
(1928) 03 MAD CK 0013
In the Madras High Court

Mrs. M.E.D'Cruz

APPELLANT

Vs

Nagiah Naidu and Others

RESPONDENT

Date of Decision : 02-03-1928

Acts Referred:

Transfer of Property Act, 1882 — Section 10

Citation : AIR 1929 Mad 64 : 114 Ind. Cas. 837 : (1929) 29 LW 91 : (1928) 55 MLJ 683

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—This case raises a somewhat knotty point of construction of a will and has been argued fully and with care by

Messrs. Pinto and Nambiar. The suit has been brought on a mortgage executed by one Nagiah Naidu, who is the 1st defendant. His minor sons

have been joined as defendants 2 to 4. What was the interest, if any, which Nagiah possessed in the property, which could have been validly

mortgaged to the plaintiff? This is the question I have to decide.

2. The property originally belonged to Narasiah, the father of Nagiah, and he executed the will in question in 1906. Paragraphs 3 and 4 deal with

the property in question. The testator says first, that the property shall be taken by his wife Venka-dammal and her minor son Nagiah. He then

proceeds to say that his wife shall be in management of the property till Nagiah attains majority; on the happening of this event, Nagiah shall

manage the property and pay suitable maintenance to his mother. Pausing here for a moment, find that the meaning is fairly clear. The Tamil

equivalent of the word "taken" in the original will is which connotes that the property shall be taken and enjoyed by the persons mentioned. The

testator has also used in his will certain Tamil words which mean "administer or manage," and I cannot, therefore, agree with the contention that

when the testator uses the word "taken", he does not intend to convey a different meaning. A careful perusal of the instrument will show that the

testator has used the word "" "" (taken) as a dispositive word, as distinct from expressions which convey merely that it is a right of management that

is intended. What do the clauses, then, that I have referred to, mean? In the first instance, the testator says that the property shall be taken by his

wife and by his son; but the moment the son attains majority, the interest of the wife is immediately cut down to a mere right to maintenance. The

two clauses must be read together and I am satisfied that their effect is not that the wife takes an absolute interest but that her right, after Nagiah

attains majority, is only to maintenance. (I may mention that Venkadammal is said to be alive, but has not been made a party to the suit). If there

were no further clauses, I think the case would present little difficulty.

3. I have now done with paragraph 3 and the testator in the next paragraph goes on to say that neither Nagiah nor Venkadamma shall leave any

power to encumber, sell or mortgage the property. Then follows the clause which reads thus:

The aforesaid properties shall be taken by the male issue of my son Nagiah and shall be used and enjoyed by them with power to sell, make gift,

etc.

4. Do these two clauses cut down what was apparently a heritable estate conferred on Nagiah into a bare life-estate? There are several

dispositions in the will in favour of Nagiah as well as others without such a limitation. I may particularly refer to paragraphs 8 and 9. It is noticeable

that the testator makes a distinct provision in favour of his grandsons and adds that they shall enjoy the property with full powers of alienation.

Would I be justified in ignoring these words, or while reading the will, scoring out this clause? It seems to me that the effect of this clause is to

confer upon Nagiah only a life-estate and the testator intends that after Nagiah's death the property shall be absolutely taken by his male children.

If the combined effect of the clauses in paragraph 3 and the last clause to which I have referred is, that Nagiah shall take only a life-estate, the

restraint imposed on alienation is not inconsistent with the bequest. What is

prohibited is alienation of the property and is not alienation of the life-estate. The clause in regard to alienation is thus consistent with the view that what is conferred on Nagiah is only a life-estate. It is undoubtedly true that if I once hold that, on a true construction, Nagiah takes an absolute interest, the covenant in restraint of alienation would be void; such a condition deprives the property of its legal incidents and would be repugnant to the main purpose of the transfer. This is enacted by Section 10 of the Transfer of Property Act and the principle underlying it has been applied in the case of (1879) L.R. 6 I.A. 182 (Privy Council) , 1 CWN 387 (Privy Council) Laa Ramjewan Lal v. Dal Koer ILR (1897) C. 834 and Muthukumara Chetty v. Anthony Udayar ILR (1914) M. 867

5. One reason suggested against my accepting the view that Nagiah takes only a life-estate is that there are no words to the effect that the grandsons shall take the property after his dSath; but, it seems to me that the general scheme of this will makes it essential that these words must be supplied. Section 77 of the Indian Succession Act runs thus:

Where any word material to the full expression of the meaning has been omitted, it may be supplied by the context.

6. The rule is thus stated in Jarman on Wills, 6th Ed., Vol. I, p. 581:

Where it is clear on the face of a will that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied in order to effectuate the intention, as collected from the context.

7. Of this we have a very simple example in an early case, where a devise to A. and the heirs of his body, and, if he should die, then over, was read "and if he should die without issue.

8. The leading case on the point is Abbott v. Middleton 5 and Romilly, M.R., held that the words ""without leaving any child"" could be supplied after the words ""dying"" in the final gift over.

9. The bequest ran thus:

To my son, during his life(i and, on his demise, to his child or children, but in case of my son dying before his mother, to the children of my daughters.

10. The words ""without leaving any child"" were supplied after the words ""dying before his mother"". The case was taken to the House of Lords, the Court was divided in opinion, but the view of the Master of the Rolls was upheld. Lord Wensleydale, who was not for supplying the omission, states the rule tersely thus:

Words and limitations may be supplied or rejected when warranted by the immediate context or general scheme of the will, but not merely on a conjectural hypothesis of the testator's intention however reasonable, in opposition to the plain and obvious sense of the instrument.

11. Reading the entire will and all its parts, I have come to the conclusion that the testator intended that Nagiah was to take a life-estate and after his death the property was to be taken by the latter's sons. At the time the will was made Nagiah had no sons and it is common ground that it is by reason of Act VIII of 1921 that the bequest in favour of Nagiah's unborn sons is valid and takes effect. No question has been raised in regard to the applicability of this Act. In the result, I must hold that it was only the life-interest of Nagiah that could be validly mortgaged to the plaintiff.

12. Mr. Pinto for the plaintiff advances an ingenious argument and it is this. He says that what is taken by Nagiah is an absolute estate and the only effect of the clause relating to the testator's grandsons is to retain for the bequest in favour of Nagiah the quality of ancestral property. See *Nagalingam Pillai Vs. Ramachandra Tevar, and Rajagopal Pillai Vs. P. Veeraperumal Pillai and Others*, The provision that the son shall have no power to alienate but that the grandsons shall take a heritable estate, militates against this contention. The clauses to which I have referred make it clear that the estates taken by Nagiah and his sons are not co-existing but consecutive.

13. There is another argument of Mr. Pinto which I may notice. The Tamil words in paragraph 4 of the will, which have been rendered as ""male issue"" are (*Aan Santhathi*). Mr. Pinto says these words mean not male issue but male descendants. His argument is, that if these words mean male descendants, the clause would be void and Nagiah would take the property as on intestacy. It is unnecessary to decide this point, for it is clear beyond doubt that the expression means male issue. The word "*santhathi*" is used in two places in paragraph 2 in the sense of "issue" and this is

not disputed. I find no reason for assuming that the same word has been used in two different senses. {See Section 86, Indian Succession Act).

14. The case is adjourned to to-morrow for the plaintiff to prove his claim.

15. I pass a mortgage decree against the 1st defendant for Rs. 3,720 with interest on Rs. 3,000 at 12 per cent, per annum from this day to the

date fixed for sale and at 6 per cent, on the aggregate amount thereafter and costs of the suit. The decree is against the interest which, I have held,

the 1st defendant has in the property in question.

16. Time for redemption is 15 days.

17. The plaintiff shall pay the costs of defendants 2 to 4 which I fix, by consent, at Rs. 100.

18. Mr. Satagopam for the minor defendants 2 to 4 asks me to allow their mother, their guardian ad litem, to take the actual costs incurred from

the minors' estate. I give her this permission and for this purpose Mr. Satagopam may get his costs taxed as between attorney and client.