
(1989) 02 MAD CK 0060
In the Madras High Court

P. Krishnan

APPELLANT

Vs

Lakshmi Ammal and Another

RESPONDENT

Date of Decision : 10-02-1989

Acts Referred:

Citation : (1989) 2 LW 76 : (1989) 1 MLJ 429

Hon'ble Judges : S. Nainar Sundaram, J

Bench : Single Bench

Judgement

S. Nainar Sundaram, J.—This Second Appeal arises out of a suit for permanent injunction O.S. No. 402 of 1972, on the file of the Additional District Munsif, Poonamallee. The first-defendant is the appellant herein. The plaintiff is the first-respondent. The second-defendant died pending the suit and the third-defendant, who is the second-respondent herein was added as the legal representative. The relationship amongst the parties runs as follows: The second-defendant was the father. One krishnammal was his second wife. The plaintiff, the first-defendant and the third-defendant through his first wife. The suit-property was a joint acquisition by the second-defendant and Krishnammal. The pleas of the defendants that the acquisition in the name of Krishnammal, was only benami for the second-defendant has been rejected by the two Courts below, as having no substance. On 15.9.1971, as per Ex.A.2, there was a Will by the second-defendant and Krishnammal, as per the terms of which the suit-property should go to the plaintiff for her life and thereafter to here grandchildren. Krishnammal died on 5.11.1971. On 17.3.1972, as per Ex.B.6, the second-defendant revoked Ex.A.2. On the same date, he executed a fresh Will as per Ex.B.7, under the terms of which the first-defendant was given the suit-property. The plaintiff wanted to maintain the possession of the suit-property, which was admittedly with her on the date of the suit, though the defendants would deny the right of the plaintiff to be in possession. The first defendant and the second-defendant raised contest mainly relying on the revocation deed Ex. B. 6 and the subsequent Will Ex. 8.7. The first Court discredited Ex.B.6. and B.7 and upheld the maintainability of the suit for permanent injunction. As a result of

its findings, the first Court decreed the suit, as prayed for. The first-defendant appealed in A.S. No. 14 of 1980, on the file of the Subordinate Judge of Tiruvellore. The lower Appellate Court upheld the maintainability of the suit. While doing so, it took note of the subsequent event, namely the death of the second defendant pending the suit. The lower Appellate Court found Ex.B.7 as not true, genuine and a valid document. Though in the earlier passage of its judgment, the lower Appellate Court opined that a joint Will is revocable at any time either of the testators during their joint life or after the death of one of them, by the survivor, yet ultimately it held that such revocation by the second-defendant was not permissible by executing Ex.B.6 and B.7. Rejecting Ex.B.7, the lower Appellate Court countenanced the right of the plaintiff under Ex.A.2. In this view, it dismissed the appeal of the first-defendant, confirming the judgment and decree of the first Court. This second appeal is directed against the judgment and decree of the lower Appellate Court.

2. At the time of admission of the second appeal, this Court mooted out the following substantial questions of law for consideration:

1. Whether the question of title can be said to be alien to the suit for bare injunction based on possession? and

2. Whether the Courts below have properly appreciated and applied the principles governing revocation of a Will to the facts of the present case?

3. On the first substantial question of law, possession having been found with the plaintiff, she could certainly maintain that possession, provided she makes out a right to it. It is true that as per the terms of Ex.A.2, the plaintiff could get at the suit property only after the life time of the second defendant. Rightly the lower Appellate Court took note of the subsequent event, namely, the demise of the second-defendant and held that the suit could be maintained by the plaintiff to protect her possession. To have her possession protected, the plaintiff has to demonstrate that her possession could not be unlawful. Hence, for the purpose of finding out whether the plaintiff has got right to lawful possession, so as to maintain that possession, the question of title can certainly be gone into. Even as a person, who has been given a life-estate only, the plaintiff could maintain a suit for permanent injunction because she is entitled to have possession during her life time. Hence, the first question is answered as above. The question as to whether Ex.A.2 could survive after Ex.B.6, the deed of revocation and if it does not survive what rights the plaintiff could claim over the suit property is a different one and will fall within the ambit of the second substantial question of law.

4. Before we consider the second substantial question of law, one controversy has got to be settled. Though the second substantial question of law does not specifically take in this aspect, yet it has got to be probed into and a finding must be given. The aspect is as to whether Ex.B.7 could be ignored as not genuine, as contended by the plaintiff. There is one feature which was omitted to be taken

note of by the two Courts below when they investigated into this aspect. The author of Ex.B.7 was the second defendant. While he was alive, he himself vouchsafed and affirmed the genuineness of Ex.B.7 in his pleadings. The second defendant wanted to sustain Ex.B.7. Under those circumstances, it will be futile to launch upon an enquiry as to whether Ex.B.7 was genuine or not. Hence, the findings of the courts below on this aspect are uncalled for and unwarranted and in ignorance of the above crucial features and they require setting aside and they are being hereby set aside and it must be held that Ex.B.7. is genuine, valid and operative.

5. Then the question that comes up for consideration is whether the second-defendant, after the demise of Krishnammal, could revoke Ex.A.2 by executing Ex.B.6. The general proposition of law is that a joint Will is revocable at any time by either of the testators during their joint life or after the death of one of them by the survivor. There could be an exception and that could be in the case of a mutual Will. Even to render a mutual Will irrevocable, two conditions will have to be satisfied; (i) The surviving testator must have received benefits from the deceased testator under the mutual Will and (ii) the mutual Will should have been executed in pursuance of an agreement that the joint testator shall not revoke the mutual Will. On the facts of the present case, the theory applicable to mutual Wills would not arise. If that is so, there could always be a revocation by the survivor of the joint testator. In Theobald on Wills 13th Edition, on Joint Wills at paragraph 97 at page 98 the following passage occurs:

Joint Wills: Persons may make joint Wills, which are, however, revocable at any time by either of them or by the survivor. A joint will is looked upon as the will of each testator, and may be proved on the death of one. But the survivor will be treated in equity as a trustees of the joint property if there is a contract not to revoke the will, but the mere fact of the execution of a joint will is not sufficient to establish a contract not to revoke. So a largely to a legatee who survived the first testator, but predeceased the second, did not lapse. Where a joint will is followed by a separate will which is conditional on a condition that fails, the joint will is not revoked even though the subsequent separate will contains a revocation clause.

In Williams Mortimer and Sunnucks on Executors, Administrators and Probate (Sixteenth Edition of Williams on Executors and the Fourth Edition of Mortimer on Probate) at page 120, the following passage on joint Wills is worth noting:

A joint will is a single instrument whereby two or more persons give; effect to their testamentary dispositions. If the will is duly executed by the testators it is as much the will of each of them as if they had made separate wills each dealing with that person's own property. Such a will is revocable at any time by any of the testators during their joint lives, and by the survivor after the death of one of them but if it is not altered or revoked, it will take effect as the will of the survivor. A joint will may operate a power of appointment.

In a treatise on Wills by Thomas Jarman (Eighth Edition - Volume, 10, this is what has been observed on joint wills:

Two or more persons may make a joint will, which, if properly executed by each, is, so far as his own property is concerned, as much his will, and is as well entitled to probate upon his death, as if he had made a separate will. But a joint will made by two persons, to take effect after the death of both, will not be admitted to probate during the life of either. Joint Wills are revocable at any time by either of the testators during their joint lives, or, after the death of one of them, by the survivor.

In *Minakshi Ammal v. Viswanatha Aiyar* (1910)1 L.R. 33 Mad. 406 a Bench of this Court, consisting of Sir Arnold White, C J. and Krishnaswami Ayyar J., countenanced the power of the survivor of the joint Will to revoke the same, unless he has derived some benefit under the Will.

6. Such being the legal position, as it stands expatiated by authorities, I am convinced that the lower Appellate Court was not right in discountenancing the right of the second defendant to revoke ExA.2 by executing Ex.B.6. The second question is answered in favour of the first-defendant. On the demise of Krishnammal, her rights in the suit-property could devolve intestate only on her husband, the second defendant, and the earlier Will Ex.A.2 having had been validly revoked by the second-defendant by executing Ex.B.6, the second-defendant was competent to deal with the suit property by executing a fresh Will Ex.B7. I have found Ex. 8.7 valid, genuine and operative. Hence, the plaintiff, to maintain their possession, cannot hang on to any right given to her under ExA.2, since that has been superseded by Ex.B.6 and B.7. The plaintiff has to fail since he has no right to lawful possession. Accordingly, the second Appeal is allowed: the decisions of the two Courts below are set aside; and the suit of the plaintiff stands dismissed. Considering the relationship between the parties. I direct them to bear their respective costs throughout.