SUPREME COURT OF INDIA

Ittianam

Vs.

Cherichi @ Padmini

C.A.No.7226 of 2002

(G.S. Singhvi and Asok Kumar Ganguly JJ.)

27.07.2010

JUDGEMENT

A.K.Ganguly, J.

1. This appeal is directed against the judgment of the Division Bench of the Kerala High Court dated 6th December, 2000 rendered in Miscellaneous First Appeal No. 44 of 1990.

2. The dispute is over some of properties bequeathed by the Will dated 8.5.1967 by one Kakkassery Ippuru.

3. The material facts on which there is not much dispute are that the testator Ippuru's first wife Kunhiri died, leaving behind daughter Molutty and son Vareed who died on 8.1.86. The wife and children of Vareed, since deceased, are the plaintiffs. The second wife of Ippuru, Kunjila, is the 7th plaintiff. She has two daughters Mariyamma, the 8th plaintiff and the other daughter is Padmini @ Cherichi, the defendant and respondent herein.

4. By a sale deed, being Exhibit-B1, dated 2.5.67, Kunjila, the second wife of Ippuru, sold to Ippuru half of her rights in respect of item Nos. 4 to 7 of the properties in the Will bequeathed by Ippuru. The other half of the property belonged to her son Vareed. Both the sale deed and the Will were registered on 8.5.1967, Ippuru died on 20.7.71.

5. In the Will of Ippuru, seven items of properties were bequeathed and out of which items 1 to 3 were given to one Molutty, daughter of the testator by his first wife. Items 4 to 7 of the properties were previously owned in equal moieties by Vareed and Kunjila, the second wife of Ippuru. Kunjila, as noted above, sold her share to Ippuru on 2.5.67 but the sale deed was registered on 8.5.67, the same day when the Will was registered.

6. After the death of Vareed on 1.8.1986, his wife and children appellants, 1 to 5 herein, jointly applied under Section 278 of the Indian Succession Act (the Act) for grant of Letters of Administration of the Will of the testator. That petition was contested by the Padmini @

Cherichi, one of the daughters of the testator's second wife. Thus the proceeding became contentious and was registered as a suit being O.S. 10 of 1988 in the District Court, Thrichur.

7. The District Judge granted the letters of administration in respect of all the items of property in the Will. An appeal was taken to the High Court whereupon by the impugned judgment the High Court upheld the genuineness of the Will but modified the grant of letters of administration only to items 1 to 3. The High Court declined to grant the letters of administration in respect of items 4 to 7 and the reasoning given by the High Court inter alia was that on the date of the Will i.e. 8.5.67 the testator's title to half of the property, namely over item Nos. 4 to 7 was not perfected. It was perfected only on the registration of sale deed, which is after the execution of the Will, even though the sale deed was executed on 2.5.1967. The correctness of the finding of the High Court is questioned in this appeal.

8. When the appeal was taken up for hearing on 25.2.2010, the learned counsel for the appellant urged that in view of provisions of Section 90 of the Act, the judgment of the High Court is erroneous. But that point was not specifically taken either before the High Court or in the Special leave petition. As such the learned counsel for the appellant prayed for leave to file an application for urging additional grounds.

9. Since the question is purely one of law and is arising from the records of the case and can be urged without raising any new factual controversy, this Court granted leave to urge the additional grounds. The respondents were granted liberty to file its response to the application for additional grounds.

10. Pursuant thereto, application for urging additional grounds was filed and the respondent, though was given opportunity to file response to those grounds, did not choose to do so. But the respondent's counsel was heard on those grounds and he sought to controvert those grounds orally.

11. Admittedly, the parties are Christians and are governed by the Act. Along with the application for additional grounds a translated copy of the Will was also filed.

12. Section 90 of the Act provides:

> "90. Words describing subject refer to property answering description at testator's death. - The description contained in a Will of property, the subject of gift, shall, unless a contray intention appears by the Will, be deemed to refer to and comprise the property answering that description at the death of the testator."

13. This Section is based on Section 24 of the English Wills Act. Prior to the English Wills Act under the common law, testamentary disposition of real property spoke from the date of the Will.

> "But the English Wills Act changed that by a statutory presumption to the effect, that unless a contrary intention appears from the recitals of the Will, the Will speaks from the date of the testator's death."

14. Section 90 of the Act uses the legal fiction "deemed" and that is used with the specific purpose of raising a presumption against intestacy. Therefore, on an analysis of the provisions of Section 90 it is clear that the property described in the Will shall be deemed to refer to and comprise the property answering that description at the death of the testator.

15. In the context of Section 90, the word `comprise' will obviously mean `to include, embrace, to comprehend compendiously, to contain, to consist of, to extend, cover" (See Shorter Oxford Dictionary on Historical Principles, page 386).

> "In Webster's Dictionary the word `comprise' means to "include and contain, consist of and embrace".
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> (Webster's Comprehensive Dictionary Encyclopedic Edition, page 269)."

16. Therefore, on a plain reading of the Section, the meaning is clear. It is, that in the absence of a contrary intention in the Will, the description of the properties in the Will shall be deemed to refer to and include the property answering that description at the death of the testator.

17. It is well known when legislature uses a deeming provision to create a legal fiction, it is always used to achieve a purpose. In *State of Cashewnut Factory, Quilon*[1], the Constitution Bench opined, when a legal fiction is created, one is led to ask at once for what purpose it is created (see para 38 page 343).

18. In this case the obvious purpose is to avoid intestacy in respect of properties referred to and comprised in the Will. Once the purpose is ascertained, the Court must give full effect to the statutory fiction and the fiction is to be carried to its logical end. In *State of Bombay*[2] this Court laid down the aforesaid propositions at page 246 of the report. In doing so, this Court relied on the famous dictum of Lord Asquith which has virtually become locus classicus on statutory interpretation of `deeming' provisions. Lord Asquith's formulations Council, 1952 AC 109 are:

> "If you are bidden to treat an imaginary state of affairs as real, you must surely, unless prohibited from doing so, also imagine as real the consequences and incidents which, if the putative state of affairs had in fact existed, must inevitably have flowed from or accompanied it.....The statute says that you must imagine a certain state of affairs; it does not say that having done so, you must cause or permit your imagination to boggle when it comes to the inevitable corollaries of that state of affairs."

19. Going by this test, in our judgment, the High Court did not properly appreciate the purport of Section 90. In the context of the Will when it is common ground that the Will does not contain any contrary intention in respect of the bequest of items 4 to 7 of the properties.

20. The principle of Section 90 which, as noted above, has been taken from Section 24 of the English Wills Act has been very lucidly discussed in Williams, Law of Wills (3rd Edition). At page 429 of the treaties, the learned author by properly appreciating the deeming clause commented:

> "A Will must be construed with reference to the property comprised within it, to speak and to take effect as it has been executed immediately before the date of death of the testator and as if the conditions of things to which it refers in this respect is that existing immediately before the date of the testator, unless a contrary intention appears from the Will."

21. On general principles also a Will speaks only from the date of the death of the testator (See[3]). In this case assuming but not admitting that the testator had not acquired title in respect of half of the property, namely, items 4 to 7 of the property bequeathed by him in the Will on 8.5.1967, but the sale deed having been registered on 8.5.1967, the title reverts back to the date of execution of the sale deed on 2.5.67 under Section 47 of the Registration Act.

> "And the testator died on 20.7.71. Therefore, much before his death, the testator acquired full title over items 4 to 7 of the property.
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> Therefore, the High Court was in clear error in not appreciating the effect of Section 90 on the interpretation of the Will."

22. It is one of the well established principles that while construing a Will, the Court should lean against any intestacy. This has been put beyond any doubt by Lord Esher, Master of Rolls in Re 30 Chancery Division 390 wherein learned Master of Rolls held:

> ".....when a testator has executed a will in solemn form you must assume that he did not intend to make it a solemn farce,- that he did not intend to die intestate when he has gone through the form of making a will. You ought, if possible, to read the will so as to lead to a testacy, not an intestacy."

23. The learned counsel for the appellant in support of his argument on Section 90 of the Act relied on a decision in the case of *Re Fleming's Will Trust Limited and Another*[4]).

24. In that case by a Will made in September 1969, the testator bequeathed to the first defendants his leasehold house at 54 Narcissus Road when the testator had his house under a lease term expiring on 28th September, 2008 subject to covenants to repair. In April 1971, the testator purchased the freehold and that was registered with acquisition of title.

25. The leasehold interest was unregistered and the testator died in February, 1973. As a sole executor of the Will, the plaintiff applied for determination of interest that passed on to the first defendants. The residuary beneficiaries under the Will claimed that the first defendants was only entitled to leasehold interest.

> "Repelling that contention, Templeman J, while delivering the judgment held:
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> "In my judgment, a gift of property discloses an intention to give the estate and interest of the testator in that property at his death; a mere reference in the will to the estate and interest held by the testator at the date of his will is not sufficient to disclose a contrary intention. It follows that the freehold in the case passes to the first defendants.
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> (page 326 Placitum g)"

26. The learned counsel for the appellants also relied on the decision in the case of Alavandar Madras 383). Construing Section 90 of the Act, the Division Bench of Madras High Court held:

> "...Under Section 90 of the Succession Act, XXXIX of 1925, there is a presumption, unless a contrary intention appears by the Will, that it comprises all property as at the testator's death..."

27. The learned counsel also relied on the decision of Bombay High Court in the case of *Abdulsakur Abba and others*[5].

> "At page 196 of the report, Bombay High Court decided:
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> "...In this connection it is necessary to remember certain general principles that attach to wills. A will speaks from the date of the death of the deceased. There might be accretions to or diminutions from the property of the testator as they existed at the date of the will. Another principle to remember in this connection is that a testator is presumed to dispose of all the property that he may die possessed of and not only what he possessed at the date of the will..."

28. Reliance was last placed on the decision of the *Harisa and another*[6]. Explaining the purport of Section 90, the High Court observed that Section 90 is in accordance with Section 24 of the English Wills Act of 1837. According to such principle "the Will has to be construed with reference to the real estate and personal estate comprised in it to speak and to take effect, as if it had been executed immediately before the death of the testator, and as if the condition of things to which it refers in this respect before the death of the testator unless contrary intention appears by the Will" (page 165 of the report). The decision in Rangoo Ramji (supra) was based on the Madras High Court decision in Gramani (supra).

29. All the decisions discussed above, namely those of English Court and of the High Courts of Madras, Bombay and Nagpur support the contention of the appellants.

30. Faced with this argument the learned counsel for the respondent wanted to rely on the observation of the Privy Council and contended that this leaning towards intestacy is purely a product of British Jurisprudence based on English necessities and English habit of thoughts and there would be no justification in taking them as guide in the case of Indian Wills.

31. The aforesaid observations were made by Lord Moulton while considering the effect of adoption in the context of an Indian Will in the case of Row and another reported in 41 Indian Appeals 51 (at page 71 of the report). These observations were by way of obiter dicta by the learned judge and were made in 1913 when the Act was not there.

32. Section 90 of the Act is on the principles of *Raju Ayyar and others*[7] speaking through Justice B.K. Mukherjea (as His Lordship then was) clarified the position. This Court considered the decision of Privy Council in *Venkat Narasimha (supra)* and held that the presumption against intestacy may be raised if it is justified from the context of the document or the surrounding circumstances and where there is ambiguity about the intention of the testator (see para 11 page 106 of the report). It is true that presumption against intestacy cannot be raised ignoring the intention in the Will. That is why Section 90 stipulates that the deeming clause will operate only where there is no contrary intention. In this case it is common ground that no contrary intention could be discerned in the Will in respect of items 4 to 7.

33. In subsequent decisions while discussing presumption against intestacy this Court made *Ponnammal and others*[8]. Justice Gajendragadkar, as His Lordship then was, speaking for the Bench, opined if two constructions are reasonably possible and one of them avoids intestacy while the other suggests it, "the Court would certainly be justified in preferring that construction which avoids intestacy" and the decision rendered in *Gnambal Ammal (supra)* was relied upon (para 15 page 1307 of the report). Same view was endorsed by this[9] wherein Justice Subba Rao, as His Lordship then was, speaking for the Bench observed where one of the two reasonable constructions would lead to intestacy that should be discarded in favour of the construction which prevents the hiatus (para 7 page 1706 of the report). The same principle has been quoted with approval by this Court in the case of *Navneet Lal*[10]. Speaking for the Bench, Justice Goswami, at para 4 page 797 of the report, quoted the aforesaid principle laid down in Pearey Lal (supra).

34. Therefore, both the English Courts and this Court in construing a Will lean against any presumption favouring intestacy in the absence of a manifest contrary intention in the Will. The argument on behalf of the learned counsel for the respondent has therefore no substance.

35. The learned counsel also relied on the decision *Domini Kuer and others*[11].

36. A perusal of the decision in Ram Saran (supra) makes it clear that the same was rendered on totally different facts and against a completely different legal background. In Ram Saran (supra), parties were Hindus, but they were governed by the Mohammedan Law of pre-emption as available to them by custom. The main question discussed in Ram Saran (supra) was when can the demand for pre-emption be exercised. The majority opinion of the Court, by a 3:2 verdict, decided that such demand can be made only after completion of the sale. The majority was of the view that a sale is complete not only after registration of the sale deed under Section 47 of the Registration Act but it is complete only after the registered document is copied in the Registration Office, as provided under Section 61 of the Registration Act.

37. We fail to appreciate the relevance of the ratio in *Ram Saran (supra)* to the facts of the present case.

38. Two other judgments cited by the learned counsel for the respondent rendered in the case of *Hamda in*[12], and that of *A. Jithendernath and another*[13], are on Section 47 of the Registration Act to the effect that the title passes retrospectively with effect from the date of execution and not from the date of registration. These are accepted legal principles on which there can be no debate but they have no application to the facts of this case.

39. For the reasons discussed above the appeal is allowed. We are constrained to set aside the judgment of the High Court and restore that of the District Judge. No order as to costs.

CIVIL APPEAL NO.4432 OF 2003

40. For the reasons discussed above and in view of the order passed in Civil Appeal No. 7226 of 2002, this appeal is dismissed. No order as to costs.

[1]*AIR 1953 SC 333*
[2]*AIR 1953 SC 244*
[3]*AIR 1964 SC 136*
[4]*(1974) 3 All ER 323*
[5]*AIR 1930 Bombay 191*
[6]*AIR 1932 Nagpur 163*
[7]*AIR 1951 SC 103*
[8]*AIR 1961 SC 1302*
[9]*AIR 1963 SC 1703*
[10]*AIR 1976 SC 794*
[11]*AIR 1961 SC 1747*
[12]*(1991) 1 SCC 715*
[13]*(2006) 10 SCC 96*