



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED:28.11.2019

CORAM:

THE HONOURABLE MR.JUSTICE **N.ANAND VENKATESH**

C.R.P. (MD) .No.2165 of 2012 (PD)

and

M.P. (MD) .No.1 of 2012

M.Jeyamary : Petitioner / Defendant / Petitioner
Vs.

M.Joseph : Respondent / Plaintiff / Respondent

PRAYER: Civil Revision Petition Petition filed under Article 227 of the Constitution of India against the fair and decreetal order dated 05.07.2012 in I.A.No.261 of 2012 in O.S.No.2604 of 2004, on the file of the learned IIIrd Additional District Munsif, Tiruchirappalli.

For Petitioner : Mr.K.Govindarajan
For Respondent : Ms.T.Banumathy

ORDER

This Civil Revision Petition has been filed challenging the order passed by the Court below dismissing the application filed under Order 7 Rule 11 (d) of the Code of Civil Procedure to reject the plaint. The petitioner is the defendant in the suit. The respondent / plaintiff filed a suit against the petitioner seeking for the relief of permanent injunction restraining the petitioner from alienating or encumbering the suit property till her life time. It is clear from the pleadings made in the plaint that the right as claimed by the plaintiff was based on the Will dated 21.06.1982. This Will was executed by one Masilamani, who is the father of the plaintiff. The plaintiff was born to Masilamani through his first wife. After the death of the first wife, the said Masilamani married the defendant. During his life time, Masilamani had executed a Will dated 21.06.1982. According to this Will, the defendant was given life interest in the suit property and the vested remainder was given to any male or female child born to the defendant through Masilamani.

2. The case of the plaintiff is that there was a son born to the defendant namely Arokiasamy and he died in a road accident on 06.07.2004. Therefore, on the death of the said Arokiasamy, the only right that is left to the defendant is the life estate given under the Will and after her life, the property will come back to the plaintiff.



3. The defendant filed a written statement. A petition for rejection of plaint was filed by the defendant on the ground that the relief sought for by the plaintiff is barred by law, since the property has absolutely vested with the defendant and the plaintiff has no right over the property and therefore, he cannot seek for the relief of permanent injunction.

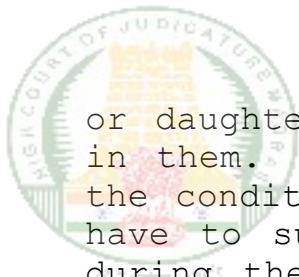
4. The Court below has dismissed this application mainly on the ground that there are triable issues in the suit, which requires evidence to be let in and therefore, those issues cannot be decided in an application filed for rejection of plaint.

5. The learned counsel appearing for the petitioner submitted that the only issue that requires to be decided in the suit is as to whether on the death of Arokiasamy, whether the defendant will only be entitled to life interest under the Will or on the death of Arokiasamy, the defendant will get the property absolutely as the legal heir of Arokiasamy.

6. The learned counsel in order to substantiate his submissions, brought to the notice of this Court Section 119 of the Indian Succession Act, 1925. The learned counsel also brought to the notice of this Court Illustration (i) under the said provision. The learned counsel submitted that on the death of Masilamani, the Will came into force and the property vested absolutely in favour of Arokiasamy by virtue of the above provision. The learned counsel further submitted that just because, the possession and enjoyment was postponed, the vesting of right does not get postponed and it happens immediately on the birth of Arokiasamy.

7. The learned counsel in order to further substantiate his submissions, brought to the notice of this Court, Section 19 of the Transfer of Property Act, 1882. This provision speaks about the manner in which a person gets a vested interest in the property. The learned counsel specifically relied upon the expression "a vested interest is not defeated by the death of the transferee before he obtains possession". The learned counsel in order to substantiate his submissions relied upon the judgment of this Court in the case of **P.Somasundaram Vs. K.Rajammal** reported in **AIR 1976 MD 295** and in the case of **Karuppanasamy Vs Saraswathy and others** reported in **2018-3-L.W. 352**.

8. Per contra, the learned counsel appearing for the respondent submitted that the Will executed by Masilamani specifically provided that the suit property will be enjoyed by the defendant during her life time and if there is a surveying son



or daughter for the defendant, the property will absolutely vest in them. The learned counsel submitted that this is subject to the condition that the son or the daughter of the defendant will have to survive during the life of the defendant. If they die during the life time of the defendant, the only right that the defendant gets is the life interest in the property and nothing more. In such an event, on the death of the defendant, the property gets back to the plaintiff, who is the son of Masilamani through the first wife. The learned counsel submitted that the issue in question requires appreciation of facts and law and the same cannot be considered at the stage of rejection of plaint and the Court below must be directed to continue further with the proceedings and complete within a time frame that can be fixed by this Court.

9. This Court has carefully considered the submissions made on either side and the materials available on record.

10. This Court has to bear in mind that while considering an application for rejection of plaint, the Court has to only consider the averments that have been made in the plaint and it should not add or subtract anything from of the averments. That apart, the Court cannot consider any defence that is taken by the defendant while deciding an application for rejection of plaint.

11. In the present case, the specific averments that has been made in the plaint is extracted hereunder:

"4.The plaintiff submits that plaintiff's father had executed a registered will dated 21.06.1982 bequeathing item No.2 of his properties described in the Will in favour of the plaintiff. At the same time, he had granted only life estate to item No.(1) of the property of the said Will to the defendant. In terms of the above Will, the defendant acquires right to possess and enjoy item No.(1) of the properties and after her, is she has son or daughter they would inherit the property as full owner of the said property. Otherwise the said property would revert to the plaintiff.

5.It is pertinent to state herein that, after the execution of the said Will, a son namely one Arokiasamy was born to the defendant and he was living with the defendant. Unfortunately, the defendant's son i.e., the step brother of the plaintiff died on 06.07.2004 in a road accident.

<https://hcservices.ecourts.gov.in/hcservices> 6 The plaintiff submits that after the death



of the defendant's son, she has not allowed the plaintiff to attend his step brother's funeral rites and ceremonies. Thereafter, it is learnt from the reliable sources that, the defendant is trying to alienate the said property to third parties, for valuable consideration and to settle in her native place.

7. In terms of the above Will validly executed by the plaintiff's father, there is specific and absolute restriction upon the defendant from transferring the suit property till her life time as the suit property is bequeathed to the defendant only for life. Hence, the defendant has no absolute title over the suit property and restrained on the alienation of the suit property is lawful and is valid and the defendant is bound by the terms of the Will. The defendant's only son Arokiasamy died as a minor. Although the above Will stipulates that the suit property is bequeathed to the defendant for life and then to her son or daughter, who ever was born to her, the son did not acquire title or possession since he died at the age of 16 before attaining majority. The above Will specifically stipulates that the suit property bequeathed to the defendant for life should go to the plaintiff as full owner with all vested rights. The defendant has no other sons or daughters to inherit the suit property as per the terms of the Will as stated above and so, the said property should revert to the plaintiff after her life time."

12. It is seen from the above averments that there is no dispute with regard to the fact that a Will dated 21.06.1982 was executed by Masilamani and the entire dispute revolves around the understanding of this Will and nothing more. The Will also forms part and parcel of the pleadings and it has been filed along with the plaint. Therefore, this Court can take into consideration the said document while considering the application for rejection of plaint.

13. The relevant portions in the Will are extracted hereunder for better appreciation:

“என் காலத்தில் என் மனைவி மூலமாக ஜோசப் என்ற குமாரன் பிறந்து சிறிது காலத்துக்கு பிறகு காலமாகி விட்டார்கள் அதன் பிறகு இரண்டாவதாக ஜெயமேரி என்பவரை விவாதம் செய்து அவர் மூலம் நாளது தேதி வரை யாதொரு ஆண் பெண் சந்ததிகள் இல்லாமல் என் குடும்பத்தில் இருந்து கொண்டு என் இஷ்டம் போல் கால வேங்களை நல்ல முறையில் யாதொரு குறையில்லாமல் நடத்திக் கொண்டு வருகிறேன்.



இதே மாதிரி என் ஆயுள் வரை நடத்திக் கொண்டு வருவால் என்ற பூரண நம்பிக்கை உண்டு. எனது முதல் மனைவி மூலம் பிறந்த என் குமாரன் ஜோசப் என்பவனை படிக்க வைத்து அரவனைத்து வயது வந்தவுடன் கல்யாணம் செய்துவைத்து அவன் தன் சம்பாத்தியத்தை கொண்டு தனிப்பட்ட முறையில் நடத்திக் கொண்டு கொண்டு வருகிறான்.

என் ஜீவிய காலத்தில் என் ஆயுளுடன் எனது இரண்டாவது மனைவி ஆண் பெண் சந்ததிகள் ஏற்படுமானால் அக்காலத்தில் அவனும் நான் என் ஆயுளுக்கு பிறகு அடையும்படி கண்டிப்புடன் அனுபவித்து 1வது அயிட்டி சொத்துக்களை வாரிசுகள் சர்வ சுதந்திர பாத்தியாய் அடைந்து அனுபவித்துக் கொள்ள வேண்டியது அதில் எங்கும் ஜோசப்புக்கும் எவ்வித பாத்தியம் கிடையாது.”

14. It is very clear from the clause extracted from the Will that the property in question was given as a life estate to the defendant. It is also clearly provided that if the defendant gives birth to any male or female child through the said Masilamani, the child will get the vested remainder.

15. The defendant has raised a plea that Arokiasamy, who was born to the defendant through Masilamani died on 06.07.2004 at the age of 16. The moment Arokiasamy was born, the property vested in him and only his possession and enjoyment was postponed. Therefore, if the property had vested in him, on his death, the property has to come to the defendant, since she is the only legal heir of the deceased Arokiasamy.

16. The plaintiff has taken a plea that Arokiasamy must survive the defendant in order to get the vested remainder in the property and if he dies during the life time of the defendant, the life interest given to the defendant will only continue and the defendant will not have any absolute powers of alienation of the property and on her death, the property has to come back to the plaintiff.

17. In order to decide this issue, the only point to be considered is as to when the property will get vested on the deceased Arokiasamy. It will be useful to take note of Section 19 of the Transfer of Property Act, 1882, in this regard. The Hon'ble Supreme Court had occasion to deal with the scope of Sections 19 and 21 of the Transfer of Property Act in the case of ***Usha Subbarao Vs. B.N.Vishveswaraiah and others*** reported in ***(1996) 5 SCC 201***. The relevant portions in the judgment are extracted hereunder:

"For the purpose of determining the date of vesting of the interest in the bequest it is necessary



to hear in mind the distinction between a vested interest and a contingent interest. An interest is said to be a vested interest when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest. The Transfer of Property Act, 1882, as well as The Indian Succession Act, 1925 recognise this distinction between a vested interest and a contingent interest. Vested interest has been thus defined in Section 19 of The Transfer of Property Act, 1882 :

"Section 19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.- An intention that an interest shall not be vested is not to be inferred from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives or from a provision that if a particular event shall happen the interest shall pass to another person."

10. In the Indian Succession Act, provision with regard to date of vesting of a legacy when payment or possession is postponed is contained in Section 119 which provides as follows:

"Section 119. Date of vesting of legacy when payment or possession postponed.-- Where by term of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatees's



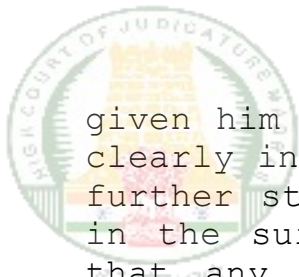
representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation: An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that; if a particular event shall happen, the legacy shall go to another person."

13. In order to determine whether the appellant can claim any right in the properties of the testator, it is, therefore, necessary to examine the nature of the bequest that was made by the testator in favour of his five sons including the deceased husband of the appellant. If it is found that the bequest is in the nature of vested interest, it would vest in the husband of the appellant on the death of the testator and after the death of her husband the appellant as his legal representative, would be entitled to claim her husband's interest in the properties. But in case the bequest is found to be in the nature of a contingent interest which was to vest in the legatees only after the death of Smt. Nadiga Nanjamma, the appellant would not be entitled to claim any interest in the properties since her husband had pre-deceased Smt. Nadiga Nanjamma."

18. It is clear from the above judgment that in order to determine as to when the property vested in the deceased Arokiasamy, it has to be seen whether the bequest clause is in the nature of vested interest or bequest is in the nature of contingent interest. In order to find out the nature of bequest, the intention of the testator as found in the Will must be taken into consideration. With regard to the construction of Will, the law is well settled that the intention has to be ascertained from the words used in the Will keeping in mind the surrounding circumstances, the possession of the testator, his family relationship and Will has to be read as a whole.

19. In the present case, the testator has specifically stated that he has provided sufficiently to the plaintiff and



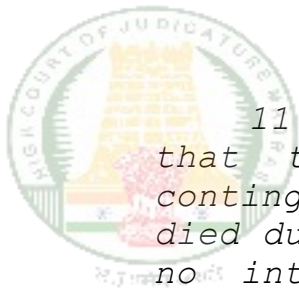
given him education and also got him married and the plaintiff is clearly in a position to take a care of himself. The testator has further stated in the Will that he wants to give a life interest in the suit property to the defendant. He also makes it clear that any son or daughter born to the defendant will take the property absolutely after the life time of the defendant. The testator also makes it clear that the plaintiff will not have any right or claim over the property in such an event.

20. It is an admitted case that a son was born to the defendant and he lived for sixteen years and unfortunately, he died in a road accident. The wordings in the Will is very clear that the moment a son or daughter is born to the defendant, the property will vest on them and their possession and enjoyment will get postponed till the life time of the defendant.

21. At this juncture, it will be relevant to take note of the judgment of this Court in ***P.Somasundaram Vs. K.Rajammal*** referred supra. The relevant portions in the judgment are extracted hereunder:

"9. In *Hazara v. Banta Singh*, AIR 1960 Punj 257, under a will, a testator bequeathed to A, B and C, equal shares in his estate. It was provided that A and B were not to alienate the properties in any way except for the payment of their share of the debt of the testator and were to keep the property only till their lives and for their maintenance. After the death of A and B, their shares also were to go to the share of C. C died during the lifetime of A and B. It was held, following the decision in *Phillip Graham Greenwood v. Phillip Graham Greenwood's case* 181 I.C. 355 : A.I.R. 1939 P.C. 78 and *Hilaso's case* (1911) I.L.R. 33 All. 558, that the will gave to A and B nothing more than a life estate and it could not be interpreted to confer an absolute estate on them and that C's interest in the property bequeathed to him was a vested one which devolved on his heir on his death even during the lifetime of A and B.

10. The last mentioned case is directly applicable to the facts of this case. From the principles enunciated in the above said decisions, it is very clear that the provisions of the will in the present case leave no doubt that the testator intended to give only a limited estate in favour of Piramu Ammal and Chellammal during their lifetime for the purpose of their maintenance, by expressly providing that they were not entitled to alienate the properties in any manner.



11.The learned Counsel for the appellant contended that the will must be interpreted as creating a contingent interest in Velammal and that since Velammal died during the lifetime of Piramu Ammal and Chellammal, no interest vested in Velammal and that therefore Exhibit A-34 was void ab initio and the property must devolve only to the reversioner, viz., the plaintiff. An interest is said to be vested when it is not subject to any condition precedent, when it is to take effect on the happening of an event which is certain; whereas an estate is contingent when the right to enjoyment depends upon the happening of an uncertain event which may or may not happen. A person takes a vested interest in property at the testator's death when he acquires proprietary right in it at that time; but the right of enjoyment is only deferred till a future event happens which is certain to happen. But, a contingent interest is one in which neither any proprietary interest nor a right of enjoyment is given at the testator's death; but both depend upon future uncertain events. In this case, since the deaths of Piramu Ammal and Chellammal were certain, Velammal had acquired a vested interest in the properties on the death of the testator Seeni Chettiar, Section 119 of the Indian Succession Act clearly applies. In the absence of any contrary contention by no stretch of imagination can it be said that Exhibit A-1 created only a contingent interest, and the argument advanced by the learned Counsel for the appellant is understandable."

22. It will also be relevant to rely upon the judgment of this Court in **Karuppanasamy Vs. Saraswathy and others** referred supra. The relevant portions of the judgment are extracted hereunder:

"8. The contention has been put forth by the appellant's counsel that as per section 125 of the Indian Succession Act, the appellant being the sole male survivor, as per the intention of the testator, on the death of Nagasubramaniam, he is entitled to obtain the entire legacy bequeathed under Ex.A1 Will. In this Connection, the illustrations ii appended Section 125 of the Indian Succession Act is relied upon. However, as rightly put forth, Section 125 of the Indian Succession Act, has no application to the facts of the present case. When the recitals of the Will Ex.A1 are seen and understood in the proper manner, it is found that the intention of the testator is to bequeath the



suit property equally on his male grandchildren absolutely and accordingly, it is found that they had been directed to take the property bequeathed in equal moieties absolutely and enjoy the same on the death of Nallammal and in such view of the matter, when there is no recital contained in the Will that the property should be taken by the surviving male legatee on the death of Nagasubramaniam and the intention of the testator is also not to given the legacy in entirety to the surviving male legatee, on the other hand, his intention is only that the two grand male children, should take them absolutely in equal moieties, accordingly, on the death of the testator, the property being vested on both the legatees absolutely as per Section 119 of the Indian Succession Act r/w 19 of the Transfer of Property Act and though Nagasubramaniam had died before the right to receive the legacy had accrued, his legal representatives would be entitled to succeed to the interest and accordingly, it is found that the respondents 1 to 4 being the legal representatives, as rightly determined by the Courts below, the respondents 1 & 2 are entitled to obtain their due shares as determined by them in the suit property. "

23. It is clear from the above judgments that a person gets a vested interest in a property at the testator's death when he acquires a proprietary right in it and the right of enjoyment is only deferred till a future event happens and which is certain to happen. It has also taken note of Section 119 of the Indian Succession Act, which was read along with Section 19 of the Transfer of Property Act. In the case law that was cited before this Court, it is seen that a similar bequest was made in favour of the person for life and the vested remainder was directed to vest on a sole male surviving. The person to whom the vested remainder was given died. Therefore, this Court held that the moment the male member to whom the property was given, was born, it vests on him absolutely and on his death, the property will have to come to his legal heir.

24. The above judgment will squarely apply the facts of the present case. A reading of the Will makes it very clear that Arokiasamy got a vested interest in the property, the moment he was born and what was postponed was only his possession and enjoyment till the life time of the defendant. Since the property had vested on Arokiasamy, on his death, the property will be succeeded by the defendant, since she is only Class-I heir for Arokiasamy.



25. If the defendant has become the absolute owner of the property by virtue of the Will, the plaintiff will have no other right or interest in the property and therefore, he cannot claim any right over the property. Consequently, the relief as claimed by the plaintiff is also unsustainable. In order to arrive at this conclusion, there is no requirement to go into the defence taken by the defendant or to go through the ordeal of trial and it is apparent on the reading of the plaint along with the Will that has been relied upon as a document in the plaint. The law as it stands is clearly a bar for the plaintiff to claim any relief against the defendant. Therefore, on this ground, the Court below ought to have rejected the plaint.

26. In the result, the fair and final order passed by the Court below in I.A.No.26 of 2012, dated 05.07.2012, is hereby set aside and the plaint filed in O.S.No.2604 of 2004 is hereby rejected and this Civil Revision Petition is accordingly allowed. No costs. Consequently, the connected miscellaneous petition is closed.

Sd/-

Assistant Registrar (RECORDS)

// True Copy //

Sub Assistant Registrar(CS)

To

The IIIrd Additional District Munsif, Tiruchirappalli.

+1 CC to M/s.T.BANUMATHY, Advocate (SR-102308[F] dated 28/11/2019)

+1 CC to MR.K.GOVINDARAJAN, Advocate (SR-102878[F] dated 02/12/2019)

C.R.P. (MD) .No.2165 of 2012 (PD)
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