

(1936) 11 MAD CK 0073
In the Madras High Court

A.M. Kuppuswami Mudaliar

APPELLANT

Vs

W. Ranganatha Mudaliar

RESPONDENT

Date of Decision : 04-11-1936

Acts Referred:

Citation : AIR 1937 Mad 835 : (1937) 46 LW 660

Hon'ble Judges : Beasley, C.J; Horwill, J

Bench : Full Bench

Judgement

Beasley, C.J.—On 6th July 1911 one W. Parthasarathi Mudaliar made a will (Ex. A) and died a few days afterwards. He left two sons named Jayaram and Ramachandra. Jayaram died on 21st April 1923 leaving a son, the plaintiff in this suit, and Ramachandra died on 31st August 1923 without issue and on 14th September 1923 his widow adopted defendant 2. Clause 32 of the will according to the Court translation reads as follows:

Should the executors think that my sons have received education, etc., are of good behaviour and have good association, and would safeguard my properties without making any wasteful expenditure, and they hand over to them all the properties remaining after paying my debts and meeting the aforesaid expenses, the whole of my estate shall be handed over after Jayaram Mudaliar, of my sons, attains the age of 35 and Ramachandra Mudaliar the age of 30. Even if so handed over, both my sons may only enjoy but shall not have the power to mortgage or sell. Only the issue of my two sons shall, at the proper time, use and enjoy absolutely with rights to gift, mortgage, exchange and sell. Neither my sons nor my other heirs have any right.

2. The plaintiff filed the suit under appeal praying for a declaration of his rights under the will and questioning the adoption of defendant 2 and claiming the whole estate even if the adoption should be proved. The learned trial Judge found that the adoption was proved but held that the plaintiff alone was entitled to take the estate under the will. This question depends upon what, by reason of the will, was the period of distribution of the estate. Here there is a gift to a class

after the determination of what has been held in previous litigation with regard to the same will in this High Court to be a contingent life-estate, Jayaram and Ramachandra being the life-tenants. The class amongst whom the estate is to be distributed is the issues of Jayaram and Ramachandra, that is the grandsons of the testator. The difficulty in this case is caused by the adoption of defendant 2 after the death of Ramachandra. He had not been adopted on the date of Ramachandra's death and the only grandson of the testator then alive was the plaintiff. The appellant's case is that the period of distribution of the estate was, by reason of the terms of will, postponed until the attainment of majority of the plaintiff (he being the first to do so) and that this being a gift to a class, all persons who answered the description of grandsons on that date are entitled to share in the estate. On the other hand, the respondent contends that directly the contingent life-estate came to an end on the death of Ramachandra, the estate vested absolutely both in interest and possession, that that was the period of distribution and that on that date there being only the plaintiff alive and answering to the description "grandson", he alone could take the estate--the subsequently adopted son of Ramachandra therefore being excluded. The appellant contends that even if this be so, by reason of the fiction of relation back, defendant 2, although adopted after Ramachandra's death, is entitled to all the rights of his deceased father and to the estate of which he was the contingent life tenant at the date of his death.

3. The first question, namely, what is the period of distribution, depends upon Clause 32 of the will; and whether the words only the issue of my two sons shall, at the proper time, use and enjoy absolutely with rights to gift, mortgage, exchange, and sell. Neither my sons nor my other heirs have any right mean that at some time later than the death of the surviving life-tenant, the issue of the testator's sons, that is his grandsons, are to get possession of the estate. If that is the meaning of those words, then the class has got to be ascertained at sometime subsequent to the determination of the life-estate. In *Andrews v. Partington* (1791) 29 ER 610, there was a bequest of the residue to all the children of A, the daughters' shares to be paid at 21, or marriage, the sons at 21, or to be sooner advanced for their benefit, with survivorship and interest for maintenance. It was held that

The fund shall be divisible when the eldest attains 21, and the division shall be among those then in esse;

and the Exception to Sections. 111 and 112, Succession Act (39 of 1925), embodies the rule laid down in *Andrews v. Partington* (1791) 29 ER 610 and other English decisions.

4. It was conceded by Mr. Suryanarayana for the respondent that if the class has to be ascertained at the date of the majority of the plaintiff, then defendant 2, the adopted son of Ramchandra, though adopted after his death, would be included in the class of grandsons. What do the words "proper time" in Clause 32 of the will mean? In my view, and here I regret that I cannot agree with the

learned trial Judge, these words must mean "at the proper age", that is to say "at majority." "Proper time" must in my opinion mean some time other than the date of the death of the survivor of the testator's estate. These words appear in Section 119, Succession Act, and presumably the advocate who drew up the will had that section in view in using those words, and if that is so, then the Explanation to that section clearly covers this case. Mr. Rajah Iyer does not contend that the estate did not become vested in interest in the plaintiff at the date of death of Ramachandra by reason of possession of it being postponed until a future date, but that the estate, though it vested in interest, did not vest in possession then but at the "proper time". This, in my view, is clearly correct. The grandson in existence on the date of Ramachandra's death, namely the plaintiff, got a presumptive share but that share was liable to be diminished if Ramachandra's widow should adopt a son--certainly a possible contingency--before the plaintiff attained majority. This she did; and the plaintiff's share was accordingly liable to be divested pro tanto.

5. The contingency upon which the testator's sons, that is Jayaram and Ramachandra were to get into possession of the life-estate does not, in my view, put any difficulty in the way of the appellant's contention. Jayaram was to get possession of the life-estate after his 35th year and Ramachandra after his 30th year provided that the executors were of the opinion that they had received sufficient education, that their conduct and associations were good and that they would safeguard the estate; and in such case the executors would cease to exist. This it is contended on behalf of the respondent is inconsistent with an intention to postpone the vesting both in interest and possession of the estate beyond the death of the surviving son. No provision is made for executors to administer the estate during the minority of the issue of those sons and the learned trial Judge thought that the fact that no intermediate estate was created in favour of anyone else and that there was no provision for accumulation and no gift over in the event of the issue dying before majority, strongly pointed to an immediate vesting of the estate. In my view, although these matters are of some importance, they do not necessarily conclude the matter. During the minority of the issue of the sons the natural or de facto guardian would be entitled to maintain them out of the income of the property and if necessary to apply to the Court for the purpose and, should any of the issue die during minority, the presumptive share would go to their legal representatives. For the reasons I have given, the appellant is entitled to succeed upon this point; and it is therefore unnecessary for me to consider the other argument put forward by him.

6. The result is that the appeal succeeds and must be allowed with costs here and in the trial Court. The Original Side decree is set aside. The trustee is directed to hand over the estate to the plaintiff and respondent 2. He is discharged subject to his accounts being passed. Plaintiff is declared a major and the guardian is discharged. No order on the other petition.

Horwill, J.

7. One Parthasarathy Mudaliar died on 12th July 1911 leaving two sons, Jayaram Mudaliar and Ramachandra Mudaliar. According to his will, the relevant portions of which have been set out in the judgment of the learned trial Judge, Jayaram and Ramachandra were to have a life-interest contingent upon their attaining the ages of 35 and 30 respectively and upon being sufficiently educated and of good behaviour to be able to manage the estate properly. After their death, their issue were to enjoy the property absolutely at the proper time. Jayaram died on 21st April 1923 leaving the plaintiff, an infant. On 31st August 1923 Ramachandra died without issue. On 14th September 1923 the widow of Ramachandra adopted defendant 2.

8. The most important question to be decided in this appeal is: when did the period of distribution arise--was it at the death of Ramachandra, or was it at the "proper time"? If at the earlier date, then another question arises, viz. whether the adopted son, defendant 2, is entitled to a half share in the property because of a legal fiction that his adoption related back to his adoptive father's death, the time at which the property vested in the grandsons. The learned trial Judge held that the period of distribution was the death of Ramachandra and that there was no rule that an adoption dates back to the time of the adoptive father's death. We think that the learned trial Judge was right in holding that the property vested in the issue of Jayaram and Ramachandra on the death of the latter. In fact, this is the conclusion to which one must come from a reading of Section 119, Succession Act. We understand that the will was drawn up by an eminent advocate who presumably used the word "Yukthakalam" (proper time) in the technical and apparently well-established sense in which it is used in this section which runs as follows:

119. Where by the terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

9. Where there is an intermediate life interest, the property would presumably vest, according to this principle, on the death of his life-tenant. The Explanation to that section begins as follows:

An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed is postponed....

10. It does not however follow that because the property becomes vested in the representatives of a class (grandsons here) the membership of that class for the purpose of dividing the property has to be determined as on the day of vesting. As laid down in 28 Halsbury, Para. 1337:

There is no rule that where there is a gift to a class on a contingent event, the

time of the happening of the contingency determines the individuals comprising the class.

11. Paragraph 1342 of the same volume lays down the rule in *Andrews v. Partington* (1791) 29 ER 610, which is to the effect that when the property is to be divided among the members of a class upon their attaining a certain age, the period of distribution is that at which a member of that class first attains that age and that the persons who are to divide the property are those who are members of that class at that time. It is unnecessary to discuss the very many English cases referred to by Mr. K. Rajah Iyer in which the rule in *Andrews v. Partington* (1791) 29 ER 610 had been followed, because the Exceptions to Sections 111 and 112, Succession Act, lay down the rules very clearly that are to be followed in India and in determining the period of distribution. Moreover, in many of the English cases, the property apparently did not vest in the class until a certain contingency arose. Section 121, Succession Act, provides for such cases in the following words:

121. Where a bequest is made only to such members of a class as shall have attained a particular age, a person who has not attained that age cannot have a vested interest in the legacy.

12. In this appeal it is not suggested that the vesting in the members of a class was postponed to a particular age, and the use of the words "proper time" as seen above, was itself an indication that the vesting took place at the death of the last life tenant. The Exception to Section 111 runs as follows:

If property is bequeathed to a class of persons described as standing in a particular degree of kindred to a specified individual, but their possession of it is deferred until a time later than the death of the testator by reason of a prior bequest or otherwise, the property shall at that time go to such of them as are then alive, and to the representatives of any of them who have died since the death of the testator.

13. The Exception to Section 112 shows even more clearly what persons are to share in the property and the proper period when the property is to be distributed. The terms of the Exception are:

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.

14. The use of the word "possession" in both these exceptions is important; for it shows that the period of distribution has no necessary connexion with the period of vesting or the acquiring of a legal title to the property. Clause 32 of the will

makes it quite clear that the issue of the testator's sons is to have possession of the property only at the "proper time", so that the period of distribution must be at the "proper time". The facts of this case are such that it does not matter whether the "proper time" was the majority of the minors or some earlier time when the grandsons of the testator should be considered by the executors sufficiently mature to manage the property (or even some earlier convenient time, whenever that might have been). No attempt has been made to show that any "proper time" arose between the date of the death of Ramachandra and the date of adoption of defendant 2 and such a contingency could hardly have arisen in the interval, because the adoption took place only 14 days after the death of Ramachandra.

15. Some of the arguments of Mr. Suryanarayaniah were directed to show that the use of such a vague expression as "proper time" and the failure of the testator to provide for such contingencies suggested that the testator intended that upon the death of his sons possession also was to be with the grandsons, the executors merely managing the property and administering it until it was convenient to hand it over to the grandsons. He has emphasized, for example, the fact that the testator has made no provision for the contingency of Jayaram and Ramachandra obtaining possession of the property upon their attaining the ages of 35 and 30 respectively and then dying before their issue had attained majority. After the property had been handed over to Jayaram and Ramachandra, the trustees would of course have no further interest in the property and upon the death of Jayaram and Ramachandra, the minors would have to take possession in spite of the provisions of the will that they should not have possession until the proper time. The answer to that can only be that the eminent gentleman who drew up the will did not exercise quite the care one would expect of him and did not foresee this contingency. The contingency was however remote; because even if Jayaram and Ramachandra had died immediately upon their attaining the ages of 35 and 30 respectively, the minors would have had but five years to wait before attaining their majority. Certain other difficulties in interpreting the will so as to delay possession beyond the death of Ramachandra are not very great. If the grandsons had died before attaining majority, the property would of course have gone to their heirs, as it had already vested in them. For the same reason, they would have been entitled to provision for maintenance and education. If the trustee did not feel bound by the terms of the will to provide for education and maintenance from this property, he could have applied to the Court for directions, the Court undoubtedly having authority to provide for maintenance and education out of property that had already vested in the minors. Whatever the difficulties in carrying out the terms of the will, this document cannot be so construed as to mean that possession was to pass to the minors immediately upon their fathers' death, and it is the time at which possession is to be given to the issue of Jayaram and Ramachandra that determines the period of distribution. It is unnecessary to discuss the cases quoted by the learned advocate for the plaintiff,

because they deal with the question of the time at which property vested in the legatees. Even *Arunchala Udayar Vs. Pachayammal and Others*, and *Narayana Aiyar v. Anai Aiyar* (1912) 17 IC 754, referred to by the learned trial Judge, do not discuss the law governing the determination of the period of distribution as the question did not arise in those cases.

16. Because of some dicta in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) IA Sup Vol 47, *Ethirajulu Naidu v. Mukunthu Naidu* (1905) 28 Mad 363, AIR 1935 95 (Privy Council) , *Pratap Sing-Shiv Singh v. Agar Singhji-Raisinghji* AIR 1918 PC 192, AIR 1925 272 (Privy Council) and *Krishna v. Sami* (1886) 9 Mad 64, to the effect that an adoption dates back to the adoptive father's death for the purpose of explaining why an adopted son can, in a very limited class of cases, divest property in the hands of others, Mr. Raja Iyer has attempted to establish a broad principle that an adoption always dates back to the adoptive father's death. From this he argues that defendant 2 must be considered to have been in existence at the time of Ramachandra's death and that even if the period of distribution were the date of Ramachandra's death, the adopted son would have been entitled equally with the plaintiff to a share in the property devised. It is however unnecessary to discuss this contention of Mr. Rajah Iyer in the view that we have taken of the legal effect of the will. As the class was to be determined only at some time after defendant 2 was adopted, it follows that defendant 2 is entitled to a half share in the suit property. The appeal is allowed with costs in both Courts.