

(2010) 01 MAD CK 0051
In the Madras High Court
Case No : S.A. No. 563 of 2003

Rajani Sivakumar and Ramesh

APPELLANT

Vs

Duraikannu, Ravi Mohan and Velambal (died)

RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Succession Act, 1925 — Section 114

Tamil Nadu Court Fees and Suits Valuation Act, 1955 — Section 37(1)

Transfer of Property Act, 1882 — Section 10, 14

Citation : (2010) 01 MAD CK 0051

Hon'ble Judges : R. Mala, J

Bench : Single Bench

Advocate : Chandramouli for A. Muthukumar, for the Appellant; S.V. Jayaraman for T.A. Shagul Hameed, for RR-1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

R. Mala, J.—The Second Appeal is filed by the legal heirs of the deceased second plaintiff-Kribalini, against the judgment and decree dated

25.11.2002 in A.S. No. 44 of 2002 on the file of the Principal District Court, Nagapattinam, confirming the judgment and decree dated 14.8.2001

in O.S. No. 202 of 1997 on the file of the Additional Sub-Court, Nagapattinam.

2. The averments in the plaint are as follows:

The deceased first plaintiff Nagalakshmi's father is Sattaya Pillai and her mother is Rajamani Ammal. They were also having two sons,

Viswanathan and Ramachandran and two daughters, Velambal and the deceased first plaintiff-Nagalakshmi. The father and the mother died 15

years ago. The suit properties belong to one Chidambaram Pillai and his wife Sivagami. They do not have any issues. Chidambaram Pillai has

executed a Will in favour of Rajamani Ammal on 25.6.1930 bequeathing all his properties in favour of Rajamani Ammal, the mother of the

deceased first plaintiff. Since they were not having any children, after the death of Chidambaram Pillai, Rajamani Ammal acquired the properties

and enjoyed the properties along with her husband and both died intestate. As per the said Will, Rajamani Ammal was given only the life estate

and after that, her children alone are entitled for absolute right over the properties equally. So, after the death of both Rajamani Ammal and

Sattayappan Pillai, both their children, Ramachandran, Viswanathan, the deceased first plaintiff-Nagalakshmi and Velambal, each are entitled to

1/4 share in the properties. Ramachandran died intestate without issues ten years ago. Velambal has after marriage, left India and her whereabouts

are not known to them. Their another son Viswanathan also died leaving behind defendants 1 and 2 in the year 1986 and so, the deceased first

plaintiff and the legal heirs of Viswanathan, each are entitled to 1/2 share in the properties. Velambal has only come over to India recently and

hence, she was impleaded as third defendant. After the death of Viswanathan, the deceased first plaintiff-Nagalakshmi and defendants 1 and 2 are

jointly enjoying the properties. Since the defendants are evading to share the properties, the first plaintiff (since deceased) was constrained to file

the suit for partition of half-share in the suit properties and other reliefs and prayed for a decree.

3. The gist and essence of the written statement filed by the second defendant, adopted by the first defendant, are as follows:

As per the Will executed by Chidambaram Pillai on 25.6.1930, which was duly executed, Rajamani Ammal was having only the life estate and

after her lifetime, her male issues alone are entitled to properties. Since the deceased first plaintiff was a female issue, she was not entitled to any

share. The second defendant settled at Chennai and is working at Port Trust, in Chennai. It is false to contend that the second defendant, as

Manager of the family, maintaining the family absolutely, and the same is imaginary. The deceased first plaintiff wantonly suppressed the recitals in

the Will and filed the suit. Viswanathan Pillai, the father of the defendants 1 and 2, was also having the legal heirs as Sukumaran, Vasuki, Paarivel,

Megala, apart from the defendants 1 and 2. So, they are also necessary parties. Since they are not impleaded as parties to the suit, the suit is bad

for non-joinder of necessary parties. The deceased first plaintiff's daughter Kribalini, i.e. the second plaintiff, after marriage, was residing at

Pondicherry. On 10.4.1998, the first plaintiff's grand daughter Rajini's marriage was performed and celebrated at Sivasakthi Marriage Hall,

Nagapattinam. Velambal attended the marriage and she was not impleaded as party. So, the suit is bad for non-joinder of necessary party. The

deceased first plaintiff was residing at son-in-law's house. The suit claim is barred by limitation. The suit ought to have been valued u/s 37(1) of the

Tamil Nadu Court Fees and Suits Valuation Act. Hence, the defendants prayed for dismissal of the suit.

4. The gist and essence of the additional written statement filed by the second defendant, adopted by the first defendant, are as follows:

The first defendant's husband, the second defendant's father Viswanathan and the second defendant's senior paternal uncle Ramachandran

entered into a partition agreement on 26.10.1977 and divided the properties equally. They alone were managing the properties and enjoying the

same and divided the same among themselves. Ramachandran Pillai died in the year 1985. So, Sukumaran, the second defendant's brother alone

is in possession and enjoyment of the properties. Hence, they prescribed title by adverse possession and prayed for dismissal of the suit.

5. The deceased first plaintiff filed a reply statement, denying the averments in the written statement, averred that Chidambaram Pillai and Sivakami

appear to have executed a Will in respect of house and house-sites and a separate Will for other landed properties and that the defendants 1 and 2

are to prove the clause relating to inheritance by male heirs.

6. The trial Court, after considering the averments in the plaint, written statement/additional written statement and reply statement of the deceased

first plaintiff, framed five issues for consideration and considering the oral evidence of P.W.1 and D.Ws.1 to 3 and Exs.A-1 to A-7 and Exs.B-1 to

B-5, dismissed the suit, stating that as per the Will, only the male issue is entitled to share in the properties. Against that, earlier the deceased

second plaintiff and subsequently, the heirs of the deceased-second plaintiff-Kribalini, prosecuted the appeal. The first appellate Court, after

hearing the arguments of counsel for the parties, framed five points for consideration and dismissed the appeal. Against that, the present Second

Appeal has been preferred by the legal heirs of the deceased second plaintiff-Kribalini.

7. At the time of admission of the Second Appeal, the following substantial questions of law were framed for consideration:

(i) Whether Ex.B-1 Will is a valid document, since the disposition under the Will makes the property inalienable for an indefinite period?

(ii) Inasmuch as Ex.B-1 Will, offends the Rule against perpetuity, Ex.B-1 Will must be deemed to be non-est and that the estate devolved by

intestate succession and consequently the plaintiffs are entitled to a half share in the suit properties?

8. The appellant's grandmother, i.e. the daughter of Rajamani Ammal, namely Nagalakshmi, the deceased first plaintiff, filed the suit, stating that as

per Ex.B-1 Will, she is entitled to 1/4 share in the properties. The deceased first plaintiff-Nagalakshmi filed the said suit for partition, stating that

the suit properties are owned by Chidambaram Pillai and he executed a Will as per Ex.B-1 and in pursuance of the Will, the heirs of Rajamani

Ammal are entitled to the properties. The whereabouts of the sister Velambal were not known and another brother Ramachandran died intestate

without issues. Hence, the available heir of the deceased Rajamani Ammal is Nagalakshmi and Viswanathan and so, each are entitled to half-share

in the properties.

9. The respondents as defendants resisted the suit, stating that the execution of the Will is true and as per the Will, the male heirs of Rajamani

Ammal alone are entitled to share in the properties. So, Ramachandran and Viswanathan alone are entitled to share in the properties and they

entered into a partition agreement. Moreover, the claim of the deceased first plaintiff-Nagalakshmi is barred by limitation and the suit was not

valued as per Section 37(1) of the Tamil Nadu Court Fees and Suits Valuation Act. The defendants prayed for dismissal of the suit.

10. The trial Court dismissed the suit, stating that only the male heirs are entitled to share in the suit properties. Against that, the legal heirs of the

deceased second plaintiff-Kribalini, preferred appeal, which was also dismissed. Against that, the said legal heirs of the deceased second plaintiff-

Kribalini preferred this Second Appeal.

11. Learned Senior counsel appearing for the appellants (plaintiffs) would

contend that in Ex.B-1 Will, there is a recital with condition restraining the alienation and so, it is hit by Sections 10 and 14 of the Transfer of Property Act. So, if Ex.B-1 Will goes, the legal heirs of the deceased

Chidambaram Pillai alone are entitled to share in the properties. Chidambaram Pillai was not having any male issues and his only daughter Janaki

also died in the earlier stage without issues. Learned Senior Counsel appearing for the appellants relied on the decisions reported in Daya Singh

(Dead) through Lrs. and Another Vs. Dhan Kaur, , Ragireddi Subbarao Vs. Ragireddi Subbarao and Others, and Bhikulal and Others Vs.

Kisanlal and Others, and prayed for allowing the Second Appeal.

12. Learned Senior Counsel appearing for the respondents-defendants would contend that without any pleading, no evidence can be looked into.

The appellants herein have based their case only on the basis of Ex.B-1 Will, and as per the recital in the said Will, they claim share in the

properties. If Ex.B-1 Will goes, as to who will succeed to the properties, has not been pleaded by the deceased first plaintiff Nagalakshmi. The

deceased first plaintiff-Nagalakshmi has not pleaded all the things in the plaint. So, without any pleading, nothing could be looked into. The first

appellate Court and the trial Court considered all the aspects in proper perspective and came to the correct conclusion. Moreover, in the written

statement, plea of non-joinder of necessary parties has been taken. In the suit for partition, all the sharers are necessary parties for adjudication.

But they have not been impleaded as parties. So, the suit is barred. Learned Senior Counsel for the respondents-defendants relied upon the

decisions reported in CDJ 1996 MHC 273 (Shanmugham and Ors. v. Saraswathi and Ors.) and (1987) 100 L.W. 486 (Ramachandra Pillai. A. v.

Valliammal (died)) and prayed for dismissal of the Second Appeal.

13. Substantial questions of law:

It is true that the deceased first plaintiff-Nagalakshmi filed the suit claiming share on the basis of Ex.B-1 Will dated 25.6.1930. All the suit

properties belong to Chidambaram Pillai. His wife Sivagami died and their only daughter Janaki also died issueless when she was a minor. The said

Rajamanai Ammal, who is the grand daughter of the sister of Tmt. Sivakami Ammal, was brought up by them. The said Chidambaram Pillai

executed Ex.B-1 Will. The execution of Ex.B-1 will is accepted by both parties.

The deceased first plaintiff-Nagalakshmi is claiming share as per Ex.B-1 Will. But while perusing the recital in the said Ex.B-1 Will, it seen that Rajamani Ammal has right to only the life estate and after her lifetime, her male heirs, without alienation, should enjoy the properties. But now, since the appellants lost their case before the trial Court, the appellants raised a plea of rule against perpetuity in the First Appeal and in the Second Appeal, but the said deceased first plaintiff-Nagalakshmi has not raised the same in the suit. Ex.B-1 Will has been filed in the earlier point of time before the District Court for obtaining succession certificate and the said Ex.B-1 Will was accordingly marked as an exhibit. It was proved. In the above said circumstances, now the appellants herein question the same without pleading.

14. It is pertinent to note that, Rajamani Ammal, till her lifetime was enjoying the suit properties and the deceased first plaintiff-Nagalakshmi filed documents Exs.A-1 and A-3 chitta, Exs.A-2 and A-4 adangal, Ex.A-5 suit notice and Exs.A-6 and A-7 are the returned covers in respect of the notice issued to respondents-defendants 1 and 2 on 18.8.1997. Except these documents, the said deceased first plaintiff-Nagalakshmi has not filed any document to show that she has been in joint possession of the properties.

15. Moreover, since the deceased first plaintiff-Nagalakshmi has filed the suit for partition, she has impleaded Velambal as third defendant only after the filing of the written statement by the second defendant. But she has not impleaded the other heirs of Viswanathan, as parties to the proceedings, because, in the written statement, it was specifically stated that they are necessary parties. Even with regard to the same, an issue was framed by the trial Court, which was decided against the deceased first plaintiff-Nagalakshmi and the same has not been taken care of. As soon as the deceased first plaintiff-Nagalakshmi lost her case, the appellants herein have come forward with plea of rule against perpetuity. But without pleading and evidence, nothing could be decided. Whether the Will is barred by rule against perpetuity, is only a question of law and it can be decided at any time.

16. Section 14 of the Transfer of Property Act reads as follows:

Section 14: Rule against perpetuity:

No transfer of property can operate to create an interest which is to take effect after the lifetime of one or more persons living at the date of such

transfer, and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the interest

created is to belong.

17. Section 114 of the Indian Succession Act states as follows:

Section 114: Rule against perpetuity--No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one

or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to

whom, if he attains full age, the thing bequeathed is to belong.

18. Even though the appellants herein are claiming that Ex.B-1 Will is barred by rule against perpetuity, but it was not pleaded. Moreover, if Ex.B-

1 Will goes, the legal heirs of the deceased Chidambaram Pillai are entitled, as per the Hindu Succession Act. But there is no evidence before the

Court to show that when Chidambaram Pillai died, who succeeded to the properties and who is the next heir of Chidambaram Pillai to succeed the

properties. In such circumstances, it is the duty of the appellants herein to prove that Ex.B-1 Will is hit by Section 114 of the Indian Succession

Act and Section 14 of the Transfer of Property Act. Per contra, the deceased first plaintiff-Nagalakshmi was claiming partition only on the basis of

Ex.B-1 Will, merely because the properties have been divided stating that as per Ex.B-1 Will, only the male heirs are entitled to the properties. In

such circumstances, the appellants have come forward with such plea of rule against perpetuity. Hence, I am of the opinion that the first appellate

Court has considered these aspects in proper perspective and came to the conclusion that the appellants are not entitled to any relief in the suit,

since they stepped into the shoes of their grandmother, the deceased first plaintiff, who claimed 1/4 share in the suit properties on the basis of

Ex.B-1 Will executed by Chidambaram Pillai.

19. Admittedly, the appellants and the respondents are not the direct descendants or the legal heirs of the deceased Chidambaram Pillai. The

deceased Rajamani Ammal got the properties by testamentary succession from Chidambaram Pillai. In the above said circumstances, I am of the

view that the first appellate Court has considered these aspects and discussed

the same in paragraphs 7 and 8 of its judgment.

20. Learned Senior Counsel for the appellants relied upon the decision of the Supreme Court reported in Daya Singh (Dead) through Lrs. and

Another Vs. Dhan Kaur, , wherein it has been held as follows:

The accepted position under the Hindu Law is that where a limited owner succeeds to an estate the succession to the estate on her death will have

to be decided on the basis that the last full owner died on that day. The inevitable corollary is that it is only the law in force at the time of the death

of the limited owner and not the law in force at the time of the last full owner's death that would govern the case. There is no reason either in

principle or on authority why this principle should not apply after the coming into force of the Act.

Thus, where a Hindu widow governed by the customary law of Punjab who had succeeded to the estate of her husband in 1933 died after the

coming into force of the Hindu Succession Act, but was not then in possession of the estate the succession to the estate would be governed by

Section 8 of the Act and not by the Customary Law of Punjab which was in force at the time of her husband's death.

21. It is true that in Ex.B-1, the properties have been bequeathed to Rajamanai Ammal and the life estate has been given and after that, her male

heirs have been enjoying the properties till their lifetime without alienation. In such circumstances, learned Senior Counsel for the appellants would

submit that Ex.B-1 is hit by Section 14 of the Transfer of Property Act and Section 114 of the Indian Succession Act. In such circumstances, if

Ex.B-1 goes, as per the Hindu Succession Act, who succeeded the properties is not disclosed. There is no material available before Court to

show that when Chidambaram Pillai died and at the time of his death, since there was no First Class heirs as per the Hindu Law, as to who are the

Second Class heirs as per the Hindu Law are not disclosed and who succeeded the properties as per the Hindu Succession Act has also not been

pleaded or proved by the appellants. Moreover, Rajamani Ammal is neither the sister's daughter nor the brother's daughter of the deceased

Chidambaram Pillai. Rajamani Ammal is only the grand-daughter of Kamalakshammal, who is the sister of Sivagami Ammal, i.e. sister-in-law of

Chidambaram Pillai. In such circumstances, there is no evidence to show that as

per the Hindu Succession Act, Rajamani Ammal succeeded to the properties. Without particulars, this Court is not in a position to conclude that Rajamani Ammal succeeded to the properties as per the Hindu Succession Act and since she died intestate, her heirs are entitled to equal share in the properties irrespective of the fact whether they are male or female. So, the first appellate Court has considered Ex.B-1 Will and dismissed the suit stating that as per Ex.B-1, Nagalakshmi is not entitled to any share. I concur with the findings of the first appellate Court.

22. Learned Senior Counsel for the appellants relied upon the decision of this Court reported in 1936 (Vol.LXXI) M.L.J. 419 (cited supra), stating that the second defendant has been representing the entire family of Viswanathan Pillai and so, the suit is barred for non-joinder of necessary party. In the said decision reported in 1936 (Vol.LXXI) M.L.J. 419, it has been held as follows:

There can be no doubt that the father is entitled to and competent to represent his sons in a partition with his brothers and a partition effected by him will be binding on the sons unless it is shown that it was fraudulent or unfair or prejudicial to their interests. The fact that some of the members are minors would not prevent the father in virtue of his position as the head of his branch to represent them. (Vide Jamna Prasad and Others Vs. Mt. Durga Dei and Another, . There is absolutely no proof that the partition effected between the three brothers was in any way unfair or fraudulent save in so far as this suit property was allotted to the first defendant's father. The question therefore is whether this allotment of 6 acres 10 cents is such as to render the partition fraudulent or unfair. The family was possessed of nearly 60 to 100 acres. The result of giving the suit property to the first defendant's father will be to deprive the plaintiff's branch of about 2 acres 5 cents and the first plaintiff can be said to have been deprived of half of it. It seems to me that if the partition is otherwise fair, it is open to the father as representative of his branch to consent to this extra allotment and if it was done bona fide it will not be open to his sons to impeach the same....

23. Learned Senior Counsel for the appellants also relied upon the decision of the Bombay High Court reported in Bhikulal and Others Vs.

Kisanlal and Others, , wherein it has been held as follows:

Where partition is claimed as between branches of the family the heads of the branches alone need to be made parties. But when the other members of a branch have joined in the institution of and have been made eo nomine parties to the suit, the Court cannot remove them from the suit on the ground that they need not have been joined in the suit. They may not be necessary but are indeed proper parties to the suit. Where all the plaintiffs have together prayed for their share in the family property and when the Court can pass such a decree in their favour there is no power in the Court to remove the minor plaintiffs from the suit.

24. Learned Senior Counsel for the respondents-defendants relied upon the decision of this Court reported in (1987) 100 L.W. 486 (cited supra)

and argued that in a suit for general partition, there could be no doubt that all the sharers are necessary parties. In the said decision reported in

(1987) 100 L.W. 486, it has been held as follows:

Though Order 1, Rule 9, of the CPC provides that no suit shall be defeated by reason of misjoinder or non-joinder of parties and the Court may in

every suit deal with the matter in controversy so far as regards the rights and interests of parties actually before it, there is a proviso which says that

nothing in that rule will apply to non-joinder of necessary parties. In a suit for general partition, there could be no doubt that all the sharers are

necessary parties as mentioned above. Apart from this, the main part of R.9 is only an enabling provision and the Court shall deal with each case

with reference to the particular facts in that case.

The decision in Kanakarathanammal Vs. V.S. Loganatha Mudaliar and Another, is authority for the position that in a suit for partition, all the

sharers are necessary parties and also for the position that the suit is liable to be dismissed for non-joinder of any one of the parties. In T.

Panchapakesan and Ors. v. Peria Thambi Naicker and Ors. 85 L.W. 841 (D.B) also, a Division Bench of this Court has taken a similar view. We

are accordingly of the view that the finding of the learned Subordinate Judge on issue No. 10 holding that the suit is not bad for non-joinder of

Nagarathinam's heirs is unsound and liable to be set aside....

25. Learned Senior Counsel for the respondents-defendants also relied upon the decision of this Court reported in CDJ 1996 MHC 273 (cited

supra), wherein it has been held as follows:

9. ...The question of non-joinder of necessary parties in a suit for partition can be raised at any time as it goes to the root of the matter. It is well

settled that a suit for partition is not maintainable in the absence of some of the co-sharers. See *A. Ramachandra Pillai v. Valliammal* (1987) 100

M.L.W. 486.

26. So, while applying the above citations to the facts of the present case, it is seen that the other heirs of the deceased Viswanathan are proper

and necessary parties for adjudicating the partition suit.

27. For the foregoing reasonings, I am of the view that there is no need to interfere with the findings of the first appellate Court.

28. In fine, the Second Appeal is dismissed. The judgment and decree of both the Courts below are confirmed. No costs.