

**Kasturi and anr. Vs. Venu and anr.**

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**Court :** Chennai

**Decided On :** Mar-13-1996

**Reported in :** (1996)2MLJ453

**Appellant :** Kasturi and anr.

**Respondent :** Venu and anr.

**Judgement :**

**Raju, J.**

1. The above second appeal has been filed by the defendants 1 and 2, who have failed through-out, in O.S.No. 362 of 1978, on the file of the Sub-Court, Tiruvannamalai, against the judgment and decree of the learned Additional District Judge, North Arcot at Vellore dated 24.2.1983 in A.S.No. 174 of 1981, confirming the judgment and decree of the learned trial Judge. The case of the plaintiff/1st respondent, before the trial court, was that the suit properties belonged to one Kuppusamy, who had a son by name Gurubaran, and two daughters Unnamalai and Parvathi Ammal, that Parvathi Ammal pre-deceased Kuppusamy, leaving behind her son Venu, the plaintiff, and Unnamalai is the 3rd defendant, whose son is the 4th defendant. The wife of Kuppusamy, by name Amaravathi, was said to have died during September, 1963 and Gurubaran, the only son of Kuppusamy, also died intestate during the year 1968, leaving behind his wife Kasturi, the 1st defendant, and a minor daughter Thavamani, the 2nd defendant, who has since

become major even during the proceedings before the first appellate court and is the 2nd appellant in her own right. Kuppusamy the original owner was said to have executed a registered Will dated 26.7.1962, marked as Ex.A-1, under which according to the plaintiff, the testator had bequeathed the suit properties to his wife Amaravathi for life, then to Gurubaran for his life and after his life-time to the male progenies of Gurubaran. Since Gurubaran died without any male issues, the plaintiff claims that the estate reverted back to the testator and intestate succession opened as the consequence of which the plaintiff became entitled to have the decree for partition and separate possession of his 1/3rd share in the suit properties as the son of the predeceased daughter of the original owner, Kuppusamy. The other ground of challenge made to the Will of Kuppusamy needs no reference since the consideration by the courts below and the submission before this Court was only on the nature and scope of the bequest made under the Will and whether the bequest in favour of Gurubaran's heirs under the Will failed, as claimed by the plaintiff.

2. Defendants 1 and 2 filed a written statement contending that the plaintiff had not correctly and properly set out the terms and conditions of the Will in the plaint that the last clause in the Will which provided that after the death of Gurubaran, who is only a life-estate holder, his children should get the properties has been deliberately omitted in the plaint and as per the last clause the 2nd defendant who is the daughter of late Gurubaran would be absolutely entitled to succeed to the entire estate after the life time of Kuppusamy's wife. In respect of the other claims also the defendants contested the claim of the plaintiff that the Will is either void, as alleged, or that the bequest has failed, as claimed. The 3rd defendant filed separate written statement virtually supporting the claim of the plaintiff and claiming a right in herself for a share. The 4th defendant has come on record as the legal representative of the 3rd defendant, who died during the pendency of the suit.

3. On the above claims and counter-claims the suit was tried and except marking the relevant documents on the plaintiff's side there was no document marked on the defendant's side and neither of the parties let in any oral evidence. Considering the materials placed before it, the trial court held that the claim of the

plaintiff is sustainable and directed that the suit property be divided into three equal shares by metes and bounds and the plaintiff be put in possession of one such share, the 4th defendant getting another share and defendants 1 and 2 to deliver the possession for the plaintiff's share to the plaintiff. The learned trial judge while decreeing the suit came to the conclusion that the Will did not offend the rule against perpetuity and that a harmonious construction of the Will would go to show that the intention of the testator in using the word 'children' in the later part of the Will would refer to only male progeny used in the earlier part of the Will and the provisions of Section 84 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act') would have no application to the case on hand where there is no ambiguity in the meaning of the clauses contained in the Will. It was the further conclusion of the trial court that when the earlier part of the Will recites that the property should vest with the male progeny of Gurubaran and in the later part instead of repeating the lengthy sentence, the testator has shortly referred that the property should devolve upon the children of Gurubaran, the word 'children' must have reference to the male children and in view of the fact that admittedly Gurubaran died without any male progeny the conditions laid down in the Will failed as also the bequest and the estate reverted back to the testator. Aggrieved, defendants 1 and 2 filed an appeal before the District court, North Arcot District at Vellore and the learned Additional District Judge has also concurred with the findings of the learned trial Judge and dismissed the appeal. The learned first appellate judge also held that the provisions of Section 88 of the Act are not attracted and on the other hand it is only Section 77 of the Act which could be applied to the case on hand and that if the word used in the later part of the Will as is given a meaning keeping in view the recitals in the earlier portion and construed as meaning no inconsistency could be found at all in the recitals and that therefore the judgment of the learned trial judge is correct. Aggrieved, the defendants have filed the above Second Appeal.

4. Mr. A.K. Kumarasamy, learned Counsel appearing for the appellants contended relying upon the substantial question of law formulated at the time of admission of the appeal that the courts below have committed a grave error of law in the construction they chose to place on the Will Ex.A-1 and that the courts below are not correct in holding that in the teeth of the provisions contained in Section 88 of

the Act that the earlier clause in the Will regarding the male issue will take effect in preference to the later clause. Per contra, Mr. S. Parthasarathy, learned Counsel appearing for the respondents contended that the courts below have properly construed the Will keeping in view the intention of the Testator and that there is nothing wrong in the meaning ascribed by the courts below to the word in the later portion of the Will to mean only taking in conjunction with the words found in the earlier portion of the Will. According to the learned Counsel the issue, if at all, arising is only the meaning to be given to a word in the Will and that does not by itself involve any construction of document to justify the claim of any substantial question of law arising in the second appeal. In other respects, the learned Counsel for the respondents adopted the reasons assigned by the courts below in support of the judgment as part of his argument. Both the learned Counsel have adverted to certain decisions and I consider it appropriate to refer to the same before dealing with the submissions of the counsel.

5. *Kasturi v. Ponnammal* : [1961]3SCR955 is that of the Apex Court wherein the rules of construction relating to a Will came to be laid down indicating therein the exceptions also to the general rules. It was observed therein as hereunder:

On the other hand, the learned Attorney General has invited our attention to a decision of this Court in *Gnanambal Ammal v. T. Rajan Ayyar* : [1950]1SCR949 in which this Court has definitely rule that a presumption against intestacy may be raised if it is justified by the context of the document of the surrounding circumstances; but it can be invoked only when there is undoubted ambiguity in ascertainment of the intentions of the testator. Mukherjee, J. as he then was observed that the cardinal maxim to be observed by courts in construing a Will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised; and in support of this view the learned judge cited similar observations made by the Privy Council in *Venkata Narasimha v. Parthasaathy*, L.R. 41 IndAp 51. In dealing with the principle that intestacy should be avoided, Mukherjee, J. said that the desire to avoid intestacy was based on English habits of thought which should not

necessarily bind an Indian Court. Therefore, there can be little doubt that what Mr. Sastri formulates as a rule of construction against the avoidance of intestacy cannot be treated as a absolute rule which should have overriding importance in construing a Will. If two constructions are reasonably possible, and one of them avoids intestacy, while the other involves intestacy, the court would certainly be justified in preferring that construction which avoids intestacy. It may be permissible to invoke this rule even in cases where the words used are ambiguous and an attempt may be made to remove the ambiguity by adopting a construction which avoids intestacy. Similarly, in regard to the rule that vesting should not be postponed, the position is exactly the same. It is obvious that a court cannot embark on the task of construing a Will with a preconceived notion that intestacy must be avoided or vesting must not be postponed. The intention of the testator and the effect of the dispositions contained in the Will must be decided by construing the Will as a whole and giving the relevant clauses in the Will their plain grammatical meaning considered together. In construing a Will it is generally not profitable or useful to refer to the construction of other Wills, because the construction of each Will must necessarily depend upon the terms used by the Will considered as a whole, and the result which follows on a fair and reasonable construction of the said words must vary from Will to Will. Therefore, we must look at the relevant clauses carefully and decide which of the two rival constructions should be accepted.

6. In *Pramod Kumari v. Om Prakash* : [1980]2SCR53 the Apex Court held that where it is clear on the face of a Will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention as collected from the context. On the construction of the particular Will before their Lordships in the said case, it was held that a reading of the whole of the Will clearly showed that it was the intention of the testator that his son alone and none else was to be the ultimate owner of the properties and the testator while specifying that his son was to take the properties in case his wife pre-deceased the testator, the testator did not specify that the son should take the properties after the death of his wife, in case she survived the testator to enjoy the life estate given to her under the Will. While coming to the conclusion that

unambiguous intention of the testator was that the son should succeed to the estate after the death of his wife the necessary words to that effect were considered by the court to be permissible to be read into the Will.

7. In *K. Ambunbi v. Bhandary* : AIR 1995 SC2491 the Apex Court had an occasion to deal with rules of interpretation of the Will with particular reference to Section 88 of the Act. In dealing with the issue, the court observed as hereunder:

The rules of interpretation of the 'Will' are different from the rules which govern the interpretation of the 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. (sic) 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 on an earlier occasion. Undoubtedly, it is the last Will which prevails.

A Will may contain several clauses and the latter clause may be inconsistent with the earlier clause. In such a situation, the last intention of the testator is given effect to and it is on this basis that the latter clause is held to prevail over the earlier clause. This regulated by the well known maxim '*cum due inter se pagnantia reperiuntur in testamento ultimum ratum est*' which means that if in a Will there are two inconsistent provisions, the latter shall prevail over the earlier. See *Hammond v. Treharne* (1938) 3 All.E.R. 308.

This principle is also contained in Section 88 of the Indian Succession Act, 1925 which together with its illustrations provides as under:

The last of two inconsistent clause prevails: Where two clauses or gifts in a will are irreconcilable, so that they cannot possibly stand together, the last shall prevail.

Illustrations:

(i) The testator by the first clause of his Will leaves his estate of Ramnagar to A and by the last clause of his Will leaves it to B and not to A. B will have it.

(ii) If a man at the commencement of his Will gives his house to A and at the close of it directs that his house shall be sold and the proceeds invested for benefit of B, the latter disposition will prevail.

It may, however, be pointed out that this rule of interpretation can be invoked only if different clause cannot be reconciled. *Rameshwar v. Balraj*

8. In I.L.R. 14 Mad. 65 a Division Bench of this Court had an occasion to deal with the principle governing the construction of a Will. In dealing with the question, it was held therein that notwithstanding the general terms of the second of the above clauses in the Will and their Lordships consideration the power of adoption conferred upon the widow in that case was read as to be restricted by the first clause and the adoption in derogation of the first clause was held to be invalid. It may be noticed even at this stage that the manner of construction of a Will countenanced in the said case may be due to the fact that the Indian Succession Act as such and the principles of construction specifically laid down under the Indian Succession Act were not in force the decision having been rendered in 1890. Even that apart in the light of the specific provisions now contained in Section 88 of the Act, the Apex Court in the decision reported in *K. Ambunbi v. Bhandary* : AIR 1995 SC2491 as emphasised the need to consider the will in terms of the said provision in such a way that the latter part Will prevail over the earlier part unlike other documents like sale deed or a gift deed or a mortgage deed or for that matter any other instrument by which interest of immovable property is created.

9. Some of the provisions of the Indian Succession Act also have been relied upon by the learned Counsel to support their respective points of stand taken. As against the reliance placed by the learned Counsel for the appellants upon Section 88, the learned Counsel for the respondents placed strong reliance upon Section 77 and Section 83 of the Act as supporting or justifying the construction placed by the courts below. The learned Counsel for the appellants would contend that the object of the testator, as could be gathered from the Will Ex.A-1 under

consideration, disclose an intention to conserve the property to the son and his heirs and this fact is best indicated from the very fact that the plaintiff, the son of the predeceased daughter of the testator has been given separately under (Sic) B schedule a property. The learned Counsel for the respondents in controverting the said submission would contend that the absence of any provision for the said daughter viz., the 3rd defendant would show that such approach and construction cannot be warranted or justified.

10. I have carefully considered the submissions of the learned Counsel appearing on either side. In construing any will, the court must always, normally take a view to perpetuate the intention of the testator and see that the bequest does not fail unless there are strong and compelling reasons to construe it otherwise, particularly when there are two constructions possible. The provisions of Section 83 of the Indian Succession Act no doubt enable the courts in construing a Will to understand in a restricted sense where it may be collected from the Will that the testator meant to use a particular word in a restricted sense and understand a word in a wider sense than that which they shall bear where it may be collected from the other words of the will that the testator meant to use them in such a wider sense. Section 77 of the Act provides that where any word material to the full expression of the meaning has been omitted may be supplied by the context. In my view, Section 77 of the Act will have no application to the case on hand since as could be seen from the conflicting claims of parties also the recitals in the will, this is not a case of any omission to be supplied to give effect to the intention of the testator to make the bequest complete and fulfilled. As for the reliance placed on Section 83 of the Act, I am of the view that though it is permissible for the court in the context of the Will and the intention of the testator to consider general words which follow particular and specific words being considered in a restricted sense and vice versa, it is to be seen whether there is justification for the manner of construction placed by the courts below and whether such construction constitutes a misconstruction or misinterpretation of a document warranting interference by this Court in the second appeal.

11. The courts below no doubt have chosen to construe the word which indisputably comprehends both male and female progenies of a person, in a

restricted manner to comprehend within the said generic term the restricted meaning taking colour from the earlier words. But on a careful consideration of the Will, keeping into consideration the avowed intentions of the testator as disclosed from the will itself, the Court is of the view that the courts below have committed an error in misconstruing the word in a restricted manner so as to render the bequest itself to fail. The provisions of Section 38 of the act do not militate against the word being construed in its normal and ordinary and admittedly wider sense without being construed in a restricted manner by superimposing on the word in the latter clause the words used in the earlier clause. If only the word in the earlier clause is not construed in the context of the latter clause which, as noticed per the view taken by the courts below of the meaning of the said word in the latter clause the intention of the testator can be given full effect and by construing the latter clause with a general word of 'disposition' in a restricted meaning the bequest has to fail, it is but obligatory for the courts to always construe the Will in a manner to perpetuate the bequest and avoid intestacy. As a matter of fact this is the cardinal principle reiterated and laid down by the Apex Court even in the decision *Kasturi v. Ponnammal* : [1961]42ITR69(SC) . It is all the more so, in this case since the statutory mandate contained in Section 88 of the Act, as interpreted by the Apex Court in the decision reported in *K. Ambunbi v. Bhandary* : AIR 1995 SC2491 is to give effect to the latter clause, and if, by construing the latter clause the intestacy could be avoided and the intention of the testator could be perpetuated, it is only that construction which should have merited the acceptance of the courts below. The courts below have, in my view, not sufficiently endeavoured to properly gather the intention of the testator from the various parts of the Will, particularly the bequest subsequently granted in favour of the plaintiff himself, which would go a long way to show that it could have never been the intention of the testator to benefit any further the heirs of the daughters to the detriment of the children of his own son. The fact that the 3rd defendant, another daughter, has not been given anything, is not a consideration which could dissuade the court from adopting the interpretation which would perpetuate the intention of the testator in as much as it could be seen from the intention of the testator disclosed in the Will that his object was not to provide for the daughters and the plaintiff has been provided, because he happened to be the son of pre-deceased daughter, apparently on the view that

he needs the protection of the grandparent, in the absence of the mother, the testator.

12. Consequently in my view the courts below have committed a grave error in misconstruing a document ignoring the principles laid down by the Apex Court and the mandate contained in the Indian Succession Act with reference to the manner of construction of Wills to give effect to the intention of the testator and always avoid intestacy whenever two constructions are possible by construing a Will in such a manner that the bequest does not fail unless there are strong and compelling reasons for adopting such a course. In the case on hand, there are no such strong and compelling reasons to construe the Will in such a manner as to result in the failure of the bequest. Consequently, the judgments and decrees of the courts below are liable to and hereby are set aside. The suit Order S. No. 362 of 1978 shall stand dismissed. The second appeal is allowed. No costs.

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