

(1958) 09 MAD CK 0031
In the Madras High Court
Case No : Second Appeal No. 702 of 1956

T.B. Sri Rangi

APPELLANT

Vs

Asia Bai

RESPONDENT

Date of Decision : 04-09-1958

Acts Referred:

Succession Act, 1925 — Section 111, 112, 121

Citation : AIR 1959 Mad 475 : (1959) 72 LW 320

Hon'ble Judges : Ramachandra Iyer, J

Bench : Single Bench

Advocate : D. Ramaswami Iyengar and P.R. Varadarajan, for the Appellant; P.S. Balakrishna Iyer and P.S. Ramachandra Iyer, for the Respondent

Judgement

Ramachandra Iyer, J.—This second appeal arises from the decree and judgment of the District Judge, Coimbatore, in A. S. No. 465 of

1954 which confirmed the decree and judgment of the Subordinate Judge, Nilgiris at Ootacamund in O. S. No. 193 of 11952. The third defendant

in the suit is the appellant. The suit was for partition and delivery of separate possession of the plaintiff's 3/5th share or in the alternative 4/6th share

in certain buildings and sites described in the schedules to the plaint.

In the present appeal we are concerned only with two of the properties, namely, shops bearing door Nos. 307 and 308. One Kamakshi was the

owner of the properties. She had a daughter, Lakshmi, through whom she had a grandson, Rangaswami. On 29-8-1924 Kamakshi executed a

will, Ex. A. 48, the construction of which is the point for consideration in the present appeal. Under that document the suit properties were

bequeathed to the children of Rangaswami.

Kamakshi died on 18-1-1925. On the date of the will Rangaswami had only one

child, a daughter, Yasoda, but by the time the testatrix died there

was also a son to him by name Sundararaja. In addition three children were born to Rangaswami before Yasoda attained the age of 18 years and

five more were born thereafter. When Sundararaja attained 18 there were six children.

On 31-1-1944 Yasoda and Sundararaja who had by then become majors sold under Ex. B-12 the properties to one Nanja Gouder. Nanja

Gouder thereafter created a mortgage over the property for a sum of Rs. 5,000. On 10-12-1945, Nanja Gouder sold under Ex. B. 1 to one

Simarathmull, the husband of the plaintiff the properties for Rs. 6000, Rs. 5000 being reserved with the purchaser for discharging the mortgage.

Simarathmull did not discharge the mortgage.

The mortgagee filed a suit on the mortgage in O. S. No. 159 of 1947 making all the persons interested in the properties as parties thereto. Pending

the suit, on 16-8-1948 Rangaswami acting on behalf of his then minor children executed a sale, Ex. A-6 in favour of the plaintiff, Simrathmul's wife

for a sum of Rs. 7000. The suit at the instance of the mortgagee ended in a decree and in execution thereof the properties were brought to sale and

the third defendant became the purchaser.

The contest is now between the plaintiff relying on her title, Ex. A. 6 and the third defendant claiming under the purchase in the court auction. The

basis of the latter claim is under Ex. B. 12, whereby Yasoda and Sundararaja sold to the mortgagor. Ex. A. 6 on the other hand, would invest the

purchaser there under, viz., the plaintiff the title of the other children of Rangaswami on whose behalf it was executed. The main dispute in the suit

related to the quantum of share to which the plaintiff and the 3rd defendant would be entitled.

The learned Subordinate Judge held that the plaintiff, was entitled to 4/6th share of the properties as on the date when Sundararajan attained the

age of 18 four more children were born to Rangaswami who according to the learned Judge also would take the benefit under the will. That meant

that Ex. B. 12 could be valid only in regard to 2/6th share while Ex. A. 6 could convey the remaining 4/6th as belonging to the four subsequently

born children. On that finding he passed a preliminary decree for partition declaring that the plaintiff was entitled to 4/6th share while the defendants

1 to 3 would be entitled to 2/6th share.

The 3rd defendant filed an appeal to the District Court, Coimbatore, and the learned appellate Judge agreed with the trial court and confirmed the

decree. The 3rd defendant, as stated already, has filed the present appeal against the decree of the appellate court.

2. It is contended on his behalf that the plaintiff could not get any share as only those children that were in existence on the date of the testatrix's

death that would obtain rights in the properties. I cannot agree. The legacy under Ex. A. 48 was expressly stated to be not for the children living at

the testator's death but to all the children of Rangaswami. But the question would still arise as to how many of the ten children born to Rangaswami

would be entitled to participate in the benefits under the will. For a due consideration of the question it is necessary to set out the relevant provision

of the will. It runs thus:

My self-acquisitions consisting of moveables and immovables described below are worth Rs. 7760. The aforesaid properties shall after my

lifetime be enjoyed in absolute rights by Yasodai now aged 3 daughter of my daughter Lakshmi Ammal's son and my grandson Rangaswami

Naidu and other children of Rangaswami Naidu male and female who would be born to him hereafter on their attaining majority. None else shall

have any manner of right over the said properties.

Until the aforesaid minors attain majority my daughter Lakshmi Ammal shall be their guardian and with the income of the properties shown below

she will meet the family expenses, take care of the minors and on their attaining majority make over the said properties to them. After the lifetime of

my daughter, Lakshmi Ammal, my grandson Rangaswami Naidu shall act as guardian of the minors, utilise the income alone of the schedule

properties for their family expenses and hand over the properties to them on their attaining majority.

As soon as the minors attain majority they shall take over the schedule properties and enjoy them with absolute rights. Neither Lakshmi Ammal nor

Rangaswami shall have any manner of right to encumber or alienate the properties below by way of gift or sale either before or after the attainment

of majority of the aforesaid minors

It is clear that the will is in favour of a class of persons represented by Yasoda

who was then in existence, viz., the children born and to be born of Rangaswami. They were the direct objects of the gift. There is no provision in the will vesting in any person a limited estate between the date of the death of the testatrix and the distribution of the legacy. The vesting of the property would take place in the children of Rangaswami immediately on the death of the testatrix.

The date of distribution is however postponed to their attaining the age of majority. As Yasoda was the eldest of the children the earliest date for distribution would be when Yasoda attained the age of 18 years in 1939. Though Yasoda is named in the will, the intention of the testatrix is to leave the properties not to her as an individual but to a class of persons of which she was the representative, viz., the children of Rangaswami born and to be born.

The members of the class would fluctuate in the passing of time. Therefore it should be ascertained from the will as to the point of time at which the class is to be ascertained. If for example the will had stated that the children would take the properties on the death of Rangaswami all his children would obtain their respective shares in the legacy as all of them would have come into existence by then. If, however, any other period is fixed it would be necessary to ascertain as to who amongst the class of persons intended to be benefited was or were in existence at that time.

3. In the latter case the denial of the legacy to the children unborn on the date of distribution is not by reason of the rule of perpetuity because all the children would come into existence before the lifetime of Rangaswami who was alive at the date of the death of the testatrix but that on the construction of the will for that there was nothing to give them as the property had been distributed before they were born to the earlier born children under the provisions of the will.

I cannot therefore accept the contention raised on behalf of the respondents by Mr. P. S. Balakrishna Iyer when he relying on Section 111 of the Indian Succession Act with special reference to illustration 6 thereto, contended that all the children of Rangaswami would take under the will.

4. From what is stated in the will it appears that the intention of the testatrix was two-fold: (1) that the children born and to be born of Rangaswami should take the property and there being no provision to the contrary each of

them would be entitled to an equal share with the rest, and (2) the properties should vest in possession in the various legatees as and when each of them attained the age of 18. These two conditions are prima facie irreconcilable.

The direction in the will that all the children should take would be inconsistent with the quantum of shares being ascertained as and when each attains the age of 18, and given over to the respective child, as some members of the class may not even be born when the eldest of them attain the age and his or her share vests in possession. The instant case affords an illustration of that problem. When Yasoda attained the age of 18 there were four other children so that she would be entitled to and should be given 1/5th share.

When her brother Sundararaja attained the age, one more child was born to his father and he would get only 1/5 of 4/5, i.e., 4/25 and this process of diminution of shares would go on till all the children are born. It would thus not be possible to give effect to the two objects of the testatrix mentioned above. In such a case to give effect to the intention of the testatrix a reference to certain principles of construction is necessary.

5. Prior to the Madras Act I of 1914, familiarly known as Seshagiri Iyer's Act; a gift or a disposition in favour of an unborn person was invalid.

That Act made such a disposition of property valid in so far as the disposition did not offend against the rules contained in Section 113 to 116 of the Indian Succession Act, 1925. (In a case of gift or other transfer Inter vivos subject to the provisions in Chapter H of the Transfer of Property Act).

Where these rules are not infringed a legacy to a class of persons some of whom were in existence and others not so in existence at the time the testament took effect, the legacy would comprehend not only the former but the latter as well. In a case where a vested interest is created in the legatee the vesting of title to the property would follow immediately on the death of the testator or testatrix. The intention being to benefit the children subsequently born (that being valid under the law), the subsequently born child or children, would divest pro tanto the property in the earlier born children so as to give an equal share to them all. Vide *Venkayamma v. Narasamma*, ILR 40 Mad 540: AIR 1917 Mad 243 and

Sivarama Aiyar v. Gopala-krishna Chettiar, 47 MLJ 337; AIR 1925 Mad 88. But how long is this defeasance to go on would depend on the

terms of the will indicating the point of time at which the members of the class are to be ascertained.

In a plain case where the legacy is given to the children of A on the death of A, the members of the class who would take would be those who

answer the description on the date of the death of A. In a case where a life estate is granted and a bequest of the remainder to the children of A, all

the children of A living at the termination of the life estate would normally be entitled to the remainder.

In such cases the intention is expressed. But in other cases where the intention is not so clearly expressed certain rules of construction are resorted

to ascertain the intention. In Halsbury's Laws of England, such rules are stated to be rules of convenience. They are stated in 34 Halsbury (Lord!

Hailsham Edn.) page 268, in Article 319 and at page 271 in Article 322:

Article 319: The first rule of convenience is as follows; A class is prima facie composed of those members if any existing, ascertainable and

capable of taking at the period of distribution which is usually at the death of the testator; but where the period of distribution is at a later date, the

class opens so as to let in all those members coming into existence before the period of distribution. Where, however; the gift is immediate but at

the death of the testator no member of the class has yet come into existence, then prima facie all the members of the class who are born at any

future period are intended to take under the gift.

As regards members of a class who the before the testator, the class is ascertained independently of them; there is no question of lapse of their

shares and they are not included; nor where they are issue of the testator, do they take by leaving issue living at the death of the testator even

where the class consists of but one person. As regards members of a class taking under a postponed gift, the death of anyone of them who has

survived the testator but before the period of distribution does not defeat his Interest provided that the contingency of surviving that period is not

part of the description of the class.

Thus the objects among whom the property becomes ultimately divisible are those members of the class who may be living at the period of

distribution and the representatives of such as may have died before the period having survived the testator.

Article 322: The second rule of convenience deals with the determination of the period of distribution where the gift is of the corpus of property

and is postponed by reason of the conditions attached to it; as where payment is to be made on the attainment by the donee of a specified age or

on his or her marriage or in other cases it appears, where such conditions are of a nature personal to the donees. This rule is as follows;

Where the postponement of enjoyment is due to conditions attached to the gift the period of distribution is considered to be reached as soon as

the conditions are so far performed that some one member of the class would be entitled to the enjoyment of his share, if the class were then not

susceptible of increase, and the class is then closed. Thus where there is an immediate gift to a class, to be paid on their attaining a specified age,

the period of distribution is the death of the testator, if any member of the class has then attained that age and if not, at the time of the first occasion

when a member attains that age.

6. In *Whitbread v. St. John*, 1804 10 Ves. Jr. 152; the testator bequeathed (after a certain provision for the education of his grand-children) the

properties to his grand children born and to be born when and as the grand children should attain their respective age of 21 years or married. It

was held that all the children that were in existence when the first of them attained the age of 21 would be entitled to the legacy.

7. In *Andrews v. Partington* (1791) 29 ER 610, there was a bequest to all the children of a particular person the sons to be paid on their attaining

the age of 21 and the daughters to be paid at marriage or on their attaining 21 years of age. It was held that the fund shall become divisible when

the eldest of the children - attains the age of 21 years and that the division should be among those who would then be in existence. This rule has

been stated in *Jarman on Wills*, Vol. III (8th Edn).

At page 1621 the learned author points out that the rule in (1791) 29 ER 610, has been viewed with some disapprobation. At page 1679 the

learned author quotes Lord Loughborough as stating that ""the rule though it is an extremely convenient construction it is convenient only to the

parties who profit by it; not to the children who are excluded."" In *Theobald on*

Wills, 11th Edn. at page 293, reference is made to the observations

of a learned Judge who described the rule as ""a somewhat battered veteran but it still remains on its feet after upwards of 200 years.

8. In India the rules in that regard have been codified by Sections 111, 112 and 121 of the Indian Succession Act. Section 112 refers to a case

where the bequest is made to a person by particular description and who was not in existence at the testator's death. The Exception to Section

112 states:

If the property is bequeathed to a person described as standing in a particular degree of kindred to a specified individual but his possession of it is

deferred until a time later than the death of the testator by reason of a prior bequest or otherwise; and if a person answering the ""description is

alive at the death of the testator or comes into existence between the event and such later time the property shall at such later time go to that

person or if he is dead to his representatives."" From the above it is clear that the legacy would ensure for the benefit of all those persons who were

in existence at the death of the testator and all those who come in existence before the legacy vested in possession. That period is called the

period) of distribution. In such cases the members of the class entitled to take are not only those who were in existence at the date or vesting of

title (i.e., when the will took effect) but also those who subsequently come into existence before the vesting of possession or period of distribution.

9. In *A.M. Kuppuswami Mudaliar Vs. W. Ranganatha Mudaliar*, , a disposition was made in favour of the grandchildren of the testator through his

two sons. The will stated ""only the issue of my two sons, shall at the proper time, use and enjoy absolutely with rights to gift, mortgage, exchange

and sell."" One of the sons of the testator died first leaving a son the plaintiff in the case. The other son died a few days thereafter childless but his

widow adopted the second defendant in the case at a time when the plaintiff was still a minor.

The plaintiff claimed that he was entitled to the whole of the estate left by the testator. The learned Judges held that the words ""at the proper time

in the will would mean the age of majority and that the period of distribution would be only when the plaintiff would attain the age of majority and

as in that case the second defendant was adopted and thereby came into

existence before the plaintiff attained the age of majority the former was entitled to a share in the legacy. In coming to this conclusion the learned Judges relied on the case in (1791) 29 ER 610.

10. In fixing the time of distribution the earliest of the dates fixed will be taken as the date of distribution. If it is stated that the members of the class are to take when they attain a particular age, the time when the eldest of them reach that age would be the earliest date of vesting in possession and that should be the date of distribution. All those of the designated class born within that time would be entitled to share in the legacy.

11. On the will Ex. A. 48 in the present case it is evident that the gift is to a class of persons one of whom alone was alive at the date of the will.

The period when that class is to be ascertained is the period of distribution, namely, when Yasoda attained the age of 18 the earliest time when possession was to be given. Therefore, all those children that were in existence on the date when Yasoda attained majority would be entitled to a share in the legacy.

Yasoda attained majority in 1939 and by then three more children besides Sundararaja had been born and therefore all the five children would be entitled to share in the distribution of the legacy: the result is that the interest of Sundararaja and Yasoda would only amount to $\frac{2}{5}$ th share in the property, the other $\frac{3}{5}$ th share going to the other children that were born next to them.

The children born after 1939 would have no right to the legacy. The third defendant being entitled to what Yasoda and Sundararaja could convey would be entitled to $\frac{2}{5}$ th share and the plaintiff who purchased in 1948 the interests of the minor legatees would be entitled to $\frac{3}{5}$ th share. The decree of the lower court will be modified accordingly by substituting $\frac{3}{5}$ th instead of $\frac{4}{6}$ th in regard to the share of the plaintiff and $\frac{2}{5}$ th instead of $\frac{2}{6}$ th in favour of the 3rd defendant. The second appeal is allowed to the extent indicated above. There will be no order as to costs.