

(1980) 03 MAD CK 0059
In the Madras High Court

Salem Town Bazaar Street, Kannika Parameswari
Devasthanam and Others

APPELLANT

Vs

T.K. Sadasivam Chettiar

RESPONDENT

Date of Decision : 24-03-1980

Acts Referred:

Citation : (1981) 94 LW 15 : (1980) 2 MLJ 435

Hon'ble Judges : Sethuraman, J

Bench : Division Bench

Judgement

Sethuraman, J.—The defendants in O.S. No. 524 of 1970 in the Court of the Subordinate Judge of Salem, are the appellants. There was one Balakrishna Chettiar, who had three sons Ramanathan Chettiar, Narayana Chettiar and Nandagopal Chettiar. There was a partition between Balakrishna Chettiar, and his sons on 1st March, 1925, under Exhibit B-2. It is enough to mention that with reference to the suit property it was allotted to Narayanan and Nandagopal. Balakrishnan is no more, and Ramanathan went away to Kumbakonam. Narayanan and Nandagopal were thereafter carrying on business in textiles in Salem. They became heavily indebted in or about the year 1939 and one of the creditors filed an insolvency petition I. P. No. .6. of 1939. against them. At that stage, there was an arrangement with the creditors and the creditors agreed to take 50 per cent, of the amount due to them. The said property along with some stock in trade belonging to Narayana and Nandagopal was transferred to one G. C. Subramaniam Chettiar for a sum of Rs. 16,500. Subramaniam Chettiar undertook to discharge all the debts by selling the stock in trade. He actually discharged all the debts. At the time of the transfer to Subramania Chettiar the suit property was valued at Rs. 10,000 and the stock in trade at Rs. 6,500.

2. The plaintiff filed the suit for declaration and permanent injunction restraining the defendants from interfering with his rights in the property. The plaintiff claimed that this property which was made over to Subramaniam Chettiar was subsequently transferred by him under two sale deeds of 26th June, 1943. The

sale deed in favour of Nandagopal, the plaintiff's father is marked as Exhibit B-3. The plaintiff contended that this transfer was in pursuance of an understanding that the property was to be reconveyed by Subramaniam Chettiar in favour of Nandagopal and Narayanan. The plaintiff's further case was that there was a joint family business which was carried on by Nandagopal and himself and that in this business some money had been earned which went into the purchase of this property under Exhibit B-3. It may be stated here that one half of the property was conveyed in favour of Nandagopal and the other half in favour of Narayanan., The said Nandagopal initially executed a will dated 21st August, 1966, the will being marked as Exhibit B-8. The property was bequeathed by Nandagopal to Kannika Parameswari Devasthanam subject to certain dispositions for charitable purposes. Subsequently the said Nandagopal executed a settlement on 30th October, under Exhibit B-4. In the said settlement deed he cancelled the will and gave the property to the same Kannika Parameswari Devasthanam subject to the same dispositions, but subject however to his life-estate. In other words, there was a life estate in favour of Nandagopal, and the trustees of Kannika Parameswari Devasthanam were to take over the possession of the property after his death. The said Nandagopal died on 2nd September, 1970, and the plaintiff claimed that the property being the joint family property, Nandagopal had absolutely no power of disposition over it and that therefore he could not have validly executed the settlement deed Exhibit B-4. The prayer in the suit was for declaration that he was entitled to the suit property and for injunction restraining the defendants from interfering with his possession and enjoyment thereof.

3. The defendants resisted the suit contending that though this property was originally transferred to Subramaniam Chettiar, subsequently, it was re-purchased by Nandagopal out of his own self-acquisitions. According to the defendants, the plaintiff and his father Nandagopal were not on good terms, the plaintiff having gone over to Madras and not having been in touch with his father for a long time. Their contention, therefore, was that Nandagopal had purchased the suit property out of his own self-acquisitions and that he had power of disposal over the suit property. There was also an allegation in the plaint that the settlement had been brought about by fraud and undue influence and this allegation was denied by the trustees of the Devasthanam, the defendants.

4. The learned Subordinate Judge framed the relevant issues that arose out of the pleadings. The main issue was whether the suit property was joint family property of the plaintiff and his father on the date of the settlement dated 30th October, 1968, and whether there existed any joint family of the plaintiff and his father at that time. There was also an issue as regards the fraud and undue influence and coercion on Nandagopal by the defendants.

5. The plaintiff examined himself as P.W.2, and a stranger as P.W. 1. The evidence of P.W. 1 was relevant only to show that the account books produced in the suit had been written by Nandagopal. The defendants examined three

witnesses. D.W. 1 was the person, who was the attesor of Exhibit B-4 and the scribe of Exhibit B-8. D.W. 2 was the attesor of Exhibit B-8 and also of Exhibit B-4. D.W. 3 is one of the trustees of Kannika Parameswari Devasthanam, who has been mentioned as the third defendant in the suit. After considering the oral and documentary evidence, the learned Subordinate Judge held that the suit property was purchased out of the joint family income and that it was, therefore, joint family property over which Nandagopal had no power of disposition under the settlement Exhibit B-4. Exhibit B-4 was held to be invalid under Hindu Law and the result was, the suit was decreed as prayed for.

6. The defendants have brought the matter on appeal before us.

7. We have already noticed that this property belonged originally to a joint family consisting of Balakrishnan, Nandagopal and* his brothers and it was allotted to Nandagopal and Narayanan under a partition of 1st March, 1925, the document having been marked as Exhibit B-2. These two individuals thereafter carried on business and it is only in the said business, they incurred liabilities resulting in the insolvency proceedings. It was at that stage a composition was arrived at with the creditors and this property was transferred in favour of Subramaniam Chettiar for a sum of Rs. 16,500. The value includes the stock in trade in textiles which was available in the premises. Originally, the plea of the plaintiff was that this stock in trade of Rs. 6,500 was not actually handed over to Subramaniam Chettiar and that his father Nandagopal had effected sales thereof at a substantial profit in consequence of the rise in prices due to war conditions and that the repurchase which was made on 26th June, 1943, was solely traceable to the joint family resources. The appellants-defendants contest-ed this position. It was submitted on their behalf that the sale deed in favour of Nahdagopal in the year 1943 is traceable only to his own individual resources. It was, in this connection that the plaintiff-respondent put forward the theory that there was an earlier understanding to the effect that Subramaniam Chettiar agreed for re-conveyance of this property to the parties at the same price as and when they were in a position to purchase them.

8. With reference to this claim to re-purchase by the plaintiff, reference was made to certain earlier proceedings. After the purchase of the property under Exhibit B-3 by Nandagopal and under a similar document by Narayanan, there was a suit O.S. No. 85 of 1943 by Narayanan in which Nandagopal and the present plaintiff Sadasivam were also impleaded. In the plaint filed in the Court of the Subordinate Judge of Salem, there was a reference to a right of repurchase available to the two brothers at the time when the property was transferred to Subramaniam Chettiar. The learned Subordinate Judge in the judgment now under appeal has pointed out that long before any dispute arose between the parties there was a claim that the conveyance in favour of Subramaniam Chettiar was subject to a right of re-conveyance and that, therefore, this right was available to Nandagopal. Even assuming that there was a right of re-conveyance, still the question as to whether the property purchased

by Nandagopal was out of his own resources or out of the resources belonging to the joint family would have to be considered. The existence of the right to demand reconveyance does not help the solution of the problem of who the purchaser is, Nandagopal or the family.

9. It was pointed out by the Privy Council in *Sitaram v. Mst. Maunni Bibi* (1942)55LW444, that where ancestral property which was lost to the family was re-purchased by the father out of his own separate monies, the property so purchased became his self-acquired property. Thus, there is no presumption that any re-purchase enured only to the benefit of the joint family. There is also no presumption that any property standing in the name of the karta or a member is joint family property.

10. There is no dispute about the fact that Nandagopal and Sadasivam (Plaintiff) were never divided between themselves. There is evidence to show that for sometime the plaintiff was having a business in Madras. There is also correspondence between the plaintiff and Nandagopal to show that they were in good terms notwithstanding the absence of the plaintiff from Salem for long spells on some business. In the absence of anything to show that this property was purchased by Nandagopal out of his own resources, it has to be treated as the joint family property. The absence of any separate property in the lands of Nandagopal would be clear from the fact that he had to face insolvency proceedings just four years prior to the purchase and had to settle with his creditors for paying only 8 annas in the rupee. Subsequently, he started a business in 1943 and for this business the plaintiff contributed a sum of Rs. 1,000. This amount is shown into the accounts as repaid to him. The plaintiff had his individual resources derived from his mother, who was no more and who had left substantial property. The amount realised from the sale of the said properties, it appears, were in the hands of the plaintiff's maternal uncle. There is nothing to doubt the authenticity of the statement that this sum of Rs. 1,000 was contributed by him though it was returned to him. Another sum of Rs. 4,060 was borrowed from Subramaniam Chettiar under a joint promissory note executed both by Nandagopal as well as the plaintiff. This shows that both of them were responsible for borrowing this money for the purpose of starting the business in 1943. As Nandagopal was thus obliged to get the signature of the plaintiff for the purpose of borrowing this sum of Rs. 4,000, it is difficult to conceive that he had resources of Rs. 5,000 for the purpose of purchasing the suit property in the year 1943. The learned Counsel for the appellant submitted that the plaintiff joined in the execution of the promissory note only as surety and that the real borrower was Nandagopal. There is however no evidence to show that this was the position. It is not in dispute that Subramaniam is still alive and if really he intended to take the signature of the plaintiff only as surety, he could have been examined to find out whether he looked upon the plaintiff only as a surety. In the absence of any such evidence, the only inference possible on the facts is that both of them borrowed money for purpose of starting a joint business. This business is traceable to the joint resources. There is no dispute about the fact

that between 1943 and 1948 this business continued. It is only in 1948, that this business appears to have been wound up and Nandagopal continued to live in Salem without doing any business till he died in 1970. Thus, the purchase of this suit property in the year 1943 is only traceable to the joint resources of the plaintiff and his father Nandagopal generated in the partnership, and the property can only be treated as joint family property. There is no other coparcener belonging to this family, so that this may be said to be a kind of tenancy in common between the plaintiff and his father. The fact that the plaintiff was impleaded by Narayanan in O.S. No. 85 of 1943 shows that the plaintiff and his father had a joint interest in this property. Therefore, the finding of the Court below that the property was the joint family property has thus to be affirmed.

11. We have to examine now, the question as to whether in the event of the property being a joint family property, the will or the settlement would be valid. The case proceeded before the Court below on the basis of the settlement Exhibit B-4 being the source of title. The case of the defendants was that Nandagopal executed the document voluntarily and that though he had executed a will bequeathing the same property to Kannika Parameswari Devasthanam, still subsequently he wanted to accelerate the benefit to the temple and therefore, executed Exhibit B-4. The will Exhibit B-8 is referred to in Exhibit B-4 and it is cancelled thereunder. The Court below has therefore, gone into the question whether the settlement would be valid. There were allegations of fraud and undue-influence. Ultimately, there is absolutely no-evidence brought on record to prove that there was any undue influence brought to bear by Nandagopal at the time when he settled this property in favour of the Devasthanam. The plea was only a half-hearted attempt at invalidating the transaction by the settlement. Thus, the question of fraud or undue influence being out of the way, the only surviving question is whether Nandagopal could have executed a settlement of the property in favour of the Devasthanam.

12. It is in this context the decision in *The Madras State Bhoodan Yagna Board, Madurai Vs. Subramania Athithan and Others*, is relevant. There a Bench of this Court was concerned with the question whether the manager of a Hindu joint family had power to make a gift of joint family property for a charitable purpose. It was pointed out that the law on the subject was well-settled, that the manager had no absolute power of disposal over joint Hindu family property for a charitable purpose and that the extent of property gifted, whether it was reasonable or out of proportion, could not therefore arise for consideration. The transaction was treated to be a void one. Applying the principle of this decision, it would follow that in the present case Nandagopal could not have executed a settlement of this property, which was the only property available, in favour of the Devasthanam. Therefore, the transaction would be a void transaction. The defendants-appellants cannot make any claim based on Exhibit B-4. The claim was rightly negated by the Court below.

13. It is at this stage that another contention strenuously urged by the learned Counsel for the appellant arises for consideration. The learned Counsel submitted that in the event of Exhibit B-4, the settlement, being ineffective to transfer the property in favour of the temple, then the will, Exhibit B-8 would be revived, as the cancellation of the will was only based on the settlement being effective. When once the settlement was not effective, then the bequest would have to be considered. His further submission was that a Hindu could execute a will with reference to his share in the property of the family after the Hindu Succession Act came into force. As Nandagopal died long before the coming into force of the Hindu Succession Act, it cannot be disputed that he has no testamentary capacity with reference to his share in the property.

14. The question that now requires to be considered is whether there is automatic revival of the will by reason of the settlement having become ineffective, it having been found to be void. In the settlement deed Exhibit B-4 dated 30th October, 1968, it is stated that the property was acquired under a conveyance by Subramaniam and that it belonged to the settlor as a self-acquired and as an absolute property. We have already seen that this claim has absolutely no scope for acceptance and therefore, we have to proceed on the basis that the property belonged to the joint family consisting of the plaintiff and his father, the settlor. In the settlement, it is stated that there was no connection between the father and son. This is contrary to the tenor of the correspondence exhibited. There is absolutely no evidence also to show that there was any kind of partition between Nandagopal and his son, and in fact both parties proceeded on the basis that there was no partition between Nandagopal and his son Sadasivam, the plaintiff. There is a further observation in the settlement to the effect.

15. The above passage from the settlement deed would show that the will was cancelled only because he wanted to accelerate the interest of the temple and that too even during, his lifetime. The will would have to come into effect only after the lifetime of Nandagopal. He wanted to convey the interest in praesenti with reference to that property and that was why this settlement came to be executed. The passage thus clearly goes to show that the cancellation of the will was not an absolute one. In this context the principle, of "dependent relative revocation" invoked by Mr. M. Srinivasan would require consideration. This principle is set out in para-graph 1368 of Halsburys Laws of England, Third Edition, Vol. 39 at page 899, as follows:

In particular, revocation may be relative" to another disposition which has already been made or is intended to be made, and so dependent thereon that revocation is not intended unless that other disposition takes effect. Such a revocation is known as; dependent relative revocation, and, if from any cause the other disposition fails to take effect, the will remains operative as it was before the revocation.

It has been pointed out in the foot note, to the above passage as under:

In such a case the animus revacandi has only a conditional existence; the condition being the validity of the disposition intended" to be substituted.

(See *Powell v. Powell* (1866) L.R.I.P. and D. 209 212.)

16. In the same volume of Halsbury's Laws of England, at page 900, there is the following passage:

In all these and other cases however, the question is whether the disposition revoked is intended not to operate whatever happens or is only to be destroyed if the provisions of the substituted instrument operate in its stead. The Court must be satisfied that the testator did not intend to revoke the original will except conditionally, in so far as the other disposition could be sent up.

At page 888 in paragraph 1353, there is another passage which also deals with this doctrine in relation to the revocation of a will, and which is as follows:

To effect a revocation there must be an intention to revoke and a will is not revoked by any presumption of intention based on an alteration of circumstances. If anything is done by the testator or by his direction which, if there was an intention to revoke, would amount to a revocation, the presumption of law from that act is in favour of the existence of the animus revocandi, but this presumption may be rebutted by evidence showing that the animus revocandi did not exist. An act done without that intention is wholly ineffectual, even if the act results in the destruction of the will. Thus, no revocation results where a testator destroys the will through inadvertence, or under the belief that it is useless or invalid or has already been revoked, or where he is drunk at the time of an alleged revocation or where he is insane at the time even though he may afterwards recover.

In *Re-Wells' Trusts, Handisty v. Wells* (1889)42Ch D646, to which reference has been made in the footnote to the above passage as follows, there was first a disposal of a fund under a will and then, as here, by a deed. The disposition under the deed was void to the extent of one fifth. It was held that to this extent, the bequest under the will was effective. Thus, there is scope for a revival of the will in case the intention of the testator was not to cancel the will unconditionally. This doctrine has been applied by a Full Bench of the Trivancore-Cochin High Court in *Thresia v. Lonan Mathew* AIR1956TC 186(F.B.), and re-affirmed in *Antony Vs. Mathew and Others*, . The latter case is merely an offshoot of the former one.

17. Thus, we have to examine the intention in the present case. The passage we have already excerpted from the settlement deed goes to show that the settlor did not want to give effect to the will, as he wanted the Kannika Parameswari Devasthanam to take the property with immediate effect and in such a case there would have been no purpose served by retaining the will.

18. It is only because the will was virtually ineffective after the settlement, he cancelled the same. But when such settlement was found to be ineffective as a

coparcener cannot settle his undivided interest, the will would get revived, as the intention of the testator is to stand by the disposition under the will. The Devasthanam would have a half-share in the property in the interest of Nandagopal. At this stage, the learned Counsel for the respondent submitted that the will must be proved independently and that in the present case, the will had not been subjected to that scrutiny as required under the law. The learned Counsel for the appellant submitted that the will had actually been proved by the material evidence available in the case. D.W. 1 was the attesor of Exhibit B-4 and was the scribe of Exhibit B-8, the will. He stated that at the time when the will was drafted, Nandagopal was about 65 to 70 years old and that he was normally carrying about with his vision intact. He and the said Nandagopal were the only persons present, but he would add that the attestors were all persons residing in the same street and attested the document. D.W. 2 is the attesor of Exhibit B-8. He spoke to the effect that the document was written by D.W. 1 and that one Padrnanabhan, and one S. N. Ramaswamy Chettiar were the attestors. D.W. 1 was said to have read out the will after it was written and he saw Nandagopal Chettiar signing the document. He also spoke to the fact that Nandagopal was in a position to read the document, his eye-sight being normal and he was also in a sound state of mind. He stated that Ramaswamy, another attestor, was residing in the opposite row about four houses away and Padmanabhan was also about 10 houses away from Nandagopal's House. On the basis of the evidence of D.Ws. 1 and 2, it is possible to hold that the will was duly executed by Nandagopal.

19. The learned Counsel for the respondent urged that the matter should be sent back because the matter has not been scrutinised by the Court below in the manner in which the proof of a will would have to be done. However, having regard to the evidence of D.Ws. 1 and 2, who have also been cross-examined by the plaintiff at the trial stage, we do not think it necessary to send the matter back again, so no useful purpose would be served by the same. At this stage it is also pertinent to note that P.W. 2, who is the plaintiff himself, has accepted that his father had signed the will. He was already aware of the will even prior to the filing of the suit. It is not as if he was taken by any surprise at the time when the trial went on when the will was produced. In the plaint, he has not challenged the validity of the will even though he was made aware of its existence and we do not think that there is any justification for the matter to be sent back to the lower Court. As already pointed out there is dispute about the fact that the will would be effective only in so far as the interest to the extent of one half of Nandagopal is concerned. The plaintiff had a half share in the house and it is unaffected by the will. Therefore, the appellants would be entitled to a half share in the property.

20. The decree of the Court below is modified accordingly and the appeal is partly allow-ed. There will be a preliminary decree, in favour of the plaintiff for partition of his one-half share in the property. The prayer for injunction would stand rejected. There will be no order as to costs.