



S.A.No.1804 of 2002

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BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 18.07.2024

CORAM

THE HON'BLE MR.JUSTICE S.SOUNTHAR

S.A.No.1804 of 2002

and

M.P(MD)Nos.1 to 3 of 2007

Madhavan Pillai

... 1st Defendant/1st Respondent
Appellant

Vs.

1.Neelavathy

... Plaintiff/Appellant
Respondent

2.A.Chellammal (Died)

... 2nd Defendant/2nd Respondent
Respondent

3.Mary Angel.A

... 4th Defendant/3rd Respondent
Respondent

(Memo presented before the Court on 11.06.2024 is recorded as R-2 died and sole appellant and R-1, who are already on record are recorded as LR's of the deceased R-2, vide Court order, dated 11.06.2024 made in S.A.No.1804 of 2002)

PRAYER : Second Appeal filed under Section 100 of the Civil Procedure Code, against the judgment and decree of the Court of Subordinate Judge, Padmanabhapuram in A.S.No.104 of 1995, dated



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30.01.2001 in reversing the well considered judgment and decree of the Court of the Additional District Munsif, Padmanabhapuram in O.S.No.84 of 1994, dated 21.11.1995.

For Appellant : Mr.J.Alaguram Jothi
For R-1 : M/s.G.V.Saranya
for Mr.S.Vasanth Yuges
For R-3 : No appearance

JUDGMENT

The first defendant in the suit is the appellant herein.

2. The respondent herein filed a suit for partition seeking half share in the suit property. The suit was dismissed by the Trial Court. The First Appellate Court reversed the findings of the Trial Court and granted preliminary decree for half share. Aggrieved by the same, the first defendant has come by way of this Second Appeal.

3. For the sake of convenience, the rank of the parties are referred to as per the ranking in the original suit.



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4. The plaintiff is the younger sister of the first defendant. The second defendant is the mother of plaintiff and first defendant. The fourth defendant is a purchaser of 20 cents of land in third item of the suit property from one Krishna Pillai, who in-turn purchased it from defendants 1 and 2. The third defendant, who was husband of fourth defendant already removed from the array of parties.

5. According to the plaintiff, the suit properties originally belonged to Mathevan Pillai, father of second defendant and grand-father of plaintiff and first defendant. He executed a registered Will, dated 17.05.1953 bequeathing the suit properties in favour of children of second defendant. It was also stipulated in the Will that second defendant shall enjoy the property till her children attain majority. At the time of execution of Will, second defendant had two children, namely, the first defendant and his sister Bala Devi. The said Bala Devi died when she was four years old and the plaintiff was born in the year 1964 subsequent to the death of testator. Relying on the bequest made under the Will, plaintiff claims half share in the suit properties along with her brother first defendant. It was also claimed that defendants 1 and 2 sold a portion



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of suit properties in favour of fourth defendant and hence, she was also made as a party to the partition suit.

6. The appellant / first defendant filed a written statement admitting the execution of Will referred to by the plaintiff. It was claimed by the first defendant that Mathevan Pillai died on 20.03.1956 and on the date of his death, first defendant was the only child of second defendant. As such, the entire suit properties bequeathed under the Will vested with the first defendant. It was claimed that the plaintiff was not born at the date of death of testator and hence, she was not entitled to claim any right under the Will. It was also claimed by the first defendant that he executed a sale deed in favour of one Krishna Pillai in the year 1981 in respect of the portion of the suit property in item No.3 and the sale consideration was utilized for conducting the marriage of the plaintiff. On these pleading, the first defendant sought for dismissal of the suit.

7. The fourth defendant, purchaser of 20 cents of property in item No.3, filed a written statement claiming that the said portion of the suit property was sold to Krishna Pillai by defendants 1 and 2 and she



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purchased it from Krishna Pillai on 05.09.1991. The fourth defendant raised a plea of ouster by claiming that 20 cents of land in item No.3 had been in her possession and enjoyment from 23.03.1981 onwards.

8. Before the Trial Court, the plaintiff was examined as P.W.1 and 4 documents were marked on her side as Exhibits A.1 to A.4. The first defendant was examined as D.W.1 and 9 documents were marked on the side of the defendants as Exhibits B.1 to B.9.

9. The Trial Court on consideration of evidence available on record came to the conclusion that plaintiff was not born on the date of death of testator and hence, she was not entitled to any share in the suit property and dismissed the suit. Aggrieved by the same, the plaintiff preferred an appeal in A.S.No.104 of 1995 on the file of the Sub Court, Padmanabhapuram. The First Appellate Court reversed the findings of the Trial Court and granted preliminary decree for partition as prayed for. Aggrieved by the same, the first defendant has come by way of this Second Appeal.



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10. The learned Counsel appearing for the appellant submitted that the testator Mathevan Pillai died in the year 1956 and the Will came into force on the date of his death. However, on the date of death of Mathevan Pillai, plaintiff was not even born. Therefore, she cannot take advantage of bequest to the children of second defendant. The entire property covered by the bequest in favour of children of second defendant would go to first defendant, who was the only child on the date of death of testator. The learned Counsel by relying on Sections 112 and 113 of the Indian Succession Act submitted that bequest in favour of person not in existence on the date of testator's death is void. The learned Counsel also submitted that first and second defendants sold 20 cents of land in third item of the suit property to one Krishna Pillai in the year 1981 and the property was purchased by fourth defendant in the year 1991 by way of registered document. The plaintiff as P.W.1 clearly admitted that the alienees had been in possession and enjoyment of the property adverse to her interest from the year 1981. Therefore, in respect of 20 cents sold by the first and second defendants, plaintiff was ousted and hence, in any event, the Courts below ought not to have granted decree in respect of the said 20 cents.



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11. As far as the plea of ouster argued by the learned Counsel for the appellant is concerned, the plea of ouster was raised by the fourth defendant purchaser in her written statement. However, she has not questioned the preliminary decree by filing any second appeal. The present Second Appeal is filed only by the first defendant. When the alienee herself failed to question the decree, the first defendant is not entitled to canvass the case of the fourth defendant that too the plea of ouster. Hence, this Court is not inclined to accept the submission made by the learned Counsel for the appellant with regard to the plea of ouster made by the fourth defendant.

12. On the basis of the above submission made by the learned Counsel for the appellant, the following substantial question of law is arising for consideration:

"1) Whether a person not born and answering a particular class of bequest is entitled to the property along with those alive on the date of the death of the testator and belonging to the same class?"



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13. The learned Counsel appearing for the respondents while taking this Court to Section 112 of the Indian Succession Act submitted that as per the terms of the Will, the mother of the plaintiff and first defendant, namely, second defendant was given right to enjoy the property till the attainment of majority by her children. In the case on hand, the plaintiff was born in the year 1964 even before first defendant attained majority. In such circumstances, by virtue of exception to Section 112 of the Indian Succession Act, the plaintiff is entitled to half share in the suit property.

14. The grand-father of the plaintiff and first defendant and father of second defendant Mathevan Pillai executed a Will bequeathing 'B' Schedule property mentioned in the Will in favour of children of his eldest daughter Chellammal, second defendant herein. It was clearly mentioned in the Will that 'B' Schedule property shall be enjoyed by Chellammal without any power of alienation till her heirs attain majority. The same can be gathered from the terms of the Will marked as Exhibit A.1 = Exhibit B.9.



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15. Section 112 of the Indian Succession Act reads as follows:

"112. Bequest to person by particular description, who is not in existence at testator's death.

Where a bequest is made to a person by a particular description, and there is no person in existence at the testator's death who answers the description, the bequest is void.

Exception.—If property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual, but his possession of it is deferred until a time later than the death of the testator, by reason of a prior bequest or otherwise; and if a person answering the description is alive at the death of the testator, or comes into existence between that event and such later time, the property shall, at such later time, go to that person, or, if he is dead, to his representatives."

16. A reading of above provision particularly exception to Section 112 of the Indian Succession Act would make it clear that if possession of the property is deferred until a time later than the death of testator, by reason of a prior bequest or otherwise and the person answering the description comes into existence between that event and such later time, the bequest will not become void and the property will go to the person, who came into existence in between. This position is very well explained



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by illustrations to Section 112 of the Indian Succession Act which reads as follows:

"Illustrations-

(i) A bequeaths 1,000 rupees to the eldest son of B. At the death of the testator, B has no son. The bequest is void.

(ii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son is born to C. Upon B's death the legacy goes to C's son.

(iii) A bequeaths 1,000 rupees to B for life, and after his death to the eldest son of C. At the death of the testator, C had no son. Afterwards, during the life of B, a son, named D, is born to C. D dies, then B dies. The legacy goes to the representative of D.

(iv) A bequeaths his estate of Green Acre to B for life, and at his decease, to the eldest son of C. Up to the death of B, C has had no son. The bequest to C's eldest son is void.

(v) A bequeaths 1,000 rupees to the eldest son of C, to be paid to him after the death of B. At the death of the testator C has no son, but a son is afterwards born to him during the life of B and is alive at B's death. C's son is entitled to the 1,000 rupees."

17. The present case is governed by illustrations (ii) and (v). In the case on hand, the bequest was made in favour of children of second defendant Chellammal. However Chellammal was given right to enjoy



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the property without any power of limitation till her children attain majority. Therefore, a prior interest is created in favour of Chellammal till the attainment of majority by ultimate beneficiaries. A reading of plaintiff averment would indicate first defendant was aged about 47 years, when the suit was filed in the year 1994. Therefore, he would have born in the year 1947. When plaintiff was born in the year 1964, she was only a minor. Therefore, it is clear, plaintiff was born before first defendant attained majority. As per the exception to Section 112 of the Indian Succession Act, plaintiff came into existence before the prior interest created in favour of Chellammal ceases by attainment of majority by first defendant. Therefore, the facts of the case clearly fit into the exception to Section 112 of the Indian Succession Act. Therefore, I hold the bequest in favour of plaintiff shall not be treated as void as per the main provision contained in Section 112. But the same will come within the exception.

18. A reading of Will would also indicate the testator wanted to give 'B' Schedule property described in the Will in favour of existing as well as would-be children of his eldest daughter Chellammal. On the date of execution of Will and on the date of death of testator, the first



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defendant, son of Chellammal was alive. The other child of Chellammal, namely, Bala Devi died subsequently. The plaintiff was born only after death of testator in the year 1964. In the Will, it is clearly mentioned bequest was made in favour of existing as well as would-be children of Chellammal. A prior interest was also created under the Will in favour of Chellammal permitting her to enjoy the property without power of alienation till all of her children attain majority. It is settled law whenever the terms of the Will is not clear or uncertain it has to be interpreted in furtherance of the bequest made by the testator. As discussed earlier, the bequest made in this case will come under exception to Section 112 of Indian Succession Act and as a consequence, this Court holds the bequest in favour of plaintiff was valid and the substantial question of law taken up for consideration is answered against the appellant and in favour of the respondents.

19. In view of the answer to the substantial question of law, the Second Appeal stands dismissed by confirming the judgment and decree passed by the First Appellate Court. The learned Counsel for the appellant submitted that pending litigation, appellant purchased property sold in favour of fourth defendant. It is always open to the appellant to



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work out equities in the final decree proceedings.

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20. With these clarifications, the Second Appeal stands dismissed.

There shall be no order as to costs. Consequently, connected Miscellaneous Petitions stand closed.

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NCC : Yes
Index : Yes
Internet : Yes
BTR

To

- 1.The Subordinate Judge,
Padmanabhapuram.
- 2.The Additional District Munsif,
Padmanabhapuram.
- 3.The Section Officer,
Vernacular Record Section,
Madurai Bench of Madras High Court,
Madurai.



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S.SOUNTHAR, J.

BTR

Judgment made in
S.A.No.1804 of 2002

Dated:
18.07.2024