
(2002) 06 MAD CK 0172

In the Madras High Court

Case No : C.M.A. No. 889 of 1992 and A.S. 479 of 1993

V. Devadoss and Maria Thangam

APPELLANT

Vs

V. Pankiraj, Chandanaraj and Arulraj

RESPONDENT

Date of Decision : 19-06-2002

Acts Referred:

Succession Act, 1925 — Section 105, 106, 107, 109
Wills Act, 1837 — Section 33

Citation : (2003) 2 LW 224 : (2003) 1 RCR(Civil) 329

Hon'ble Judges : K. Govindarajan, J

Bench : Single Bench

Advocate : T. Arulraj, for C. Ravichandran, for the Appellant; K.N. Thampi, for the Respondent

Judgement

K. Govindarajan, J.—The plaintiff in O.S.No.112/89 and the defendants in O.S.No.129/88 are the appellants. The appellants are brother and sister. The respondents are their brothers. The suit properties belonged to Mariamma Nadachi, the paternal grandmother of the appellants and respondents. According to respondents, she executed a will on 5.11.1986 marked as Ex.A2 bequeathing the properties in favour of the respondents. She died on 26.12.86. With a prayer to grant probate of the said will, the respondents filed O.P.No.68/1987. In view of the contest, it was numbered as O.S.No.129/88.

2. The 1st appellant filed a suit in O.S.No.112/89 to divide the suit property on the basis that the property was given to his father Varuvel Nadar by Mariamma Nadachi under the settlement deed dated 17.9.1946, marked as Ex.A10. He has also defended the petition filed by the respondents for the purpose of granting probate. The respondents contested the suit for partition on the basis of the will in their favour marked as Ex.A2.

3. The trial court tried the both the suits jointly and delivered common judgment. The trial court found that the will, Ex.A2 dated 5.11.86 is valid and it would bind the appellants herein. While dealing with the genuineness of Ex.A2 executed by

Mariamamma Nadachi, the trial court found that Mariamma Nadachi had executed the will on her own will and with the good and disposing state of mind. On the basis that the will is valid, the trial court decreed the suit in O.S.No.129/88 filed by the respondents and dismissed the suit for partition in O.S.No.112/89 filed by the 1st appellant. Hence this C.M.A. and the Appeal Suit.

4. The points for consideration in this Appeal and the Appeal Suit are:-

1) Whether the respondents have established the genuineness of the will as it has been disputed by the appellants?

(2) Is not the trial court committed error in not dealing with the case on the basis of Ex.A10 settlement deed dated 17.9.1946 executed by Mariamma Nadachi on the basis of which the appellants have filed the suit for partition.

5. Learned counsel for the appellants submitted that Mariamma Nadachi had already executed Ex.A10, dated 17.9.1946 settling the suit properties in the name of her son Varuvel Nadar, the father of the appellants and respondents herein. Varuvel Nadar died during the lifetime of Mariamma Nadachi and so by virtue of Sec. 109 of the Indian Succession Act, hereinafter called "the Act", the heirs of Varuvel Nadar are entitled to get the properties equally and the respondents cannot rely on Ex.A2, the will executed by Mariamma Nadachi claiming right in the suit properties, as no right can be derived under the said document.

6. Learned counsel for the respondents while answering this point, submitted that by executing the will under Ex.A2, Mariamma Nadachi had shown the contrary intention and so the appellants cannot rely on Sec. 109 of the Act to say that Ex.A10 did not lapse by the death of Varuvel Nadar.

7. Though the learned counsel for the appellants tried to submit that Ex.A10 is a settlement and by that Varuvel Nadar got right in the property even during the lifetime of Mariamma Nadachi, on perusal of Ex.A10, I am able to see that Varuvel Nadar could get the property only after the lifetime of his mother. Merely because of a restriction to sell the property by his mother during her lifetime, it cannot be said that she had passed on her right in favour of her son Varuvel Nadar even during her lifetime. So the said document can be construed only as a will in favour of Varuvel Nadar, bequeathing the properties in his favour by his mother, Mariamma Nadachi.

8. Now, we have to proceed to appreciate the scope of Sec. 109 of the Act with reference to the facts of the present case on the basis that Ex.A10 is a will.

9. Sec. 109 of the Act reads as follows:-

"When bequest to testator's child or lineal descendant does not lapse on his death in testator's lifetime

Where a bequest has been made to any child or her lineal descendant of the testator, and the legatee dies in the lifetime of the testator, but any lineal

descendant of his survives the testator, the bequest shall not lapse, but shall take effect if the death of the legatee had happened immediately after the death of the testator, unless a contrary intention appears by the will.

Illustration

A makes his will, by which he bequeaths a sum of money to his son, B, for his own absolute use and benefit. B dies before A, leaving a son, C, who survives A and having made his will whereby he bequeaths all his property to his widow, D. The money goes to D."

It is relevant to mention here Sec. 105 deals with legacy which lapses, if legatee does not survive the testator. Sec. 107 and Sec. 109 of the Act are the exemptions to the above said provision of Sec. 105.

10. According to the general provision, namely, Sec. 105 of the Act, since the will does not take effect until the death of the testator and the will cannot communicate any benefit to the persons who died before the death of the testator, the legacy lapses if the legatee does not survive the testator, unless the testator intended that legacy should go to some other person in such an event. Sec. 105 of the Act has been explained further under Sec. 106 of the Act. According to the said provision, if the legacy is given to two persons jointly, then it would not lapse on the death of one of them, and one of the legatees who survives take the entire legacy.

11. Sec. 107 of the Act further explains the words used in Sec. 105 regarding the intention of the testator and also deals with different types of joint legatees. Under the said provision it is stated that where the legacy is given to legatees with the intention to give distinct shares of the legatees, if any legatee dies before the testator, the specific share given to that legatee will not go to the remaining legatee or legatees but will lapse and it will remain with the testator, and it has to be treated as an intestate of the testator.

12. Sec. 109 of the Act deals with another exception to the rule in Sec. 105 of the Act. We have already extracted the said provision for proper appreciation.

13. The following conditions have to be fulfilled to rely on Sec. 109 of the Act for the purpose of avoiding the lapse of the legacy:-

- (1) The bequest must be to a child or other lineal descendant of the testator;
- (2) The child or lineal descendant dies during the lifetime of the testator leaving a lineal descendant who survives the legatee;
- (3) There should not be any contrary intention in the will;
- (4) The said provision has been made to prevent the property given by testator to the child going from the estate of such a child or his family being left without any property by reason of the death of the child before the testator. The said provision is extending the life of legatee beyond the life of the testator to give

effect to the will by avoiding a lapse. Such avoidance could be only if any contrary intention is not made in the will. The above said provision has been made on the basis of Sec. 33 of the Wills Act 1837.

14. (1941) 1 All ER.238 - In *Re Hurd, Fairwell, J.*, has held that Sec. 33 applied only to prevent a lapse and that it did not alter the way in which the estate of the person predeceasing the testator was administered, but simply increased that estate and did not alter the persons entitled to it under the law on the death of the person predeceasing the testator.

15. In *In re Scott* (1901) 1 KB 228 where Stirling, L.J. observed with reference to the scope of Sec. 33 of the Act as follows:-

"The legislature has simply provided that in certain cases there shall be a posthumous addition of a property of a deceased person, the object of the provision being to place that additional property at the disposal of the deceased while still living. At this point, in my judgment, the operation of the Wills Act ceases; and this additional property is left to go and devolve as prt of the property of the deceased child.

16. In the same judgment, it is also held as follows:-

"In section 33 the effect is to be "as if the death of" the devise or legatee "had happened immediately after the death of the testator." To ascertain the meaning of this, let me suppose that the testator by his will has (as in the present case) devised real estate in fee to a child who predeceases him. If the child had survived the testator, the will would have passed the real estate to that child in fee; and the legislature prescribes that, notwithstanding the death of the child, the legal effect of the will shall be the same -that is to say, that the will shall pass the real estate to the child in fee. Such seems to me the natural meaning of the language of the Act nor can I see any difficulty in understanding it. The legislature has simply provided that in certain cases there shall be a posthumous addition to the property of a deceased person, the object of such provision being to place that additional property at the disposal of the deceased while still living. At this point, in my judgment, the operation of the Wills Act ceases; and this additional property is left to go and devolve as part of the property of the deceased child. If the child, while living, entered for valuable consideration into any contract with reference to such property (as, for example, by way of sale or mortgage, or by way of covenant in a marriage settlement), by such contract the property will be bound. If the child made a will by which such property is, by appropriate language, disposal of, either specifically or otherwise, the property will pass under such disposition. If the child died intestate, the property will go to the persons entitled by law as upon an intestacy. If the child died an undischarged bankrupt, it will vest in the trustee in bankruptcy, and so on." Subsequently he quotes from a judgment of Jessel M.R. in *Pickersgill v. Rodger*, (1876) 5 Ch.D. 163 and says (1901) 1 K.B. 228 : Sir George Jessel M.R., speaking of section 33 of the Wills Act, says 5 Ch.D.163:

The result, therefore, is this, that the child "dying in the testatrix's lifetime has his estate augmented by the devise or bequest made to him by the testatrix; in other words, the subject of the devise or bequest falls into the estate of the child, and of course can be disposed of by the will of that child, if that will contains apt words to dispose of it." "

17. While dealing with the Sec.33 of the Wills Act with reference to legal fiction on the death of the legatee and the testator with reference to vesting of the properties on the legatee, in *In re Hensler*, decd. (1881) 19 Ch.D.612 it has been held as follows:-

"It must therefore be declared that John Hensler the son took the property but died intestate "as to it, and that the petitioner is entitled as his heir-at-law."

18. While construing the nature of vesting on the heirs of legatee after the death of testator, under Sec.33 of the Wills Act, it is held in *In re Hurd*, 19 Ch.D. 612, as follows:-

"Section 33 of the Wills Act, 1837, provides that the gift is not to lapse, but is to take effect as if the death of the legatee had happened immediately after the death of the testator. If those words be taken literally, it must, in the present case, be assumed that Sarah died in 1939, immediately after the death of the testatrix, from which it seems to follow that the legacy given to her shall be administered according to the law then in force. In my judgment, however, that is not the true effect of this section: its object and effect is to prevent lapse, and its result is that the gift, instead of lapsing, becomes part of the estate of the deceased person, on the footing that the legatee was alive at the death of the testatrix and was therefore a person to whom a legacy could be given. That result, however, does not, in my judgment, alter the position that, although Sarah is deemed, for the purpose of making this gift effective, to have been living in 1939, the share which she takes under the gift becomes none the less a part of her estate and must be administered as part of her estate in accordance with the law in force at the date of her death in 1923. Obvious difficulties might arise were not that the true effect of the section. For instance, if a person died intestate before 1925 and it became necessary to inquire who were the next-of-kin and an inquiry was ordered, the whole matter was investigated, and the master's certificate made finding who were the intestate's next-of-kin, if subsequently the estate is increased by a legacy given by a person who died after 1925 and saved from lapse by section 33, if the legacy is to be administered in accordance with the law after 1925, a further inquiry as to the next-of-kin will be necessary on the footing that the intestate's death took place long after it actually did, and different persons may become entitled. On the whole I have come to the conclusion that that section applies only to the prevention of lapse. It is intended only to prevent the gift from not taking effect, and the result is that a gift which would otherwise have lapsed passes to the legal personal representative, who takes it as part of the estate to be administered in accordance with the law applicable to that estate. The Wills Act,

1837, does not, in my judgment, so apply as to alter the way in which the estate should be administered. It operates only to increase that estate and does not alter the persons entitled to it under the law in force at the intestate's death."

19. From the above, it is clear that on the death of Mariamma Nadachi, the testatrix, on 26.12.85 the heirs of Varuvel Nadar, namely, the appellants and respondents, are entitled to inherit the properties, in view of the intervention of Sec. 109 of the Act avoiding the lapse of the legacy due to the death of Varuvel Nadar before the demise of the testatrix. The legacy given under Ex.A10 instead of lapsing, became part of the estate of Varuvel Nadar.

20. To sustain that defence, Mariamma Nadachi, immediately after the death of Varuvel Nadar, her son, expressed her contrary intention to make the legacy under Ex.A10 lapsed and so the appellants cannot take advantage of Sec. 109 of the Act.

21. So we have now to consider whether the subsequent will dated 5.11.86 marked as Ex.A2 could be construed as her contrary intention to revoke the will under Ex.A10 and thereby whether the will under Ex.A10 would lapse.

22. We are not having many decided cases on the question of constituting contrary intention to exclude the operation of Sec. 109 of the Act.

23. In *Amy Rusi v. Framroz*, Vol.LVI.1953 the Bombay Law Reporter 910, while construing the meaning of contrary intention, it is held as follows:-

"It was stated that there is a remarkable paucity of judicial opinion on the meaning and effect of this expression "contrary intention". The argument was that very little is required to show a contrary intention requisite for affecting bequests under this section. My attention has not been drawn to any principle or any statement from any leading treatise in support of this argument. On a plain reading of the section it appears that the only possible construction of the words "unless a contrary intention appears by the will" would be that there must be a clear, unambiguous and unequivocal intention by the testator in the will itself before a bequest in favour of a lineal descendant, should be unfortunately die before the testator, can be defeated. One does not elaborate on a question of this nature when it appears that this must be the only reasonable construction of the words at the end of the section."

24. The above said decision of the Bombay High Court has been followed by the Division Bench of the Kerala High Court in *Mavila Chathoth Vasudevan Nambiar Vs. Mavila Chathoth Krishnan Nambiar and Others*, :holding as follows:-

"On the very terms of the section, it operates to confer the bequest on the heirs of the child or lineal descendant unless a contrary intention appears by the will. The contrary intention that the legacy should lapse on the death of the legatee before the testator, has to be found in the will itself. The words "unless a contrary intention appears by the will" mean that there must be a clear, unambiguous and unequivocal intention by the testator in the will itself before a

bequest if favour of a child or lineal descendant can be defeated."

25. On facts, in the above said decision, it is further held as follows:-

"17. The statement in the will Ext.B3 that none other than Madhavi Amma shall take her share is only an affirmation of the exclusive rights of Madhavi Amma over her share vis-a-vis the other legatees under the will. It is not an expression of any contrary intention on the part of Kunkan Adiyodi that the bequest should lapse if Madhavi Amma predeceased him. The bequest to Madhavi Amma therefore, falls on her lineal descendants who are defendants 4 to 9 in the suit."

26. From the above, it is clear that the subsequent will Ex.A2 cannot be taken into consideration to pinpoint the contrary intention of the testatrix. Moreover such contrary intention must be in the said will itself. There should be an express statement which is necessary to exclude the operation of Sec. 109 of the Act. Even under Ex.A2 it is not stated that earlier will Ex.A10 had lapsed. Ex.A2 has been executed only on assumption that Ex.A10 had lapsed due to the death of the legatee. The contrary intention should be only for the purpose of preventing the operation of Sec. 109 of the Act. There is no recital in any of the documents pointed out to show the intention of the testatrix Mariamma Nadachi that Ex.A10 should lapse if Varuvel Nadar predeceased her and she had not given out her intention to divert the property to anybody in the event of Varuvel nadar predeceased her. As already stated contrary intention is only with respect to the applicability of Sec. 109 of the Act. In the absence of any such intention immediately after the death of legatee, Sec. 109 of the Act would come into effect, but his heirs can claim right in the property only after the death of testator or testatrix.

27. In this case, as stated already, such contrary intention has not been established but only on the basis of Ex.A2 respondents are trying to contend that she had shown her contrary intention and so Ex.A10 had been lapsed. I am not able to accept the said submission. As held in the decisions cited above, the contrary intention should be in the said will itself and not after the death of the legatee. In the absence of any such contrary intention, we have to take it that Ex.A10 need not be lapsed and the heirs of Varuvel Nadar are entitled to the property, and Ex.A2 cannot be sustained and enforced.

28. In view of the above discussion, C.M.A.No.889/92 is allowed and the petition filed by respondents in O.P.No.68/87 re-numbered as O.S.129/88 is dismissed. No costs.

29. The 1st appellant filed the suit in O.S.112/89 for partition on the basis of Ex.A10. In view of the above said findings, he is entitled for partition of his 1/5 share and so the 1st appellant is entitled for a decree for his 1/5 share as prayed for. So, there will be a preliminary decree for partition of 1/5 share of the plaintiff. Consequently, A.S.No.479/93 is allowed. No costs.