

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 10.04.2017

PRONOUNCED ON : 15.06.2017

CORAM

THE HONOURABLE MR. JUSTICE T.RAVINDRAN

C.S.No. 751 of 2012

1. Fiona Geraldine Wilkins,
Represented by her
Power of Attorney Agent,
Martin Fideliss Weller,

2. Mario Desmond Weller,
3. Martin Fideliss Weller

...
Vs.

Plaintiffs

1. Peter Joseph Pinto
2. Noel John Pinto
3. T.D.Prathaban
4. M.Kuppuswamy

...

Defendants

(Impleaded as 4th defendant as per
order dated 15.04.2014 passed in
A.No.1142 of 2014).

For Plaintiffs : Mr.N.D.Bahety

For Defendant No.1 : Mr.Ivor Peter D'Cruz
for Mr.J.Kamaraj

Defendant No.2 : Set ex parte

Defendant No.3 : No appearance

For Defendant No.4 : Mr.T.N.Sugesh

JUDGMENT

Suit for partition, declaration and permanent injunction.

2. The averments contained in the plaint are briefly stated as follows:

The plaint schedule properties etc., were owned by late Luis Xavier Pinto, who died on 25.01.1998 and his wife late Lena Pinto, who died on 01.06.2002, both in Mumbai, India, leaving behind their sons, namely, the Defendants 1 and 2 and another son by name Anthony Stanislaus Pinto alias Tony, who died in August, 2008 leaving behind no heirs and their daughter Marie Fernandes, who died in June, 2005 leaving behind no surviving heirs and another daughter, namely, Pamela Rose Weller, who died on 04.11.1993 leaving behind the plaintiffs as her heirs and legal representatives. Accordingly, the plaintiffs are entitled to a total aggregate of 1/3rd undivided share in the properties left behind by the deceased Luis Xavier Pinto and Lena Pinto and the defendants have projected two Wills dated 29.03.1996 and 09.11.1999 respectively, which have been executed by the above said deceased and thereby, the first defendant claimed to have

become the sole and exclusive owner of the properties and assets left by them, providing certain meager bequests to the plaintiffs and others and in the absence of the above said two Wills, the first defendant cannot lay any claim exclusively over the plaint schedule properties and inasmuch as the Wills above mentioned had not been probated as mandated under Law and the parties being Anglo-Indian Christians, according to the plaintiffs, claiming partition in the plaint schedule properties, called upon the defendants to allot their shares by way of a legal notice and inasmuch as the defendants have sent a reply disputing the entitlement of the claim made by the plaintiffs by way of projecting the above said two Wills, after exchange of various notices between the parties, according to the plaintiffs, they had been necessitated to lay the suit for partition and other reliefs.

3. The averments contained in the written statement filed by the first defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. It is true that the plaint schedule properties belonged to Luis Xavier Pinto and Lena Pinto and they had left behind the legal heirs as stated in the plaint. The above said two deceased had left behind the Wills dated 29.03.1996 and 09.11.1999 in respect of the properties and assets

belonging to them, wherein, the various persons including the plaintiffs had been bequeathed certain payments and accordingly, the first defendant, as the executor of the above said Wills, had carried out the direction of the testator/testatrix of the above said Wills and the plaintiffs have also received the payment under the Wills in question and other beneficiaries have also been made the payment as provided in the Wills and accordingly, on the death of the testator/testatrix, the properties described in the Wills devolved only upon the legatees with immediate effect and the plaintiffs, having acted under the Wills and also received the payment mentioned therein cannot now contend that the first defendant is not entitled to the plaint schedule properties as per the terms of the Wills on the footing that the parties are Anglo Indians and not Indian Christians. The first defendant is the sole and Exclusive owner of the estate bequeathed in the above said Wills except the bequests made to the plaintiffs and the second defendant. The Wills, in question, are not required to be probated as per Law as the parties are Indian Christians. The plaintiffs cannot claim that they are the co-owners of the plaint schedule properties and thereby, demand 1/3rd share in the suit properties. The plaintiffs have laid the suit only to extort huge money illegally and hence the suit is liable to be dismissed.

4. The averments contained in the written statement filed by the third defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. The suit is barred by limitation. The third defendant had purchased Item No.2 of the plaint schedule properties from the first defendant and his wife, vide, sale deed dated 07.04.2010 for a valid consideration, after verification of the title deeds and in a bona fide manner. The parties being Indian Christians, the Wills in question need not be probated as required under law, in terms of Section 213(2) of the Indian Succession Act, 1925 and even in the absence of probate as such, the plaintiffs are not entitled to seek and obtain any share in the plaint schedule properties. The sale effected in favour of the defendant is valid and binding upon the plaintiffs and hence, the plaintiffs are not entitled to seek and obtain the reliefs sought for.

5. The averments contained in the written statement filed by the fourth defendant are briefly stated as follows:

The suit is not maintainable either in law or on facts. The fourth

defendant had purchased the plaint schedule property described in the written statement from the third defendant vide sale deed dated 21.06.2012 for a valid consideration and in a bona fide manner, after verification of the title deeds. The parties are Indian Christians and hence, there is no requirement of obtaining the probate of the Wills involved in the matter and the sale effected in favour of the fourth defendant is valid and binding upon the plaintiffs and the plaintiffs are not entitled to seek and obtain any share in the suit properties as claimed and hence, the suit is liable to be dismissed.

6. On the pleadings set out above, the following issues are framed for determination:

1. Whether the Will dated 29.03.1996 and 09.11.1999 are liable to be probated?

2. Whether the first defendant has become the owner of the property of Late Mr.Luis Xavier Pinto and Late Mrs.Lena Pinto?

3. Whether the sale deed executed by the first defendant in favour of the third defendant is valid?

4. Whether the plaintiff is entitled to the relief of permanent injunction as prayed for?

5. Whether the plaintiffs are estopped from challenging the Will established in respect of the amounts bequeathed in the Will?

6. To what other reliefs, the parties are entitled to?

7. In support of the plaintiffs' case, PW1 has been examined and Exs.P1 to Ex.P15 have been marked. In support of the defendants' case, DWs1 and 2 have been examined and Exs.D1 to D5 have been marked.

8. Issue No.1:

The short point that arises for consideration in this lis is, whether the Wills dated 29.03.1996 and 09.11.1999 are required to be probated as per law.

9. The suit has been laid by the plaintiffs for partition. The fact that the plaint schedule properties belonged to the deceased Luis

Xavier Pinto and Lena Pinto are not in dispute. It is also not in dispute that the above said deceased had left the Wills above mentioned in respect of the assets and properties owned by them inclusive of the plaint schedule properties. Even the execution of the above said two Wills as such are not disputed by the plaintiffs. In the absence of the above said two Wills, it is also found that the plaintiffs would be entitled to obtain 1/3 share in the plaint schedule properties. As on date, it is found that the plaintiffs as one branch, the first defendant as another branch and the second defendant as third branch are the legal heirs of the deceased Luis Xavier Pinto and Lena Pinto. Therefore, it could be seen that in the absence of the Wills above mentioned, the above said parties would be entitled to seek and obtain 1/3rd share in the suit properties.

10. As adverted to above, the plaintiffs have admitted the existence of the above said Wills of the deceased Luis Xavier Pinto and Lena Pinto. It is also found that the plaintiffs have also received payment under the above said Wills. Therefore, the Wills, in question, above mentioned are not in dispute as such.

11. The point that arises for consideration in this case is whether

the Wills above mentioned are required to be probated as per law. According to the plaintiffs, the parties being Anglo Indian Christians, in the absence of probate of the above said Wills, the first defendant cannot claim the exclusive ownership in respect of the suit properties and thus according to the plaintiffs, the defendants 3 and 4 also could not lay any claim over the portion of the plaint schedule properties, said to have been purchased by them.

12. Per contra, according to the defendants, the parties involved in the lis are Indian Christians and in such view of the matter, according to them, the Wills above mentioned are not required to be probated as per law and hence, in the face of the above said two Wills, the plaintiffs cannot seek and obtain 1/3rd share in the suit properties as prayed for.

13. Therefore, the main issue is whether the parties involved herein are Anglo Indians as put forth by the plaintiffs or Indian Christians as claimed by the defendants. As per Section 213(2) of the Indian Succession Act, 1925, the requirement of probate of the Wills is not required in the case of Wills made by Mohammadians and Indian Christians.

14. An "Indian Christian" has been defined, as per Section 2 (d) of the Indian Succession Act, 1995, as follows:

"2(d). "Indian Christian" means a native of India who is, or in good faith claims to be, of unmixed Asiatic descent and who professes any form of the Christian religion;"

15. An "Anglo Indian" has been defined, as per Article 366 (2) of the Constitution of India, as follows:-

" 366 (2). "an Anglo-Indian" means a person whose father or any of whose other male progenitors in the male line is or was of European descent but who is domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only;"

As per the above said definition of Anglo-Indian, it is found that the father or any of whose other male progenitors in the male line of

the Anglo Indian should be of European descent and he should have been domiciled within the territory of India and is or was born within such territory of parents habitually resident therein and not established there for temporary purposes only.

16. In the above said position, it has to be seen whether the deceased Luis Xavier Pinto and his wife Lena Pinto are Indian Christians or Anglo-Indians. The copy of the sale deed dated 17.01.1962 executed in favour of the above said deceased by Gladys Rachael Mayberry has been marked as Ex.D2. A perusal of the same would go to show that the Vendor had described herself as Anglo-Indian, whereas, the above said deceased, namely, the purchasers had been specifically mentioned as Indian Christians. The copy of the settlement deed executed by the above two deceased in favour of their sons had been marked as Ex.D3, wherein also, the settlor, namely, the above said deceased had clearly described themselves as Indian Christians and it is found that Ex.D3 had come into existence on 27.03.1968. Even in Ex.D4, the sale deed dated 07.04.2010, executed by the first defendant in favour of the third defendant, the first defendant has described himself only as Christian. As seen from the Baptism certificate of Luis Xavier Pinto, who was born on 04.12.1910,

the copy of which had been marked as Ex.P11, it is found that he was born in Bodiem in Goa on 04.12.1910. Similarly, as per the copy of the marriage certificate between the Luis Xavier Pinto and Lina Menezes solemnized on 27.11.1938 marked as Ex.P12, it is also shown that the place of birth of parties, ie., the bridegroom and the bride, are Goa and Hubli. A copy of the certificate of death of L.C.Menezes marked as Ex.P13, which would go to show that Nationality is mentioned as Goan. The same is also reiterated in Ex.P15, reply received from the Corporation by the second plaintiff.

17. According to the plaintiffs, even though in Exs.D2 and D3, Luis Xavier Pinto and Lena Pinto have described themselves as Indian Christiana and the first defendant has described himself as Christian in Ex.D4, the same by itself would not govern the issue and according to them, the above said two deceased are natives of Goa and inasmuch as Goa was under the Portuguese territory and annexed to Indian territory only on 20.12.1961, according to the plaintiffs, the residents of Goa, prior to 20.12.1961, the same being under the Portuguese Rule could only be termed as of European descent and in such view of the matter, it is contended that inasmuch as Luis Xavier Pinto and Lena Pinto had been born prior to 20.12.1961 in Goa, within the

territory of Portuguese Rule, they should be declared as having come from European descent and accordingly, as per the definition of Anglo-Indian given under Article 366 (2) of the Constitution of India, they are only Anglo-Indians and in such view of the matter, the Wills, in question, are required to be probated.

18. However, countering the above contention, according to the defendants, even though Goa had been under the Portuguese Rule and annexed with India only on 20.12.1961, admittedly, Goa being part of the Asiatic region and inasmuch as the parties involved have asserted themselves to be Indian Christians and acted also in good faith, claimed and professed only Christian religion, according to them, the parties involved are governed by the definition of Indian Christian as provided under section 2 (d) of the Indian Succession Act and in such view of the matter, the Wills, in question, are not required to be probated as per law.

19. The third plaintiff examined as PW1 has admitted that he has not produced any document that Portuguese are Anglo Indians and further admitted that as per Ex.P11, Luis Xavier Pinto was born in Bodiem, which is within the territory of Goa and Goa was under the

Portuguese control and now it is in Asia and as per Ex.P12, the bridegroom mentioned therein is a native of Goa and bride is a native of Hubli and further admitted that both in-laws were from Goa. However, he would claim that they are Portuguese descendants. Though the case of PW1 that his in-laws are Portuguese descendants on the footing that they are natives of Goa, which had been once ruled by Portuguese, however, it is found that Goa fell within the territory of Asia and when it is also found that Luis Xavier Pinto and Lena Pinto are of Asiatic descent and accordingly, acted in good faith and also claimed to be, and professed only the Christian religion, form being immaterial, and accordingly, described themselves only as India Christians even in the documents executed by them, as adverted to above, it could be seen that they are only Indian Christians and not Anglo-Indians.

20. The plaintiffs having come forward with the case has to establish that Luis Xavier Pinto and Lena Pinto ancestors particularly, their male line is or was of European descent, but who is domiciled within the territory of India and is or was born within such territory of parents, habitually resident therein. When the above criteria for holding them as Anglo Indians are not projected by any material and on the other hand, when it is found that Goa forms part of Asiatic

region and subsequently, annexed with India from 20.12.1961, though it had been under the Portuguese at one point of time, that alone would not entitle the plaintiff to contend that Luis Xavier Pinto and his wife, merely because, they are natives of Goa, are Anglo-Indian and cannot be termed as Indian Christians.

21. The main criteria for holding a person as Anglo Indian being that his father or any of whose other male progenitors in the male line should be of European descent and when the same is not established in the case by the plaintiffs, merely because, Goa was under the Portuguese Rule cannot be a ground for holding that the Luis Xavier Pinto and his wife Lena Pinto are also Anglo Indian Christians, when there is no material to hold that their male ancestors are of European descent as described under 366(2) of the Constitution of India.

22. Further, PW1 during the course of cross examination has also admitted that his religion is not Anglo-Indian and he has received the benefits under the Wills in question. Therefore, it could be seen that the plaintiffs' case that the parties are Anglo-Indian Christian mainly rests upon the Baptism Certificate Ex.P11 and the marriage certificate Ex.P12 and on the footing that Luis Xavier Pinto and Lena Pinto are the

residents of Goa, which was once under the Portuguese Rule. Merely Goa was under the Portuguese Rule, it cannot be held that the residents of Goa, at that time, are Anglo-Indian Christians, particularly, when it is noted that Goa was annexed with India since 20.12.1961. That apart, when the parties involved, namely, Luis Xavier Pinto and Lena Pinto are said to have admittedly hailed from Goa, which is falling under Asiatic region and when, they had also in good faith followed Christian religion and accordingly, described themselves as Indian Christians in all the documents, it is found that they are Indian Christians only as defined under Section 2(d) of the Indian Succession Act, 1925. Inasmuch as the plaintiffs have failed to establish that their male ancestors are of European descent and with reference to the same, no material is also forthcoming on the part of the plaintiffs and when the parties are not shown to be Anglo Indians as defined under Article 366 (2) of the Constitution of India, I hold that the plaintiffs have failed to establish that the parties involved in this lis are Anglo-Indians as putforth by them.

23. The Counsel for the plaintiffs, in support of his case, relied upon the decisions reported in **(AIR 1981 Supreme Court 1946) Vinodkumar Shantilal Gosalia Vs. Gangadhar Narsingdas**

Agarwal and others), 1954 AIR (Madras) 563 (A.R.V.Achar Vs. Madras State represented by the Secretary, Local Administration Department, Fort St.George, Madras and another)). The principles of law enunciated in the above said decisions are taken into consideration and followed as applicable to the facts and circumstances of the case at hand.

24. In the light of the above, I hold that inasmuch as the Wills dated 29.03.1996 and 09.11.1999 are executed by Luis Xavier Pinto and Lena Pinto, who are Indian Christians, they are not required to be probated as per Law and accordingly, Issue No.1 is answered.

25. Issue - 2

Under the Wills executed by Luis Xavier Pinto and Lena Pinto, it is found that the first defendant had become the owner of the properties described in the Wills above mentioned. It is also found that the plaintiffs have also been given the payment under the Wills executed by them and the same had been admitted by PW1. In such circumstances, as rightly contended, the doctrine of election provided under Section 180 of the Indian Succession Act would also apply and bind upon the plaintiffs as far as the Wills in question are concerned.

In such view of the matter, I hold that the plaintiffs cannot lay any claim over the plaint schedule properties and seek partition in respect of the same. I therefore hold that the first defendant has become the owner of the properties left by Luis Xavier Pinto and Lena Pinto under the Wills dated 29.03.1996 and 09.11.1999 and accordingly, Issue No.2 is answered.

26. Issue No.3

Inasmuch as the first defendant has become the owner of the plaint schedule properties, it is found that the sale deed executed by the first defendant in favour of the third defendant is valid and binding upon the parties concerned. Accordingly, I hold that the sale deed executed by the first defendant in favour of the third defendant is valid and binding upon the plaintiffs.

27. Issue No.4:

In tune with the answers given to the issue Nos.1 to 3, I hold that the plaintiffs are not entitled to obtain the reliefs of partition, declaration and permanent injunction as prayed for. Accordingly, issue No.4 is answered against the plaintiffs.

28. Issue No.5

Admittedly, the plaintiffs gained benefits under the Wills in question. Accordingly, the doctrine of election applies and hence, the plaintiffs are estopped from challenging the Wills in question in respect of the amounts bequeathed under the Wills as they are valid and binding upon them. Accordingly, issue No.5 is answered.

29. Issue No.6:

The suit is dismissed with costs.

15.06.2017

Index : Yes/No
Internet : Yes/No
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T.RAVINDRAN,J.

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PRE-DELIEVERY JUDGMENT
MADE IN
C.S.No. 751 of 2012

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