

(1971) 11 AP CK 0018

In the Andhra Pradesh High Court

Case No : Letter Patent Appeal No. 107 of 1970

Kadiyala Venkatasubbaiah and Others

APPELLANT

Vs

Sarupuri Narayanamma and Others

RESPONDENT

Date of Decision : 11-11-1971

Acts Referred:

Transfer of Property Act, 1882 — Section 8

Citation : AIR 1972 AP 341

Hon'ble Judges : Gopal Rao Ekbote, J; A.V. Krishna Rao, J

Bench : Division Bench

Advocate : Sadashiv Rao and A.L. Narayana Rao, for the Appellant; Y.B. Tata Rao, for the Respondent

Judgement

Gopal Rao Ekbote, J.—This appeal is from the judgment of our learned brother Parthasarathi, J. given in Appeal No. 283 of 1966 on 20th March, 1970, whereby the learned Judge dismissed the appeal.

2. The material facts are that the appellant-plaintiff instituted the suit for recovery of possession of A to C schedule properties and for mesne profits, past as well as future, alleging inter alia that the suit properties originally belonged to the plaintiff and his undivided brothers Nagayya, Venkayya and Raghavayya. The eldest brother Nagayya died long ago leaving his widow Raghavamma and a minor daughter Venkatasubbamma. The plaintiff and his two minor brothers maintained these ladies. They also performed the marriage of Venkatasubbamma with the 1st defendant. As Raghavamma wanted some arrangement to be made in her favour for maintenance, it was agreed that Raghavamma and her daughter Venkatasubbamma should enjoy the income from A and B Schedule lands and reside in the thatched house on the C Schedule site. It was also agreed that after the lifetime of Raghavamma, the property would be enjoyed by the daughter Venkatasubbamma, but that the said properties would continue to vest in the donor's family in case Venkatasubbamma did not have any issue. To evidence this arrangement a document was executed on 29-4-1930 by the plaintiff and his

two brothers in favour of Raghavamma and Venkatasubbamma.

3. Shortly after the execution of the document Venkayya and Raghavayya died unmarried. Venkatasubbamma also died issueless in 1936. Raghavamma died in 1964.

4. The plaintiff in view of these facts alleged that according to the said document the property reverted to the settlors and since the plaintiffs entitled to the said property and not the 1st defendant as the heir of Venkatasubbamma he wanted the reliefs to be granted to him.

5. The 1st defendant stated in his written statement that his wife Venkatasubbamma had become the absolute owner of the plaint schedule property on the date when the document was executed subject to the condition that she would maintain her mother Raghavamma. After Venkatasubbamma's death the 1st defendant as her heir became the owner of the property subject of course to maintain Raghavamma. The 1st defendant accordingly maintained Raghavamma during her lifetime. It was contended that the last clause in the gift deed that the plaint properties shall revert back to the donors' family in case Venkatasubbamma died issueless was surreptitiously introduced without the knowledge of Raghavamma and Venkatasubbamma. It was contrary to the agreement made at the time of the marriage of Venkatasubbamma with the 1st defendant. The last clause is void and inoperative.

6. The 2nd defendant is the person who had allegedly purchased some property from the 1st defendant. The 3rd defendant is a lessee. They in their written statements supported their transfers on the ground that the 1st defendant was competent to make them.

7. Upon these pleadings, the trial Court framed appropriate issues. The second issue was "whether last clause in the gift deed was surreptitiously introduced as contended by the defendants?" After a proper trial the trial Court found on issue was not surreptitiously introduced as was contended by the defendants. Upon an interpretation of the gift deed, however, the trial Court came to the conclusion that it was a case of conditional or restricted transfer and the last clause which puts restriction is void as it is repugnant to the main clause whereby absolute property has been transferred.

8. Aggrieved by the decision of the trial Court dated 25th February, 1966, the plaintiff preferred an appeal to this Court. Parthasarathi, J., who heard the appeal also agreed with the view of the trial Court that the present is the case of absolute transfer of the property in favour of Venkatasubbamma and the last clause relating to reversion of property in case Venkatasubbamma does not have any issue is void as it is repugnant to the main clause. It is this concurrent view that is now assailed in this appeal.

9. The contention of the learned Advocate for the appellant was that the gift deed has not been properly construed by both the Courts. His contention was

that the gift deed is no doubt a transfer of absolute right in favour of Venkatasubbamma, but such a transfer is made with a defeasance clause to the effect that if Venkatasubbamma does not have issue, the property will revert to settlors. The document therefore does not transfer absolutely the property in favour of Venkatasubbamma, but as the defeasance clause came into operation, as Venkatasubbamma died issueless her absolute transfer was converted into a life estate. The plaintiff being the person entitled to the property because of the defeasance clause the suit ought to have been decreed.

10. In order to appreciate the implications of this contention, it is necessary to read the document fully. The original document is in Telugu. There was some controversy over the translation of the document as extracted, by the learned Judge in his judgment. After some discussion, however, it was found that the translation extracted by the learned Judge in his judgment is substantially correct translation of the original Telugu Deed. We did not, however, exclusively depend upon mere translation. "We were taken through the original Telugu gift deed also. We also find that the translation we are now going to extract from the judgment of the learned judge is substantially correct. It is as follows:

"Raghavamma of you is our sister-in-law and Venkatasubbamma our elder brother"s daughter and we have been living jointly even during the lifetime of our brother and up-till now. So we had as per your wish and that of ours given in marriage Venkatasubbamma of you, to our nephew Madanapalli Pitchaiah"s son, Nagaiah, Subsequent thereto, you, being unwilling to remain joint with us represented to us that you would remain separate from us, to which we had agreed and so on the advice given by our relations to which both of us have agreed, we have executed this sundry land of the extend of K-4-24 described in the schedule hereunder should be taken by you towards your maintenance and after the death of Raghavamma, by Venkatasubbamma towards "Pasupu Kinkuma" and that you should have nothing to do with our joint family debts. It is therefore settled that you should take possession of the said property this day itself and enjoy only the in]come there from and that on the death of the said Raghavamma of you the said should pass to Venkatasubbamma. Further it is settled that Venkatasubbamma of your and her sisters (Santhathivaru) should be in enjoyment thereof with absolute power of gift, transfer an ale etc. It is settled that Raghavamma of you should not in any manner claim any separate maintenance etc. to be given to her during the rest of her life time by us. So you may, subject to the aforesaid terms take possession of the aforesaid property and be in enjoyment thereof. You yourself shall pay the sarkar sist etc, thereon and get the said land entered in your name in the Government accounts. In respect there of we or our heirs shall not raise any dispute whatever either with you or your descendants. This deed is executed with the arrangement that in case no female or male issue is born in the said Venkatasubbamma, the said schedule mentioned property should on her death, pass to us or our descendants and not to the heirs of the said Venkatasubbamma."

11. Before we consider the nature of the document, it is well to remind ourselves about the position of law in this regard.

12. Now the general principle embodied in Section 8 of the Transfer of Property Act is that, a grant prima facie carries with it all the legal incidents thereof, but that it may be modified according to the wish of the parties, the maxim being *modus at conventio vincunt legem* - the form of agreement and the convention of parties overrule the law. Where a grant doesn't carry with it all the legal incidents thereof, but is modified by conditions and restrictions, it is conditional or restricted transfer. Where, however it carries with it all the legal incidents thereof, it is an absolute transfer.

13. The distinction between the conditional or restricted transfer and an absolute transfer has to be necessarily borne in mind because they produce different results. In cases where a conditional or restricted transfer is made, whether such condition or restriction is prior or subsequent, the transfer is defeated if the condition or restriction in either case is not satisfied. Whereas in cases of absolute transfers, the property with all legal incidents passes to the transferee. If the terms of the transfer in such case at the same time direct that the property is to be enjoyed with certain restrictions, the restrictions are to be disregarded. The reason is that the direction restricting the enjoyment of the property is inconsistent with or repugnant to the intention to make an absolute transfer, that is, a transfer which will carry with it the right of unrestricted enjoyment of the property as a legal incident thereof, and, since the Court cannot give effect to both at the same time, the main provision will be given effect to and the repugnant one disregarded.

14. Whether a particular document evidencing transfer of property is a conditional or restricted transfer or is an absolute transfer must necessarily depend upon the contents of the document itself.

15. If the document is clear and unambiguous and it becomes unnecessary to interpret it by employing the recognised canons of construction, then the document, whether it falls under one or the other category, has to be given full effect to. The difficulty however arises only when the document does not bring out clearly the intention of the parties in express words. In such cases the first principle is to read the document as a whole. If it discloses that one part of the document is apparently inconsistent with the other part of the same document, then every attempt should first be made to reconcile the two conflicting clauses so as to read the two parts of the document harmoniously, if possible. Where, however, it is not possible to harmonise the two clauses, the first clause has to be given effect to, and the subsequent clause disregarded.

16. Upon such a construction of the document, it is found that the transfer is conditional or restricted, full effect will have to be given to it. On the other hand if the main clause purports to transfer absolutely all the incidents of the property, then the subsequent repugnant clause has to be disregarded as it would be void.

17. It must be remembered that there is at times a difference between the conditional or restrictive transfer or a transfer with a defeasance clause and an absolute transfer coupled with restriction on the enjoyment or alienation of the property transferred. This difference, if not properly kept in view, one is likely to go wrong.

18. Now a defeasance is "a condition relating to a deed or to an obligation, recognizance, statute, or the like, which being performed by the obligor or recogniser, the act is disabled and made void as if it had never be end one; which differs from a conditionally in this, that this (a condition) is always made at the same time and annexed to or inserted in the same deed; but that "defeasance" is always made in a deed by itself, and for the most part made after the deed where unto it hath relation."

19. Thus "a defeasance is something which defeats the operation of a deed or document. If it is contained in the same deed, it is called a "condition."

20. The word "defeasance" comes, from the French word defaire, that is, to defeat or undo. Defeasible therefore means that which may be annulled, abrogated, cancelled or made void; capable of defeating, destroying or impairing. And defeasible title means "one that is capable of being annulled or made void-not one that is already void or is an absolute nullity" (See Law Lexicon by Ramanatha Iyer, page 305).

21. It is in the light of this back ground that we have to read the gift deed and construe it appropriately.

22. Before we construe the deed. It is well to remember the circumstance in which the deed was executed. It is a common ground that Raghavamma's husband had already died and she was not entitled to anything except maintenance from the joint family property of which her husband was a coparcener before his death. It is also a common ground that at the time when the document ground that at the time when the document was executed. Venkatasubbamma was hardly 13 years of age but was married to the defendant. The reason for executing the document was that Raghavamma was unwilling to stay with the members of the joint family and wanted to live separately and was claiming her maintenance. She also wanted some arrangement to be made towards pasupukunkuma of her daughter of her Venkatasubbamma, which was not made at the time of her marriage. It was, however, plain that Venkatasubbamma could not have claimed as a matter of right any property towards pasupukunkuma. It is in the back ground of these circumstances that the document came to be executed.

23. A careful and close reading of the whole document as such would bring out unequivocally that the intention of the parties was that Raghavamma would enjoy only the usufruct of the property during her lifetime. She was therefore not given any absolute right in the property thus transferred. The document then provides that after the death of Raghavamma the property would go to

Venkatasubbamma and her issues.

She and her issue would have rights of full enjoyment with transfer and alienation of the property. It is only then that the last clause appears in the document in regard to which the contention of the 1st defendant was that it was surreptitiously introduced in the document and did not form part of the document originally stood. This contention has been negated by both the Courts. The last clause therefore has to be taken as a part of the document originally executed. It is upon this clause that the entire arguments of both the learned advocates were concentrated. While it was contended by the learned advocate for the appellant that it is a defeasance clause and makes the transfer a conditional or restricted transfer, it was argued by Sri Tata Rao, the learned counsel for the respondent, that the said clause puts only a restriction on the enjoyment of the property by Venkatasubbamma and therefore it is repugnant to the earlier main clause by and under which absolute transfer was made in favour of Venkatasubbamma. He therefore submitted that the last clause was inoperative and void.

24. The correct method would be to view that the document as a whole and not stop where the property was transferred to Venkatasubbamma in language which conveys that the property was transferred absolutely. That main clause has to be necessarily read along with the last clause appearing in the document. Both these clauses were intended by the parties to be introduced in the same document and at the same time. If these two clauses are read along with the other contents of the document keeping in view the circumstances in which the document had come into existence, one would have every little difficulty in reaching the conclusion that the last clause was not a restriction on enjoyment of the property but the last clause was a defeasance clause. It unconditionally stipulated that if Venkatasubbamma did not have any issue, male or female, the property will revert to the settlors. Once it is remembered that the transfer was a gift in favour of Raghavamma, which was a restricted transfer, and the gift over to Venkatasubbamma with a defeasance clause, then there would be no difficulty in reaching the conclusion that the transfer in favour of Venkatasubbamma was also a restricted or conditional transfer of the property in her favour.

The reason is obvious. The defeasance clause as has been seen earlier if it comes in the same document it assumes the character of a condition. If the two clauses therefore are read together, then it becomes patently clear that the absolute rights which were intended to be transferred to Venkatasubbamma were subjected to a condition that in case she dies issueless the property would revert to the settlors. This defeasance clause is perfectly satisfied in the present case because Venkatasubbamma had pre-deceased Raghavamma. She died issueless. On the date of the death of Raghavamma, the conditional transfer in favour of Venkatasubbamma could not have taken place because there was no occasion for giving effect to that clause at all. Neither Venkatasubbamma was alive then nor had she left any issue.

25. That a part, the defeasance clause is worded both positively as well as negatively. While conferring absolute right on Venkatasubbamma, the document categorically recites that the property is transferred to her and her issue. The defeasance clause makes it further clear that if she dies issueless then the property would revert to the settlors. The parties were not contended with that alone. They further added that the intention is not to benefit any other heir of Venkatasubbamma except her issue. In the face of this clear and unambiguous language with particular emphasis on the property being transferred only on that condition, we fail to see how it can be legitimately contended that the last clause is only a restriction on the enjoyment of the property of Venkatasubbamma, and being repugnant to the main clause is void. In our judgment, it is a defeasance clause which defeats the absolute transfer of property in favour of Venkatasubbamma in case she dies issueless.

As she died issueless the defeasance clause will have to be given full effect to. We find ourselves unable to agree with the contention that the intention of the parties was to absolutely transfer the property in favour of Venkatasubbamma. Neither there are words to that effect in the document read as a whole nor the circumstances in which the document came into existence warrant any such contention. Venkatasubbamma neither had any interest in the property nor she had any right to that property. She got the interest only by and under the document. The intention to us seems to be clear that the settlors did not want anyone except Venkatasubbamma and her issues to benefit from the property and that is why they emphatically stated that no other heir of Venkatasubbamma would be permitted to enjoy the property if she dies issueless. The word *vernetu* that is arrangement used in the document is significant. On a plain reading of the document therefore we do not find any hesitation in holding that the document does not convey absolute title to Venkatasubbamma. Even if it conveys such a title, it is only subject to the defeasance clause, that is to say that the transfer in her favour, would be defeated in case she dies issueless. That seems to us to be the plain meaning of the document and it is difficult, if not impossible to place any other construction on the document.

26. We are supported in our conclusion by the following decision.

27. In *Bhoobun Mohini v. Hurrish Chunder Chowdhry* (1879) ILR 4 Cal 23 (PC) the sanad granting a talook was in the following words:

"You are my sister; I accordingly grant you as a talook for your support the three Villages, H. F. and K, belonging to any Zamindari, with all rights appertaining there to, at a tahut jamma of Rs. 361. Being in possession of the lands and paying rent according to the tahut jamma, do you and the generations born of your womb successively (*santan sreni kreme*), enjoy the same. No other heir of yours shall have rights or interest."

28. The Judicial Committee of the Privy Council held that the earlier words of the sanad, when read together, were to be taken as conferring an absolute estate on

K, and that the effect of the concluding words "no other heirs of yours, and C.," was to make the absolute estate before given defeasible in the event of a failure of issue living at the time of K's death, in which event the estate was to return to the donor and his heirs; but that as that event had not occurred, it followed that K took an estate which she could dispose of by will, and consequently that the plaintiffs were entitled to succeed to their suit. Their Lordships further found that there was no thing n such a condition repugnant to Hindu Law. It is an executory devise which is perfectly valid.

29. In *manjamma v. Padmanabhayya* (1889) ILR 12 Mad 393 question for decision was whether the 1st plaintiff was under the terms of the Karar lawfully entitled to take the property on the deaths of Sitarama without issue. The karar was in the following terms:

"If the said Sitarama shall have descendants, neither your male descendants nor any one else shall have any interest in any of the property herein mentioned. If the said Sitarama, happen to be without descendants, the male off-spring of my daughter Daveramma, your wife, shall enjoy the property equally, but no other shall have any interest therein, such others shall have any interest therein, such is the swatantra karar executed with my free will and pleasure."

30. Considering the nature of the interest taken by Sitarama and having regard to the expression "no others shall have any interest therein", the Court held that it was of the opinion that Sitarama's estate was made defeasible in the event (which had occurred) of the failure of issue living at the time of his death. Their Lordships relied upon (1879) ILR 4 CI 23 (PC):

31. *Kristormoni Dasi v. Narendra Krishna Bahadur* (1889) ILR 16 Cal 383 is another Privy Council case. A testator bequeathed the residue of his estate to his executors upon trust to pay the income to his daughter during her lifetime; and after her death in trust to convey the residue to his two half-brothers, in equal moieties, and to the heir or heirs male of whom upon trust to give the same to the sons or son of his daughter. Both the half-brothers survived the testator. On the death of one of them the daughter (to who children, as well as to the half-brothers had been born) making all persons interested parties, claimed that the trusts and limitations had become void as to one moiety of the residue bequeathed, and that she had become entitled there to for the estate of a Hindu daughter. Of the children, all were born after the testator's death, save three sons of the surviving half-brother who were born in the testator's lifetime. Their Lordships of the Privy Council observed:

"that the gift of the residue so far as it purported to confer an estate of heirs male of their bodies, was contrary to law and void; that the gift to the plaintiff's sons, unborn at the death of the testator, was incapable of taking effect; that each of the half-brothers took an estate for life in one moiety of the residue bequeathed, in remainder expectant on the death of the plaintiff; and that accordingly, on the deaths of the half-brother, who had died before this suit was

brought the inheritance of his moiety had devolved on the plaintiff as daughter and heir of her father, and as she claimed."

32. In regard to the defeasance clause their Lordships said:

"In stating the rule relating to the defeasance of a prior absolute interest by a subsequent event, it is important to add, first that the event must happen, if at all, immediately on the close of a life in being at the time of the gift, as was laid down in the Mullic case (9 Moore's Indian Appeals 123) and secondly, that a defeasance by way of gift over must be in favour of somebody in existence at the time of the gift, as laid down in the Tagore case."

33. Referring to the case of Bhooburn Mohini (1879) ILR 4 Cal 23 (PC), their Lordships said that the case conformed to all the said rules. It was stated:

"There was no gift over in that case. The donor made gift to his sister Kasiswari in Vernacular terms, which though this Committee held to mean that, if Kasiswari died leaving no issue then living, her interest was to cease. In effect the construction was that, if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none, it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent, he or his heir would lawfully re-enter."

34. The last case in this series is Lakshminarayana Nainar v. Valliammal (1911) ILR 34 Mad 250. The Bench of the Madras High Court was confronted with the *rajinamma* filed in the High Court. It was agreed thereunder that certain properties should be held and enjoyed in common by R and P and that in the event of R becoming issueless the entire properties should belong to P. R having subsequently sold the properties to L, died issueless, Peiro Ramaswami died without leaving any issue. The question in those circumstances was whether his alienation of the suit properties during his lifetime in favour of the 1st defendant can have any legal validity after his death. The Lordships stated:

"Assuming that Peria Ramaswami had an absolute estate in a moiety of the properties; there is a clear gift over that moiety on his dying without issue to the fourth defendant. In (1889) ILR 16 Cal 383 (PC) the Privy Council observed with reference to an earlier decision of their Lordships in (1879) ILR 44 Cal 23 (PC): "In effect the construction was that if Kasiswari left issue, the absolute interest given to her in the first instance was to remain unaffected, but if she left none it was cut down to a life interest. In the latter case nothing had passed from the donor but the life interest, and when that was spent her or his heir would lawfully re-enter." The case in (1879) ILR 4 Cal 23 (PC) with reference to which the foregoing observations were made was one of gift to a sister who and the generations born of her womb were to enjoy the properties successively but no other heir of hers was to have a right or interest. "their Lordships held that the instrument conferred upon the sister an absolute estate but the absolute estate so given was" defeasible in the event of a failure of issue living at the time of her death in which event the estate was to such a defeasance followed by a gift over

in favour of a person in being is perfectly valid under the Hindu Law has long been decided (see *Seemurty Soorjeemoney Dossee v. Denobundoo Mullick*) (1881) 9 Ind App 123(PC).

The effect of such a defeasance being to cut down the original absolute estate to a life estate, we cannot accede to the contention that it is only the property undisposed of by Paria Ramaswami that can pass to the fourth defendant in the former suit. The alienation by Paria Ramaswami in favour of the first defendant being invalid beyond his lifetime, the second appeal fails....."

35. Mr. Tata Rao, the learned Counsel for the respondents, however placed vehement reliance on the following two decisions of the Madras High Court: *Pugal Umperumal Pillai v. Thangathammal* AIR 1949 Mad 690 and *Tiruchendur Sri Subramaniaswami Temple v. Ramaswami Pillai* 1950 1 Mad LJ 300 : AIR 1950 PC 32. In the first case, the relevant portion of the gift deed by the father in favour of his daughter was as follows:

"As I have given away to you the property in the schedule herein worth Rupees 1500 as stridhanam gift, you shall holding and enjoy the aforesaid property hereditary and from son to grandson and so on as long as the Sun and Moon last. After your lifetime, your issues if there are any, shall get the aforesaid property. If you have no male or female issues, the aforesaid property shall revert to me and to my male heirs. I shall, till my lifetime, reside jointly with you in the thatched house mentioned in the schedule."

36. The contention before the Court was that what was intended by the donor was the granting of a life estate to Veeraperumal Ammal with a remainder to her issue and that this was made plain by the second sentence showing that the donor wanted the issue of Veeraperumal Ammal to get the property after her death. It was further contended that as the clause stood in the absence of any issue for Veeraperumal Ammal, the property should revert to the donor and her male heirs. There was a defeasance clause or a reverted which showed that the donee had only a life estate.

37. Construing the document, the learned Judges said:

"This contains three distinct and clear phrases indicating the nature of the estate to be taken by the donee. Any one of such phrases occurring alone in a deed of gift will be sufficient ordinarily to enable the Court to construe the document as one granting an absolute estate. If the donor had stated that the donee shall hold and enjoy the property here editorially, there wouldn't be much difficulty in construing it as a gift absolute. But here other phrases such as "from so on to grandson and so on" and also "as long as the Sun and Moon last" are indicative of nothing but an absolute grant."

38. Relying upon *Lalit Mohan Singh Roy v. Chukkumlal Roy* (1897) ILR 23 Cal 834 (PC) and applying the principle laid down in that case their Lordships felt no difficulty in holding that the intention of the donor was that her daughter should

taken an absolute estate.

39. On a superficial reading of this judgment no doubt it may appear to support the contention advanced by the learned Advocate for the respondents. But if one looks to the judgment of Rajamannar, J., from whose judgment the appeal was preferred and was confirmed by the Court (reported in AIR 1949 Mad 122) it would be clear that the defeasance clause in that case had never come into operation because Veeraperumal Ammal did leave behind her issue. In paragraph 9 of the Judgment, the learned, Judge observed:

"The result would therefore be that she would acquire an absolute estate under the terms of the document.

40. If the observations made by the Bench are understood in the light of what is found by Rajamannar, J., and not disagreed by the Appellate Court, it would not be difficult to hold that in that case the defeasance clause had been satisfied and the donee had become an absolute owner of the property. The discussion relating to the understanding of the document therefore must be appreciated in view of this finding. Moreover, in the said judgment the negative words which we find in our present case do not appear. That, in our judgment makes a good deal of difference in understanding the document. We have already seen that in most of the cases on which we have placed reliance such a negative clause had appeared and which negative clause had influenced the learned Judges in forming their opinion. We do not therefore consider this decision to be anything contrary to what we have stated.

41. The other decision *Tiruchendur Sri Subramaniaswami Temple v. Ramaswami Pillai* 1950 1 Mad LJ 300 : AIR 1950 PC 32 was also a case where a testator had stated in his will " I have bequeathed to my son the right to all my properties and moneys, etc., and he shall solely enjoy them. If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur." On a construction of the said will, the Privy Council held:-

"the bequest to the son was unconditional and therefore conferred upon him an absolute estate. The provision for devolution of the property in case the son should die without issue was not in any way intended to limit either the character of the estate that was given by the earlier bequest in favour of the son or make it conditional and liable to be divested at his death without issue."

42. The facts of the case and the contents of the document are far removed, from the facts of the present case and the contents of the document with which we are concerned. There, the question of defeasance clause did not arise and was not canvassed. The negative words which we find in our document didn't appear in the document with which the Privy Council was concerned. The line of succession did not continue but the property was directed to be given to the Temple in case there were no issue. The bequest was in favour of the only son who even otherwise would have got the property after the death of his father on his own. It is in these circumstances that their Lordships held that it was a case

of absolute transfer and not a conditional or restricted transfer.

43. This case came to be considered in *S. Narayana Doss (Died) and Another Vs. Arumugathammal and Another*, by a Bench of the Madras High Court. In that case a will, exhibit A-1, fell for construction. After referring to the fact that a Division Bench of the Madras High Court in *Tiruchendur Sri Subramaniaswami Temple Vs. P. Ramasamia Pillai (insane)* through his wife and guardian *R. Muthammal and Others*, Had made the observations referred to in the said judgment, their Lordships referred to the Privy Council case referred to above and referred also to 1950 1 Mad LJ 300 : AIR 1950 PC 32. Their Lordships then observed:

"The Tiruchendur case 1950 1 Mad LJ 300 : AIR 1950 PC 32 has hardly any resemblance to the facts of the present case. The paramount intention of the testator Pichai Pillai in that case was to confer an absolute estate on his son and that was given effect to. The device in favour of the temple on the death of Pichai Pillai's son issueless was construed to be a provision by way of devolution of the property in future. It is clearly pointed out by Pandurang Rao, J., that there was no reason in that case why the testator should have contemplated the son taking only a limited estate of a life estate holder. But in the present case there was every reason on the part of the testator Velayutha Konar to confer only a life estate to his daughters as he desired and was anxious that his properties should be enjoyed absolutely by his grand-children."

44. The case therefore not only explained the Privy Council case and the decision of Bench of the Madras High Court from which the appeal was filled before the Privy Council but lends considerable support to what we have concluded above.

45. We are therefore satisfied that the gift deed in the instant case because of the defeasance clause and as Venkatasubbamma had died issueless must be deemed to have resulted in cutting down the absolute right of Venkatasubbamma to a life interest. But as Venkatasubbamma has already died at the time when she could have taken over from Raghavamma, there was no occasion for giving her any life estate because she had died issueless. The property, therefore, according to the defeasance clause was reverted to the settlor's family. It was not disputed before us that if that is the correct position of law, then it is the plaintiff, who is entitled to the suit property and not the 1st defendant.

46. What following from what is stated above is that the transfer, that is to say the sale deed effected by the 1st defendant in favour of the 2nd defendant and the lease deed executed by him in favour of the 3rd defendant, were bad in law and could not be given effect to. The 1st defendant had no right whatsoever to inherit the property from Venkatasubbamma as the property had reverted on the death of Raghavamma because of the defeasance clause to the settlors. After the death of Venkatasubbamma, who died issueless, therefore, there was no occasion for the 1st defendant, nor he had any right, title or interest in the suit property which he could convey either to the 2nd defendant or to the 3rd

defendant.

47. For the above said reason, we would allow the appeal, set aside the judgment of the learned Judge as well as the judgment of the Trial Court and decree the plaintiff's suit with costs throughout. The profits, past and future, will be inquired in to by the Trial Court and a suitable decree passed in the light of the result of such inquiry.

48. Appeal allowed.