

(1934) 11 MAD CK 0041
In the Madras High Court

Thayalai Achi and Others

APPELLANT

Vs

Kannammal and Another

RESPONDENT

Date of Decision : 05-11-1934

Acts Referred:

Succession Act, 1925 — Section 88

Citation : AIR 1935 Mad 704 : 156 Ind. Cas. 846

Hon'ble Judges : Stone, J;Pakenham Walsh, J

Bench : Division Bench

Judgement

1. This appeal raises two questions; (1) whether one Ponnammal Achi was married in the Asura form so that her stridhanam property goes to her brother Nataraja Pillai; (2) whether she took an absolute estate without any executory or other gift over in favour of Nataraja Pillai, under the will of her husband Samia Pillai.

2. The first question is primarily one of fact. The burden is upon the appellant to displace the presumption that the marriage is in the ordinary form. The learned trial Judge has considered the evidence and the credibility of the witnesses. He has seen the witnesses and we have not. We see nothing in the record to show that his conclusions as to the credibility or weight of testimony or evidence is wrong and we see, therefore, no reason for differing from his conclusion of fact. That conclusion was that it is not proved that Ponnammal Achi was married in the Asura form.

3. The second question raises a point on the construction of a will. Points of great complexity can arise when the will to be construed is written in a precise language possessing many terms of art the content of which has been defined by Courts. Matters are made much more difficult where the will is in a language as uncertain and so lacking in precision as Tamil and terms are used which one side alleges have a technical meaning and the other side alleges have something less than a technical meaning and which if found in an English will would be construed as cutting down rather than as extending the bequest in question but

which when found in this will admittedly have not that effect.

4. The relevant words, in the translated form that seems best to render the original, are as follows:

After my death, my wife Ponnammal Achi, enjoying with all rights and powers of alienation by gift, exchange or sale the movable and immovable properties belonging to me by ancestral right and self-acquisition and situate in Tirappu Melaiyur village, Melaiyur vattam, Malaiyur Mahanam, Kumbakonam Taluq, Madharjunam Sub-District, Tanjore District, shall herself discharge the debts payable by me on bonds and pro-notes amounting to Rs. 3,000.

5. I have hereby given full authority to the said Ponnammal Achi, my wife for affecting sales, etc., after my death, in respect of my immovable and movable properties either for the purpose of discharging the debts or for any other reason... My wife shall have my obsequies performed at a cost of Rs. 300.

6. If after the alienations that may be made by my wife Ponnammal Achi for the purpose of discharging the afore-mentioned debts and for meeting the aforementioned expenses, there be any property, movable or immovable, left at the time of her death, the same shall be taken, after her death by Nataraja Pillai."

7. It should not be overlooked that this will is dated 1899 at that time it was a common or, at least a possible, opinion that a grant of the absolute estate to a Hindu widow did not confer upon her the right of alienation. Indeed that was so held by the High Court of Allahabad in Surajmani v. Rabinath Ojha 25 A 351 : A W N 1903 66. That was put right on appeal.

8. The words "enjoying with all rights and powers of alienation by gift, exchange or sale," are words which standing alone or uncontrolled by the context are apt words to describe an absolute estate. Thus Sedasiva Ayyar, J, in Muthu Venkatanarayanan Chetty v. Authi Pandu Ranga Naidu 51 Ind. Cas. 217 : (1919) M W N 103 observes:

I venture to think that with full proprietary powers (Sarva Swatantrathudan) is the strongest expression that an alianor can employ to confer an absolute estate of the alienee.

9. That observation emerged when discussing and criticising Manika Mudali v. Muthachi Kavandan 30 Ind. Cas. 685 : 18 M L T 34 : 2 L W 887 where Ayling, J. expressed the view that those words did not confer an absolute estate. It was noted by Spencer, J., in Muthu Venkatanarayanan Chetty v. Authu Pandu Ranga Naidu 51 Ind. Cas. 217 : (1919) M W N 103 that those words do not occur in the document then under discussion. The words were "I have gifted in lieu of maintenance...the house with rights of alienation by sale. Spencer, J. took the view that the Judicial Committee in Jogeswar Narain Deo v. Ram Chandra Datt 23 C 670 : 23 I A 37 : 7 Sar. P C J 13 : 6 M L J 75 had decided as a matter of construction that a gift of property to A with power of alienation by sale or gift conveys an absolute estate, and accordingly held that where the words of grant

confer on the grantee powers of alienation, the ordinary implication is that the grant is an absolute one. It was pointed out (*Nanjamma v. Nachiammal* 17 M L J 622 being cited on the point) that where the grant is to a wife in the words "You shall enjoy the same all your life" the addition of the words "with power to sell and give away" would not enlarge the estate into an absolute estate.

10. *Jogeswar Narain Deo v. Ram Chandra Datt* 23 C 670 : 23 I A 37 : 7 Sar. P C J 13 : 6 M L J 75 above-mentioned was a case of the construction of a will. The bequest was to the youngest widow and her son "for your maintenance" with power to alienate by sale or gift. It was held that an absolute estate passed, the words "for your maintenance" not reducing the interest to one for the life of the respective legatees. The actual words (in translation) there were:

Upon my death you and your sons and grandsons in due order of succession shall hold possession... and I give you the power of making alienations by sale or gift.

11. Those words are words clearly giving an estate of inheritance with power of alienation. Indeed that appears not to have been disputed. The question was whether they were cut down by the words "for your maintenance." They are of course much stronger words than are here present.

12. The result we have come to on this branch of the case is that *prima facie* a gift to a widow in the words "enjoying with all rights and powers of alienation by gift, exchange or sale" is an absolute estate unless the words are controlled or explained by the context. That is, unlike in England where the addition of such words would suggest a life estate with a power, in India, *prima facie* such words confer an absolute estate the words being used not to confer a power but to indicate the extent of the interest. But such words, though having that effect, are not words like "in fee simple" which as a matter of conveyancing describe in succinct and technical form the estate; they are words which merely show intention and may submit to other words more clearly and positively showing another intention as in the case in *Nanjamma v. Nachiammal* 17 M L J 622 above cited.

13. In this case the testator proceeds to explain why he has given his wife authority to dispose of his property. The language used is such that it does not, cut down the authority. She is stated to have been given this authority "for the purpose of discharging debts or for any other person". But we think, taking into account the next clause, which gives anything that may be left at the time of the widow's death to Nataraja Pillai and looking at the will as a whole the testator had the intention of giving to his wife a right to enjoy the property as absolutely as possible. We lay stress on the word "enjoy". The widow could use the property, could consume the property, could alienate the property. She could, in the fullest possible sense, enjoy the property. She could, we think (it is not necessary for the purposes of this case to determine the point) have left the property by will and have thus enjoyed in relation to it the pleasure of giving it away after her death, she could have exchanged it for other property, she could

have sold it and spent the proceeds. But if she did not, during her lifetime, thus get rid of the property, or that into which it had been turned, and did not leave it by will, her enjoyment comes to an end with her death and what is left (subject of course to the payment of debts and expenses) passes to Nataraja Pillai.

14. This being our view of the intention as deduced from all the words used by this testator, very little purpose is served by examining the long line of case cited on both sides. That would become, perhaps, necessary were we construing this will as giving an absolute estate with executory limitation over in favour of Nataraja, or if we were cutting down an absolute estate because of the gift over to Nataraja Pillai.

15. It may, however, be desirable to point out that on this latter point a certain confusion seems to have crept into the argument. It is said that such a gift over would be void for repugnancy alternatively for uncertainty. But in construing a will one has to bear in mind the provision of Section 88 of the Indian Succession Act which enacts for India the rule of construction of wills developed in England (See Jarman on Wills, 7th Edition, page 543), and applied in *Sherratt v. Bentley* (1833) 2 M & K 149 : 39 R R 168 and the other cases which follow that case, viz., that where two clauses in a will collide the later clause prevails. Thus, if repugnancy is regarded it would be the earlier and not the later gift that would have to be cut down. This is made clear in *Constable v. Bull* (1849) 64 E R 539 : 3 De. G & Sm. 411 : 18 L J Ch. 302 : 13 Jur. 619 : 22 L J Ch. 182 : 84 R R 362 and the cases following that case. There the gift to the wife was absolute. There was a later bequest not, of the same property but, as here, of what, remained of the same property at the widow's death. Apart from the words "whatever remains of" V.C. Knight Bruce stated as though it were a perfectly clear and obvious proposition that "the subsequent, bequests would have the effect of so reducing the interest given to the widow". He also held that the words in question made no difference. See also the judgment of the Judicial Committee in *Bhaidas Shivdas v. Bhai Gulab* 65 Ind. Cas. 974 : 46 B 153 : 26 CWN 129 : 15 L W 412 : 20 A L J 289 : 42 M L J 385 : 49 I A 1 : 35 C L J 314 : 24 Bom. L R 551 : A I R 1922 P C 193 (P C).

16. Repugnancy and uncertainty are, when examined, not applicable in the construction of a will like this when considering what if anything Nataraja Pillai took. The casts such as *Bhaidas Shivdas v. Bhai Gulab* 65 Ind. Cas. 974 : 46 B 153 : 26 CWN 129 : 15 L W 412 : 20 A L J 289 : 42 M L J 385 : 49 I A 1 : 35 C L J 314 : 24 Bom. L R 551 : A I R 1922 P C 193 (P C), *In re Dixon* *Dixon v. Charlesworth* (1903) 2 Ch. 458 : 72 L J Ch. 642 : 88 L T 862 : 51 W R 652 *Perry v. Merritt* 18 Eq. 152 where the doctrine of repugnancy or uncertainty have been considered will be found to be cases of trusts. Thus the Privy Council in *Bhaidas Shivdas v. Bhai Gulab* 65 Ind. Cas. 974 : 46 B 153 : 26 CWN 129 : 15 L W 412 : 20 A L J 289 : 42 M L J 385 : 49 I A 1 : 35 C L J 314 : 24 Bom. L R 551 : A I R 1922 P C 193 (P C) applied the rule in *Horwood v. West* (1823) 1 Sim. & St. 387 : 1 L J Ch. 201 : 24 R R 199 a rule that relates to trusts, because there was

no direct gift over but a direction to the widow to leave "whatever property might remain" in a certain way. That direction had no binding effect or it constituted a precatory trust. It was held not to constitute a trust because of uncertainty of subject-matter. Here there is no trust but a direct gift. The doctrine of uncertainty does not apply.

17. This case is certainly weaker than *Tallur v. Jagmohan* 22 b 409 where the will gave property to B as owner, with absolute power of disposal equal to the testators, with a gift on B's death to C as owner. Yet there it was held that B only took a life-estate.

18. This present case seems to be very near to *Hara Kumari v. Mohim Chandra* 12 C W N 412 where the bequest was to a wife in the following terms; "You shall become possessor of my properties. You shall have the right and power to alienate by gift or sale. My daughter shall be entitled to and possess or of whatever properties shall remain after your death and the said daughter shall have the same rights as you have". The only difference is that there is a distinction drawn between being entitled to and being possessor of. There were also other indications in the will of a desire on the part of the testator to benefit the daughter. It was indicated that if one looked at the bequest to the widow alone it looked like an absolute gift but that one could not, in construing the will, shut one's eyes to the words relating to the daughter. It was held that looking at the will as a whole the widow took an estate for life with a power of alienation and to the extent to which the power was not exercised the daughter similarly took the property. In the same sense is AIR 1932 172 (Privy Council) , though there the facts are somewhat different. The applicability of that case lies in this that a bequest of what would prima facie be an absolute interest was cut down by regarding other provisions of the will inconsistent with such prima facie meaning. That case also issues a warning against applying to the construction of words used in an Indian will ideas proper in the construction of English wills brought into existence in a different environment.

19. The appeal accordingly succeeds. With regard to costs, the plaintiff has succeeded throughout on the issue as to the form of marriage. On the issue relating to the construction of the will the learned trial Judge came to one conclusion in a very careful judgment. We, it is true, have come to another conclusion. But it cannot be said that the will does not raise a difficulty of construction and we think in all the circumstances the costs throughout should come out of the estate as would be the case where the question raised was simply as is the true construction of a will.