

(1947) 02 MAD CK 0014
In the Madras High Court

Kamisetti Subbarayadu

APPELLANT

Vs

Pathi Subbamma

RESPONDENT

Date of Decision : 18-02-1947

Acts Referred:

Citation : (1948) ILR (Mad) 182 : (1947) 60 LW 293 : (1947) 1 MLJ 350

Hon'ble Judges : Wadsworth, J

Bench : Division Bench

Judgement

Wadsworth, J.—One Thayaramma died on the 5th January, 1931 leaving a will dated the 30th December, 1930. Thayaramma had a sister

who was the plaintiff in the Court below and two children, the elder being the defendant who is the appellant here and the younger a daughter.

Both the children were minors when she died. By the will the paternal aunt of the testatrix one Pedda Venkatasubbamma was appointed executrix

along with two others and she was also nominated as the guardian of the minors. The appellant became a major in 1942. He was at that time a

ward under the Court and a petition was filed to declare him a major resulting in an order dated the 22nd February, 1943. On the 28th February,

1943 his guardian Pedda Venkatasubbamma handed over the properties to him. On the 24th March, 1943 the plaintiff, sister of the testatrix,

demanded the right under the will to purchase the half share of item 3 in "" D "" schedule which is a house belonging originally to the plaintiff and

Thayaramma. The will contemplates the exercise by the plaintiff of a right to purchase this half share for half the original price at which the property

was purchased. It is common ground that until March, 1943, after the estate had been handed over to the appellant no indication had been given

that the plaintiff wished to exercise this option. She says that she abstained from doing so out of deference to the wishes of her aunt Pedda

Venkalasubbamma who was also the defendant's guardian. The trial Judge was not inclined to believe this story in the absence of confirmation.

The substantial question in this appeal is whether the option which the plaintiff claimed to exercise was still subsisting in March, 1943.

2. Thyaramma's will is a somewhat lengthy document not drafted by an expert. The relevant passages may be extracted. After a gift to her

daughter of the properties in A and C schedules, the testatrix recites:

My son Subbarayudu shall enjoy with full powers of gift, sale, etc., the entire property belonging to me other than the moveable and Immovable

property given to my daughter Venkatasubbamma as mentioned in the above paragraphs (i.e.,) B schedule mentioned jewels, D schedule

mentioned lands, houses, etc., E schedule mentioned out standings and all other moveable and Immovable properties that may be found to belong

to me.

Then follow directions for the maintenance of minors, for the collection of debts and the construction of a house in a vacant site. Next comes the

following passage ;

If my elder sister Pathi Raguvayya Setti Garu's wife Subbamma is willing to purchase the right to a half share possessed by me in the Mahadi

Midde forming item 3 to D schedule out of the Immovable property belonging to me, my executors shall receive from the said Pathi Subbamma

half of the amount relating to the deed of sale in respect of the said house obtained by me and the said Pathi Subbamma, sell to her (Subbamma)

my right to a half share in the said house, execute a sale deed in her favour and deliver the same after getting it registered. If the said Pathi

Subbamma is not willing to purchase the said house, the said house shall be sold in public and my half share of the amount realised thereby shall be

kept in deposit in a Government bank or Government bonds shall be purchased with the same or the executors shall advance the amount for

interest at a reliable place and augment the same....

Next come certain directions regarding the sale of jewels. Then we have the following sentences :

Except this, the executor shall not have the right to alienate by way of sale etc.

the other Immovable properties belonging to me.

Then come directions relating to repairs of property, the marriages of the son and daughter and we have the following clauses:

After my son attains majority, the executors shall hand over to him the remaining moveable and Immovable properties belonging to me exclusive of

the Immovable and moveable properties given to my daughter as provided above, jewels, amount in cash and the accounts and deliver to him

possession of the same. My son Subbarayudu shall enjoy the same with all power of disposition by way of gift, sale, etc. Except my son none

others shall have any right whatsoever in it.

It is contended for the defendant-appellant that the will does not create any interest in the property in favour of the plaintiff, that the plaintiff cannot

enforce the direction by which she is not bound, there being no mutuality, that there is no gift to the plaintiff, that a mere right to purchase property

cannot properly form the subject of a gift, and that if there is an obligation on the part of the executors to sell the property to the plaintiff at a fixed

price, this obligation does not continue after the estate has been handed over to the residuary legatee. It has also been argued that if the provision in

favour of the plaintiff is to be regarded as an option it must be exercised within a reasonable time. A suggestion has been made that the plaintiff's

right would be barred after six years from the date on which the legacy becomes payable under Article 120 of the Limitation Act. On the other

hand the respondent has contended that the provision in favour of the plaintiff may be read either as a gift of an option to purchase the property

exercisable at any time, subject to the rule against perpetuities or as a trust imposed upon the executors which will not be defeated by the failure of

the executors to perform the trust, or alternatively as a gift of the property itself to the plaintiff subject to a condition that she shall pay a stipulated

sum. In any case it is contended that there is no question of limitation and that the plaintiff can exercise her option to purchase the property at any

time during her lifetime.

3. The first step to a proper decision of this case is to determine the precise effect of the rather vague language used in the will. We cannot accept

the contention of Mr. Muthukirshna Aiyar for the appellant that the first clause granting the properties in "D" schedule to the defendant must be

read as a complete disposition of those properties and that the subsequent clause about the sale of item 3 of "D" schedule must be regarded as a mere direction to the executors not affecting the gift. It seems to us clear that reading the will as a whole the intention was to give to the defendant either item 3 of "D" schedule or the sale proceeds thereon. We do not think that the will placed any obligation on the executors to convert item 3 of "D" schedule into cash. It seems to us clear that the will contemplates only two contingencies which would justify the sale. One is the contingency of Subbamma offering to pay half of the original purchase price, i.e., Rs. 4,125, for the acquisition of the half share in the house which forms item 3 of "D" schedule. The other contingency is the contingency of Subbamma being unwilling to purchase the other half share herself, but being willing to have the whole of the property including her own half share sold by the executors. It has been argued by Mr. K. Krishnaswami Aiyangar for the respondent that the words.

If the said Pedda Subbamma is not willing to purchase the said house, the said house shall be sold in public.

should be read as empowering the executors to sell the half share in the house in public for the benefit of the estate. That this is not the intention of the will is clear from the following words which provide that.

my half share of the amount realised thereby shall be kept in deposit.

These words seem to us to establish that the testatrix was contemplating the public sale not of a half share, but of the whole house and was making

provision for the safe custody and augmentation of the defendant's half share in the proceeds of such a sale. The will does not seem to contemplate

any sale in the event of Subbamma being unwilling to purchase the half share herself or unwilling to join in a sale of the whole house.

4. Now the next question arises whether the will contemplates any period during which the option by Subbamma should be exercised. Mr. K.

Krishnaswami Aiyangar has argued that there is no limit at all other than such limits as may be imposed by the general law and that Subbamma the

plaintiff can exercise the option to purchase the other half share of the house at any time during her lifetime, unless perhaps the property has passed

to the hands of third parties without notice of her rights. It must, however, be remembered that this provision for the option in favour of the plaintiff

forms part of a passage in the will which defines the executor's powers of sale. The passage is closed by the sentence :

Except this, the executors shall not have the right to alienate by way of sale etc., the other Immovable properties belonging to me.

This will requires the executors to hand over the whole estate as soon as the defendant attains majority and on receiving possession of the estate

the defendant is to enjoy it with all powers of disposition by way of gift, sale, etc., and except him no one else is to have any right whatsoever. We

do not think that it would be consistent with the clear and forcible language of these clauses of the will to postulate an intention on the part of the

testatrix that the defendant on attaining majority should take item 3 of schedule ""D"" burdened with an option in favour of the plaintiff exercisable at

any time during her lifetime to buy the property at a fixed price. We are therefore of opinion that under this will what the plaintiff got was an option

to purchase from the executors at a fixed price item 3 of schedule ""D"" at any time before the executors ceased to function on the transfer of the

estate to the defendant after his attainment of majority.

5. The law on the subject has been clearly summarised in the text books. Halsbury's Laws of England (second edition) Volume 34, paragraph 29,

under the Caption "" Interests which may be created by Will "" runs as follows:

One form of conditional gift is an option to purchase, or other gift conditional on some consideration being given. A mere option to purchase given

to a named donee may be personal to the donee and not transmissible ; on the other hand, a gift for named consideration is prima facie construed

as transmissible to the donee's representative and assigns....

The donee must as a rule strictly comply with any terms of the option as to the time of signifying his exercise of the option, time of payment or

otherwise. He is entitled on exercising the option to the surplus, after deducting the price, on any sale after the testator's death made on a

compulsory purchase or in an action to administer the testator's estate.

6. Then in paragraph 153 of the same volume in the part entitled "" Legal incidents of a gift by Will, "" we have the following passage:

Whereas the testator has prescribed a period within which a condition must be performed, this period must be strictly observed subject to the

jurisdiction, if any, of the Court to grant relief from forfeiture. If, however, the

testator has not prescribed such a period and the condition is one to be performed by the donee personally, not requiring the intervention or concurrence of any other person, the period for the performance of the condition is necessarily the life of the donee and no longer, and the condition is not complied with if the donee dies without having performed it.

Where persons other than the donee are to be benefited, the period allowed is, as a rule, a reasonable period.

7. We have been taken through most of the leading cases on which these passages are based and we are satisfied that this is a correct summary of the law.

8. The following is a similar passage from Theobald on Wills (9th edition) at page 189 :

Testators sometimes give options of purchasing a part of their property. Such an option may be personal to the beneficiary or it may be transmissible. If transmissible it must be so limited as not to transgress the rule against perpetuities.

The person to whom the option is given is entitled if he exercises the option to have the property free from incumbrances.

But he must comply strictly with the terms of the option and if the option is to be exercised and the purchase-money paid within a given time, the option will be lost if this is not done, though there may be difficulties in the title or any other circumstance has caused delay.

9. Applying the rules summarised above to the present facts, we are of the opinion that the plaintiff had under this will an option to purchase item 3

of schedule "" D "" for a price of Rs. 4,125 exercisable so long as the estate was under the administration of the executors, but that the will

contemplates the cessation of the option at the time when the estate was transferred to the defendant on his attaining majority. The plaintiff not

having exercised the option within the time contemplated in the will cannot now claim to exercise it against the defendant who under the terms of

that will has to get an absolute estate in the property unhampered by any interest created in favour of anybody else.

10. The result therefore is that the appeal must be allowed and the suit dismissed. The appellant is entitled to costs throughout.