

Abirami Vs. Mathinan and anr.

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Court : Chennai

Decided On : Dec-12-1983

Reported in : (1984)2MLJ341

Appellant : Abirami

Respondent : Mathinan and anr.

Advocate for Pet/Ap. : Mr. V. Sridevan

Judgement :

R. Sengottuvelan, J.

1. This second appeal is filed by the second plaintiff in O.S. No. 215 of 1975 on the file of the District Munsif of Kumbakonam challenging the legality and correctness of the Judgment of the Subordinate Judge of Kumbakonam in A.S. No. 138 of 1976.

2. The facts of the case are briefly as follows: One Sivanandi Servai died in the year 1928. The appellant Abirami, the second plaintiff in the suit, is the daughter of Swaminathan who is the daughter's son of Sivanandi Servai through his daughter Alamelu. The second respondent in this second appeal Dandayuthapani, the first plaintiff in the suit, is the daughter's son of Sivanandi Servai through his another daughter Nagammal. Apart from the two daughters Alamelu and Nagammal, Sivanandi Servai had a predeceased son by name Subramanian. Subramanian at

the time of his death left his widow Chellammal who is not a party to the suit. Subramanian had a son Adimoolam through his wife Chellammal and he died at the age of three, thus pre-deceasing Subramanian. The relationship is fully set out in the undermentioned genealogical table.

Sivanandi Servai (died in 1928)

Alamelu (died) Nagammal (died) Sub-ramanian

(Pre-deceased his

father

Sivanandi

Servai).

Swaminathan (died) Dandayuthapani

(first plaintiff)

Abirami Chellammal

(2nd Plaintiff)

Adimoolam

(died)

3. One year after the death of Sivanandi Servai in the year 1928, there was a family settlement in respect of the properties left by him between Chellammal, his daughter-in-law Alamelu his daughter and Swaminathan, his daughter's son and Nagammal his another daughter and Dandayuthapani, her son, as per Ex.A-1, the original of which is Ex.B-19. According to the said settlement, the A schedule properties mentioned in the said document were given to Chellammal for enjoyment during her lifetime and after her lifetime, the properties are to revert back to the two daughters of Sivanandi Servai, namely Alamelu and Nagammal.

The properties set out in B schedule to Ex.B. 19 were given absolutely to the two daughters Alamelu and Nagammal. Alamelu died leaving a son Swaminathan who also died leaving his only daughter the second plaintiff. Nagammal, the other daughter of Sivanandi Servai, died leaving her only son Dandayuthapani, the first plaintiff in the suit.

4. Chellammal left a will Ex.B-1 in favour of one Rathinam, the first respondent in this second appeal and the defendant in the suit, by which she bequeathed the properties given to her under Ex.B-19 absolutely to the abovesaid Rathinam. Chellammal died on 9-11-1974. After the death of Chellammal, the appellant herein and Dandayuthapani filed the suit O.S. No. 215 of 1975 on the file of the District Munsif, Kumbakonam for declaration that they are the absolute owners of the suit property, namely, the property mentioned in A Schedule to Ex.B-19 and for a permanent injunction restraining the first respondent herein from interfering with their possession of the suit property. The case set out in the plaint is that as per Ex.B-19, Chellammal is entitled only to a right of enjoyment for her lifetime and as per the recitals in the said document and as per Section 14(2) of the Hindu Succession Act, 1956, the properties revert back to the plaintiffs, and the first respondent herein, who claims the properties by means of a will executed by Chellammal, is not entitled to any rights in the same. The genuineness of the Will is also challenged.

5. The trial Court, after considering the oral and documentary evidence in the case came to the following conclusion:

(1) Though in the document Ex.B-19 it is recited that Chellammal is entitled to enjoy the A Schedule property mentioned therein for her lifetime, yet in view of the fact she had a pre-existing right of maintenance in the property, the said limited right had become absolute on the passing of the Hindu Succession Act.

(2) The Will executed by Chellammal in favour of the first respondent, namely Ex.B-1 is true and valid. In view of the abovesaid conclusion arrived at, the learned District Munsif dismissed the suit. As against the said judgment, the second plaintiff filed an appeal A.S. No. 138 of 1976 on the file of the Subordinate Judge, Kumbakonam. The learned Subordinate judge, on a consideration of the evidence

in the case and the judgment of the trial Court, affirmed the findings of the District Munsif and dismissed the said appeal. This second appeal is filed challenging the legality and correctness of the Judgment of the Subordinate Judge, Kumbakona in A.S. No. 138 of 1976.

6. Mr. V. Sridevan, learned Counsel for the appellant raises the following contentions in support of his argument that the judgment and decree of the first appellate Court are not sustainable in law: (1) The conclusion arrived at by both the courts below that the right to enjoy the properties in lieu of maintenance granted under Ex.B-19 in respect of the suit property stands converted into absolute right on the passing of the Hindu Succession Act, 1956 is not sustainable in view of the fact that it is not specifically stated in Ex.B-19 that Chellammal is entitled to enjoy the properties in lieu of maintenance, thereby implying a pre-existing right. (2) The will Ex.B-1 executed by Chellammal had not been proved in accordance with the provisions of the Indian Succession Act and the Indian Evidence Act. (3) Ex.B-19 dealt with the properties of Sivanandi Servai and his wife and the properties of Sivanandi Servai's wife cannot be said to be the family properties of Sivanandi Servai in which Chellammal can claim a pre-existing right of maintenance.

7. The first contention of the learned Counsel for the appellant is based upon the interpretation of Section 14 of the Hindu Succession Act, 1956. Before referring to the decisions rendered in respect of this section, it will be useful to reproduce Section 14(1) and (2) of the said Act.

14(1). Any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner.

Explanation: In this sub-section, 'property' includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the

commencement of this Act.

14(2). Nothing contained in Sub-section (i) shall apply to any property acquired by way of gift or under a will or any other instrument or under a decree or order of a Civil Court or under an award where the terms of the gift, will or other instrument or the decree, order or award prescribe a restricted estate in such property.

By Section 14(1) of the Act the limited ownership of a female Hindu in the property possessed by her on the date of coming into force of the Hindu Succession Act is converted into an absolute estate. But as per Section 14(2) of the Act, if any property was held by a female Hindu under an instrument which prescribed a restricted estate in such property, then such property will not become the absolute property under Section 14(1) of the Act. The question arose whether in a case where certain properties were given to a Hindu widow in lieu of maintenance by means of a document with the express recital that the properties are to revert back to the heirs of the last male owner after the death of the widow falls under Section 14(1) or Section 14(2) of the Act. There have been conflicting decisions on this point. One set of decisions took the view that in such a case, as per the recitals in the document, the provisions contained in Section 14(2) of the Act will apply and the property will revert back to her husband's heirs after the death of the widow. Another set of decisions took the view that such recital is only a description of the widow's right to maintenance according to law as it then stood and such a case cannot come under Section 14(2) of the Act and the widow can only be treated as being in possession of the property as a limited owner which converts into an absolute estate as per Section 14(1) of the Act. The controversy was set at right by the Supreme Court in the decision reported in *V. Tulasamma v. Sesha Reddi* : [1977]3SCR261 , and also affirmed by a subsequent decision in *Vajia v. Thakorbhai* : [1979]3SCR291 . The Supreme Court came to the conclusion that in cases where the widow is entitled to a pre-existing right anterior to the document, only Section 14(1) of the Act applies.

8. The contention of Mr. V. Sridevan, learned Counsel for the appellant is that unless the document Ex.B-19 sets out expressly that the A Schedule properties were given to Chellammal in lieu of maintenance there is nothing to show that

Chellammal was in possession of the A schedule properties by virtue of a pre-existing right. He relies upon the decision of Varadarajan, 3 as he then was, reported in Soundararajan v. Venkataraman : (1976)2MLJ466 , in support of his contention. In that case under a partition deed dated 25-7-1919 a life estate was created in favour of 'N', widow of one of the deceased coparceners and on her death, the properties were to revert to the remaining four coparceners to be shared by them equally. After the passing of the Hindu Succession Act, 1956 'N' the widow executed a Will in favour of 'S' in respect of the properties,, The remaining coparceners filed a suit for partition of the properties on the death of N. On the passing of the Hindu Succession Act, N's estate was enlarged into an absolute estate under Section 14(1) of the Act. Varadarajan, J., as he then was, held that N had no pre-existing right in the suit properties and she got the suit properties only under the partition deed whereby she had been given only a limited right to enjoy the properties without powers of alienation and the properties had to revert back to the four coparceners on her death and the case fell within Section 14(2) of the Act since the right was acquired by her in these properties only for the first time under the partition deed and the same did not get enlarged under Section 14(1) of the Act. The learned Judge, on the evidence in that case, came to the conclusion that 'N' had no pre-existing right in the suit properties and the right which she got is only traceable to the partition deed, since no mention was made in the said partition deed about the right of maintenance available to the widow.

9. The document, instrument, decree or award may in certain cases of its own force, create a restricted estate in property and may in certain cases only re-state the restricted estate which the female Hindu possessed even prior to the date of the instrument, decree or award. Before applying Sub-section (2), the proper question to ask is, does the instrument or decree 'prescribe' a restricted estate in the property, or does it merely acknowledge and recognise (and not prescribe) a pre-existing estate upon which the Hindu Law had imposed a restriction, because the holder of the estate was a woman? If before the date of the deed or decree, she had no interest in the property and her only source of title is the deed or the decree, which confers upon her a restricted estate, Sub-section (2) of Section 14 of the Act will apply, and such a restricted estate will not be enlarged into an absolute estate under Sub-section (1) of Section 14. If, on the other hand, the

source of her title is independent of the instrument or decree and she holds a restricted estate even prior to the date of the instrument or decree and all that the instrument or decree does is merely to recognise the pre-existing restricted estate of the female Hindu, then Sub-section (1) of Section 14 would certainly operate upon the restricted estate and expand it into an absolute one.

10. Before applying the principles to the facts of this case, we have to examine the recitals in Ex.B-19 and ascertain whether the right of Chellammal in respect of the A schedule property is referable only to the document, Ex.B-19. As per the recitals in Ex.B-19, it is stated that all the five executants are entitled to a right of inheritance. The relevant sentence can be usefully extracted:

This recital clearly indicates that Chellammal had a pre-existing right and the right to A schedule properties did not originate by the execution of the document, Ex.B-19. Since there is a clear recital indicating a pre-existing right in favour of Chellammal under Ex.B-19, the principle laid down in *Soundararajan v. Venkataraman* : (1976)2MLJ466 , dealing with documents which do not mention any pre-existing right, cannot be applied to the facts of this case. The conclusion arrived at by both the courts below that Section 14(1) of the Act is applicable to the property got by Chellammal under Ex.B-19 is correct and there are no grounds for interfering with the concurrent findings of both the Courts below in this regard.

11. The second contention raised by the appellant is that the will in favour of the first respondent herein executed by Chellammal marked as Ex.B-1 has not been proved in accordance with law, since only one of the attestors had been examined as D.W. 3. As per Section 68 of the Indian Evidence Act, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been examined for the purpose or proving its execution if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. In this case there is no evidence that the other attestors are dead. We have to see whether the examination of D.W. 3 is sufficient proof of the Will Ex.B-1. D.W. 3 in his evidence states that he saw Chellammal executing the Will. In cross-examination, he states that he saw other attestors also attesting the Will. According to Section 68 of the Indian Evidence Act, a will can be proved by

summoning one of the attesting witnesses. But that attesting witness must prove the execution of the will by the testator and that the execution was done before the other attesting witnesses. If the sole witness examined to prove the will is capable of proving the execution and attestation by two witnesses, then the evidence of such witness is sufficient proof of the Will under Section 68 of the Act. In this case, D.W. 3 has spoken to the fact that the late Chellammal executed the will and that the attestors had also attested the same. According to the observations contained in *M. Ramaswamy v. C. Ramaswami*, : AIR1975 Mad88 , the evidence of D.W. 3 is sufficient proof for the will. Under the circumstances, the execution and attestation of the will is proved by the evidence of D.W. 3 and the lower appellate Court chose to rely upon the evidence of D.W. 3. Therefore, the contention of the learned Counsel for the appellant that the will Ex.B-1 had not been proved according to law will have to be negated.

12. The third contention of the learned Counsel for the appellant is that in any event it is stated in Ex.B-19 that the properties comprised in that document consists of ancestral properties of Sivanandi Servai and the properties of his wife. The argument is that the properties of the wife of Sivanandi Servai will not constitute the family property of Sivanandi Servai in which Chellammal is entitled to a right of maintenance and as such those properties cannot be said to be the properties in respect of which Chellammal had a pre-existing right. But it will have to be borne in mind that after the death of the wife of Sivanandi Servai, Sivanandi Servai succeeded to the same as heir to his wife. On the death of Sivanandi Servai, his son Subramanian, if he had been alive, would have succeeded to the property got by Sivanandi Servai through his wife. According to the principles of Hindu Law, Chellammal can claim a right of maintenance in respect of the property which her husband would have got, if he had been alive. Hence Chellammal had also a pre-existing right of maintenance in respect of the properties of the wife of Sivanandi Servai. Hence, the third contention of the learned Counsel for the appellant also will have to be negated.

13. In the result, there are no grounds for interfering with the concurrent findings of both the Courts below and there are no merits in this second appeal. Hence, this second appeal is dismissed. However, there will be no order as to costs.

