
(2012) 08 MAD CK 0024
In the Madras High Court
Case No : S.A. No. 1597 of 1997

Kaliappan (Died) and Others

APPELLANT

Vs

A.K. Somasundaram (Died) and Others

RESPONDENT

Date of Decision : 08-08-2012

Acts Referred:

Hindu Succession Act, 1956 — Section 14, 14(1), 14(2)
Specific Relief Act, 1963 — Section 33
Succession Act, 1925 — Section 113, 114, 115, 119
Transfer of Property Act, 1882 — Section 10, 11, 13, 14, 19

Citation : (2012) 6 MLJ 492

Hon'ble Judges : M. Venugopal, J

Bench : Single Bench

Advocate : A. Nilaphar for R. Subramanian, for the Appellant; R. Babu and B. Kumaraswamy, for the Respondent

Judgement

M. Venugopal, J.—The appellants/defendants 1 to 3 have preferred the instant Second Appeal as against the Judgment and Decree dated

8.11.1996 in A.S. No. 124 of 1995 passed by the Learned Subordinate Judge, Gobichettipalayam, in confirming the Judgment and Decree dated

25.11.1993 in O.S.No. 155 of 1992 passed by the Learned District Munsif, Gobichettipalayam. During the pendency of the Second Appeal, the

1st Appellant/1st Defendant expired on 29.6.2001. Upon his death, the Appellants 4 and 5 have been brought on record as Legal Representatives

of the deceased 1st Appellant.

2. Likewise, during the pendency of the Second Appeal, 1st Respondent/1st Plaintiff died on 20.9.2010 and the 4th Respondent has been arrayed

as his Legal Representative.

3. The First Appellate Court viz., the Learned Subordinate Judge,

Gobichettipalayam, while passing the Judgment in A.S. No. 124 of 1995 (filed by the defendants as appellants) on 8.11.1996, has, inter alia, opined that "based on Exhibits A-7 to A-9, the appellants/defendants appears to have no manner of legal right in the suit properties. But, as per the aforesaid documents, they can enjoy the suit property till the life-time of Pavakkal and further that the respondents/plaintiffs based on Exhibit A-1 have right in the suit properties and they can also get the suit properties legally only after their mother Pavakkal's death and consequently, confirmed the Judgment and Decree of the trial Court passed in the main Suit, by holding that the Judgment and Decree of the trial Court do not suffer from any defects and dismissed the Appeal with costs."

4. Before the trial Court, in the main Suit, 1 to 3 issues have been framed for adjudication. On behalf of the respondents/plaintiffs, witness P.W. 1 has been examined and Exhibits A-1 to A-12 have been marked. On the side of the appellants/defendants, witness D.W. 1 has been examined and no documents have been marked.

5. The trial Court, on an examination of oral and documentary evidence available on record and upon analysis and scrutiny of the same, has granted the relief of declaration and also the recovery of possession to and in favour of the respondents/plaintiffs in respect of the suit properties and decreed the suit without costs.

6. At the time of admission of the Second Appeal, this Court has formulated the following Substantial Questions of Law No. 1 to 4:

1. Whether in law the Courts below are right in omitting to note that Exhibit A-1 it-self is void for the reason that vested remainder cannot be created in perpetuity and therefore it offends Section 13 of the Transfer of Property Act ?

2. Whether in law the Courts below are right in omitting to note that when the respondents have claimed interest in the property only after the life of Pavakkal whether the decree for recovery of possession can be granted when the life interest holder is still alive ?

3. Whether in law the Courts below are right in overlooking that the recitals in Exhibit A-1 conferring rights to unborn male descendants of

Ponnammal in perpetuity are repugnant to Sections 113, 114 and 115 of Indian Succession Act ?

4. Whether in law the Courts below did not err in overlooking that the appellants are bona fide purchasers for value without notice who have improved the property and who are entitled to equity u/s 33 of the Specific Relief Act ?

The contentions, discussions and findings on substantial Questions of Law No. 1 to 4:

7. The Learned counsel for the appellants/defendants contends that the trial Court as well as the First Appellate Court have committed an error in

holding that the Sale Deed executed by Pavakkal, the mother of the respondents/plaintiffs on 10.5.1984 in favour of the Appellants is not valid.

8. It is the further submission of the Learned counsel for the appellants/defendants that both the Courts below have failed to note that Pavakkal is

the absolute owner of the property as per the terms of the Will and that the Sale Deed was attested by the elder brother of the respondents.

9. Advancing her arguments, the Learned counsel for the appellants/defendants submits that if the respondents/plaintiffs were born at the time of

execution of the Will, the Testator would have executed the Will in their favour.

10. The Learned counsel for the appellants/defendants projects a legal plea that both the Courts below have failed to appreciate that the

respondents/plaintiffs have not established that they were born prior to the execution of Exhibit A-1-Will dated 11.7.1944 and they are entitled to

obtain possession of the suit property after the death of Pavakkal.

11. Lastly, it is the contention of the Learned counsel for the appellants/defendants that the respondents/plaintiffs should have filed suit for setting

aside the sale in favour of the Appellants/Defendants and without setting aside the sale, the relief of declaration of possession during the period of

life interest was not a valid one.

12. Per contra, it is the submission of the Learned counsel for the Respondents 2 and 4 that the trial Court as well as the Appellate Court have

looked into the entire gamut of the facts and circumstances of the case and further has taken note of the oral and documentary evidence adduced

by the parties and has come to a categorical conclusion that the respondents/plaintiffs are entitled to obtain the relief of declaration in respect of the

suit properties and also recovery of possession and as such, the said conclusions arrived at, need not be interfered with by this Court sitting in

Second Appeal.

13. Before dealing with the Substantial Questions of Law No. 1 to 4, it is useful for this Court to make a reference to the pleadings projected by the parties to the litigation.

14. In the Complaint, the respondents/plaintiffs have averred that the suit property originally belonged to one Ponnammal, the maternal grand-mother of the Plaintiffs. She executed a registered Will on 11.7.1944 in respect of the properties including the suit property. In terms of the Will, the properties were to be enjoyed for life by her husband and her three daughters (including the Plaintiffs' mother Pavakkal) and subsequently to be enjoyed by her grand-sons and their heirs in male line generation after generation without power of alienation.

(ii) The prohibition of alienation by any of the beneficiaries is not a valid one and therefore, as per the Indian Succession Act, the property vested absolutely in the grand-sons of the said Ponnammal on her death during the year 1945 subject to the life estates in favour of her daughters. As such, the respondents/plaintiffs became the absolute owners of the vested remainder in respect of the suit property, in possession and enjoyment of their mother Pavakkal.

(iii) The appellants/defendants, being aware of the aforesaid facts, had obtained Sale Deeds from the respondents/plaintiffs' mother in regard to the suit property and are now in possession and enjoyment of the same. The Sale Deeds dated 10.5.1984 could not bestow absolute title to the appellants/defendants and they obtain a right to enjoy the property, as per the Sale Deeds, till the demise of Pavakkal. The said Sale Deeds are ab initio void.

(iv) A legal notice dated 16.11.1984 was issued to the appellants/defendants and they had not issued any reply, after receiving the notices. On 12.12.1991, notice was issued before filing of the suit, for which, the appellants/defendants received the notice and issued a reply which contain false allegations. Inasmuch as there was a cloud on the title of the respondents/plaintiffs, they had filed the present suit for declaration of the title in respect of the suit property.

(v) In view of the fact that the appellants/defendants had taken over the possession of the suit property from respondents/plaintiffs' mother, they

ought to deliver possession of the suit property to the respondents/plaintiffs on the demise of Pavakkal. Hence, the relief for delivery of possession by the Defendants in respect of the suit property is sought for.

15. The Written Statement Pleas (filed by the 1st Appellant/1st Defendant):

(i) In the Written Statement filed by the 1st Appellant/1st Defendant (later deceased) and adopted by Defendants 2 and 3, it was mentioned that it

was true to state that the suit property belonged to the respondents/plaintiffs' grand-mother Ponnammal and further, it was equally true that the

said Ponnammal wrote a Will dated 11.7.1944 and in law, after the life-time of Ponnammal's husband, the Will properties belonged to

Ponnammal's three daughters absolutely with full rights. Furthermore, as mentioned in the Will, the property could not be enjoyed from generation

to generation and that the suit properties belonged to respondents/plaintiffs' mother Pavakkal absolutely and that the appellants/defendants' father

Thavasiappa Nadar in the suit land be-came a lease hold tenant and was in possession and enjoyment of the same by means of possession. Even

during the life-time of Ponnammal, the appellants/defendants' father was a lease hold right holder/lessee/tenant and after Ponnammal, the

appellants/defendants' father was a tenant/lease holder and enjoyed in that capacity.

(ii) After the Periyathambi Gounder, the appellants/defendants' father viz., Thavasiappa Nadar remained as a lease hold right holder/lessee/tenant

and paid the lease hold rent and was in enjoyment of the premises. After the demise of Periyathambi, in the suit property Pavakkal had absolute

right and the appellants/defendants had paid proper sale considerations and obtained a Sale Deed from Pavakkal and was in enjoyment of the

property by means of being in possession. As such, the respondents/plaintiffs had no manner of right in the suit property.

(iii) The suit filed by the respondents/plaintiffs was not maintainable because of the fact that the Pavakkal was not added as one of the Defendants.

The Sale Deed dated 10.5.1984 executed by Pavakkal to the appellants/defendants could not be brushed aside to the respondents/plaintiffs and

when Pavakkal was alive and her life-time, the respondents/plaintiffs could not seek the relief of declaration or the relief of recovery of possession.

(iv) Moreover, in the Sale Deed executed by Pavakkal to and in favour of the

appellants/defendants, the respondents/plaintiffs" brother Ramasamy had affixed his signature. Without impleading the respondents/plaintiffs" elder brother Ramasamy, the suit was filed. The respondents/plaintiffs had no cause of action for filing of the suit.

16. P.W. 1 (1st Respondent/1st Plaintiff) had deposed that the suit property originally belonged to his mother Ponnammal who executed Exhibit

A-1-Will dated 11.7.1944 in respect of the suit properties and as per the Will, after the life-time of Ponnammal her husband Periyathambi

Gounder was to enjoy the suit property till his life-time and thereafter, her three daughters, Kaliasammal, Pavakkal and Marakkal had to enjoy the

"A" schedule property till their life-time and "B" schedule property was to be enjoyed by her brother A.K. Ramasamy till his life-time and further,

three daughters had enjoyed "A" schedule properties till their life-time and thereafter, their heirs were to enjoy the same. The further evidence of

P.W. 1 was to the effect that Ponnammal, Periyathambi and Marakkal had died and three daughters had orally partitioned "A" schedule properties

and were in enjoyment of the same and Pavakkal, her mother had only enjoyment right in the suit property and the suit properties were sold by her

mother to the Defendants and her mother had no right to sell the same.

17. P.W. 1 proceeds in her evidence to state that during the year 1984 his mother had sold the property to the Defendants and he came to know

about the sale two or three months later and that the suit property belonged to them.

18. Added further, P.W. 1 (in her cross examination) had deposed that the lands mentioned in "A" schedule were sold by his mother's sister

Marakkal and Kaliasammal and that the lands at Seiyampalayam Karai village were sold and Kaliasammal has sold four acres of land at Kundrathur

Village and that Marakkal and Kaliasammal had sold the lands four years prior to his mother selling the suit properties and that he had not initiated

any action in respect of those lands and that Kaliasammal had two sons and Marakkal had no children and that Kaliasammal had no right to sell the

property to and in favour of her sons and that his mother and sisters had effected partition themselves for which no document was written.

19. Apart from the above, P.W. 1 had also stated that the land at Puliampatti village, the land at Kundrathur and the land at Seiyampalayam

Village the lands were equally divided between his mother, Kaliasammal and Marakkal and they were in enjoyment of the same and in respect of the partition after their life-time all the properties were to devolve upon the male heirs, as stated in the Will.

20. D.W. 1 (in his evidence) had deposed that Appellants 2 and 3/Defendants 2 and 3 are his brothers and that in the suit land originally belonged to Pavakkal, his mother Ponnammal and during her life-time of Ponnammal, they had enjoyed the suit property on lease for nearly 50 years and that by virtue of three Sale Deeds dated 10.5.1984, they purchased the same from Pavakkal, who had right in the suit property as per Will and the respondents/plaintiffs had no right in the suit property and as per Will, Pavakkal, Marakkal and Kaliasammal had other lands and the said lands were sold by the aforesaid three persons to different persons.

21. D.W. 1 (in his cross examination) had deposed that in Exhibit A-1-Will dated 11.7.1944, it was mentioned that the properties described therein were to be enjoyed after Ponnammal by her husband till his life-time and thereafter, it was to be enjoyed by her three daughters and that "B" schedule property was to be enjoyed by grand-son Ramasamy and when he met the other two sisters Marakkal and Kaliasammal and when he asked them, they informed that they had no right in the suit property and therefore, he had purchased the same during the year 1984 and the recitals in Exhibit A-7-Sale Deed dated 10.5.1984 were correct.

22. In Exhibit A-1-Will dated 11.7.1944 executed by Periyathambi Gounder's wife Ponnammal viz., the maternal grand-mother of the respondents/plaintiffs, in respect of her properties including the suit properties, the recitals of the Will point out that the properties were to be enjoyed during her life-time and after her life-time the properties are to be enjoyed by her husband Periyathambi Gounder and he was to enjoy the income till his life-time and after his demise, the properties are to get the "A" schedule properties and to enjoy the same equally by her daughters 1.

Kaliasammal W/o. Nanjappa Gounder; 2. Pavakkal W/o. Kulanthai Gounder; 3. Marakkal W/o. Kalyani Gounder. Also, in the Will, it is mentioned that her son-in-law's son viz., grand child Ramasamy Gounder has to get the "B" schedule properties. The aforesaid four persons are to enjoy the properties till their life-time and after their life-time, their male heirs are to enjoy

the property generation after generation.

23. Exhibit A-2-respondents/plaintiffs" Lawyer's Notice dated 16.11.1984 addressed to the 2nd Appellant/2nd Defendant, it is, inter alia,

mentioned that Pavakkal viz., the mother of the respondents/plaintiffs has no right to sell the schedule property mentioned therein or to encumber

the same and that she has no right or claim and without the knowledge of the respondents/plaintiffs, their mother Pavakkal has sold the property

and the said sale will not bind them. Exhibit A-3-respondents/plaintiffs" Lawyer's Notice dated 16.11.1984 has been issued to the 1st

Appellant/1st Defendant (deceased).

24. In Exhibit A-4, the respondents/plaintiffs Lawyer's Notice dated 16.11.1984 addressed to the 3rd Appellant/3rd Defendant, it is mentioned

that the respondents/plaintiffs" mother Pavakkal, as per her mother Ponnammal's Will dated 11.7.1944, is to enjoy the schedule property

mentioned therein and as per the recitals of the said Will, the said property can be enjoyed by the respondents/plaintiffs" mother till her life-time

and thereafter, her male heirs are to enjoy the property. Further, it is also mentioned that the respondents/plaintiffs" mother has no right or to

encumber the property in any manner. But, the respondents/plaintiffs" mother Pavakkal has sold the property during her last year without the

knowledge of the respondents/plaintiffs and that the said sale is not valid in law.

25. In Exhibit A-5, the respondents/plaintiffs Lawyer's Notice dated 12.12.1991 addressed to the 2nd Appellant/2nd Defendant, it is mentioned

that the respondents/plaintiffs" mother without their knowledge has sold the property on 10.5.1984. Already on 16.11.1984, Lawyer's notice has

been issued for which no reply in lawyer's notice has been issued or no endeavour has been made to cancel the said Sale Deed and as such, the

sale is not a legally valid one.

26. Exhibit A-6 is the Reply Lawyer's Notice of the Appellants/Defendants dated 19.12.1991 addressed to the respondents/plaintiffs Lawyer, it is

stated that the appellants/defendants" father Thavasiappa Nadar, prior to Ponnammal executing the Sale Deed, was a lessee of the lands

mentioned in the notice by doing the cultivation and that from Pavakkal, they have purchased the property and was in enjoyment of the properties

27. By means of Exhibit A-7-Sale Deed dated 10.5.1984, Pavakkal has sold the

property to Kaliappan. As per Exhibit A-8, Pavakkal has sold the property to Karuppannan. Likewise, as per Exhibit A-9-Sale Deed dated 10.5.1984 Pavakkal has sold the property to the 3rd Appellant/3rd Defendant.

28. Exhibit A-10 is the SSLC School Book of the 1st Respondent/1st Plaintiff wherein his date of birth is mentioned as 15.7.1935. Exhibit A-11 is the 2nd Respondent/2nd Plaintiffs SSLC Book in which his date of birth is mentioned as 18.2.1939. Exhibit A-12 is the SSLC Book of the 3rd Respondent/3rd Plaintiff in which his date of birth is mentioned as 1.7.1942.

29. The Learned counsel for the appellants/defendants cites the decision of the Hon"ble Supreme Court in The Brahma Vart Sanatan Dharm Mahamandal Vs. Kanhyalal Bagla and others, wherein it is held hereunder:

The will makes it abundantly clear that by unambiguous term the absolute ownership of the properties was bequeathed to W by her husband.

Repeatedly in the will, it has been made clear that the intention of the executant of the will was to bequeath absolute right of ownership of his properties to his wife.

Admittedly, the deceased widow, W, was the third wife of the testator and the testator was not having any other heir except his wife, who was

entitled to maintenance from her husband and from his property. So, after the death of her husband, she would have life interest in the said

property even without the Will being executed in her favour. In view of Section 14(1) of the Hindu Succession Act, she would be absolute owner

of the said property. Having regard to the well-settled proposition of law in regard to the cases like the one present herein, the exception provided

u/s 14(2) of the Act would have no applicability.

30. She also relies on the decision of the Hon"ble Supreme Court in Ramkishore Lal Vs. Kamal Narain, wherein, in paragraph 12, it is observed as follows:

12. The golden Rule of construction, it has been said, is to ascertain the intention of the parties to the instrument after considering all the words, in

their ordinary, natural sense. To ascertain this intention the Court has to consider the relevant portion of the document as a whole and also to take

into account the circumstances under which the particular words were used. Very

often the status and the training of the parties using the words have to be taken into consideration. It has to be borne in mind that very many words are used in more than one sense and that sense differs in different circumstances. Again, even where a particular word has, to a trained conveyancer, a clear and definite significance and one can be sure about the sense in which such conveyancer would use it, it may not be reasonable and proper to give the same strict interpretation of the word when used by one who is not so equally skilled in the art of conveyancing. Sometimes" it happens in the case of documents as regards disposition of properties, whether they are testamentary or non testamentary instruments, that there is a clear conflict between what is said in one part of the document and in another, A familiar in-stance of this is where in an earlier part of the document some property is given absolutely to one person but later on, other directions about the same property are given which conflict with and take away from the absolute title given in the earlier portion. What is to be done where this happens ? It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be disregarded as unsuccessful attempts to restrict the title already given. (See Sahebzada Mohammad Kamgar Shah Vs. Jagdish Chandra Deo Dhabal Deo and Others, It is clear, however, that an attempt should always be made to read the two parts of the document harmoniously, if possible. It is only when this is not possible, e.g., where an absolute title is given in clear and unambiguous terms and the later provisions trench on the same, that the later provisions have to be held to be void.

31. The Learned counsel for the appellants/defendants invites the attention of this Court to the decision in G. Narayanan and Others Vs. R.N.

Rajagopalan and Others, wherein, at paragraph 8, it is laid down as follows:

8. Insofar as the bequest regarding the first schedule properties in favour of the first appellant is concerned, the testator has provided that the first appellant and his heirs should from generation to generation enjoy the properties without in any manner encumbering them and perform the charity, of feeding the Brahmins on "Thuvadasi" days with the income therefrom. The interest thus conferred on the first appellant with reference to the first schedule properties is only a life interest. Cl. 3 of the Will creates not only a life

interest in favour of the first appellant but also a series of successive life interests in favour of the heirs of the first appellant. No such valid successive life interest can be created in favour of persons in existence and unborn persons. But when there is a gift to a class of persons some of whom are in existence and others are not, such a gift will be valid and take effect with regard to persons in existence at the time of the testator's death and invalid regarding others, but it does not fail wholly and totally.

The first appellant was undoubtedly alive when the testator died in 1928 and, therefore, the life interest in respect of the first schedule properties conferred in his favour under the Will Exhibit A-1 would undoubtedly take effect. But as regards respondents 1 and 2 they were not in existence on the date when the will under Exhibit A-1 took effect, for it is seen from the plaint that they were born in 1945 and 1947 respectively, while the will had come into effect in 1928, on the death of the testator. The creation of successive life estates and (that) too in favour of persons not in existence is not permissible in law and the life estate so created in favour of persons in existence and those not in existence would take effect with reference to those in existence at the time of the death of the testator and invalid as to the rest. This is clearly laid down by the Supreme Court in *Bajrang Bahadur Singh v. Bakhtraj Kuer*, AIR 1953 SC 700: (1953) 1 MLJ (SC) 108.

In view of this, it follows that the life estate conferred in favour of the first appellant under the Will Exhibit A-1 with reference to the first schedule properties thereunder alone is valid and not the subsequent life estates in favour of his heirs, who were not in existence on the date when the testator died. It also follows that the successive life estates in favour of the heirs of the first appellant or the restrictions regarding the alienations imposed under Clause 3 of the Will would not be binding upon respondents 1 and 2. The first appellant under Exhibit A-1 secured only a life interest in the first schedule properties (the suit properties) and the remainder vested in respondents 1 and 2 free from the restrictions imposed on the nature of the estate and the power of dealing with the property. That would mean that any dealing by the first appellant regarding the suit properties would not enure beyond his lifetime. Respondents 1 and 2 are,

therefore, entitled to succeed to the properties after the lifetime of the first appellant and the transactions of partition and other alienations entered into by, the first appellant would not, therefore, be binding upon respondents 1 and 2.

32. That apart, the Learned counsel for the Appellants/Defendants cites the following decisions:

(a) In Smt. Beni Bai Vs. Raghubir Prasad, , the Hon"ble Supreme Court, in paragraph 8, has held as follows:

8. In the present case, the widow was conferred the limited right in lieu of maintenance in recognition of her pre-existing right. The limited interest conferred upon her by virtue of the Will being in lieu of maintenance and in recognition of her pre-existing right, the said right transformed into an absolute right by virtue of Section 14(1) of the Act. The said right was not conferred on her for the first time. Thus sub-section (2) of Section 14 of the Act has no application to the present case. Under such circumstances, the widow became the absolute owner of House No. 27 and was fully competent to execute the Gift Deed in favour of her daughter. The Gift Deed executed by the widow was thus valid.

(b) In Smt. Palchuri Hanumayamma Vs. Tadikamalla Kotlingam (D) by L.Rs. and Others, it is mentioned as follows:

12. Mr. Nagaraja has also relied on Section 19 of the Transfer of Property Act and Section 119 of the Indian Succession Act. According to him,

u/s 19 of the T.P. Act, the interest in the suit property created in favour of the appellants mother is a vested interest and merely because the time of

handing over of possession is postponed till the death of the widow or the right to manage and enjoy the fruits of the property are conferred on the

widow till her death, the right which is a vested interest in the property in favour of the mother of the appellant, does not cease to be a vested

interest. This would have been so if, as a matter of fact, under the Will, a right had vested in the appellants mother. While discussing the other

contentions advanced on behalf of the appellant, we have come to the conclusion that under the Will no right had vested in any of the daughters

and the property in question was given to Ramamma in lieu of her maintenance during her life-time and it is only after the death of Ramamma that

the surviving right, if any, would have vested in the daughters. But before the

death of Ramamma in view of the intervening factor, namely, enactment of Section 14 of the 1956 Act, deprived the daughters of their legal right to claim a share in the property because by virtue of the said enactment, Rammmas right got enlarged into an absolute estate and she became an absolute owner of the property, therefore, reliance on Section 19 of the T.P. Act is misplaced.

13. Similarly, Section 119 of the Succession Act provides where in a bequest a 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 Will, become vested in the legatee on the testators death. By this, Mr. Nagaraja wanted us to come to the conclusion that on the death of the testator the right in the property bequeathed vested in the three daughters. We are unable to accept this argument for the very same reason based on which we have turned down his contention based on Section 19 of the T.P. Act.

(c) In V. Tulasamma and Others Vs. Sesha Reddy (Dead) by Lrs., , it is observed as follows:

Sub-section (1) of Section 14 is large in its amplitude and covers every kind of acquisition of property by a female Hindu including acquisition in lieu of maintenance and where such property was possessed by her at the date of commencement of the Act or was subsequently acquired and possessed. She would become the full owner of the property. Sub-Section (2) is more in the nature of a proviso or exception to sub-section (1). It excepts certain kinds of acquisition of property by a Hindu female from the operation of sub-section (1) and being in the nature of an exception to a provision which is calculated to achieve a social purpose by bringing about change in the social and economic position of woman in Hindu society, it must be construed strictly so as to impinge as little as possible on the broad sweep of the ameliorative provision contained in sub-section (1). It cannot be interpreted in a manner which would rob sub-section (1) of its efficacy and deprive a Hindu female of the protection sought to be given to her by sub-section (1).

Sub-section (2) must, therefore, be read in the context of sub-section (1) so as to leave as large a scope for operation as possible to sub-section

(1) and so read, it must be confined to cases where property is acquired by a

female Hindu for the first time as a grant without any pre-existing right, under a gift, will, instrument, decree, order or award, the terms of which prescribe a restricted estate in the property. Where, however, property is acquired by a Hindu female at a partition or in lieu of right of maintenance, it is in virtue of a pre-existing right and such an acquisition would not be within the scope and ambit of sub-section (2), even if the instrument, decree, order or award allotting the property prescribes a restricted estate in the property.

33. The Learned counsel for the Appellants submits that Pavakkal viz., the mother of the respondents/plaintiffs sold the properties, as per Exhibits

A-7 to A-9-Sale Deeds, to the Appellants/Defendants and ever since the date of purchase, they are in possession and enjoyment of the same.

Further, the Respondents/Plaintiffs have filed the suit 8 years after the sales that were effected during the year 1984 and that even on the date of

filing of the suit, the respondents/plaintiffs' mother Pavakkal was alive and she was not added as a party to the suit and also that one more sister

and other sisters were not parties to the suit.

34. It is the contention of the Learned counsel for the appellants/defendants that as per Exhibit A-1-Will dated 11.7.1944 no life estate in first

clause in respect of "A" schedule properties was given and that there cannot be any life estate by generation after generation.

35. The Learned counsel for the appellants/defendants contends that Ponnammal died in the year 1945 and Periyathambi (her husband) died after

3 years in the year 1948 and as per Hindu Succession Act, 1956 Ponnammal's right enlarges into absolute estate as per Section 14(1) of the

Hindu Succession Act, viz., the right of maintenance.

36. Also, the Learned counsel for the appellants/defendants projects a plea that in the Will, Ponnammal's daughter Pavakkal as a pre-existing right

and hence, Section 14(1) of the Hindu Succession Act will apply.

37. The plea of the appellants/defendants is that for non-joinder of Pavakkal and brother Ramasamy in the suit, the suit filed by the

respondents/plaintiffs is to be dismissed.

38. It is also the contention of the appellants/defendants that the sale by Pavakkal, as per Will and Partition, will bind the respondents/plaintiffs.

39. The Learned counsel for the appellants/defendants referred to Section 10 of the Transfer of Property Act, 1882 which speaks of "Right of transfer" which is incidental to, and inseparable from, the beneficial ownership of property. As a matter of fact, Section 10 of the Transfer of Property Act incorporates a Rule of Justice, Equity and Good Conscience and governs transfers to which the Transfer of Property Act does not apply. Section 10 enjoins that "a condition which absolutely restraints the power of alienation is void."

40. Also, the Learned counsel for the appellants/defendants drawn the attention of this Court Section 13 of the Transfer of Property Act which speaks of "Transfer for benefit of Unborn person". Further, the Learned counsel for the appellants/defendants has also invited the attention of this Court to Section 14 of the Transfer of Property Act which speaks of "Rule against perpetuity"

41. It is to be noted that Section 13 of the Transfer of Property Act dealing with "Transfer for Benefit of Unborn Person" is almost similar to that of Section 113 of the Indian Succession Act, 1925. It cannot be lost sight of that Section 13 of the Transfer of Property Act controls Section 113 of the Indian Succession Act and both of them are to be read together, as opined by this Court.

42. As regards the Rule against perpetuity u/s 14 of the Transfer of Property Act, 1882, it is based on the policy that the liberty of alienation is not to be exercised to its own destruction and that all contrivances shall be void which tend to create a perpetuity or place property forever beyond the reach of the exercise of power of alienation.

43. It must be borne in mind that the rule against perpetuity does not require that the vesting shall take place at the birth of the ultimate beneficiary. It requires that the vesting cannot be delayed in any case beyond his minority.

44. Section 10 of the Transfer of Property Act points out to a restriction on the transfer of property. However, Section 11 of the Act refers to a restriction on the enjoyment of property. It is to be kept in mind that the two Sections is on the same principle that a condition repugnant to the interest created is void. It cannot be gainsaid that Section 11 of the Act speaks of absolute interest only. A restraint on transfer is repugnant to any interest in property, whether absolute or limited, for the right of transfer is an

incident of ownership. A restriction on enjoyment is repugnant to an absolute interest, but it may not be repugnant to a limited interest such as a lease-hold or a life-estate. Also, the difference between Section 13 of Transfer of Property Act and Section 113 of the Indian Succession Act is that the earlier Section pertains to transfer inter vivos, while the latter relates to bequest which comes into effect only on the death of the testator. The essential feature mentioned in Section 113 of the Indian Succession Act, 1925 is that an individual disposing of property to another shall not fetter the free disposition of that property in the hands of numerous generations. The rule is far away from the rule against perpetuity, although their effects sometimes overlap each other.

45. At this stage, this Court aptly points out the decision of the Hon^{ble} Supreme Court in Raj Bajrang Bahadur Singh Vs. Thakurain Bakhtraj

Kuer, wherein in paragraph 13 and 14, it is held as follows:

13..... In cases where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground "of repugnancy; but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the Will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word ""malik"".

14.... It is quite true that no interest could be created in favour of an unborn person but when the gift is made to a class or series of persons, some of whom are in existence and some are not, it does not fail in its entirety; it is valid with regard to the persons who are in existence at the time of the testator's death and is invalid as to the rest.

46. In P.V.S. Vencatachellum Vs. P.V.S. Kabalamurthy Pillai, , it is held thus:

Under Section 10 of the Transfer of Property Act, a condition absolutely restraining a transferee from disposing of the property is void, and the

Section is wholly silent as to the validity of qualified restraints on alienation. A condition imposing a partial restraint on alienation is not void.

Whether the restraint in a particular case is absolute or partial has to be gathered from the intention of the transferor from the contents of the

document. Section 10 relates only to transfers made by act of parties. It does not apply to sales under the Indian Companies Act, nor to transfers

by operation of law taking effect "in invitum" at a sale in execution of a decree. A family arrangement and a compromise of disputed claims are not

transfers. But the principle would be applicable where the condition involves an absolute restraint on alienation. Similarly, the Section does not

apply to partitions; but restraints clearly offending the rule must be held to be void.

47. Also, this Court worth recalls the decision of this Court in T. Subramania Nadar Vs. T. Varadharajan and T. Thirumoorthy, wherein in

paragraphs 15 and 17, it is laid down as follows:

15. What is given to unborn person need not necessarily vest in him at his birth. Vesting must, however, takes place other than the limitations

prescribed by Section 14. Section 14 of the Transfer of Property Act controls Section 13 of the Transfer of Property Act and as such both these

Sections Should be read together.

17. The effect of these enactments is that a gift can be made to an unborn person subject to the following conditions (i) that the gift shall be of the

whole of the remaining interest of the testator in the thing bequeathed and not of a limited interest; and (ii) that the vesting is not postponed beyond

the life in being and 18 years, being the rule against perpetuities as laid down in Section 114.

48. This Court in the interest of justice, cites the following decisions:

(a) In the decision of the Hon"ble Supreme Court in F.M. Devaru Ganapati Bhat v. Prabhakar Ganapathi Bhat, (2004) MLJ 180 (SC) wherein in

paragraph 12, it is held hereunder:

12 There is no ban on the transfer of interest in favour of an unborn person. Section 20 permits an interest being created for the benefit of an

unborn person who acquires interest upon his birth. No provision has been brought to our notice which stipulates that full interest in a property

cannot be created in favour of unborn person. Section 13 has no applicability to the facts and circumstances of the present case. In the present

case, the donor gifted the property in favour of the appellant, then living, and also stipulated that if other male children are later born to her brother

they shall be joint holders with the appellant. Such a stipulation is not hit by Section 13 of the Act. Creation of such a right is permissible u/s 20 of

the Act. The respondent, thus, became entitled to the property on his birth. In

this view, there is also no substance in the second contention.

(b) In *Ramu Gounder, Ramaswamy Gounder and Krishna Gounder Vs. K. Radhakrishnan*, it is observed as follows:

It is well settled that in case of such a conflict the earlier disposition of absolute title should prevail and the later directions of disposition should be

disregarded as unsuccessful attempts to restrict the title.

Thus the subsequent repugnant recital found in Exhibit A-2 could have been made to enable the testator to enjoy the property till her life-time and

that is why a prohibiting clause was subsequently inserted upon that the execute should not encumber the property. By proper construction of the

same such a meaning alone can be given. Otherwise, this clause should be considered as repugnant to earlier one and had to be eschewed.

(c) In *C. Manoharan v. C.V. Subramaniam and Others*, (2006) 4 MLJ 898, it is held as follows:

When an appeal is disposed of without notice of death of one of the parties, the legal representatives of the deceased party are bound by the

decree passed and they cannot contend that the decree is a nullity.

Plaintiffs who were not born at the time of the execution of the settlement deed in their favour, are bound by the acts of the life estate holder, which

resulted in a Court auction sale of the property covered under the settlement deed.

49. In law, a perpetuity is the settlement of an estate or an interest in tail, with such remainders expectant upon it as are in no sort in the power of

the tenant in tail in possession to dock by any recovery or an assignment as per *Lord Nottingham in Duke of Norfolk's Case*, (1881) 3 Ch.Ca. 1.

The original sense of "Perpetuity" is an inalienable, and indestructible interest according to *Mukhopadhyaya's Law Of Perpetuities*, at page 25.

The modern sense of "perpetuity" is an interest which will not vest till a remote period. Therefore, a perpetuity is a limitation, with a view to take

the subject out of commerce, for a longer period than a life or lives in being and 21 years beyond, and in the case of posthumous child, a few

months more, allowing for the term of gestation as per *Lewis On Perpetuity*, Ch. 12. As far as our country is concerned, instead of 21 years, the

minority of some individuals who are not in existence. In few cases, it may go up to 21 years. In modern times, the term "perpetuity" as the

meaning of "inalienable interest" against the old fashioned sense of an "unbarrable entail" (vide Preface to Jarman On Wills, 6th Edn. at page iv).

50. The ingredients of Section 113 of the Indian Succession Act deals with the subject of gifts to unborn persons and also it prescribes the limit of

the quantum of interest that can be provided to an unborn person i.e. one cannot give a life interest or any other limited interest to an unborn

person. Further, if a bequest is to be made in favour of an unborn person, then, the testator should give the whole of the beneficial interest to that

unborn child in order that it should be valid and that if the entire remaining interest is not given such a bequest is wholly void.

51. Moreover, the testator can provide a fractional interest in any property an unborn individual. The term "the whole of the remaining interest of

the testator" does not refer to the whole property of the testator. The expression "remaining interest" in law, means the entire interest of the testator

less the interest carried out by the earlier bequest. The term "remaining interest" means an interest which is as completed as an interest which the

testator had in the property bequeathed, such interest not being fettered or limited except by and to the extent of the prior estates. However,

whether a vested interest is provided in the property bequeathed in favour of an unborn person the vested interest would not be avoided merely by

reason of imposition of limitations which restrict enjoyment.

52. In the instant case on hand, the property mentioned in the schedule of the Plaint in O.S. No. 153 of 1992 filed by the respondents/plaintiffs is in

respect of new S.F. No. 222 (Old S.F. Nos. 2-B/2, 4-B and 5-A) Nanja land extent 2.73 acres (1.26.5 hectares) with Koppu, Pali, Pasanavar

and other easement rights attached to the land, situated at Nanjai Puliampatti Village, Gobichettipalayam Taluk within the sub-registration district of

Thookanaickenpalayam and the registration district of Gobichettipalayam.

53. In Exhibit A-7-Sale Deed dated 10.5.1984 Pavakkal has sold an extent of 0.37 out of hectares 1.26.5 in New Government Survey No. 222

of Nanjai Puliampatti Village. In Exhibit A-8-Sale Deed dated 10.5.1984 executed by Pavakkal to and in favour of the 2nd Appellant/2nd

Defendant an extent of 0.37.0 has been sold out of hectare 1.26.5 in New Government Survey No. 222 at Nanjai Puliampatti Village of

Gobichettipalayam Taluk. In Exhibit A-9-Sale Deed dated 10.5.1984 Pavakkal has

sold to the 3rd Appellant/3rd Defendant an extent of 0.37.0

out of hectare 1.26.5 in New Government Survey No. 222 of Nanjai Puliampatti.

54. The trial Court, in its Judgment in the main suit, at paragraph 11, has, among other things, opined that though the Appellants/Defendants have

purchased the suit property by means of Sale Deed dated 10.5.1984 and have been in enjoyment of the same, yet, it is not a valid sale as per

recitals of Exhibit A-1-Will. Further, it also held that since on both sides it has been admitted that the Appellants/Defendants are in enjoyment of

the suit properties, till the death of Pavakkal, as per Sale Deed, they are entitled to be in possession of the same. Also that the trial Court has come

to the conclusion that the respondents/plaintiffs are entitled to claim recovery of possession in respect of the suit properties from the

appellants/defendants after the death of Pavakkal.

55. The trial Court, in the Judgment, has referred to the decision of this Court in Maya Jothi Vs. Ranganayaki Ammal, wherein it is held as follows:

In this case the settlement confers only a life interest in favour of the defendant and not an absolute interest, and that after her lifetime the property

will have to be taken by her heirs who are alive on the date of her death.

56. Also, the trial Court has referred to the decision of the Hon"ble Supreme Court in S. Rajagopal Chettiar Vs. Hamasaveni Ammal and others,

wherein it is held as follows:

3. After going through the contents of the will we agree with the view taken by the High Court. We do not agree with the contention of the learned

counsel for the appellant raised before us that Padmanabha Chettiar, the testator, of the will wanted to give absolute right in the property to his wife

Dhanalakshmi Ammal and thereafter absolute right in favour of his daughter Rajalakshmi Ammal. The above intention is negated by a clear

mention in the will that after Rajalakshmi Ammal the property shall ultimately go to her male children. In case the intention of the testator was to

give the properties absolutely in favour of Rajalakshmi and not merely life interest then there was no question of mentioning that after her it should

go to her male children.

57. The First Appellate Court, in A.S. No. 124 of 1995 filed by the appellants/defendants, on 8.11.1996 has held that there are no defects in the

Judgment and Decree of the trial Court and accordingly, confirmed the same thereby dismissing the Appeal with costs.

58. A cursory perusal of the recitals of Exhibit A-1-Will dated 11.7.1944 executed by Ponnammal (Testatrix) shows that it has following three

Clauses:

(i) The properties mentioned in the Will were to be enjoyed by her husband Periyathambi Gounder;

(ii) After his demise, their 3 daughters viz., 1. Kaliasammal; 2. Pavakkal; 3. Marakkal are to enjoy the "A" schedule properties equally;

(iii) Thereafter, her son-in-law Kulandaisamy Gounder's son viz., the grand-son Ramasamy Gounder is to get the "B" schedule properties.

Moreover, after their demise, their male heirs are to enjoy the said properties generation after generation without the power of encumbrance. In

respect of "B" schedule properties, her grand-son Ramasamy Gounder and his male successive heirs have no right to mortgage/create Borkyam

and even if they have created like that, they are not valid.

59. It is not in doubt that as per Exhibit A-1-Will dated 11.7.1944, the respondents/plaintiffs' mother Pavakkal has right to enjoy the suit

properties till her life-time. Therefore, when she has executed Exhibits A-7 to A-9-Sale Deeds dated 10.5.1984 in respect of the properties

mentioned therein to and in favour of the appellants/defendants, then, the said Sale Deeds are a valid one because of the fact that a life interest/life

estate holder is entitled to sell her interest to and in favour of third parties/strangers, in the considered opinion of this Court.

60. The appellants/defendants, in law, are entitled to be in possession, till the life interest holder viz., Pavakkal is alive, as opined by this Court.

During the life-time of Pavakkal, the respondents/plaintiffs cannot seek the relief of declaration of their title in the suit properties. As such, the

contra view taken by the trial Court as well as the First Appellate Court, that the respondents/plaintiffs are entitled to obtain the relief of declaration

in respect of suit properties, are not in accordance with the well laid down principles of law.

61. However, this Court holds that the appellants/defendants are entitled to hold and enjoy the suit properties as per the Sale Deeds till the life-

time of Pavakkal. Further, it is held by this Court that till the life-time of

Pavakkal, the respondents/plaintiffs cannot claim the recovery of possession in respect of suit properties from the appellants/defendants because of the fact that Pavakkal during her life-time, having conveyed the suit properties, the Respondents/Plaintiffs cannot seek recovery of possession because they as vested remainders have to wait till the exclusion of life interest holder viz., Pavakkal or her demise.

62. The recital of Exhibit A-1-Will dated 11.7.1944 of Ponnammal, the maternal grand-mother of respondents/plaintiffs clearly spell out her

intention to give the properties for her grand-sons and as such, it does not create any right endlessly, in the considered opinion of this Court.

Moreover, the clause in Exhibit A-1-Will, "... Thereafter, to be enjoyed by her grand-sons is a valid one for one generation and therefore, it does

not offend Section 13 of the Transfer of Property Act which deals with the transfer for the benefit of an unborn person." Also, that Exhibit A-1-

Will dated 11.7.1944 is not a void one and also it does not offend Section 113 of the Indian Succession Act. Continuing further, conferring rights

to unborn person is valid up to the first generation because of the fact that the intention of Ponnammal (Testatrix) is to provide for the unborn male

children.

63. The appellants/defendants, after their purchase of the suit properties as per Exhibits A-7 to A-9-Sale Deeds from Pavakkal, have stepped into

her shoes. As a matter of fact, the contents and recitals of Exhibit A-1-Will dated 11.7.1944 executed by Ponnammal are explicit and they are

self-explanatory, as opined by this Court. In the Written Statement filed by the appellants/defendants, no plea has been taken that the

appellants/defendants are the bona fide purchasers of the concerned properties for value without notice and made improvements etc. In law, the

purchasers of properties, even if they are aware of defective title of vendor at the time of agreement of sale/purchase, are entitled to refuse to

purchase the properties and they cannot be compelled to purchase the same.

64. Section 51 of The Transfer of Property Act, 1882 refers to "Improvements made by bona fide holders under defective titles". The ambit of

Section 51 of The Transfer of Property Act, 1882 is limited, since it applies to a transferee who in good faith believes himself that he is absolutely

entitled to. Section 51 of The Transfer of Property Act, 1882 is a general one

whereas Section 63A of The Transfer of Property Act is a special Section which refers to "Improvements to mortgage property".

65. D.W. 1, in his cross examination (before the trial Court), has deposed that they have purchased the lands from the respondents/plaintiffs

mother Pavakkal. The appellants/defendants have not taken the plea before the trial Court, in their written statement, that they have purchased the

properties as bona fide purchasers for value without notice and made improvements thereon. Equally, no issue has been framed by the trial Court

in this regard. Therefore, this Court is not going into the entitlement or otherwise of Equity relief pleaded by the appellants/defendants as per

Section 33 of the Specific Relief Act, 1963. However, this Court, in the interest of justice, directs the appellants/defendants to agitate their rights if

any as per Section 51 of The Transfer of Property Act, 1882 (relating to improvements etc.) by means of separate legal proceedings before the

competent forum in the manner known to law if they so desired and advised.

66. it is to be noted that in regard to the relief of recovery of possession, the period of limitation is 12 years.

67. In law, in an instrument of Will any number of life interests can be created, but a vested remainder cannot be passed on beyond one

generation. Inasmuch as the intention of Ponnammal (Testatrix) in Exhibit A-1-Will dated 11.7.1944 is to provide for unborn male children, then,

conferring of such right to them are valid up to the first generation and in law, there is no fetter/bar on the transfer of interests in favour of an unborn

person. Therefore, Exhibit A-1-Will specifying a clause that after Pavakkal's life-time, properties are to be enjoyed by her grand-sons are not in

any way repugnant to the ingredients of Sections 113, 114 and 115 of the Indian Succession Act. In any event, the clause in Exhibit A-1-Will

"..... grand-sons heir in male line generation after generation are to enjoy the properties without power of alienation", offends rule against

perpetuity. Accordingly, the Substantial Questions of Law 1 to 4 are so answered. In the result, this Court holds that the appellants/defendants are

entitled to hold and enjoy the properties as per the Sale Deeds till the life-time of Pavakkal. Further, it is held by this Court that till the life-time of

respondents/plaintiffs" mother Pavakkal, they cannot claim the recovery of possession in respect of the suit properties from the

appellants/defendants because of the fact that Pavakkal during her life-time having conveyed the suit properties, the Respondents/Plaintiffs cannot seek recovery of possession in view of the fact that as vested remainders they are to wait till the exclusion of life interest holder viz., Pavakkal or her demise. The appellants/defendants are directed to agitate their rights, if any, as per Section 51 of The Transfer of Property Act, 1882 (relating to improvements etc.) by means of separate legal proceedings before the competent forum in the manner known to law, if they so desired and advised. The Second Appeal is disposed of, in above terms. The parties are directed to bear their own costs. To that extent, the Judgment and Decree of the trial Court in O.S. No. 155 of 1992 dated 25.11.1993 and that of the First Appellate Court in A.S.No. 124 of 1995 dated 8.11.1996 stand modified.