

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 04.06.2015

CORAM:

THE HONOURABLE **MS. JUSTICE R. MALA**

Rev. Application No.67 of 2012

in

A.S.No.1037 of 2007

Date of Reserving the Order 01.06.2015	Date of Pronouncing the Order 04.06.2015
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1.K.Rajeswari

2.K.Thiyagarajan

3.T.Menaka

4.K.Mahendran

5.Visalakshi

6.Minor Bharanidharan

7.Minor Sukrudha

Minors 6 and 7 rep by their father
and next friend K.Thiyagarajan

..Review Petitioners/Appellants

Vs.

1.M.V.Shanmugam (Deceased)

2.Smt.Daisy Rani

3.Smt.Neeraja

4.S.Venkataraman

..Respondent/ Respondents

(RR2 to 4 brought on record as LR's of the deceased sole respondent vide order of the Court dated 05.03.2015 made in M.P.No.1 of 2013 in Review Application No.67 of 2012)

Prayer:

Review Application has been filed against the Decree and Judgment dated 03.03.2011 made in A.S.No.1037 of 2007.

For Petitioners : Mr.S.Balasubramanian

For Respondents : Mr.Ar.L.Sundaresan, Senior Counsel

for Ms.AL.Gandhimathi, for R2 to

R4

R1 – Died (Steps Taken)

ORDER

The present review application has been filed against the Decree and Judgment dated 03.03.2011 made in A.S.No.1037 of 2007.

2. The brief facts of the case is as follows:

The first respondent herein as plaintiff had filed a suit in O.S.No.36 of

2005 on the file of the District Court, Salem for specific performance on the basis of the sale agreement dated 20.10.2004. The review petitioners who are the defendants in the said suit raised the plea that the document is not a sale agreement but it was only a security for the amount borrowed. However, the Trial Court after considering the submissions made by both sides had decreed the suit. Against the said judgment of the Trial Court, the defendants preferred an appeal in A.S.No.1037 of 2007, wherein the judgment of the Trial court was confirmed. Against the said judgment of the appellate Court, the defendants/appellants preferred an Special Leave Petition before the Hon'ble Apex Court and the said SLP came to be dismissed as withdrawn with the liberty to the petitioner/appellant/defendants to file review against the order passed by the learned Single Judge so as to bring to his notice the provisions of the Hindu Disposition of Property Act, 1916 (herein after called as the 'Act') and The Miscellaneous Personal Laws (Extension) Act, 1959. Thus, the review petitioners have now come before this Court seeking review of the order made in A.S.No.1037 of 2007.

3. The learned counsel for the review petitioners/appellants/defendants has come forward with this review petition stating that while deciding the appeal, this Court has not considered

the Hindu Disposition of Property Act, 1916 and The Miscellaneous Personal Laws (Extension) Act, 1959. So, the finding regarding the bequest in favour of the 6th and 7th review petitioners as void has to be reviewed in as much as the absolute estate has been given to the 6th and 7th review petitioner under the Ex.B.1/Will. The review petitioner 2 and 4 have been given only life estate in the Will. As per Section 2 and 3 of the Hindu Disposition of Property Act, 1916, the Will in favour of the unborn child is valid. So, the review petitioners 6 and 7 are having vested interest in the property and since they are minors, the interest of the minors has to be safeguarded. Thus, the finding in respect of bequest in favour of 6th and 7th review petitioners is void has to be reviewed. To substantiate his argument, the learned counsel for the petitioner relied upon the following decisions:

- 1. AIR 1970 Supreme Court 1759, Raman Nadar Vishwanathan Nadar and others v. Snehappoo Rasalamma and others.**
- 2. 1975 (1) MLJ 212, N.Radhakrishna Naidu and others v. S.Govindaswami Naidu and another.**
- 3. AIR 1983 Andhra Pradesh 139, Javvadi Venkata Satyanarayana v. Pyboyina Manikyan and others.**

and submits that as per Section 2 and 3 of the Hindu Disposition of Property Act, 1916, the Will in favour of the unborn child is valid.

Hence, the learned counsel for the review petitioner prayed for setting aside the impugned order.

4. Resisting the same, Mr.Ar.L.Sunderasan, learned Senior Counsel appearing for the respondent would submit that the review itself is not maintainable because it is a well settled principle that the review of the order passed by the competent Court is possible only under 3 circumstances namely,

(i) On discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by a party at the time when the decree was passed or order made.

(ii) On account of some mistake or error apparent on the face of the record.

(iii) or for any other sufficient reasons.

However, in the given case on hand, none of the above three circumstances exists. Hence, the review itself is not maintainable. To substantiate his argument, the learned Senior Counsel relied upon the decision reported in **2008-2-L.W.156, K.Alliammal v. The Special Tahsildar, Adi Dravida Welfare Department, Tirupattur**. Further, the ignorance of law is not an excuse. The learned Senior Counsel would further submit that in the SLP preferred before the Hon'ble

Apex Court, the following order came to be passed.

"Petitioners are permitted to withdraw this petition with liberty to file review against the order passed by the learned Single Judge so as to bring to his notice provisions of the Hindu Disposition of Property Act, 1916 and The Miscellaneous Personal Laws (Extension) Act, 1959.

Accordingly, special Leave Petition is dismissed as withdrawn."

5. The learned senior counsel appearing for the respondent would further submit that the decision relied on by the learned counsel for the review petitioner is not relevant to the facts of the present case because as per Section 2 of the Hindu Disposition of Property Act, 1916, the Act is applicable subject to the limitations. The said limitations and conditions has been clearly stated under Section 3 of the said Act. He would further submit that this Court in paragraphs 15 to 19 of its Order has already discussed the limitations mentioned under Section 3 viz., Chapter II of the Transfer of Property Act, 1882 which was substituted for "sections 13, 14 and 20", by the Transfer of Property (Amendment) Supplementary Act 20 of 1929 and also in respect of dispositions by will those contained in Sections 113,

114, 115 and 116 of the Indian Succession Act, 1925. Thus, the learned Senior counsel appearing for the respondent prayed for dismissal of the review petition.

6. Considered the rival submissions made by both sides and perused the typed set of papers filed before this Court.

7. Now this Court has to decide whether the review itself is maintainable?

At this juncture, it is appropriate to incorporate Order 47 Rule 1 CPC.

"1. Application for review of judgment.- (1) Any person considering himself aggrieved -

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,

(b) by a decree or order from which no appeal is allowed or

(c) by a decision on a reference from a Court of Small Causes, and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or

order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the Appellate Court the case on which he applies for the review."

8. It is pertinent to note that after the dismissal of the appeal, the review petitioners had preferred Special Leave Petition (Civil) No.____/2011. When the matter came up for hearing on 08.12.2011 for condonation of delay, the delay was condoned, however on the representation made by the learned counsel for the petitioners, the SLP was dismissed as withdrawn.

9. In the decision relied on by the learned counsel for the respondent reported in **2008-2-L.W.156, K.Alliammal v. The**

Special Tahsildar, Adi Dravida Welfare Department, Tirupattur,

the Division Bench of this Court has held in paragraph 4 as follows:

"4. We are of the view that the scope of exercising the review power is very limited. The power of review may be exercised on the discovery of new and important matter or evidence which, after exercise of due diligence was not within the knowledge of the person seeking the review or could not be produced by him at the time when the order was made; it may be exercised where some mistake or error apparent on the face of the record is found; it may also be exercised on any analogous ground. But, it may not be exercised on the ground that the decision was erroneous on merits and the review petitioners have not been properly represented at that time of arguing the case or the counsel who argued on behalf of the review petitioners has not placed any relevant materials before the Court. That would be the province of a court of appeal. A power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate Court or crept in the judgment and decree which is appealed again."

So, from the above decision it is made clear that the review is entirely different from an appeal and that a power of review is not to be confused with appellate powers which may enable an appellate court to correct all manner of errors committed by the subordinate Court or crept in the judgment and decree which is appealed again. However, in the instant case, it is not the case of the petitioner that there is error apparent on the face of the record or that new facts have been discovered after exercise of due diligence.

10. Further, the testator Kuppusamy Chettiar has bequeathed the properties by executing a Will on 12.05.1969 giving life estate to his daughter Visalakshi, son Krishna Chettiar and daughter-in-law Rajeswari, w/o. Krishna Chettiar. After the life time of his son Thiagarajan and also the male issues born to Krishna Chettiar and Rajeswari is given only the life estate and only the children born to the male issues of Krishna Chettiar and Rajeswari are given absolute estate. The said Kuppusamy Chettiar died in the year 1975 and on the date of death of Kuppursamy Chettiar, neither the 4th defendant nor the 6th and 7th defendants were born. So, as per Section 13 of the Transfer of Property Act, 1882 and Sections 112, 113 and 114 of the Indian Succession Act, this Court has held that on the date of the

death of the testator, the minors i.e., sixth and seventh defendants were not born and even the fourth defendant was not born. So, the testator's bequest in favour of unborn persons is void. Now the defendants have come forward with the new provision viz., The Hindu Disposition of Property Act, 1916. As per the said Act, several benefits have been accorded to the unborn child. Section 2 of the said Act reads as follows:

"2. Dispositions for the benefit of person not in existence.- *Subject to the limitations and provisions specified in this Act, no disposition of property by a Hindu, whether by transfer inter vivos or by will, shall be invalid by reason only that any person for whose benefit it may have been made was not in existence at the date of such disposition."*

11. Section 3 of the Act reads as follows:

"3. Limitation and Conditions.- *The limitations and provisions referred to in section 2 shall be the following, namely :-*

(a) in respect of dispositions by transfer inter vivos, those contained in Chapter II of the Transfer of Property Act, 1882 (4 of 1882) and

"Chapter II" was substituted for "sections 13, 14 and 20", by the Transfer of Property (Amendment) Supplementary Act 21 of 1929, s.12, which came into force on the 1 April, 1930.

(b) in respect of dispositions by will those contained in sections 113, 114, 115 and 116 of the Indian Succession Act, 1925 (33 of 1925)."

12. It is true that the Hindu Disposition of Property Act, 1916 has been extended to the whole of India, except Jammu and Kashmir from 01.12.1960. So, as per Section 3 of the said Act which deals with Limitations and Conditions, I am of the view that the Will/Ex.B.1 is void in respect of unborn child on the date of death of the testator. This Court in paragraph 15 to 19 of its order has considered the said aspect and came to the conclusion that the Will is void in respect of the unborn child i.e., D4, D6 and D7, on the date of death of the testator.

13. At this juncture, it is appropriate to consider the decisions relied on by the learned counsel for the review petitioners.

13.1.1. In the decision reported in **1975 (1) MLJ 212, N.Radhakrishna Naidu and others v. S.Govindaswami Naidu**

and another, it was held that a Hindu can make a bequest in favour of an unborn child. The result of this is, subject to the limitations in Chapter II of the Transfer of Property Act and Sections 113, 114, 115 and 116 of the Indian Succession Act, no transfer *inter vivos* or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of such disposition. It is appropriate to incorporate paragraph 6 of the said decision:

"6. That takes me on to the second question argued by the learned Counsel for the appellants, namely, whether such a bequest is hit by Section 113 of the Indian Succession Act, 1925. Admittedly, the bequest in favour of Sethulakshmi Ammal's children would be a bequest in favour of unborn persons. Therefore, the law relating to a bequest in favour of an unborn person will be clearly applicable. The history of this branch of law has been set out in Mulla's Hindu Law, Thirteenth Edition, at pages 402-403 as follows:

"It was held by the Privy Council in the Tagore case in 1872, that a Hindu cannot dispose of his property by gift in favour of a person who was not in existence at the date of the gift, nor could he dispose of his property by will in

favour of a person who was not in existence at the date of the death of the testator. The first enactment which validated gifts and bequests in favour of unborn person was the Hindu Transfers and Bequests Act, 1914. This was an Act of the Madras Legislature. It applied in terms to the whole of the State of Madras and was intended so to apply. It was followed by the Hindu Disposition of Property Act, 1916, which was an Act of the Imperial Legislature. It applied to the whole of British India except the province of Madras for which legislation had already been made by the local Act of 1914. After the Act of 1916, was passed, the High Court of Madras held as to the Madras Act of 1914, that the local Legislature had no power to take away the right of a Hindu domiciled within the local limits of the ordinary original civil jurisdiction of High Court of Madras to be governed by the Hindu law as it stood when the High Courts Act, 1861, was passed. The fact, however, was that the Hindu law as it then stood did allow gifts and bequests in favour of unborn persons, and the Tagore case had misinterpreted that law. This led to the enactment by the Imperial Legislature of the Hindu Transfers and Bequests (City of Madras) Act, 1921. This Act extends in effect the

local Act of 1914 to Hindus domiciled in the City of Madras-It also validates gifts and bequests made by Hindus domiciled in the City of Madras subsequent to the 14th February, 1914 being the date on which the local Act of 1914, came into force. The result is that as between them the Acts of 1914, and 1921 apply to the whole State of Madras, and the Act of 1916 applies to the rest of India.with effect from 1st February, 1960; The Hindu Transfers and Bequests Act, 1914; and The Hindu Transfers and Bequests (City of Madras) Act, 1921, stand repealed: and The Hindu Disposition of Property Act, 1960 has now been made applicable to the whole of India including the State and City of Madras excepting the State of Jammu and Kashmir."

The resulting position is that a Hindu can make a bequest in favour of an unborn child. The result of this is, subject to the limitations in Chapter II of the Transfer of Property Act and Sections 113, 114, 115 and 116 of the Indian Succession Act, no transfer inter vivos or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was' not born at the date of such disposition."

13.1.2. But the above citation is not applicable to the facts of the present case because in the above citation one Venugopala Naidu had only a daughter by name Sethulakshmi Ammal and he had no son. However, he adopted one Narayanaswami Naidu as his son. The said Venugopala Naidu executed a Will on 14.12.1932 and under the said Will, he gave one house to the adopted son and another house to the daughter Sethulakshmi Ammal. He also provided for his lands to be divided in the proportion 2:1, the adopted son taking a two-third share and the daughter taking an one-third share. With regard to the movable properties also, he provided that they should be taken equally by the adopted son and the daughter. In clauses 4 and 5 of the Will, he provided for the manner and the extent of the enjoyment of the properties by the daughter and what should happen to the same after her death. In clause 4, he provided that the daughter should enjoy the property without any right of alienation during her life time and if male children were born to her, they would take the property absolutely and without male children if she had a daughter, she should marry that daughter to any son of the Narayanaswami Naidu of her choice and thereafter the couple and their children would take the property absolutely. The testator died in the year 1937. A son was born to the daughter and her husband, the first plaintiff in

the suit on 05.01.1948, but that son died on 29.09.1948. Thereafter, Sethulakshmi Ammal did not have any further issue and she herself died in February, 1961, after leaving a Will dated 27.01.1961 under which she bequeathed all her estate to her husband, the first plaintiff in the suit. At this juncture, the Husband of Sethulakshmi Ammal as first plaintiff and the tenant as second plaintiff has filed the suit for declaration that the first plaintiff, Husband of Sethulakshmi Ammal is absolutely entitled to the suit properties and for permanent injunction restraining the defendants from taking possession and enjoyment of the suit properties.

13.2.1. In the decision reported in ***AIR 1970 Supreme Court 1759, Raman Nadar Vishwanathan Nadar and others v. Snehappoo Rasalamma and others***. In the above citation, one Krishnan Nadar and Raman Nadar who are brothers had jointly executed a Will in respect of the assets of Krishnan Nadar. On the date of the Will, Raman Nadar had only three daughters and no sons. Krishnan Nadar died on 05.12.1947. After the death of Krishnan Nadar, the appellant's mother was married to Raman Nadar who is the father of the appellants. It is specifically provided in the Will that in the event of Raman Nadar begetting a son or sons in future, those male issues will succeed to the assets of Krishnan Nadar to the

exclusion of the daughters. Under the said Will, he made life estate in favour of his brother Raman Nadar to maintain his children and those born to him later and without alienating or wasting the properties. After the life of Raman Nadar, if he leaves behind no sons, the three daughters and the daughters, if any, born after the date of execution of Will shall enjoy the properties either in common or in equal shares, effecting mutation, taking pattahs and paying the revenue in their own names, but without making any alienation thereof. If there be sons born to Raman Nadar, they will take all the properties after the life of Raman Nadar with absolute right. The learned counsel also drawn by attention to paragraph 11 of the said decision, which is usefully extracted hereunder:

"11. The doctrine in Tagore's case has been altered by three Acts, namely, the Hindu Transfers and Bequests Act, 1 of 1914, the Hindu Disposition of property Act of 1916 and the Hindu Transfers and Bequests (City of Madras) Act, 1921. The legal position under these Acts is that no bequest shall be invalid by reason only that any person for whose benefit it may have been made was not born at the date of the testator's death. This rule, however, is subject to the limitations and provisions contained in ss. 113, 114, 115 and 116 of the Indian

Succession Act, 1925."

But, the above citation is not applicable to the facts of the present case.

13.3.1. In the decision reported in ***AIR 1983 Andhra Pradesh 139, Javvadi Venkata Satyanarayana v. Pyboyina Manikyan and others***, much emphasis was placed on paragraphs 9 and 12 of the said decision and the same is extracted here under:

"9. The invalidity of the transfer must be judged with reference to the original settlement deed but not by the voluntary Act of the donees under the deed itself. The person who obtained the benefit of the deed by his own volition cannot defeat the terms of the deed under which he obtained the interest. The courts below committed a serious mistake in holding that as Ganga raju renunciated his life estate and hence the original estate created in favour of unborn persons has failed. Further the courts below made a distinction that Ganga Raju made the relinquishment deed before the birth of children to him but according to us it has no legal consequence as once the gift to the unborn person is valid under S. 13, no one

can defeat such interest and the unborn person acquires vested interest on his birth. The life estate holder cannot defeat the interests of the unborn person by transferring the life estate to a third person. We are clearly of the opinion that the relinquishment made by Ganga Raju before the birth of his children has not altered the legal position in any way and the sons born to him acquire vested interest as and when they are born. The view of the courts below to the contrary is clearly unsustainable.

...

...

12. Once it is admitted that the gift to unborn children in this case did not offend S. 13 or 14 of the Transfer of property Act and the unborn children acquire vested interest the moment they are born under S. 20 there is no possibility of defeating the interests of the unborn children as violative of the provisions of S. 16 of the Act. None of the requirements of S. 16 of the Transfer of property Act were satisfied and hence the settlement deed is operative in respect of both life interest and the interest created in favour of unborn children."

13.3.2. In the above citation, Once P.Muthaiah had a son Ganga Raju and he executed a settlement deed in respect of the suit property conferring life estate on his son and after his death to the sons of Ganga Raju to be borne absolutely. Ganga Raju in his turn executed relinquishment deed of his life estate in favour of his father Muthaiah on 31.08.1934 under Ex.A.4. Ganga Raju died in 1971 leaving behind three sons. It was contended therein that the said Ganga Raju executed a relinquishment deed long before the birth of his sons and hence, the gift in favour of the unborn sons has failed. In paragraph 4 of the said decision, it was specifically stated that there should be an interest created for the benefit of a person or class of persons which must fail by reason of the rules contained in Section 13 and 14 of Transfer of Property Act and that there should be another interest created in the same transaction. The other interest must intend to take effect after or upon failure of the prior interest. A gift made to an unborn person should not offend Section 13 and 14. Section 13 requires two conditions to be fulfilled. (1) The transfer inter vivos cannot be made directly to an unborn person but must be preceded by a prior disposition in favour of a living person. (2) The interest given to the unborn person is the whole of the interest remaining in the transferor.

13.3.3. Thus, the above citation does not apply to the facts of the present case on hand.

14. In the instant case, Kuppusamy Chettiar executed the Will on 12.05.1969 giving life estate to his wife Kuppammal and after the life time of Kuppammal, his daughter Visalakshi, son Krishna Chettiar and daughter-in-law Rajeswari, w/o. Krishna Chettiar is given life estate. After their life time, minor Thiagarajan, son of Krishna Chettiar and Rajeswari and also male children, if any, born to Krishna Chettiar and Rajeswari shall enjoy the properties without any alienation and only the grandchildren of the Krishna Chettiar and Rajeswari is given the absolute estate. Kuppusamy Chettiar died in the year 1975 and on the date of death of the said Kuppusamy Chettiar, neither the 4th defendant nor the 6th and 7th defendants were born. Furthermore, as per Section 3 of the Hindu Disposition of Property Act, 1916, there is limitations and conditions. In such circumstances, I am of the view that the bequeathing of the Will in favour of the unborn children viz., 6th and 7th defendants is void. The above factum was already discussed in paragraph 15 to 19 of the judgment.

15. Further, it is pertinent to note that the suit has been filed

for specific performance. If really the 6th and 7th defendant had got the property under the Will, their right accrued only on the death of Rajeswari and Thiagarajan who were having life estate in the property. So, on the date of filing of the suit, they are not having any right over the property and they are having only vested interest. In such circumstances, I am of the view that the review application itself is not maintainable.

16. In view of the above stated facts and circumstances, I do not find any grounds to review the judgment and decree passed by this Court dated 03.03.2011 made in A.S.No.1037 of 2007.

17. In fine, the review application stands dismissed as not maintainable and also on merits.

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