

(2008) 12 MAD CK 0247

In the Madras High Court

Case No : C.R.P. (NPD) No. 1858 of 2008 and M.P. No's. 1 and 2 of 2008

Uma

APPELLANT

Vs

Salem Sowdambiga Finance and Others

RESPONDENT

Date of Decision : 17-12-2008

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 115
Transfer of Property Act, 1882 — Section 53

Citation : (2009) 1 LW 730 : (2009) 2 MLJ 407

Hon'ble Judges : V. Ramasubramanian, J

Bench : Single Bench

Advocate : R. Subramanian, for N.S. Sivakumar, for the Appellant; T.P. Manoharan, for Respondent-1, for the Respondent

Final Decision : Dismissed

Judgement

V. Ramasubramanian, J.—This Civil Revision Petition arises out of the dismissal of an application filed under Order XXI, Rules 58 and 99 CPC, by the Executing Court and confirmed by the lower Appellate Court.

2. Heard Mr. R. Subramanian, learned Counsel appearing for the petitioner and Mr. T.P. Manoharan, learned Counsel appearing for the first respondent. The respondents 2 to 7 and 9 have been served with notice, but they have not entered appearance. Service on 8th respondent is not completed, but I consider it unnecessary, in view of the fact that the fight is only between the petitioner herein and the first respondent.

3. The first respondent in this Civil Revision Petition filed a suit in O.S. No. 320 of 1997 on the file of the Additional Sub Court, Salem, against one Sri Raja Vinayaga Traders, a partnership firm, for recovery of a sum of Rs. 4,84,825/- together with interest and costs. While the partnership firm was cited as the first defendant in the suit, the wife, 4 sons and 2 daughters of one M.R. Lakshmanan were cited as defendants 2 to 8 in the suit. All these 8 defendants are the respondents 2 to 9 in this Civil Revision Petition.

4. On 10.1.2005, a decree was passed in the said suit, in favour of the first respondent herein, directing the respondents 2 to 9 herein to pay a sum of Rs. 4,84,825/- together with interest on the principal amount of Rs. 4,30,000/- at the rate of Rs. 2.25 per Rs. 100/- per month from the date of the plaint till the date of the decree and at the rate of 6% per annum from the date of the decree till the date of realisation. The judgment-debtors, who are the respondents 2 to 9 herein, have not filed any appeal against the judgment and decree and hence the decree has attained finality.

5. Therefore the first respondent herein (who is the decree holder) filed an Execution Petition in REP No. 256 of 2005 for executing the decree by the sale of the property described in the schedule to the Execution Petition. In the Execution Petition, the petitioner herein, who is none other than the wife of the third defendant (4th respondent herein) filed an application under Order XXI, Rules 58 and 99 CPC in REA No. 340 of 2006, claiming that the property sought to be sold in execution of the decree, was bequeathed to her by her father-in-law M.R. Lakshmanan, by a Will dated 11.6.1996 and that after the death of M.R. Lakshmanan on 13.9.1996, she became the absolute owner of the property and that therefore the decree passed against respondents 2 to 9 herein, cannot be executed against her property.

6. After an elaborate enquiry, in which both the petitioner and the first respondent were allowed to lead evidence, the Executing Court dismissed E.A. No. 340 of 2006 by an order dated 13.11.2006 and the same was confirmed on appeal in CMA No. 1 of 2008, by the Additional District Court (FTC-II), Salem, by a judgment dated 29.1.2008. Aggrieved by those concurrent orders, rejecting her application under Order XXI, Rule 58, the petitioner has come up with the present revision.

7. Before advertng to the rival contentions, it is necessary to place on record, certain dates and events, since the rival contentions, revolve around the same. They are as follows:

(i) Mr. M.R. Lakshmanan (whose legal heirs are the respondents 3 to 9 herein) was a partner in the first respondent-finance company, which is the decree holder. He was also the partner of the firm (second respondent herein) which borrowed money from the first respondent herein in the year 1991.

(ii) Mr. M.R. Lakshmanan, who was also a Lawyer by qualification, had earlier executed a Will dated 19.2.1989, bequeathing the property now sought to be sold in execution of the decree, to and in favour of 2 of his sons.

(iii) However, M.R. Lakshmanan executed a fresh Will, on 11.6.1996, after revoking the first Will, bequeathing the said property in favour of his 4 daughters-in-law, who were not partners of the second defendant-firm. Within 3 months of the execution of the second Will, M.R. Lakshmanan passed away on 13.9.1996.

(iv) The first respondent filed the suit in June 1997 against the respondents 2 to

9 herein. Along with the suit, the first respondent also moved an application for attachment before judgment. On 13.6.1997, an order of attachment was granted and the same was later made absolute, by the trial Court.

(v) Ultimately the suit itself was decreed on 10.1.2005 and the first respondent herein filed Execution Petition in April 2005.

(vi) In July 2006, at the time of proclamation, the petitioner filed the application under Order XXI, Rule 58 CPC before the Executing Court, which has led to this revision petition.

8. Assailing the order of both the Courts below, Mr. R. Subramanian, learned Counsel for the petitioner contended as follows:

(a) Section 53 of the Transfer of Property Act, invoked by the Courts below, to reject the application of the petitioner, has no application to the case on hand, since the petitioner does not claim under a Deed of Transfer, but claims under a Will. A bequest under a Will is not a transfer and hence Section 53, which deals with fraudulent transfers, has no application.

(b) Even if the case is presumed for the sake of argument, to be covered by Section 53 of the Transfer of Property Act, it cannot be assailed, when there is only a single creditor. Section 53 would apply only if there is a body of creditors. There is nothing on record to show that the deceased M.R. Lakshmanan, executed the Will, with intent to defeat or delay a body of creditors. Therefore, Section 53 cannot be invoked.

(c) At any rate, the validity of a Will cannot be challenged by a stranger, but can be challenged only by a person who would otherwise be entitled to succeed. The first respondent-decree holder is a stranger and hence cannot challenge the Will.

(d) The decree was also not obtained by the first respondent against the petitioner herein, on the premise that she had inherited the estate of the borrower. The decree was obtained against the wife, sons and daughters of M.R. Lakshmanan and hence it would not bind the petitioner or the estate inherited by her.

In support of his above contentions, the learned Counsel for the petitioner also relied upon certain decisions, which I shall refer to later.

9. In response, Mr. T.P. Manoharan, learned Counsel for the first respondent contended that Mr. M.R. Lakshmanan, who was a partner of the first respondent-finance firm, was also a partner of the second respondent-firm and he borrowed money in 1991. When the first respondent threatened to sue him in 1996, M.R. Lakshmanan, being a law graduate himself, appears to have created a Will dated 11.6.1996, with intent to defraud the first respondent. The Will dated 11.6.1996, never came to light from the date of institution of the suit in June 1997 till the date of decree in January 2005. Under the Will, the wife, 4 sons and 2 daughters were not given a share in the property and the property was bequeathed only to

the 4 daughters-in-law, in revocation of the earlier Will dated 19.2.1989 executed in favour of his 2 sons. Thus, the Will propounded by the petitioner is clouded by suspicious circumstances. An order of attachment before judgment, was in force, from 13.6.1997 till the date of decree viz., 10.1.2005, but the wife, sons and daughters of M.R. Lakshmanan, never even made a whisper about the Will, for a full period of 8 years, when the attachment was in force. Even the petitioner who has now jumped into the battle field, did not file any application for raising the order of attachment, from 1997 till 2005. Therefore the learned Counsel for the first respondent contended that the orders of the Court below do not warrant any interference.

APPLICABILITY OF SECTION 53

10. As stated earlier, the first contention of the learned Counsel for the petitioner is that Will is not a transfer, coming within Section 53 of the Transfer of Property Act. In support of the said contention, Mr. R. Subramanian, learned Counsel for the petitioner relied upon the decision of the Supreme Court in *S. Rathinam @ Kuppamuthu and Ors. v. L.S. Mariappan and Ors.* 2008 1 L.W. 23. While considering the question whether the right to manage a temple can be the subject matter of testamentary succession, it was held by the Supreme Court in the said decision in paragraphs-21 and 34 that a Will is not a transfer, but a mode of devolution.

11. Section 5 of the Transfer of Property Act, defines a "transfer of property" as follows:

In the following section "transfer of property" means an act by which a living person conveys property, in present or in future, to one or more other living persons, or to himself; or to himself and one or more other living persons; and "to transfer property" is to perform such act.

12. As seen from the definition, a transfer necessarily involves a conveyance. A Will presupposes the right of revocation in the testator. But in a transfer, the act is complete and there could only be reconveyance and not revocation. Therefore there is no difficulty in accepting the first contention of the learned Counsel for the petitioner that the first respondent cannot take shelter u/s 53 of the Transfer of Property Act, to assail the Will in favour of the petitioner, as there is no transfer of immovable property.

13. Once it is concluded that the first respondent cannot take recourse to Section 53, the second argument of the learned Counsel for the petitioner, relating to the necessity for a "body of creditors" need not even be gone into. The law laid down by Justice M. Srinivasan, in *P. Srinivasan Vs. Suseelabai and Others*, and followed by M. Jeyapaul, J., in *Pinna Thevar Vs. M.S. Maniam and S. Jayaseelan*, that Section 53 cannot be invoked by a single creditor but can be invoked only when there are more than one creditor, will have no application to the present case, once the first contention of the learned Counsel for the petitioner is accepted to the effect that the first respondent cannot invoke Section 53. In other words, I

am accepting the first contention of the counsel for the petitioner that Will is not a transfer of property and that therefore the first respondent cannot challenge the Will on the ground that it is a fraudulent transfer, hit by Section 53. Therefore the question as to whether there must be a body of creditors to invoke Section 53, has no relevance at all.

14. But my above conclusion that the case on hand is not covered by Section 53, does not mean that the challenge of the first respondent to the Will, should fail. It is true that a Will is not a "transfer" and Section 53 of the Transfer of Property Act, is not attracted to the case on hand. But it does not mean that a question of fraud cannot be raised by a creditor, in respect of the Will set up by a debtor to defeat the rights of a creditor. The first respondent/deed holder may not be entitled to invoke Section 53 of the Transfer of Property Act, to challenge the Will. But a creditor can certainly challenge a Will on the ground that it is vitiated by fraud. Such a contention, if raised, has to be considered de hors Section 53 of the Transfer of Property Act.

15. It is a fundamental principle of law that fraud vitiates all solemn acts. "Fraud and deceit ought not to benefit any person ? *fraus et dolus nemini patrocinari debent*". What is incorporated in Section 53 of the Transfer of Property Act, is only one of its "avatars" or manifestations. Since Will is not a transfer, a creditor may not be able to challenge such a manifestation of fraud, from the stage set in Section 53. But he can always challenge it on the fundamental principle that fraud vitiates all acts including a Will.

16. In other words, de hors Section 53, it is possible to challenge the Will as vitiated by fraud. The Court can always test whether the act complained of, was fraudulent and whether it was done with intent to defraud the creditor, since "fraud and justice never dwell together- *fraus et jus nunquam cohabitant*". Such a challenge may not fall under the category of "fraudulent transfer" within the meaning of Section 53 of the Transfer of Property Act. But it may nevertheless fall under the category of "attempt at fraudulent disposition of property".

17. Quoting from Story's Equity Jurisprudence, 14th Edition, Vol.1., the Supreme Court observed in *Hamza Haji Vs. State of Kerala and Another*, , as follows:

Fraud indeed, in the sense of a court of equity, properly includes all acts, omissions and concealments which involve a breach of legal or equitable duty, trust or confidence, justly reposed and are injurious to another, by which an undue and unconscientious advantage is taken of another.

18. The Courts have gone to the extent of holding that even a judgment obtained by fraud, is of no effect. In *S.P. Chengalvaraya Naidu (dead) by L.Rs. Vs. Jagannath (dead) by L.Rs. and others*, , the Supreme Court held as follows:

...The Courts of law are meant for imparting justice between the parties. One, who comes to the Court, must come with clean hands. We are constrained to say that more often than not, process of the Court is being abused. Property-

grabbers, tax-evaders, bank-loan dodgers and other unscrupulous persons from all walks of life find the court-process a convenient lever to retain the illegal gains indefinitely. We have no hesitation to say that a person, whose case is based on falsehood, has no right to approach the Court. He can be summarily thrown out at any stage of litigation.... A fraud is an act of deliberate deception with the design of securing something by taking advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage.

19. Again in *A.V. Papayya Sastry and Others Vs. Government of A.P. and Others*, , the Supreme Court reiterated that even a judgment, decree or order obtained by playing fraud on the Court, Tribunal or Authority is a nullity and non est in the eye of law. If this is the fate of even a judgment of a Court obtained by fraud, it is needless to point out that a Will, executed out of a fraudulent intent to defraud the creditor, cannot also be taken to be valid in the eye of law. Such a Will may not come within the mischief of Section 53 of the Transfer of Property Act, but it does not mean that anything that falls outside Section 53 is no mischief.

20. "Qui per fraudem agit, frustra agi ? What a man does fraudulently, he does in vain". In *Ram Chandra Singh Vs. Savitri Devi and Others*, , the Supreme Court quoted from "Bigelow on Fraudulent Conveyances", the following:

?If on the facts the average man would have intended wrong, that is enough

In paragraph-23 of its decision, the Supreme Court held that "a collusion or conspiracy with a view to deprive the rights of the others in relation to a property would render the transaction void ab initio".

21. As seen from the facts of the case, the Testator M.R. Lakshmanan, allegedly borrowed money in the year 1991 from the first respondent-finance firm, of which he was also a partner. The money was borrowed for the benefit of the second respondent-firm (first defendant in the suit), in which his sons were partners. His first Will executed in the year 1989, named 2 of his sons as the legatees. It is the case of the first respondent-finance Company that when they threatened to sue him for recovery of money, he created the second Will dated 11.6.1996, bequeathing the property in favour of his daughters-in-law, with a direction to them to pay Rs. 3,000/- to his wife and to pay Rs. 25,000/- to the daughters. The Testator and his sons, who are defendants 3 to 6 in the suit, were living together in the same house till the death of the Testator on 13.9.1996. Therefore there was virtually no reason for disinheriting the sons, who were the beneficiaries under the first Will. The Testator was a law graduate and one of his sons, had knowledge of the Will but chose to keep it secret during the entire proceedings, despite an order of attachment before judgement being in force for 8 full years. Thus the intention of the Testator as well as his sons is quite obvious that they only wanted to save the property from being proceeded against. In such circumstances, I have no hesitation to hold that despite the inapplicability

of Section 53 of the Transfer of Property Act, the first respondent was entitled to question the Will as fraudulent.

RIGHT TO CHALLENGE THE WILL

22. The next contention of Mr. R. Subramanian, learned Counsel for the petitioner is that as a stranger, the first respondent has no right to question the validity of the Will. In support of the said contention, the learned Counsel for the petitioner relied upon the decision of I. David Christian, J., in Valliammal v. S. Arumugha Gounder and Anr. 2001 (1) CTC 708. It was held in paragraph-17 of the said decision that "it stands to common sense and reason that the truth and validity of the Will normally will be challenged only by those persons who are the legal heirs of the testators and who would have succeeded to the properties of the testators, but for the Will".

23. Though on general principles, the above contention of the learned Counsel for the petitioner is correct, it cannot be accepted as having universal application, for all types of situations. Valliammal's case arose out of a suit for recovery of possession filed by Valliammal's husband against a person who was a Lessee of the property. The Lessee did not question either the title of his Lessor Sivasubramania Sastriyar or the title of Valliammal's husband, who purchased it from Sastriyar. After the institution of the proceedings, Valliammal's husband died and she was brought on record, on the basis of the Will. Thereafter she withdrew the suit with liberty to file a fresh suit and came up with the next suit. In that next suit, the Lessee questioned the validity of the Will. It is under such circumstances that this Court held that the Lessee of the property had no right to challenge the validity of the Will. As a matter of fact, Valliammal examined the attestors to the Will to prove the Will and on facts, this Court held in paragraph-16 of the said judgment that "there is nothing to warrant a conclusion that the Will appears to be unnatural or Will could not have been executed by the Testator, while in a sound and disposing state of mind."

24. In the case on hand, M.R. Lakshmanan admittedly executed a Will dated 19.2.1989, bequeathing the only property that he had, in favour of his 2 sons. Under the second Will dated 11.6.1996, the Testator did not give a share in the property to his wife, 4 sons and 2 daughters, but bequeathed the property in favour of his 4 daughters-in-law (wives of defendants 3 to 6). In the proof affidavit filed by the petitioner, in lieu of chief examination, the petitioner admitted that the very existence of the Will dated 11.6.1996 became known to her only on 17.8.2005 and that too, through her husband L.Madhavarajan, who is the third defendant in the suit. She further admitted in paragraph-5 of the proof affidavit that she came to know about it only after a notice was affixed in the property that it would be sold in execution of the decree. In cross examination, the petitioner admitted that her husband knew about the execution of the Will, but he did not reveal the same to her. She also admitted that the Testator (her father-in-law) and all his sons lived in the same house, indicating that the testator was not estranged from his sons. When a suggestion was put to

the petitioner during cross examination that the Testator and his sons had lot of loans to be discharged and that the Testator executed the Will to save the property from being proceeded against, she did not deny the suggestion. On the other hand, she said that she did not know about it. Therefore, it was clear that the son of the Testator (the husband of the petitioner), had knowledge of the alleged execution of the Will, in the year 1996 itself. But he never brought it to the notice of the Court, either at the time when an order of attachment was passed on 13.6.1997 or at any time thereafter, that there was a Will and that the property cannot be attached. The fact that the Testator was a law graduate was elicited in cross examination and suggestions were put to the petitioner that the Will was created for the purpose of defeating the rights of creditors like the first respondent herein. It is in the background of the above facts that the right of the first respondent to question the Will, has to be considered.

25. Coming to the contention that it is not open to a stranger to challenge a Will, it is to be stated that the said principle is based upon the theory of caveatable interest and is mostly applicable to proceedings for the grant of Probate or Letters of Administration. But even there, it is always open to a person, who would otherwise be entitled to inherit the property, to challenge the same. In the present case, if the Will goes, the judgment-debtors would succeed to the property and the decree holder would become entitled to bring it to sale. The prohibition for a stranger to challenge a Will, arises out of two fundamental aspects viz., (i) the respect that is due to the last wish of the Testator and (ii) the acceptance of such last wish by persons who would have otherwise inherited the property. When the last wish of the Testator was not actually to lay down the method of devolution, but simply to save his property from the clutches of a third party-creditor, the Court can always pierce the veil and find out the true intention. To this limited extent, a challenge by a stranger can always be entertained, since it is not actually a challenge to the method of devolution indicated in the Will, but to the very purpose of such disposition.

26. Mr. R.Subramanian, learned Counsel for the petitioner contended that the suit was not instituted against the petitioner, as a person representing the estate of the deceased borrower. In fact the petitioner was not even a party to the suit. Therefore, the learned Counsel contended that the decree holder cannot even proceed against the property at the hands of the petitioner, as a person representing the estate of the deceased borrower.

27. In this connection, Mr. R.Subramanian, learned Counsel for the petitioner placed reliance upon the decision in Administrator-General of Burma v. C.R.V.V.S. Chettiyar Firm AIR 1928 Rang. 83. But that was a case where a non-Indian Christian left a Will, appointing some persons other than his wife as Executors. The firm which lent money to the deceased, sued only his widow, as a legal representative of the deceased, without making the Executors as parties. Therefore the Court held that the widow did not have the legal capacity to represent the estate.

28. Though the above contention appears to be a little attractive, it cannot stand a closer scrutiny. The petitioner who claims to be one of the beneficiaries under the Will, admits that she herself was not aware of the existence of the Will, from the year 1996 till the year 2006. The petitioner's husband, who was one of the defendants in the suit, was admittedly aware of the Will, even during the pendency of the suit and he did not make a whisper about it, for a full period of 10 years from 1996 till 2006, despite an order of attachment in force from 13.6.1997 till the date of decree on 10.1.2005. Therefore, there was no occasion for the first respondent-decree holder to implead the petitioner as a party to the suit, as a person representing the estate of the deceased borrower, when the petitioner as well as the first respondent had no knowledge of the existence of the Will. Hence the contention of the learned Counsel for the petitioner cannot be accepted.

29. Moreover, the decision relied upon by the learned Counsel for the petitioner, is of no assistance to him, for the simple reason that in the present case, the suit was not instituted against the legal representatives of the borrower in their capacity as persons representing the estate of the deceased borrower. It was instituted against a firm, of which M.R. Lakshmanan was the Managing Partner and his sons were the other Partners. At the stage of execution, the petitioner sprung a surprise, with a Will and that was not accepted as a genuine document by both the Courts below. Incidentally it is to be pointed out that it is the petitioner who has come up with a petition under Order XXI, Rules 58 and 99 CPC, on the strength of the alleged Will, about which she had no knowledge for a period of 10 years till a notice for the sale of the property was affixed. Therefore she also had a duty to dispel the shadow cast upon the Will in accordance with law.

30. It was lastly contended by the learned Counsel for the petitioner that the petitioner filed I.A. No. 1220 of 2007 before the lower Appellate Court, to lead additional evidence and that the same was rejected without sufficient reasons by the Court below. But it is seen from the records that the additional documents sought to be filed by the petitioner were the partnership deeds and the first Will. These documents were sought to be filed for the purpose of showing that all the 4 sons of M.R. Lakshmanan were not partners of the borrower-firm and that even under the first Will, the bequest was made only in favour of 2 sons, who were not partners in the borrower-firm.

31. But the application to lead additional evidence, I.A. No. 1220 of 2007 was filed by the petitioner at the stage of appeal. Therefore, the petitioner must have satisfied the lower Appellate Court that these documents were not available at the time of trial before the Court of first instance. The petitioner failed to satisfy the Court in this regard. Moreover, all the sons of M.R. Lakshmanan were made parties to the suit, way back in the year 1997 and they themselves never raised a contention that two of them were not partners. Therefore in effect, the petitioner was attempting to lead evidence (i) to prove what was not pleaded and

(ii) to prove something in favour of other defendants, when they themselves never raised an issue. In such circumstances, the dismissal of the application for filing additional documents cannot be found fault with.

32. In view of the above, I find no justification to interfere with the concurrent findings of both the Courts below. Both the Courts, have actually rendered substantial justice between the parties and it is not open to this Court to interfere with those orders, in a revision u/s 115 CPC.

33. As a matter of fact, the present proceedings arise out of the dismissal of an application under Order XXI, Rule 58, by the executing court. Against the said order, she filed an appeal and the same was dismissed by the lower appellate court. Order XXI, Rule 58 (4) stipulates that an order made under Rule 58 shall have the same force and be subject to the same conditions as to appeal as if it were a decree. Therefore, the petitioner was not entitled to file a revision against the orders impugned herein, but should have filed a civil miscellaneous second appeal. However, I have considered the validity of the orders of both the courts below even on merits and have found that there exists no justification to interfere with the same. Hence the Civil Revision Petition is dismissed. No costs. Consequently connected miscellaneous petitions are also dismissed.