaintiffs 1 & 2 and the first Defendant are the legal heirs of the deceased Angappa Chettiyar. Under the said circumstances, the first Defendant is also one of the co-owners of the suit property. Since the first Defendant is also one of the co-owners of the suit property and since the preset suit has been instituted for the relief of perpetual injunction so as to restrain the Defendants from interfering with the peaceful possession and enjoyment of the Plaintiffs, it is needless to say that the present suit is not legally maintainable as against the first Defendant.

28. The trial court, after considering all the contentions raised on either side, has rightly dismissed the suit. But the first appellate court without considering the provisions of Section 112 of the said Act, has erroneously come

to the conclusion that the bequest under Ex.A.27 has not become lapsed and ultimately decreed the suit. The judgment and decree passed by the first appellate court are totally incorrect and the same are liable to be set aside and all the substantial questions of law raised in the present second appeal are having substance and altogether the present second appeal deserves to be allowed.

29. In fine, this second appeal is allowed without costs at the stage of admission. Consequently, connected M.P. No. 1 of 2010 is closed and the judgment and decree passed in passed in A.S. No. 29 of 2009 by the Principal Sub-Court, Thanjavur are set aside. The judgment and decree passed in O.S. No. 147 of 2007 by the District Munsif Court, Thanjavur are restored.