

(1996) 08 MAD CK 0114

In the Madras High Court

Case No : O.S. Appeal No. 132 of 1996 and O.S. Appeal No. 216 of 1986

M. Vaidurayamma

APPELLANT

Vs

P. Suryanarayanan, Pandyan Studio No. 22 (Old No. 29)
Pycrofts Road, Triplicane, Madras-5, PLM Stores, No. 22 (Old
No. 29) Pycrofts Road, Triplicane, Madras-5 and L. Ramasamy
Nadar and Bros, No. 22 (Old No. 29), Pycrofts Road,
Triplicane, Madras-5

RESPONDENT

Date of Decision : 17-08-1996

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 141, 151
Constitution of India, 1950 — Article 225, 235
Evidence Act, 1872 — Section 90
Succession Act, 1925 — Section 146, 213
Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 72, 73

Citation : (1996) 08 MAD CK 0114

Hon'ble Judges : Srinivasan, J;S.S. Subramani, J

Bench : Division Bench

Judgement

S.S. Subramani, J.—The unsuccessful plaintiff in C.S. No. 216 of 1986, on the file of this Court, is the appellant before us. The suit was instituted in forma pauperis, and on dismissal of the suit, this appeal was filed by the appellant as an indigent person.

2. The material averments that are stated in the plaint are that this plaint schedule property bearing Door. No. 22 (Old No. 29), Pycrofts Road, Triplicane, Madras, originally belonged to one Sakala Subbarayalu Chetty, having purchased the same with his own funds, and he gave the same as "Stridhana" to his daughter Seshamma. It is further said that at the time when the property was given as "Stridhana", Seshamma was already married to Jilla Venkata Krishnamma Chetty son of Jilla Narasimhulu Chetty. Seshamma died without issues in 1903, and thereafter her husband married Kamalamma alias Kanakamma as his second wife. It is further stated that after the death of the first wife, Kamalamma alias Kanakamma took the property as "stridhana"

property from the first wife, claiming herself as sister of Seshamma. It is said that the second wife was collecting rent in respect of the plaint schedule property. She also died issueless in the year 1918, and there after, Jilla Venkatakrishanna Chetty married one Lakshmi Thayaramma, who is the mother of the plaintiff, It is said that plaintiffs mother was also enjoying the property, treating the same as "Stridhana" property, and she died on 25.3.1981. It is also said that plaintiff, being the only issue of her mother, is entitled to succeed to the plaint schedule property. It is said that the first defendant is obstructing her enjoyment of the property and that he is collecting rent from the tenant arrayed as defendants 2 to 4 in the suit. Plaintiff, therefore filed the suit for declaration of her title as absolute owner of the plaint schedule property and for consequential reliefs which include the relief of mesne profits as well.

3. In the written statement filed by 1st defendant, he denied the title of plaintiff over any portion of the property. According to him, the property originally belonged to Sakala Subbarayalu Chetty and Venkatesa Chetty, they having obtained the name as per an indenture dated 21.3.1889 from the Rt. Hon"ble Secretary of State for India in Council. Venkatesa Chetty executed a Will dated 18.7.1920, bequeathing his right over the property to his adopted son Venkatasubbiah Chetty, who died intestate, leaving his wife and two daughters, viz., Ranganayaki and Indira. According to the first defendant, there was a partition between the legal heirs of Venkatasubbiah Chetty on 12.12.1962 and the plaint schedule property was taken by Indira, who in turn executed a will on 6.6.1972, bequeathing the property to the first defendant in this case. It is further stated that for the last 60 years, the first defendant's predecessors have been in enjoyment of the plaint schedule property, and, even if the plaintiff had any right, title or interest over the suit property, the same is lost by long hostile adverse possession. It is also contended that the suit is barred by limitation. The first defendant also disputed the claim put forward by the plaintiff on the basis of various Wills.

4. On the above pleading, parties joined issue, and the learned Judge, after discussing the entire evidence, came to the conclusion that the plaintiff has no title, right or interest in the plaint property. The learned Judge also found that the suit is not barred by limitation, and that the right of the plaintiff is lost by long adverse possession by the first defendant and his predecessors. The suit was dismissed.

5. It is against the said judgment, plaintiff has preferred this appeal as an indigent person.

6. Plaintiff claims the plaint schedule property as belonging to her on the ground that it originally belonged to Seshamma, first wife of Jilla Venkata Krishanamma Chetty, who is also the father of the plaintiff. It is her case that when Seshamma obtained the property as "Stridhana" on her death, any woman taking the place of Seshamma as the wife of Venkata Krishanamma Chetty will obtain that right. It is her case that on the death of Seshamma issueless, the

right over the property devolved on the second wife Kamalamma alias Kanakamma, and on the death of Kamalamma alias Kanakamma, the right devolved on Lakshmi Thayaramma, mother of the plaintiff. On a reading of the plaint, we do not find that any claim was put forward on the basis of the Will alleged to have been executed either by Seshamma, or by Kamalamma or by the mother of the plaintiff. Narration in the plaint shows that the claim put forward by plaintiff is on the basis of intestate succession. But when the matter came before the learned Judge, during trial, plaintiff changed the stand and she claimed that Seshamma had executed a Will, and likewise, Kamalamma had also executed another Will. It is on the basis of these Will deeds, plaintiff came to court and sought the reliefs in respect of the suit item.

7. If we are to consider the Wills, plaintiff can only be non-suited for the simple reason that the properties that are the subject matter of these Wills are situated within the city of Madras, i.e., at Triplicane, and, under the provisions of the Indian Succession Act, a Will which is not probated cannot be acted upon for any purpose.

8. A similar question came for consideration by this Court in the case reported is Ganshamdoss Narayandoss Vs. Gulab Bi Bai, That was in respect of a Will which came into existence before the Indian Succession Act came into force and the matter was covered by S. 187 of the Succession Act, 1865 (Act 10 of 1865). A Bench of this Court referred the matter to a Full Bench, and it was answered that even a defendant cannot rely on an unprobated Will, if he wants to establish title on its basis. Their Lordships further said that there is no difference between plaintiff and defendant in so far as an unprobated Will is concerned. And, even if the defendant relies on a Will to prove that a third party is having right to the property and not the plaintiff, he Will be debarred from agitating the same on the basis of an unprobated Will. The concurring judgment of Anantakrishna Ayyar, J. (relevant portion at pages 1059, 1060) reads thus:

If the plaintiff is in possession of any land or goods or can otherwise make out a prima facie title to them, it is not enough for the defendant to show better title in some third persons, he must also show that he acted as agent for such third person at the time he did the act complained of.

Thus, where a plaintiff makes out a prima facie title in him to the property in dispute, the defendant has to show a better title either in himself or in some third person. If what is stated above be the correct principle of pleading applicable to such cases, it follows that when the plaintiff in the present case shows a prima facie title in himself to the property in dispute - as the admitted heir-at-law of the last owner the defendant has "to show a better title" either in himself or in some third person (in the words of the learned author quoted above) or "establish a right as legatee" (in the language of S. 213, Indian Succession Act. 39 of 1925) in himself or in some third person. It seems to me, therefore that where the plaintiffs prima facie title to the property is established, the defendant in order to non-suit the plaintiff should establish the title of the

legatee. The general law would seem to be that the defendant's plea of Jus tertii cannot be entertained when he does not state in whom (such) the right resides. The defendant must trace the title to a third party other than plaintiff. A mere suggestion that there may be a third party with better title is nothing Chandra Kanta Pathak v. Bhagjur Reperi (1 I.C.525) It has been held by the Privy Council that

Possession is a good title against all the world except the person who can show a better title : Sundar v. Parbati, Narayana Row v. Dharmachar.

Similarly, a prima facie title made out by the plaintiff to the property in suit is, I think, a good title against all the world, except against the person who can show a better title. This prima facie title of the plaintiff has no doubt to be proved by him if it be not admitted by the defendant; but when once plaintiffs prima facie title and prove a better title in some person other than the plaintiff. If such person's rights should happen to be as legatee under a Will, since the defendant has to prove such person's right as legatee, he comes within the scope of S.213, Succession Act, 39, 1925 (Section 187 of the old Act 10, 1865) under which

No right as legatee can be established in any Court of justice, unless a Court of competent jurisdiction has granted probate of the Will under which the right is claimed.

9. Section 187 of Act 10 of 1865 is similar to Section 213 of the Indian Succession Act, 1925. Relevant portion of S.213 of the said Act reads thus:

No right as executor or legatee can be established in any Court of justice, unless a Court of competent jurisdiction in India had granted probate of the Will under which the right is claimed, or has granted letters of administration with a Will or with a copy of an authenticated copy of the Will annexed.

10. The Supreme Court had occasion to consider a similar question and the same is reported in Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others, wherein their Lordships accepted the principle laid down in AIR 1927 Mad 1054= 26 L.W. 697 (FB) (cited supra) and relying on the said decision, their Lordships held thus:

Section 213 creates a bar to the establishment of any right under Will by an executor or a legatee unless probate or letters of administration of the Will have been obtained, whether that right is claimed by the person as a plaintiff or defendant; Ganshamdoss Narayandoss Vs. Gulab Bi Bai, relied on.

The words of S. 213 are not restricted only to those causes where the claim is made by a person directly claiming as a legatee. The section does not say that no person can claim as legatee or as an executor unless he obtains probate or letters of administration of the Will under which he claims. What it says is that no right as an executor or legatee can be established in any Court of Justice, unless probate or letters of administration have been obtained of the Will under which

the right is claimed, and therefore it is immaterial who wishes to establish the right as a legatee or an executor. Whosoever wished to establish that right, whether it be a legatee or an executor himself or somebody else who might find it necessary in order to establish his right to establish the right of some legatee or executor from whom he might have derived title, he cannot do so unless the Will under which the right as a legatee or executor is claimed has resulted in the grant of a probate or letters of administration.

A, claiming as legatee under a will of which she had obtained letters of administration filed a suit for declaration of her title in regard to a property included in the Will, she sought to establish that the ownership of that property vested in her testator as legatee under a will executed in favour of her testator by another person. No probate or letters of administration had however been obtained in regard to that will.

Held, that S. 213 barred A from establishing the right of her testator as legatee under the alleged Will as no probate or letters of administration had been obtained.

11. Apart from the legal bar on the plaintiff to rely on the will, there are other circumstances also to show that the plaintiff cannot claim any right on the basis of the alleged will. Ex. P-1 is a registration copy of the document executed in favour of Seshamma by Sakala Subbarayalu Chetty and his son Venkatesan Chettiar. A reading of the document shows that the property was given by them as "Stridhana" to late Seshamma. It declares that Seshamma and her children and grandchildren will enjoy the same from generation to generation. It further says that neither Seshamma nor her descendants will have any right to alienate the property. The right that is given is only a right of enjoyment.

12. It is this right of Seshamma that is claimed by plaintiff on the basis of the subsequent documents. Ex. P-2 is the carbon copy of a document written in Telugu. It is alleged by plaintiff that it was written by Seshamma on 1-8-1903. It is not proved by any one, and there is no explanation as to what happened to the original deed. We find that the body of Ex.p-2 is written by using a carbon paper and the signature is alleged to have been affixed in pencil. Some scribblings are also there, giving the details of the attestors. We have already stated that there is no reference to Ex. P-2 in the plaint, and, when the plaintiff was examined as P.W. 1, she said that she obtained possession of Ex.P-2 and other documents only after the death of her mother. She has also said that her mother has not said anything about the original of Ex.p-2, and she has not seen the signature of Seshamma. She has further said that she did not ascertain or enquire whether any of the attestors to Ex-P-2 is alive or not. She also does not say anything about the original of Ex. P-2. Being a copy of a document, the presumption u/s 90 of the Evidence Act also cannot apply. No attempt was made by plaintiff to adduce secondary evidence to substantiate the genuineness of Ex. P-2. The learned Judge who had occasion to consider the veracity of the witness, has stated that Ex. P-2 is not a valid document which could be relied on by the

plaintiff. The genuineness of Ex. P-2 was doubted.

13. Ex. P-3 is a document alleged to have been executed by Kamamma on 9-9-1918. Even in respect of this document, there is no reference in the plaint. Ex. P-3 is also another carbon copy of a document written in Telegu. Even in respect of Ex. P-3, no attempt was made to find out as to what happened to the original. P.W. 1 pleads ignorance about the signature of the testator and also about the details of the attestors. She also said that she did not make any enquiry whether the attestors are alive or not. In fact, we do not find any signatures, either of the testators or the attestors in Ex. P-3. If it could have been the carbon copy of the original, the signature must also be there. The absence of the signatures in Ex. P-3 also creates a doubt regarding the genuineness of Ex. P-3. Ex. P-4 is a typewritten document, which is not bearing any date. It is alleged to have been executed by the plaintiff's mother in favour of the plaintiff. P.W. 1 has said that her mother known only Telugu, and she is not in a position to explain how plaintiff's mother happened to execute a document like Ex. P-4. Further, if it is to be construed as a Will, there must be two attestors. We find that in Ex. P-4, only one person has affixed his signature and even the details of the attestors are not available in Ex. P-4. Further we find that no specific bequest has been made so far as the plaint property is concerned. In Ex. P-4, there is a reference as to the Will of the year 1918 alleged to have been executed by Kanamma. Even in respect of Ex. P-4, plaintiff was not in a position to give any satisfactory answer.

14. If we ignore the Wills Ex. P-2 and P-3, plaintiff can succeed only if she can show that the property of Seshamma will devolve on the person who is substituted in her place. At the time of her death, there was no co-widow. The marriage with Kamamma was only after the death of the first wife. Plaintiff's mother was also married only after the death of the second wife. If Seshamma died intestate and she has no issues, the "Stridhana" (property will go only to her husband).

15. Mulla on Hindu Law - 15th Edition (1982) at pages 202 and 203, deals with the above topic. The relevant portion reads thus:

147. Succession to Stridhana according to Mitakshara - For the purpose of succession, the Mitakshara divides stridhana into two classes, namely:

(1) Shulka, which is defined as a gratuity for which a girl is given in marriage; and (2) other kinds of stridhana.

(1) Shulka - Shulka devolves in the order mentioned in S.146, sub-section (1).

(2) Other kinds, of stridhana - stridhana other than Shulka passes in the following order:

1. unmarried daughter;

She takes before married daughter. The rule applies to Jains in the absence of a

special custom.

2. Married daughter who is unprovided for;
3. Married daughter who is provided for;
4. Daughter's daughter;
5. Daughter's son;
6. Son;
7. Son's son.

If there be none of these, in other words, if the woman dies without leaving any issue, her stridhana, if she was married in an approved form, goes to her husband.

16. In E.J. Trevelyan on Hindu law, 1913 Edition, at page 434, the learned author says thus:

The succession to a childless woman depends upon the form of the woman's marriage.

If she has been married in the Brahma form, and the marriage will be presumed as being in that form, (even in the case of Sudras if the parties belong to a respectable family), the property goes to her husband, and after him to his nearest sapindas, in order of their rights of succession to him.

17. In either way, the property of Seshamma cannot be claimed by the plaintiff either on the basis of intestate succession or on the basis of Exs-P-2 and P-3.

18. Learned counsel for the appellant relied on the decision reported in I.L.R.36 Mad 116= 21 MLJ 850= (1911)2 M.W.N.168= 12 I.C.128 (Nanja Pillai v. Sivabagyathachi) wherein the question that came for consideration was, who is the person entitled to succeed to Stridhana property of a woman who died leaving no issues, and what will happen to the property when it is inherited by the husband. While considering the question, a Bench of this Court held thus:

The text of the Mitakshara bearing on the matter is placitum. 11 of section XI of Chapter II which is in these words; "Of a woman dying without issue as before stated, and who had become a wife by any of the four modes of marriage denominated Brahma, Daiva, Arsha, Prajapatya, the (whole) property, as before described, belongs in the first place to her husband. On failure of him, it goes to his nearest kinsmen (sapindas) allied by funeral oblations...". As has long been pointed out Cotebrookis' translation of the term "Sapindas" in this connection as "Kinsmen allied by funeral oblations" is not correct but should be kinsmen allied by affinity; or, to put it literally, persons allied to each other by possession of particles of the same body. The meaning of the above text is plain; it means that the stridhana property of woman married according to an orthodox form who has left no issue will devolve on her husband and on failure of the husband the

property will go to his sapindas in the order laid down in the Mitakshara with reference to succession to the property of a male. That is to say, we have to ascertain the person who would succeed to the property as the nearest sapinda of the husband if the property belonged to him.

The above said decision is only against the appellant. It says that the husband will be the legal heir. The plaintiff in this case is not claiming any right as legal heir of her father.

19. The learned Judge has held that even if the plaintiff has any right, the same is also lost by long and hostile possession of the first defendant and his predecessors. Ex.D-3 dated 21.3.1899 is the Indenture issued by the Rt. Hon'ble the Secretary for State in India in Council in which late Sakala Subbaraya chetty and Venkatesa Chettiar were declared as owners of the plaint property. It is alleged by the first defendant that one of the beneficiaries under Ex.D-3 namely, Venkatesa Chettiar executed a Will on 8.4.1920. The original has been produced as Ex.D-4. It is said by him that the entire property was bequeathed by him in favour of his adopted son Venkatesa Chetty, who died intestate. Ex.D4 has not been probated and therefore, for reasons stated earlier, Ex. D-4 cannot be relied on for any purpose, But when we take the subsequent documents, it can be seen that the first defendants' predecessors were dealing with the property, Ex.D-6 is a partition deed executed between the legal heirs of late Venkata Subbiah Chetty, the adopted son of Venkatesa Chetty mentioned in Ex.D-3. The partition deed is dated 12-2-1962. Plaint item is also one of the items that was dealt with, and we find that C schedule Item No.2 pertains to the plaint item.

The same is allotted to Indira, the third executant under the deed. She had been enjoying the property and she also executed a Will on 6-6-1972. On her death, the Will of Indira was probated and Ex.D-10 is the Probate Certificate. One of the items that is dealt with under the Will is the plaint item. In page 2 of the said Will, it is seen that the plaint item was bequeathed to the first defendant in this case, who is described as her fourth nephew. It is further seen from other documents that the revenue receipt was also being paid by Indira, and subsequently by the first defendant in this case. From these documents, it is clear that the plaintiff's claim that her mother was enjoying the property till 1981 and thereafter the first defendant put forward a claim cannot be sustained. No evidence was let in to show that her mother was enjoying the property at any time before her death. In fact, the evidence is that herself and her mother were never living together. Plaintiff was all along residing at Nellore. When asked about the enjoyment of the property, she only pleaded ignorance. We do not find any ground to interfere with the finding of the learned Judge. The appeal is without any merits and the same is, therefore, dismissed, however, without any order as to costs.

20. At the fag end of the hearing, learned counsel for the appellant submitted that the appeal was instituted by the appellant as a Indigent person, and this Court may exempt the plaintiff from paying Court-fee, or necessary direction

may be given to the Government not to realise the court-fee due on the plaint as well as the Memorandum of Appeal.

21. We do not think the Court can exercise such a power. Chapter VII of the Tamil Nadu Court-fees and Suits Valuation Act, 1955, deals with refunds and remissions, and S. 72 deals with exemption from payment of court-fee. Sec. 73 of the said Act empowers the Government by Notification in the Gazette to reduce or remit, in the whole or in any part of the fees chargeable under this Act, and may, in like manner, cancel or vary such notification. The same corresponds to S.35 of the Court-fees Act, 1870, which is repealed by the Tamil Nadu Court-fees and Suits Valuation Act, 1955. By virtue of the power given under S. 73, Notifications have been issued by the Government on various occasions. In none of those Notifications, the Government has exempted the collection of court-fee or empowered the Court to give direction against the Government not to collect court-fee from indigent persons.

22. In 1980-II-M.L.J. 545= (Official Receiver, Coimbatore v. Ramaswami Gounder), a Full Bench of this Court held that the inherent powers of a court cannot be invoked to pass on administrative or ministerial order. In that case, their Lordships were considering the question whether this Court has got power to refund court-fee not provided under the Act Overruling the earlier decisions of this Court, it was held thus: As already stated, the inherent power u/s 151, Civil Procedure Code, is a judicial power and it cannot be invoked to pass administrative and ministerial orders, such as the issue of a certificate that the stamps though defaced had not been utilised. The said inherent power under Sec. 151, Civil Procedure Code, as already stated, can be invoked by the Court for granting refund of court-fee only in cases where excess court-fee has been paid under orders of court which orders are subsequently reversed or set aside, for, in such cases the court is bound to rectify its own mistake in calling upon the party to pay the court-fee which he is not bound to pay under the law. We are, therefore, of the opinion that the Court has not power to grant a certificate under Sec. 151, Civil Procedure Code, merely setting out the facts that the court-fees paid though defaced have not been utilised, and the decision of this Court on this point starting from Nagaratham, In re, cannot be taken to be good law.

The Government of Madhya Pradesh issued a Notification whereby certain persons who instituted certain categories of suits were exempted from paying court-fee. The High Court issued a Memorandum whereby it directed that the procedure contemplated under Order 33, read with Sec. 141, C.P.C. may be followed in all cases instituted by persons seeking exemption from payment of court-fee. The validity of the Memorandum was questioned before the High Court. A Division Bench (Gwalior Bench) of the Madhya Pradesh High Court, in the decision reported in Ramji Sharma Vs. High Court of M.P., Jabalpur and Others, said that the High Court has no power to issue such Memorandum, and that such an exercise was unauthorised exercise of judicial power. The Division Bench further held that while issuing the Memorandum, the Court is not

exercising the power either under Sec. 122 or 124 of the Code of Civil Procedure, or the power under Art.225 or 235 of the Constitution of India. In paragraph 11 of the Judgment, the learned Judges said thus :

The Deputy Registrar of this Court issuing the impugned "Memorandum" or even the Committee authorising issue thereof, in our view, was unmindful of the consequence likely to ensue therefrom. Indeed, the scope of a proceeding under O.33, C.P.C is entirely different one and it has no relevance at all to the question of total exemption of court-fees contemplated u/s.35 of the Act. The procedure contemplated under O.33, C.P.C provides merely for deferment of payment of court-fees and not for total exemption and that procedure cannot, therefore, be followed when a claim is made for total exemption pursuant to the Government Notification.

(Emphasis Supplied)

Though the case before the Madhya Pradesh High Court was a converse case, the principle enunciated therein applies to this case also. The power of exemption from payment of court-fee is a matter for the Government to decide, and the statute, namely, Sec.73 of the Court-fees Act also specifically provided for the same. The Court, by invoking its inherent power cannot give a direction to the Government to grant any exemption not provided for in the Statute or Notification issued by the Government. Hence, the request made by the learned counsel for the appellant is rejected.