

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 03.10.2019

CORAM:

THE HON'BLE MR.JUSTICE R.SUBRAMANIAN

S.A.No.8 of 2014

J.Ramajayam (since deceased)

1. Rasa Khannu
2. Manoharan
3. Murugesan
4. Govindaraj
5. Amudha
6. Gajendran
7. Pattusami
8. Roja mani
9. Selvaraj
10. Sundari

..Appellants/Defendants

Vs.

Rajasekaran

..Respondent/Plaintiff

PRAYER: Second Appeal filed under Section 100 of C.P.C., to set aside the judgment and decree of the learned Sub Judge, Neyveli, dated 31.10.2012 in A.S.No.6 of 2012, reversing the judgment and decree of the learned District Munsif-cum-Judicial Magistrate, Neyveli, dated 10.04.2012 in O.S.No.13 of 2006.

For Appellants : Mr.K.V.Babu

For Respondent : Mr.Hema Sampath,
Senior Counsel
for Mrs.R.Meenal

J U D G M E N T

The defendants 2 to 5 and the legal representatives of the deceased 1st defendant in O.S.No.13 of 2006 have come up with this second appeal.

2. The suit in O.S.No.13 of 2006 was filed by the respondent herein seeking declaration of title and permanent injunction.

3. The case of the respondent is that the suit properties originally belonged to one Krishnasamy Padaiyatchi, son of

Manikka Padaiyatchi through his first wife Muruvayee. After the death of Muruvayee, Manikka Padaiyatchi had married to one Dhanammal as his second wife and through her, he had begotten the defendants 1 to 5 in the suit. The Couple, namely Manikka Padaiyatchi and Murvayee have one more daughter viz., Pounambal, who is no more. The plaintiff is the brother's grand son of Manikka Padaiyatchi, namely Lakshmana Padaiyatchi. According to the plaintiff, since Dhanammal gave step motherly treatment to Krishnasamy Padaiyatchi, he was brought up by Lakshmana Padaiyachi. Thirumal, son of Lakshmana Padiayatchi and the father of the plaintiff had died at young age and therefore, Krishnasamy Padaiyachi has taken care of the family and he has also been shown as guardian of the plaintiff and other children of Thirumal. Therefore, out of love and affection he had towards the family of Thirumal, Krishnasamy Padaiyatchi executed a Will, bequeathing the properties to the plaintiff on 06.09.2004. Krishnasamy Padaiyatchi died on 17.09.2004. Therefore, according to the plaintiff, he had become the absolute owner of the properties as per the Will dated 06.09.2004 and the defendants who are the step brothers and sisters of Krishnasamy Padaiyatchi have no right over the suit properties. On the above contentions, the plaintiff sought for declaration of title and injunction.

4. The suit was resisted by the defendants contending that the Will set up by the plaintiff is not true. It was also claimed that Krishnasamy Padaiyatchi is not the absolute owner of the property in order to bequeath the properties to the plaintiff. Pending suit, the 1st defendant Ramajayam died on 17.06.2010. It is not in dispute that the counsel for the defendants filed a memo into the Court setting out the details of the legal representatives of the deceased 1st defendant.

5. The counsel for the plaintiff however filed a reply memo which reads as follows:

"It is submitted that during the pendency of the suit the first defendant Ramajayam died on 17.06.2010. A memo to that effect has already been filed and recorded.

The suit is filed for declaration and injunction. The deceased Ramajayam was one of the daughter's of deceased Manicka Padaiyatchi through his 2nd wife. The other defendants are other sons and daughters. Since the other defendants are represent the heirs of Manicka Padayatchi's 2nd wife the plaintiff has not impleaded the heirs of deceased Ramajayam. The suit may go ahead with the other defendants. "

6. It appears that an application was taken to amend the cause title seeking to insert the word 'died' after the name of

the deceased 1st defendant in the suit. The trial Court upon an analysis of the evidence on record, found that the Will dated 06.09.2004 propounded by the plaintiff is not true and valid. On the said finding, the trial Court concluded that the step brothers and sisters of deceased Krishnasamy Padaiyatchi, the defendants would be entitled to the properties. Based on the said finding, the trial Court dismissed the suit.

7. Aggrieved, an appeal was filed by the plaintiff against the defendants 2,3,4 and 5 alone. The 1st defendant was shown as dead in the cause title. The lower appellate Court however reversed the finding of the trial Court upheld the will and granted decree in favour of the plaintiff.

8. Aggrieved, the defendants 2 to 5 and the legal representatives of the deceased 1st defendant have preferred the above second appeal.

9. The following substantial questions of law were framed at the time of admission of the Second Appeal:

- i) Whether the order passed against a dead person is a nullity or not?
- ii) Whether the Will dated 06.09.2004 is vitiated by fraud, undue influence and has been brought about in a shrouded and suspicious circumstances?
- iii) Whether the exclusion of legal heirs as legatees, vitiate the Will dated 06.09.2004?
- iv) Whether the respondent has proved the Will as per Sections 68, 63 and 287 of the Indian Succession Act?

10. I have heard Mr.K.V.Babu, learned counsel appearing for the appellants and Mrs.Hema Sampath, learned Senior counsel appearing for the respondent.

11. Elaborating on the questions of law, Mr.K.V.Babu, learned counsel appearing for the appellants would submit that the suit had abated after 90 days, after the death of Ramajayam. Despite having been informed about the availability of the Class I legal heirs, the plaintiff did not take steps to implead them and chose to file a memo stating that the brothers and sisters of the first defendant would represent his estate. He would also point out that it was the estate of Krishnasamy Padaiyatchi which was subject matter of the suit and not the estate of Manikka Padaiyatchi. He would also point out that it is a specific case of the plaintiff that the properties are the self-acquired properties of Krishnasamy Padaiyatchi, which he had, by a testament dated 06.09.2004, bequeathed in favour of the plaintiff. Krishnasamy died unmarried and without issues and

defendants being the step brothers and sisters of Krishnasamy Padaiyatchi, being his Class II heirs each one of them would inherit a undivided interest in the property of Krishnasamy Padaiyatchi. Upon the death of Ramajayam, sister of Krishnasamy Padaiyatchi, her share in the property of Krishnasamy Padaiyatchi would devolve on her Class I heirs, namely her children who figure as the appellants 1 to 6. Since Ramajayam died even pending suit, the suit having abated, the Courts below were not right in proceeding with the suit against the dead person and granting a decree.

12. The learned counsel for the appellants would also rely upon the Judgment of the Supreme Court in Gurnam Singh (D) thr. L.Rs. And Ors Vs. Gurbachan Kaur (D) by L.Rs. reported in AIR 2017 SC 2419 in support of his submission that the decree against a dead person is nullity. The learned counsel would also invite my attention to the judgment of the learned Single Judge of this Court in Selvaganesan Vs. Kalaiselvi and Ors. reported in 2019 (4) CTC 138, wherein this Court held that the decree passed against the dead person would be nullity. There is no quarrel over the proposition of the law that a decree passed against the dead person is nullity.

13. Contending contra, Mrs. Hema Sampath, learned Senior Counsel appearing for the respondent would submit that the decree cannot be said to be an indivisible decree. The Court can proceed to determine the controversy between the plaintiff and the defendants 2 to 5. According to her, the decree may not bind the appellants 1 to 6. It is also her further contention that the Courts below accepted the memo, therefore, the counsel for the plaintiff proceeded with the suit and the lower appellate Court had not gone into the effect of non impleading of the legal representatives of Ramajayam. Therefore, according to her, the decree cannot be disturbed on the ground that the legal representatives of Ramajayam have not been impleaded in the suit.

14. I have considered the rival submissions.

15. The fact that Ramajayam died pending suit on 17.06.2010 is admitted. A reading of the memo filed by the counsel for the first defendant shows that the Court was informed that he had died leaving behind the appellants 1 to 6 as legal heirs. Unfortunately, no steps have taken to implead those legal representatives.

16. The learned counsel for the plaintiff whose attention was drawn to the fact that the 1st defendant had died leaving behind Class I heirs chose to file a reply memo stating that the estate of Manikka Padaiyatchi is represented by other defendants. Unfortunately, the trial Court also accepted the

reply memo and proceeded with the suit. Such proceeding by itself, in my considered opinion, will not have the effect of setting aside the abatement that has already occurred due to the non impleading of the legal representatives of the deceased Ramajayam. On the death of Ramajayam on 17.06.2010, 90 days thereafter, the suit stood abated as against Ramajayam. Any finding rendered in the suit in the absence of legal representatives of the deceased Ramajayam, cannot bind them. This defect was not cured in the appeal also. The appeal was filed against the defendants 2 to 5 alone by showing Ramajayam as dead, in the cause title. The lower appellate Court has reversed the judgment of the trial Court and upheld the Will. The effect of the judgment of the lower appellant Court is that the Will will be binding on the defendants 2 to 5 who are shown as respondents in the First appeal and at the same time, the appellants and other legal heirs of Ramajayam can still contest the validity of the Will. Such an anomalous situation cannot be cured by this Court. The claim that the defendants 2 to 5 represent the estate of Manikka Padaiyatchi, cannot be accepted, as the suit was not against the estate of Manikka Padaiyatchi. The suit is against individuals who would inherit the property of Krishnasamy Padaiyatchi, son of Manikka Padaiyatchi, de hors the Will. The Class II heirs do not get any right to the estate of a male hindu who dies after coming into force of the Hindu Succession Act, if there are any Class I heirs. Therefore, brothers and sisters of the deceased Ramajayam who are on record as defendants 2 to 5, cannot represent the estate of Ramajayam, more so when Ramajayam's Class I heirs are alive. Therefore, the claim made in the memo filed before the trial Court showing that the defendants 2 to 5 would represent the estate of Manikka Padaiyatchi and hence there is no necessity to implead the legal heirs of the deceased 1st defendant, is wholly misconceived and is a product of misadventure on the part of the counsel who appeared for the plaintiff.

17. I am therefore of the considered opinion that the entire proceedings that took place after the abatement of the suit on the death of Ramajayam, are opposed to law and they cannot be sustained. Mrs.Hema Sampath, learned Senior Counsel appearing for the respondent would however contend that the decree is divisible and hence the entire suit cannot be said to have abated. I am unable to subscribe to the arguments of the learned Senior Counsel. The decree that is sought for is one for declaration and injunction, that too based on the Will. If the arguments of the learned Senior Counsel are accepted, it will create a situation where the Will will be valid in respect of the appellants 7 to 10 and invalid as far as appellants 1 to 6 are concerned. Such a situation cannot be allowed. The resultant position is that the suit had abated as a whole and the judgment of the 1st appellant Court rendered in the absence

of the legal heirs of deceased Ramajayam, is a nullity.

18. In view of the above discussion, the Judgment of the first appellate Court is set aside. The suit in O.S.No.13 of 2006 will stand dismissed as abated in full, in view of the death of the 1st defendant, pending suit and in the absence of his legal representatives being brought on record. Accordingly, the Second Appeal stands allowed. No costs.

Sd/-
Assistant Registrar (CS-V)

//True copy//

Sub Assistant Registrar

vum

To

- 1.The Sub Judge, Neyveli.
- 2.The District Munsif-cum-Judicial Magistrate,
Neyveli.
- 3.The Section Officer,
VR Section,
Madras High Court,
Chennai.

+1cc to Mrs.R.Meenal, Advocate SR.No.84833

+1cc to Mr.K.V.Babu, Advocate SR.No.84720

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S.A.No.8 of 2014

CNR (CO)
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