

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 28.02.2020

CORAM

THE HON'BLE MR.JUSTICE S.M.SUBRAMANIAM

A.S.No.554 of 2018

Gajarajan

...Appellant/2nd Defendant

Vs.

S.Gandhimathi Selvam

...Respondent/Plaintiff

Prayer: Appeal Suit filed under Section 96 Read with Order 41, Rule 1 of the Code of Civil Procedure, against the judgment and decree in O.S.No.3 of 2016 dated 4th June 2018, on the file of the III Additional District Court, Vellore at Tirupattur.

For Appellant : Mr.V.Raghavachari

For Respondent : Mr.M.Sivavarthanan

JUDGMENT

The appeal suit is directed against the judgment and decree passed in O.S.No.3 of 2016 dated 04.06.2018.

2. The defendant is the appellant in the appeal suit and the respondent/plaintiff instituted a suit for partition and separate possession of plaintiff's half share in the suit properties and for grant of permanent injunction against the defendants from alienating and encumbering the share of the plaintiff and for costs.

3. The facts in brief as narrated in the plaint are as follows:

The plaintiff is the sister of the defendant. One Chinnakannammal was the mother of the plaintiff and the defendant. The plaintiff's mother Chinnakannammal purchased the 4th item of the suit property for a valid sale consideration on 17.02.1963 and enjoyed the same till her death. The 1 to 3 items of the suit properties were originally belonged to the plaintiff's grand father Subbaraya gounder. He executed a settlement deed in favour of the plaintiff's mother Chinnakannammal on 07.09.1971. On the same day, the Chinnakannammal was put in possession and enjoyment of suit items 1 to 3 schedule properties. Revenue accounts viz., Pattas, Chittas, Adangal, were transferred in the name of

Chinnakannammal. The said Chinnakannammal had sold some portion of the property to third parties. Chinnakannammal died intestate on 7.12.2006. Hence, the plaintiff inherited as the legal heir of Chinnakannammal along with defendant. The plaintiff has been enjoying the suit properties jointly along with defendant. The defendant gave proceeds to the plaintiff. Hence, the plaintiff and defendant alone are now entitled to equal share in the suit property. The plaintiff had called upon the defendant on 15.10.2015 to divide the suit properties into two equal shares by metes and bounds and to allot one such share in her favour. But the defendant evading the same. The plaintiff was suspecting the defendant and verified the documents and learnt that the defendant transferred the properties in her name and create forged documents. Hence, the plaintiff was issued a legal notice on 07.11.2015 to the defendant. The defendant received the same and gave reply notice on 1.12.2015 with false allegations. Hence, the plaintiff filed this suit. The defendant has no exclusive right or title over the suit property. Hence, the suit.

4. The written statements filed by the defendant reveals that the contentions set out in the plaint are denied and the gist of the written statements are extracted hereunder:

The suit is not maintainable and liable to be dismissed. It is true that the 1 to 3 items of the suit properties were originally belonged to the plaintiff's grand father Subbaraya gounder. He executed a settlement deed in favour of the defendant and plaintiff's mother Chinnakannammal on 7.9.1971. It is true that on the same day, she was put in possession and enjoyment of items 1 to 3 schedule properties and it is true the revenue accounts viz., Patta, Chitta, Adangal, were transferred in the name of Chinnakannammal. As per the provision of settlement deed dated 7.9.1971, the male decedents of Chinnakannammal are alone entitled to the suit properties if anything remain after the life time of Chinnakannammal. Hence, the plaintiff is not entitled for partition for the suit properties items 1 to 3. The defendant is the only male legal heir of the Chinnakannammal. Chinnakannammal sold some portion of properties to third parties. Hence, the extent and boundaries of the 1 to 3rd items of the suit properties are not correct. Chinnakannammal with her sound state of mind of dispossession of property, she executed a will in favour of the defendant in the presence of witnesses on 16.12.2001. On the same day, the plaintiff had received Rs.1,00,000/- from the defendant. Hence, the defendant has been in possession and enjoyment of the suit properties. There is no cause of action for the suit. The value of the property is not correct. Therefore, the plaintiff is not entitled for any right over the suit properties and the suit is to be dismissed with costs.

5. Based on the pleadings, the trial Court framed the issues as to whether the male decedents of Chinnakannammal are alone entitled to the suit properties after Chinnakannammal as per the Settlement deed dated 7.9.1971; whether the alleged will dated 6.12.2001 executed by Chinnakannammal is true and valid; whether the plaintiff is having half share in the suit properties; whether the plaintiff is entitled for partition and separate possession as prayed for; whether the plaintiff is entitled for permanent injunction as prayed for and to what other relief.

6. On the side of the plaintiff, PW1 was examined and Ex.A1 to Ex.A5 were marked. On the side of defendant DW1 to DW3 were examined. Ex.B1 to Ex.B16 were marked.

7. With reference to Issue No.1, the facts admitted by the respective parties are considered by the trial Court. Accordingly, the suit properties are originally belonged to the mother of the plaintiff and the defendant. Chinnakannammal, the mother of the plaintiff and defendant acquired item No.4 of the suit properties by way of a registered sale deed dated 17.2.1963 and she got the other items i.e., 1 to 3 items of suit properties from her father through a registered settlement deed dated 7.9.1971. The mother of the plaintiff and defendant died intestate on 7.12.2006, leaving behind her children, the plaintiff, defendant and her husband Srinivasan as her legal heirs.

8. Mr.Srinivasan, the father of the plaintiff and defendant died 6 years prior to the date of the suit. Thus, the plaintiff and the defendant alone are entitled to equal share in the suit properties. The contention of the plaintiff was that she demanded for partition and issued legal notice. In view of the fact that the defendant disagreed for partition, the plaintiff was constrained to institute the suit for partition and possession. The defendant contended that their mother deceased Chinnakannammal executed an unregistered will, declaring her properties i.e., suit properties in favour of the defendant. However, the plaintiff contended that there is no possibility of executing any such will by the deceased Chinnakannammal and such a will produced by the defendant is a forged one. On the basis of the forged will, the defendant made name transfer in all revenue records and now, attempting to dispose of the suit schedule properties. The defendant has stated that in respect of item 1 to 3 of the suit properties, the mother deceased Chinnakannammal acquired right from and out of the settlement deed in her favour(Ex.A2). It is further contended that the deceased Chinnakannammal executed an unregistered will in favour of the defendant and bequeathed the entire suit properties in favour of the defendant. It is contended that at the time of execution of the said will, the

defendant have given a sum of Rs.1,00,000/- to the plaintiff and the plaintiff signed as attesor in the will. Thus, the plaintiff has no right over the suit properties.

9. Ex.A2 is the certified copy of settlement deed and Ex.A5 is the Xerox of certified copy of settlement deed. The trial Court found that perusal of Ex.A2 / Ex.A5 reveals the first part of the deed, the executor of settlement deed gave absolute right over the properties found in the settlement deed to the deceased Chinnakannammal, later the executor had stated that if any property left at the time of her death, the same to be given to the male legal descendants of Chinnakannammal. DW1 in his evidence, has deposed that as per the above said contents of Ex.A2/Ex.A5, settlement deed, he claimed right over item 1 to 3 of the suit properties as her only male descendant.

10. The Constitution Bench of the Hon'ble Supreme Court of India in the case of Ramkishorelal and another vs. Kamal Narayan, reported in AIR 1963 SC 890, settled the legal principles in the matter of considering the settlement deeds and the Golden Rule of construction is narrated as under:

"12. The golden Rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in their ordinary, natural sense. To ascertain this intention the Court had to consider the relevant portion of the document as a whole and also to take into account the circumstances under which the particular words were used. Very often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has to a trained conveyancer a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of convincing. Sometimes it happens in the case of documents as regards disposition of properties, whether they are testamentary or non-testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another. A familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where

this happens? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohd. Kamgar Shah v. Jagdish Chandra Deo Dhabal Deo) [(1960) (3) SCR 604 at p. 611] . It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."

11. The trial Court considered the above cited judgment of the Hon'ble Supreme Court of India reported in AIR 1963 SC 890, wherein, the Apex Court held that a "familiar instance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion, it is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible; it is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void. "

12. Relying on the above judgment, the father of the deceased Chinnakannammal, executed the settlement deed and gave absolute right to his daughter deceased Chinnakannammal as stated below:

"உன் பேருக்கு இப்பத் திரம் மூலம் தான் செட்டில்மெண்ட் எழுதி வைத்து சொத்தையம் இன்றே உம்முடைய சுவாதினம் செய்துவிட்டேன். இனி மேற்படி சொத்துக்கும், எனக்கும், என் எவ்வகை வாரிசுகளுக்கும், எந்தவித பாத்தியமும், சம்மந்தமும், தொடர்ச்சியும் கிடையாது. தான் சொத்தை நீயே அடைந்து சர்வ சுதந்திரமாய் தானாதி விக் கிரயங்களுக்கு பாத்தியப்பட்டு, சுகமாய் ஆண்டு அனுபவித்துக் கொள்ள வேண்டியது."

13. Accordingly, Ex.A2/Ex.A5 Settlement deed, the father of deceased Chinnakannammal gave absolute right to his daughter Chinnakannammal and later the said executor of settlement deed had stated that @brhj;J cd;Dila fhy jpirf;F gpd; ,Uf;Fkhpd; ic& brhj;ij ck;Kila Mz; re;jjpfs; rk ghfk hf mile;Jf; bfhs;s ntz;oaJ///@

14. The trial Court found that since in the later part of the above said settlement deed, the executor of the same had imposed a condition that the same is not valid and the same is to be held as void. With reference to the said findings, the trial Court relied on the decision reported in AIR 1995 Supreme Court Page 2491, wherein the Hon'ble Supreme Court has held that, subsequent part, clause or portion prevails over the earlier part only in will, further observed that the "rule of interpretation of the 'Will' are different from the rules which govern the interpretation of other documents say, for example, a sale deed or a gift deed or a mortgage deed or, for that matter, any other instrument by which interest in immovable property is created. While in these documents if there is any inconsistency between the earlier or the subsequent part or specific clauses inter se contained therein, the earlier part will prevail over the latter as against the rule of interpretation applicable to a Will under which the subsequent part, clause or portion prevails over the earlier part on the principle that in the matter of 'Will', the testator can always change his mind and create another interest in place of the bequest already made in the earlier part or on an earlier occasion. Undoubtedly, it is the last Will which prevails." The same is also relevant to the case on hand. Since herein the executor had executed a settlement deed gave absolute right in the first part of the document and then, imposed a condition in the later part of the settlement deed hence, the later part of the settlement deed i.e., the condition imposed in the later part is not valid and the first part of the document alone prevails.

15. The learned counsel appearing on behalf of the appellant mainly contended that the Settlement Deed dated 07.09.1971 is to be read cogently and the absolute right regarding the property was given in favour of Chinnakannammal and if the property was left after her demise, then the property should go in favour of the Male heirs. Therefore, there is no ambiguity or infirmity in respect of the settlement deed and the right flows consequently from the mother to son and under these circumstances, the trial Court has committed an error in arriving a conclusion that the second portion of the settlement deed is void.

16. In support of the said contention, the learned counsel for the appellant relied on the judgment of the Madras High Court in the case of Lakshmi Ammal Vs. Allauddin Sahib, reported in (1962) 2 MLJ 187, wherein it is held as follows:

"9.

The various decisions cited at the Bar both by the appellant's counsel and the learned council for the respondent are only instances where the above general principles have been applied. Where as in

this case, two kinds of dispositions are found, the first creating an absolute estate and the second a gift over, after the lifetime of the donee of the absolute estate the language of the will has been considered in each particular case to find out whether the predominant intention of the testator in regard to the subsequent disposition was to whittle down the first estate to a limited estate. Thus, Varadachariar, J. in Subbamma v. Ramanaidu, 1937-1 Mad LJ 268 : (AIR 1937 Mad 476) had to deal with a will which conferred on the testator's wife an estate described as the right of "Hakdar" and also provided that she should enjoy the property in the same way as the testator himself had been doing. There was a gift over in favour of the testator's grandchildren of the entire properties. It was observed by the learned Judge that

"it was doubtful if the first gift in favour of the testator's wife was held to be an absolute estate, whether a gift over in these terms would be valid at all and that to avoid such a possibility the proper rule of construction has been held to be to take the will as a whole; and the presence of a gift over which is not a mere gift by way of defeasance has generally been held to be an indication that the prior gift was only of a limited interest."

The learned Judge also referred to the decision of a Division Bench of this court in Thayalai Achi v. Kannammal A.S. No. 232 of 1929: (AIR 1935 Mad 704) dealing with a similar will where the language was even stronger in favour of an absolute estate to the widow because the diapositive clause contained words conferring wide powers of disposition on her but in view of the gift over and the reference in the context to the discharge of debts the learned Judges thought it right to limit the power of disposition to circumstances of necessity or the discharge of debts."

17. In the case of Angurbala Mullick Vs. Debabrata Mullick, reported in AIR 1951 SC 293, wherein the Hon'ble Supreme Court of India held as follows:

"On the question of construction Mr. Banerjee's main argument is that if the relevant provisions of the indenture dealing with devolution of shebaitship are read as a whole, it will be manifest that the executants of the deed intended that the issue of Mrityunjay were to have preference over other heirs in the matter of succession to shebaitship; and that an heir who is not an issue could not come in so long as an issue remained alive. The relevant portion of the document has been set out already and it provides

in the first place that after the death of Nitto Sundari, her son, the said Mrityunjoy Mullick, shall become the shebait, after him his wife Smt. Kiranbala Dassi, and after her death, the heirs of the said Mrityunjoy Mullick shall be and act as shebait. Then there is a proviso to the effect that if the said Mrityunjoy shall happen to die without any issue or without giving any authority to his wife, him surviving, to adopt, then in such case it shall be competent for Mrityunjoy to appoint by will or otherwise a shebait who would act as such after the death of the said wife; but in case the said Mrityunjoy Mullick shall happen to die without any issue, the shebaitship of the said Thakur after the death of his wife shall devolve upon his heirs under Hindu Law. Mr. Banerjee lays stress upon the proviso, particularly the last portion of it and it contains, according to him, a clear direction that it is only on the failure of issue that the heirs of Mrityunjoy can come in as shebait. In order that the proviso may be reconciled with the clause that precedes it, Mr. Banerjee invites us to hold that the word "heirs" in the previous clause should be taken to mean only the issue of Mrityunjoy."

18. In the case of Delhi Development Authority Vs. Durga Chand Kaushish, reported in (1973) 2 SCC 825, wherein the Hon'ble Supreme Court of India held as follows:

"19. Both sides have relied upon certain passages in Odgers' "Construction of Deeds and Statutes" (5th ed. 1967). There (at pages 28-29), the First General Rule of Interpretation formulated is : "The meaning of the document or of a particular part of it is therefore to be sought for in the document itself". That is. undoubtedly. the primary rule of construction to which Sections 90 to 94 of the Indian Evidence Act give statutory recognition and effect. with certain exceptions contained in Sections 95 to 98 of the Act. of course, "the document" means "the document" read as a whole and not piecemeal.

20. The rule stated above follows logically, from the Literal Rule of Construction which, unless its application produces absurd results must be resorted to first. This is clear from the following passages cited in Odgers' short book under the First Rule of Interpretation set out above:

Lord Wensleydale in Monypenny v. Monypenny(1) said:

"the question is not what the parties to a deed may have intended to do by entering into

that deed, but what is the meaning of the words used in that deed: a most important distinction in all cases of construction and the disregards of which often leads to erroneous conclusions."

19. In the case of F.M.Devaru Ganapathi Bhat Vs. Prabhakar Ganapathi Bhat, reported in (2004) 2 SCC 504, wherein the Hon'ble Supreme Court of India held as follows:

"9. The answer to the second question hinges upon the interpretation of Sections 13 and 20 of the Act, which read as under :

"13. Transfer for benefit of unborn person Where, on a transfer of property, an interest therein is created for the benefit of a person not in existence at the date of the transfer, subject to a prior interest created by the same transfer, the interest created for the benefit of such person shall not take effect, unless it extends to the whole of the remaining interest of the transferor in the property.

20. When unborn person acquires vested interest on transfer for his benefit. Where, on a transfer of property, an interest therein is created for the benefit of a person not then living, he acquires upon his birth, unless a contrary intention appears from the terms of the transfer, a vested interest, although he may not be entitled to the enjoyment thereof immediately on his birth."

10. The contention of learned counsel for the appellant is that since the donor did not create the interest of the entire property survey No.306 for the benefit of unborn male child, namely, the respondent, the interest sought to be created under the gift deed is invalid. In support, learned counsel places reliance on the observations made in para 14 of the decision in Raj Bajrang Bahadur Singh v. Thakurain Bakhtraj Kuer [AIR 1953 SC 7] which reads as under : "Of course this by itself gives no comfort to the defendant; she has to establish, in order that she may be able to resist the plaintiff's claim, that the will created an independent interest in her favour following the death of Dhuj Singh. As we have said already, the testator did intend to create successive life estates in favour of the successive heirs of Dhuj Singh. This, it is contended by the appellant is not permissible in law and he relied on the case of Tagore v. Tagore [18 W.R.359]. It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series

of persons, some of whom are in existence and some are not, it does not fail in its entirety, it is valid with regard to the persons, who are in existence at the time of the testator's death and is invalid as to the rest. The widow, who is the next heir of Dhuj Singh, was in existence when the testator died and the life interest created in her favour should certainly take effect. She thus acquired under the will an interest in the suit properties after the death of her husband, commensurate with the period of her own natural life and the plaintiff consequently has no present right to possession."

11. The brief facts of the relied decision are that a will was executed by one Raja Bisheshwar Bux Singh. The will, inter alia, stated that after the death of the testator his younger son and his heirs and successors, generation after generation, may not feel any trouble and that there may not be any quarrel between them, therefore, it as being executed with respect to certain villages so that after the death of the testator, his younger son may enjoy the said properties. The younger son and his heirs, without power of transfer, shall exercise other rights in respect of the said properties. When the will was executed, the defendant, being the wife of the younger son of Raja Bisheshwar Bux Singh was already there. On the construction of the will, it was held that the younger son had only a life interest in the properties under the terms of his father's will. Had it been an absolute interest, the property would have reverted to the elder son of the testator. Construing the will, it was held that the testator did intend to create successive life interest in favour of the successive heirs of his younger son that was held to be not permissible in law. Under these circumstances, the Court observed that no interest could be created in favour of an unborn person. The decision relied upon has no applicability in the facts and circumstances of the instant case. The present is not a case where any successive interest has been created under the gift deed. There is no ban on the transfer of interest in favour of an unborn person. Section 20 permits an interest being created for the benefit of an unborn person who acquires interest upon his birth. No provision has been brought to our notice which stipulates that full interest in a property cannot be created in favour of unborn person. Section 13 has no applicability to the facts and circumstances of the present case. In the present case, the donor gifted the property in favour of the appellant, then living,

and also stipulated that if other male children are later born to her brother they shall be joint holders with the appellant. Such a stipulation is not hit by Section 13 of the Act. Creation of such a right is permissible under Section 20 of the Act. The respondent, thus, became entitled to the property on his birth. In this view, there is also no substance in the second contention."

20. Citing the above judgments, the learned counsel for the appellant reiterated that the interpretation of the will or a settlement deed is to be read with reference to the intention of the executor and the intention flows from and out of the language employed is to be found out and accordingly, the wishes are to be considered. As far as the settlement deed in the present case is concerned, the absolute right was granted in favour of the mother of the appellant Chinnakannammal. The settlement deed reveals that the mother of the appellant was vested with an absolute power to deal with the property in the manner she wishes. However, the property was not alienated or sold by the mother of the appellant and as per the settlement, it is to be vested with the Male heirs. Thus, there is no ambiguity with reference to the terms of the settlement and therefore, the trial Court has not considered these aspects and arrived an erroneous conclusion.

21. The learned counsel appearing on behalf of the respondents disputed the said contentions by stating that the Constitution Bench of the Hon'ble Supreme Court of India in the case of Ramkishorelal (Cited supra) categorically held that "where an absolute title is given is unclear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void". Therefore, the Constitution Bench of the Hon'ble Supreme Court of India would be directly applicable with reference to the settlement deed, which is the subject matter of the present appeal suit and accordingly, the trial Court has taken a decision in consonance with the principles laid down.

22. Let us now consider the judgments referred by the learned counsel for the appellant.

23. As far as Angurbala Mullick case (cited supra) is concerned, the document, which was the subject matter in that case provides "in the first place that after the death of Nitto Sundari, her son, the said Mrityunjoy Mullick, shall become the shebait, after him his wife Smt. Kiranbala Dassi, and after her death, the heirs of the said Mrityunjoy Mullick shall be and act as shebait". The facts and circumstances are

entirely different and the issue before the Hon'ble Supreme Court in that case was, whether the plaintiff is entitled after the death of her husband to act as shebait of an idol named Sree Sree Nitto Gopal Jew founded by Mrityunjay and his mother, either solely or jointly with the defendant, her stepson.

24. Perusal of the facts reveals that the said judgment is of no avail with reference to the facts and circumstances of the present case, with reference to the settlement deed. As far as the other cases are concerned, the facts are entirely different and the interpretation of deeds were dealt with by the Hon'ble Supreme Court and it is made clear that the intention of the parties are to be considered. The intention whether it is hit by the rule of perpetuity or hit by the provisions of law are to be considered by the Courts. Intention can be identified by understanding the language adopted in the document and whether the intention made is in consonance with law or affects the rule of perpetuity or otherwise are also to be scrutinized.

25. In the present case, the settlement deed unambiguously stipulates that "the executor relinquished his right including the right of all other heirs and further, has stated that there is no continuity of right in respect of the said property, as far as the other heirs are concerned. It is further reiterated that Chinnakannammal is entitled for an absolute right and she can enjoy the property mentioned in the settlement deed as an absolute owner. While conferring such a right in an absolute manner, subsequently a clause has been incorporated in the event the property remains, then it shall go to the male legal heirs. Now, it is to be considered, whether the legal interest of the property is valid. The rule is that no legal interest in property is valid unless it is certain, at the time, when the disposition takes effect, that the interest must vest within a life or lives.

26. Therefore, the continuity or certainty are to be looked into. In the present case, admittedly, an absolute right was granted to the said Chinnakannammal in the settlement deed. Once, the absolute right is granted, then the executor could not have exercised any further right, so as to adopt another clause in the settlement deed in the event of availability of the property after the death of Chinnakannammal, the same should go to the Male heirs. The said clause incorporated in the settlement is undoubtedly trenching on the first clause, which provides absolute right to the deceased Chinnakannammal. The intentions are running contrary and it trenches on the first clause and thus, the second clause trenches on the first clause. Thus, it is to be considered that the second clause is void. This exactly is the

reason why the defendants in the suit made an attempt to prove the will. Once the property in question is the subject matter of the settlement, then why the deceased Chinnakannammal executed a will in favour of the appellant is also not made clear before the trial Court. If the appellant is of an opinion that settlement deed provides an absolute right with reference to the second clause, then an attempt is made to establish a will, which was executed by deceased Chinnakannammal and such contradictions raises a doubt in the mind of the Court that the appellant himself is doubtful about the second clause and under those circumstances, he relied on the will for the purpose of establishing his right to inherit the property.

27. The golden rule of construction laid down by the Constitution Bench of the Hon'ble Supreme Court of India is to be followed with reference to the facts and circumstances of the present case is concerned, because there is a substantial difference between a "Will" and a "Settlement". In the present case, admittedly, it is a settlement. Once the property is settled by the settlor in favour of the settlee, absolutely, then the settlor's right ceased to exist and thereafter the settlor cannot travel beyond and bequeath the property after the lifetime of the settlor in favour of the male heirs of the family. Then, such a settlement possess the character of a will, which is impermissible. Therefore, the difference between a settlement and will is to be understood in the context and the language employed either in the settlement or in the will.

28. In the present case, the settlement unambiguously enumerates that the suit mentioned property has been settled in favour of Chinnakannammal absolutely. Thus, the title of the property stands transferred in favour of Chinnakannammal and on such transfer in the first clause, the settlor loses his/her right to impose another clause for inheriting the property by the male legal heirs after the demise of the settlor. Such a clause acquires the character of a will, which is not permissible in a settlement deed. This exactly is the reason why, the Courts have held, when the second clause in a settlement trenches into the first clause, then the second clause became null and void.

29. The learned counsel for the appellant distinguished the judgment of the Madras High Court in the case of Govindaraja Pillai and others Vs. Mangalam Pillai and another, reported in (1933) AIR (Mad) 80. The Hon'ble Mr. Justice Sundaram Chetty, J., while considering the facts of the case, where a suit brought by the plaintiffs 1 and 2 to recover possession of the plaintiff mentioned properties, alleging that they became entitled to the same on the death of

their sister Madurambal in 1924 without any issue. The 1st defendant is the husband of Madurambal. When he married her, he was a man of advanced age, and at the instance of the parents of the girl, he executed a registered settlement deed, Ex. A, on 2nd June 1916 in favour of the girl. The material portion of Ex. A runs thus: "I have accordingly given you the undermentioned properties valued at Rs.1,000 and you shall yourself from this day hold and enjoy the same with all rights. Should any issue be born to us, that issue shall get the properties after our death. If there is no issue, after your death, your brothers (Plaintiffs 1 and 2) should take the properties."

30. With reference to the above fact, it is held that "The distinction between a repugnant provision and defeasance provision is sometimes subtle, but the general principle of law seems to be, that where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void; but where the grant of an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative."

31. The learned counsel for the appellant relying on the said portion reiterated that it is a defeasance provision, wherein in the present case, the settlor reiterated that if the property remains, then the male heirs will inherit the same after the death of the settlee. Therefore, it is a defeasance clause and cannot be construed as repugnant to the main clause, wherein the settlor gives an absolute rights to the settlee. When if it is a defeasance clause, then the rule must be that the second clause is subject to defeasance on the happening of a contingency and where the effect of such defeasance would not be a violation of any rule of law, the original estate is curtailed and the gift over must be taken to be valid and operative.

32. In this pretext, the learned counsel for the appellant is of an opinion that the clause flows simultaneously portraying the intention of the donor and such an intention cannot be construed a repugnant provision and therefore, there is no impediment as such and accordingly, the settlement deed is a valid document and the defeasance on the happening of a contingency cannot be construed as bad in law. The other cases relied on by the Madras High Court in the above judgment is also read over by the learned counsel for the appellant and he contended that "A Hindu, no doubt, may

give property by way of an executory gift upon an event which is to happen, if at all immediately on the close of a life in being and in favour of a person born at the date of the gift, and such a gift over might be a sufficient indication that only a life estate to the first taker was intended."

33. In yet another paragraph, the finding made is that "I am clearly of opinion that the absolute estate conferred upon Madurambal under Ex. A was subject to defeasance in the event of her dying without any issue and such a defeasance clause is not opposed to any rule of law and has been recognised by the Privy Council to be valid."

34. In yet another judgment of the Kerala High Court in the case of Parvathi Bhavani Vs Velayudhan Govindan, in A.S.No.141 of 1955, the Division Bench of Kerala High Court also reiterated the said principles, which is extracted hereunder:

".....5. It is no doubt true that Clause 4 standing by itself creates an absolute estate in favour of Sivadasan, but Section 28 of the Transfer of Property Act expressly allows the creation of such an interest subject to the condition that on the happening of a specified uncertain event the interest shall pass to another person. Section 28 reads:

On a transfer of property an interest therein may be created to accrue to any person with the condition superadded that in case a specified uncertain event shall happen such interest shall pass to another person, or that in case a specified uncertain event shall not happen such interest shall pass to another person. In each case, the dispositions, are subject to the rules contained in Sections 10, 12, 21, 22, 23, 24, 25 and 27."

".....The donor and donee may agree that on the happening of any specified event which does not depend on the will of the donor a gift shall be suspended or revoked; but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor, is void wholly or in as the case may be."

".....Section 28 expressly allows the gift of any interest in favour of the donee subject to the condition that on the happening of a specified uncertain event the interest shall pass to another person. In such a case what is really conferred on the donee under the first clause is only, a life estate even, though the interest is described in that clause as an absolute estate, and the absolute interest passes to the donee or donees under the

second clause on the happening of the specific uncertain event."

".....The gift to the donee under the first clause is therefore only a gift of a life estate and the defeasance clause will not be repugnant to that gift and will not offend the provisions of Section 126 of the Transfer of Property Act. The apparent conflict between Section 28 and 126 will thus be resolved."

"....This is not what was happened in the present case. Here the donor was actually making an ulterior devise or transfer of the property to take, effect on the happening of a specified uncertain event and was not making a simple provision for the succession or devolution of property which had been absolutely given to the donee. We hold that CI. 13 of Ext.A is only a defeasance clause which can be made u/s 28 of the Transfer of Property Act and that it is valid and would take effect."

35. However, the above judgment was delivered mainly relying on the judgment of the Madras High Court in the case of Govindaraja Pillai and others (cited supra). Thus, the principles followed by the Madras High Court is reiterated by the Kerala High Court in the case of Parvathi Bhavani (cited supra).

36. In reply, the learned counsel for the respondents disputed the contentions of the appellant by stating that the judgments now relied on cannot have any application with reference to the provisions of law as of now. The judgment of the Madras High Court was delivered on 02.08.1932 as well as the Kerala High Court delivered the judgment on 27.07.1956 and under these circumstances, those judgments cannot be relied upon nor have any application with reference to the legal position prevailing as of now and even as on the date of settlement deed in the present case.

37. In support of the said contention, the learned counsel for the respondents submitted that the 1933 judgment of the Madras High Court was prior to the Hindu Succession Act and the Hindu Succession Act provides equal right to the female heirs. Therefore, the 1933 judgment, if applied, it would result in violation of Sections 14 and 16 of the Hindu Succession Act. If the said principle is relied on with reference to the facts and the circumstances of the present case, it will affect the rights of the female legal heirs

and such a right is vested to a female legal heir under the provisions of the Hindu Succession Act and the subsequent amendments thereon.

38. After the Hindu Succession Act, the female heirs get equal right in the property and therefore, the judgment of the Madras High Court delivered during the year 1933 cannot have any application.

39. This Court is of the considered opinion that admittedly, now equal right of property has been provided to female heirs under the Hindu Succession Act and in subsequent amendments. In the present case, the settlement deed was admittedly executed on 07.09.1971 after the Hindu Succession Act. The settlement deed unambiguously enumerates that the said Chinnakannammal gets an absolute right in respect of the property mentioned in the suit. The property was settled absolutely in favour of said Chinnakannammal and thereafter, the second clause is incorporated, stating that if the property remains, then the same should go to the male legal heirs of the family. Thus, the second clause is directly in violation of Sections 14 & 16 of the Hindu Succession Act and therefore, becomes void.

40. Even the Madras High Court judgment in the case of Govindaraja Pillai and others (cited supra), His Lordship the Hon'ble Mr. Justice Sundaram Chetty, J., in unambiguous terms held that "where the intention of the donor is to maintain the absolute estate conferred on the donee but he simply adds some restrictions in derogation of the incidents of such absolute ownership, such restrictive clauses would be repugnant to the absolute grant and therefore void"

41. The first principle is that the absolute estate conferred on the donee, adds some restrictions in derogation of the incidents of such absolute ownership, then it is void. The exceptions is dealt with by the Hon'ble Judge. In a second portion, if such an absolute estate is expressly or impliedly made subject to defeasance on the happening of a contingency, then it is valid and operative.

42. Again, the learned judge relied on a judgment of the Privy Council, reported in (1879) ILR 4 23(Privy Council) and (1888) L.R. 16 I.A.29(Privy Council), which reiterates that "I am clearly of opinion that the absolute estate conferred upon Madurambal under Ex.A1 was subject to defeasance in the event of her dying without any issue and such a defeasance clause is not opposed to any rule of law and has been recognised by the Privy Council to be valid."

43. Reading on the above principle, with reference to the facts in those cases, the defeasance was that "in the event of death without any issue." Therefore, only in the event of death without any issue, then such further clauses can be designated as a defeasance clause. In the present case, the question would not arise in view of the fact that the second clause states that after the death of the settlee, if the property remains, then the same shall go to the male legal heirs. The very clause itself is in violation of Sections 14 & 16 of the Hindu Succession Act. When any such clause assuming even defeasance, then also, it becomes void on account of the statutory right provided to the female heirs. Therefore, such a clause even as per the Madras High Court Judgment is in violation of any rule of law, then the same is not valid and cannot be operated. Therefore, this Court is able to form an opinion that in a settlement deed, wherein an absolute right was conferred in favour of a daughter and in the event after the death of this daughter, if the property remains, then the further clause stating that the said property shall go to the male heirs is to be construed as repugnant to the first clause provided absolute right and the second clause became void as the same is in violation of Sections 14 & 16 of the Hindu Succession Act.

44. As rightly contended by the learned counsel for the respondents, the Madras High Court judgment is of the year 1933 is Privy Council Hindu Succession Act and therefore, the subsequent development providing equal right to female heir can never be brushed aside and in this context, this Court has to arrive a conclusion that the second clause in the settlement deed providing right to a male heir, after the death of Chinnakannammal is void.

45. This apart, the golden rule of construction as held by the Hon'ble Supreme Court in the case of Ramkishorelal and another vs. Kamal Narayan, reported in AIR 1963 SC 890, (cited supra) categorically enumerates that "where an absolute title given is unclear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void."

46. Thus, the facts as well as the nature of the second clause in the settlement deed in the present case is undoubtedly is in violation of the Hindu Succession Act and it trenches on the first clause by depriving the female heirs to get their right. Thus, in a settlement deed, such clauses are impermissible and consequently, the second clause in the settlement deed is void.

47. For all these reasons, this Court is of the considered opinion that the Constitution Bench judgment in the case of Ramkishorelal and another (cited supra) would be directly applicable with reference to the facts and circumstances of the case on hand. The first clause in this settlement deed Ex.A2/Ex.A5 provides an absolute title, which is clear and unambiguous. The later provision undoubtedly trench on the same and therefore, the later provision is to be held as void. Thus, the trial Court has rightly applied the principles laid down by the Constitution Bench of the Hon'ble Supreme Court of India in the case of Ramkishorelal and another (citedsupra) and there is no perversity or infirmity as such.

48. Relying on the said judgment, the trial Court arrived a finding that Ex.A2/Ex.A5 settlement deed dated 7.9.1971, the defendant is not entitled to claim any exclusive right over the item 1 to 3 of the suit properties as male decedent of deceased Chinnakannammal.

49. With reference to Issue No.2, the trial Court categorically found that the will is suspicious in nature. The will is an unregistered document and further, the sanctity of the will had not been established before the Court by the defendant. While considering the genuinity of the will, the trial Court found that the burden is on the defendant to prove the execution of Ex.B15/Ex.B16 will. DW2 one of the attesor Gnanasekaran is none other than the brother of his wife, has deposed in his evidence that he purchased the stamp papers for the will and the will was registered. However, the trial Court found that Ex.B15/Ex.B16 is unregistered will. Further, he has deposed that at the time of execution of will, the father of the plaintiff and defendant was also present. But he did not know why the father of the plaintiff and defendant had not signed as attesor. DW1 has deposed in his evidence that he married the daughter of the plaintiff and then, he divorced her. The trial Court found that DW2 is the brother of the second wife of the defendant. As interested witness, the evidence of DW2 was not relied upon by the trial Court. DW3, the scribe of the will has deposed that he did not know the art of typing. But, in the will, DW3 had signed as typed and drafted by him. Further he had deposed as follows:

"மேற்படி உயிலை யாருக்காக எழுதினேன் என்றால் கஜராஜன் என்பவருக்காக சின்னகண்ணம்மாள் குறிப்ப, கொடுத்து அதிலிருந்து அவர் சொல்ல, சொல்ல தட்டச்சு செய்து சின்னகண்ணம்மாளிடம் சாட்சிகள் முன்னிலையில் கையொப்பம் பெற்று சின்னகண்ணம்மாளிடம் உயிலை கொடுத்துவிட்டேன்.."

"இந்த உயில் சம்மந்தமாக திருப்பத்துர் மாவட்ட உரிமையியல் நீதிமன்றத்தில் அ.வ.எண்.90/2009 என்ற வழக்கில் சாட்சியம் அளந்ததுள்ளதால் என்றால் ஆம். அந்த சாட்சியத்தில் எனக்கு தட்டச்சு

செய்யத் தெரியாது. நான் தட்டச்சு செய்யவில்லை, தட்டச்சு செய்தவர் என்ற இடத்தில் நான் கையெழுத்துப் போட்டிருக்கிறேன் என்று சாட்சியம் அளித்திருக்கிறேன் என்றால் ஆம்."

The above said self contradictory evidence of DW3 is not reliable. Further, DW3 has deposed that,

"மூலபத்திரத்தை நான் பார்க்கவும் இல்லை. படிக்கவும் இல்லை..."

"பி.வா.சா.ஆ.15-ல் சின்னகண்ணம்மாள் கஜராஜனை தன் மகன் என்று கூட சொல்லவில்லை என்றால் சரிதான்..."

"காந்திமதிக்கு சொத்து ஏன் கொடுக்கப்படவில்லை என்பதற்கான காரணமும், பி.வா.சா.ஆ.15 உயிலில் சொல்லப்படவில்லை என்றால் சரிதான்..."

50. In view of the above deposition, the trial Court has found that the evidence of DW3 is not reliable as the evidence of a Scribe. The other findings of the trial Court, which all are relevant as extracted hereunder:

"The above said evidence of DW3 is not reliable as the evidence of a Scribe. Further, a perusal of Ex.B15/Ex.B16 reveal that there is no relationship of the Executor of the will with the executive is not stated. Further, there is no reason is stated why the another legal heir i.e., the plaintiff was not given any property and why the entire property of the deceased Chinnakannammal was given only to the defendant. Further, it is stated that the will was prepared at the veranda of the Sub.Registrar's office. But no reason is stated why it was not registered. Though it has been stated by DW3 the scribe that he had drafted and typed the will on the instructions of the testatrix but this fact appeared to be false on the face of the documents itself. There are many suspicious circumstances appearing on the face of documents which go to suggest that in fact nothing was drafted or typed by the scribe on the instructions of the testatrix, but a typed matter was placed before him for his signature as scribe. The above said circumstances create strong doubts on the genuineness of Ex.B15/Ex.B16. Further, the disposition made in the will appeared to be un-natural im-probable and unfair. The Learned Counsel for the plaintiff had cited a decision reported in AIR 1968 Supreme Court Page 1332 in which it is held that, in a case in which a will is prepared under circumstances, which raise the suspicion of the court that it does not express the mind of the testator it is for those who propound the will to remove that suspicion. The same is relevant to the case on hand, since the defendant has not removed the suspicion why entire property of the deceased Chinnakannammal was given to the defendant i.e., to the son alone when her daughter i.e., plaintiff is also alive. The defendant had stated that at the time of Ex.B15/Ex.B16 will, he gave

Rs.1,00,000/- to the plaintiff, but the same is not proved. In this regard, PW1 is not cross examined to prove the receipt of Rs.1,00,000/- the presence of the plaintiff, attestation and execution of Ex.B15/Ex.B16 will. Further, a perusal of records reveal that the plaintiff has signed in Vakalat, Plaint and deposition in English, but the alleged attesting signature found in Ex.B15/Ex.B16 will is in Tamil. On the side of the defendant, the S.S.L.C. Certificate and Mark sheet of the plaintiff is filed in which the signature of the plaintiff is in Tamil. But both the documents are of the year 1975. But Ex.B15/Ex.B16 is of the year 2001. The arguments of the Learned counsel of the plaintiff that, the signature found in SSLC Certificate and Mark Sheet of the plaintiff of the year 1975 was used for forging the signature in Ex.15/Ex.B16 is seems to be acceptable one. In this regard PW1 is not cross examined to prove the attestation and execution of Ex.B15/Ex.B16 will. Since, the Will is not duly proved the defendant is not entitled to any benefit under Ex.B15/Ex.B16. In the absence of Will as legal heirs of deceased Chinnakannammal, the plaintiff and defendant are entitled to have equal share in the suit properties. As co-sharer the plaintiff is entitled to claim injunction to restrain the defendant from disposing the suit properties on his own. For the above said reasons and in the above said circumstances, it is decided that for Issue No.2, the alleged will dated 6.12.2001 executed by Chinnakannammal is not true and valid one, and Issue No.3, the plaintiff is having half share in the suit properties, for Issue No.4, the plaintiff is entitled for partition and separate possession as prayed for, and for Issue No.5, the plaintiff is entitled for permanent injunction as prayed for."

51. This Court is of the considered opinion that even a registered will cannot be construed as conclusive. Even in respect of a registered will, if any doubtful circumstances arises, then the parties are at liberty to establish the suspicious circumstances and the Courts are bound to adjudicate such suspicious circumstances and arrive a conclusion that whether the testator had intended to execute such a will and the contents are made known to the testator at the time of execution of the will and whether a particular Will is surrounded by suspicious circumstances or not is the question of fact and it depends upon the facts and circumstances of each case. While the execution of the Will is attended by suspicious circumstances, the propounder has to explain the circumstances and has to remove the suspicion of the Court in order to satisfy the conscious of the Court.

52. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in making of the Will under which, he receives substantial benefits, interventions, arbitrations and alterations in the Will are all in the nature of circumstances, which shows the suspicion about the execution of the Will itself.

53. As far as the present facts are concerned, the Scribe (DW3) himself has deposed before the trial Court that he did not know the art of typing. But, in the will, he had signed as typed and drafted by him. This apart, DW2 one of the attessor Gnanasekaran deposed that he purchased the stamp papers for the will and the will was registered. However, the trial Court found that the will was unregistered. Though the witness deposed that it was executed at the Registrar's office, there is no proof to establish the same. This apart, the sold property also has been included in the will. All these factors found by the trial Court reveals that the will is suspicious and unregistered and the witnesses also deposed with contradictions.

54. In a suit for partition, even the defendant, while claiming the title over the suit property, is bound to establish that he is entitled for the property. The plaintiff could able to establish that the mother is the absolute owner of the property. The plaintiff is further established that the will is a suspicious document and the genuinity of the will has not been proved by the defendant during the course of trial.

55. This being the factum established, this Court is of the considered opinion that the defendant has not established the fact regarding the will executed in his favour with reference to the suit schedule property and per contra, the plaintiff could able to establish that she is entitled for half share in the property and accordingly, the trial Court has not committed any perversity or infirmity as such.

56. This being the findings of the trial Court, this Court is of an opinion that the appellant is not entitled for the relief as such sought for in the present appeal suit. Consequently, the judgment and decree dated 04.06.2018 passed in O.S.No.3/2016 is confirmed and the appeal suit in A.S.No.554 of 2018 stands dismissed. No costs.

Sd/-

Assistant Registrar (CO MDU)

//True copy//

Kak

To

The III Additional District Court,
Vellore, Tirupattur.

Copy To
The Section Officer,
Vernacluar Records,
High Court, Madras-104

+1cc to Mr.M.Sivavarthan, Advocate SR.No.18166

A.S.No.554 of 2018

RSK (CO)
GMY (17/08/2020)



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