

(1958) 10 MAD CK 0005

In the Madras High Court

Case No : Special Tribunal Appeal No. 10 of 1956

V.T.S. Sevugapandia Thevar

APPELLANT

Vs

V.T.S. Thyagasundaradas Thevab and Eleven and Others

RESPONDENT

Date of Decision : 15-10-1958

Acts Referred:

Madras Impartible Estates Act, 1902 — Section 4
Oudh Estates Act, 1869 — Section 22, 8

Citation : (1959) ILR (Mad) 601

Hon'ble Judges : Rajagopalar, J; Balakrishna Ayyar, J

Bench : Division Bench

Advocate : V. Vedantachari and T. Rangaswami Ayyangar, for the Appellant; A. Sundaram Ayyar, for T.R. Mani, G. Ramanujam and A. Narayanaswami, for the Respondent

Final Decision : Allowed

Judgement

Balakrishna Ayyar, J.—This is an appeal from the order of the Estates Abolition Tribunal, Madurai, made on 28th August 1956 in Original

Petition No. 185 of 1955.

2. On 8th March 1954, the Government of Madras took over the Zamindari of Seithur under the provisions of Madras Act XXVI of 1948. On

19th July 1954, they deposited a sum of Rs. 68,589 as advance compensation. Sevugapandia Thevar, the Zamindar of Seithur, claimed that on

29th December 1895, his father Sundara Doss Thevar had executed a Will bequeathing the zamindari to him, that he took the zamindari under that

Will as his self-acquired property and that in consequence Section 44 (2)(b) of the Act and the rules framed thereunder applied to the case with

the result that he was entitled to the entire money. His sons, however, contended that the zamindari was an

impartible estate which had to be regarded as the property of a joint Hindu family for the purpose of ascertaining the succession thereto before the notified date,

that in consequence, Section 45 of the Act applied and that the amount of the advance compensation which the Government had deposited had to be divided between them and their father.

3. One member of the Tribunal took the view that Sevugapandia Thevar did not take the zamindari under the Will of his father Sundara Doss

Thevar, but outside it, that in consequence Section 45 of Madras Act XXVI of 1948 applied and that the sons were entitled to a share in the

compensation. The other two members of the Tribunal took the view that Sevugapandia Thevar took the estate under the Will but that nevertheless

the estate had to be treated as an impartible estate which belonged to a joint Hindu family, that for that reason Section 45 applied and the sons

were entitled to share in the compensation. Sevugapandia Thevar has, therefore, preferred this appeal.

4. It will be convenient to set out at this stage the salient features of the Will of Sundara Doss Thevar. It is dated 29th December 1895. The

preamble recites that the testator is the Zamindar of Seithur in Srivilliputhur taluk, Tirunelveli district, and that at the time he executed the Will he

was staying in the choultry belonging to the Rajah of Ramnad in cusba Thallakulam, Madurai district. He then states that he owned (i) the

Zamindari of Seithur, as impartible, ancestral property, descending by lineal primogeniture, (ii) the Elumalai Zamin which he had purchased on 1st

April 1895 as his self-acquisition in order to give it to Muthuswami Pandian, a son of his deceased brother, and (iii) several other properties,

movable and immovable. The testator then gives the names of the persons who are his relations and who, he considered, had claims on him. Of

these, the first is Sevugapandia Thevar, his only son, then aged eleven years. In speaking about him, the testator says that he is entitled to get all his

properties as his heir. The next person, the testator mentions, is his mother Periyayi Athal who, he recognizes, has to be maintained. He then

mentions his daughter, Muthathal, then seven years old, and finally he mentions Muthuswami Pandian, his nephew. About all these three, he states

that they are entitled to maintenance from him. He then states that in view of

the fact that he was frequently falling ill he considered it necessary to make arrangements as regards the individuals and the properties he mentioned.

5. We now get clause one of the Will which has been translated as follows:

Our son Sevugapandia Dorai Avargal shall take the properties set out in A schedule herein after our lifetime and hold and enjoy the same with

absolute rights and from son to grandson and so on in succession. He himself shall maintain our mother also.

6. The property set out in schedule A is the Zamindari of Seithur. By Clause two, he gave the Elumalai Zamin to Muthuswami Pandian, his

brother's son. As in the case of the Zamindari of Seithur, which he gave to Sevugapandia Thevar, Sundara Doss Thevar gave the Elumalai Zamin

to Muthuswami Pandian:

to hold and enjoy the same with absolute rights and from son to grandson and so on in succession.

7. By Clause three, he gave the properties set out in schedule C to his daughter, Muthathal, as her stridhanam, and states that Muthathal and her

issue were to enjoy the same hereditarily. Then comes this rider:

In case she has no issue the said properties shall revert to Seithur Zamin.

8. By Clause four, Sundara Doss Thevar makes provision for a woman called Chellam who had been serving his wives long and faithfully. He gives

her the properties set out in schedule D to

hold and enjoy the same with absolute rights hereditarily from son to grandson and so on in succession.

9. By Clause five, he makes a bequest of the properties set out in schedule E to one Muthiah Bagavathar. The Will provides that this Bagavathar

was to

hold and enjoy the said properties after our lifetime with absolute rights from son to grandson and go on in succession.

10. By Clause six, he makes the bequest of a sum of Rs. 2,000 to Dr. Van Allan for the construction of a hospital.

11. By Clause seven, he directs that certain debts he had contracted and any others that he might contract

shall be paid and discharged after our lifetime from and out of the A schedule properties and the assets relating to the same, regardless of whether

those debts are otherwise secured or not.

12. By Clause eight, he appoints Nagappa Swami Kuppachi Naicker, Zamindar of Peraioor, to be the executor of his Will.

13. By Clause nine, certain directions are given to the executor, but these are not now material.

14. By Clause ten, Sundara Doss Thevar, the testator, directs that during the minority of his son Sevugapandia Thevar and his nephew

Muthuswami Pandian, the executor, and, after they attained majority, those two individuals should perform and conduct the various festivals,

choultries and charities as they had been conducted in the past.

15. In Clause eleven, there is the direction that the pannai pertaining to the Zamindari of Seithur should not be leased by the executor but should be

cultivated as was being done by the testator himself.

16. Three other clauses follow which are not of present interest.

17. The Will was attested by six persons, the first two of whom were High Court Vakils of Madurai and the third a First Grade Pleader of

Madurai. The Will was registered on the 30th December 1895.

18. Before we examine the various contentions urged before us it would be useful to recall the legal position in 1895, when Sundara Doss Thevar

made his Will.

19. Some thirty-one years previously, the Privy Council had ruled thus in the well-known Sivaganga Case (1863) 9 M.I.A. 539 (P.C.):

Where property belonging in common to a united Hindu family has been divided, the share of a deceased member of the family goes is the general

course of descent of separate acquired property ; but if there it a co-partnership between the different members of the united family survivorship

follows.

Upon the principle of survivorship, the right of the co-partners in the undivided estate overrides the widow's right of succession ; but with respect

to self-acquired property of a member of the united family, the other members of the family have neither community of interest, nor unity of

possession, therefore, the foundation of the right to take by survivorship fails.

20. In 1888, the Privy Council decided in Sartaj Kuari's Case (1888) ILR 411. 272 (P.C.) that the holder of an impartible estate was competent

to make a gift of a part of the estate. The material facts there were as follows: On 18th February 1871, Raja Bhawani Ghulam Pal made a gift of seventeen villages which belonged to the Raj to his younger wife. A suit was brought by the mother and guardian of Lal Narindar Bahadur Pal, a minor son of Raja Bhawani Ghulam Pal, challenging the alienation. It was admitted that the Raj was impartible and that by custom succession was by primogeniture. Their Lordships held that the gift was good. They referred to an earlier decision of theirs in *Stree Rajah Yanumula Venkayamah v. Stree Rajah Yanumula Boochiah Vankondora* (1870) 13 M.I.A. 333 (P.C.) and, observed:

This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the co-parcenary in it which under the Mitakshara law is created by birth does not exist.

* * *

If, as their Lordships are of opinion, the eldest son, where the Mitakshara law prevails and there is the custom of primogeniture, does not become a co-sharer with his father in the estate, the inalienability of the estate depends upon custom, which must be proved, or, it may be in some cases, upon the nature of the tenure.

* * *

For the foregoing reasons, their Lordships are of opinion that the Plaintiff has failed to show that the gift ought to be declared to be invalid, and they will humbly advise Her Majesty to reverse the decrees of the lower Courts, and to decree that the suit be dismissed with costs in both these Courts.

21. In *Beresford v. Ramasubba* ILR (1889) Mad. 197, a Division Bench of this Court observed that the previous view which had been held in this Court stood overruled by the Privy Council in *Sartaj Kuari's Case* (1888) ILR 10 All. 272 (P.C.), and, applying that decision of the Privy Council, they upheld an alienation by way of a lease which had been made by the Zamindar of Kangundi.

22. It must be remembered that at the time *Sundara Doss Thevar* executed this Will, the Madras Impartible Estates Act had not been passed. That Act declared that all the estates included in the schedule to it shall be deemed to be impartible estates. The Zamindari of Seithur appears in the

schedule. The Act also imposed various restraints on the alienation of a zamindari by the holders thereof for the time being. But this enactment was still in the future. The position in 1895, was that whether impartible and ancestral property was treated as the self-acquired property of the holder or as the joint family property of the holder made no difference so far as his power of alienation was concerned.

23. It will be convenient at this stage to trace the further development of the law so far as is here relevant.

24. In *Sri Raja Rao Venkata Surya Mahipati Rama Krishna Rao Bahadur v. The Court of Wards* (1899) ILR 22 Mad. 383 (P.C.) (see page 239

of (1921) ILR 43 All. 228 (P.O.), commonly known as the first Pitapur case, the Privy Council decided two points:

(i) That the case of *Sartaj*, which was a case of direct inter vivos gift, covered by analogy the case of alienation by will.

(ii) That the law as laid down in *Sartaj*, which was a case from the North-Western Provinces, also applied in Madras, notwithstanding the elder

Madras decisions, Madras being under the Mitakshara law.

25. Next in chronological order comes *Lal Ram Singh v. Deputy Commissioner of Partabgarh* (1923) ILR 45 All. 596 (P.C.). The estate in that

case was one governed by the Oudh Estates Act of 1869, and, according to the custom of the family obtaining before 1856, ordinarily devolved

upon a single heir. In compliance with an agreement which compromised a still anterior litigation *Hanwant Singh*, the holder of the estate, executed

an instrument of settlement, one paragraph of which ran as follows:

That on the death of the last three persons, i.e., *Raja Hanwant Singh*, *Raja Rampal Singh* and *Dirgaj Kuar*, the mother of *Raja Rampal Singh*,

Babu Lachman Singh, the second son of *Raja Hanwant Singh*, and his heirs and representatives shall succeed to the entire *Rampur Kaithaula*

estate, as provided by Section 22 of Act I of 1869. But the said *Babu Lachman Singh* shall not interfere in any way with the said *ilqa*, beside the

six villages which he has received u/s 8, during the lifetime of *Raja Rampal Singh* and his mother, *Dirgaj Kuar*.

Hanwant Singh died first, then the mother, then *Lachman Singh* and lastly *Rampal Singh*. On the death of the last named person it became

necessary to determine who succeeded in reversion. The Privy Council held that

Lachman Singh received an absolute estate in reversion, that he took the property as self-acquired property and could dispose of it by Will. This is a case of an estate received under a settlement.

In *Ulagalum Perumal Sethurayar v. Subbalakshmi Nachiar* (1935) 71 M.L.J. 1, a Division Bench of this Court decided that where a zamindar

having absolute rights of alienation makes a settlement in favour of a son of his, the settlee take the property as his absolute property, that is, as

self-acquired property and not as joint family property. On appeal, the Privy Council confirmed this decision; vide: *Perumal v. Subbulakshmi* ILR

(1939) Mad. 443 (P.C.). The facts of the case are thus summarised in the judgment of their Lordships.

26. In 1902 the zamindar was S. Kotilinga Sethurayar (hereinafter called the settlor), a Hindu governed by the Mitakshara. He held the impartible

estate as ancestral property belonging to the joint family of which he was a member, and not as his separate property. His first wife had died, but

he had married again. By his first wife he had a son, K. Kotilinga Sethurayar. His second wife was enceinte. Being displeased with his son he

desired to defeat his son's prospect of succession to the estate by making use of the power of alienation recognized as belonging to owners of

impartible estates by the decision of this Board in the case in *Sartaj Kuari v. Deoraj Kuori* (1888) ILR 10 All. 272 (P.C.). His power of alienation

was, however, in danger of becoming restricted by legislation so as to become no greater than the power of a managing member of a joint Hindu

family to alienate ancestral property. A few days before 2nd June 1902, when the Madras Impartible Estates Act, 1902 (Madras Act II of 1902),

came into force, he executed a deed of settlement, dated 29th May 1902, in respect of the impartible zamindari. By that deed he declared that he

was dissatisfied with the character and conduct of his son and was desirous that the son should not succeed to the zamindari. He settled the

zamindari upon himself for life and subject thereto granted it absolutely to the child with whom his second wife, Thanga Pandichi, was then

enceinte, if such child should be born alive and a male.

* * * * *

Thereafter on 13th August 1902, Minakshi Sundara was born of the second wife Thanga Pandichi. In 1903 the settlor's first-born son, K.

Kotilinga Sethurayar, died. In 1904 the second wife died, and the settlor having married a third time the Appellant Ulagalum Perumal was born to him by his third wife in June 1906. On 7th January 1907, the settlor died and Minakshi Sundara succeeded to the zamindari, the estate being managed on his behalf by the Court of Wards till 1923, when he came of age. He died in July 1929, and as the Collector proposed to recognise his half-brother, the Appellant, as entitled to succeed to the impartible estate, the widow brought her suit on 1st October 1929, to establish her right to succeed. Her case is that when in 1902 her husband took a vested interest in the estate by virtue of his father's exercise of his unfettered right of alienation, the estate ceased to be property of the joint Hindu family as truly and completely as if it had been granted to a stranger to the family. Accordingly, that the principle of survivorship cannot on his death be applied to carry his estate to the eldest member of the senior branch of the family ; and that it descends to her according to the rules which govern succession to separate property.

27. Their Lordships then observed:

And it would seem that the right of any given person to succeed by survivorship to any given property must depend both upon the person continuing to be a member of the joint family and also upon the property continuing to belong to the family. If the zamindar has a power of alienation which is not limited by legal necessity nor liable to be controlled by any other member of the family, so that he can squander the property or give or sell it to a stranger, thereby defeating the rights of other members, there would not seem to be great force in the reflection that when he transfers to a member of the family he is effecting a result similar to that produced by partition without having the power to compel partition. The status of an individual as a member of a Hindu joint family is in no way inconsistent with his owning separate property; and the right of unfettered alienation affirmed in *Sartaj Kuari v. Deoraj Kuari* (1888) ILR 10 All. 272 (P.C.) may well produce results, when exercised in favour of a member, which are as favourable or more favourable to him than those which partition would have produced. If the property ceases to be the property of the joint family there is nothing to which the right by survivorship can attach and there is no added difficulty in its becoming the separate

property of an individual member. The right of alienation was held to belong to the holder of an impartible estate because the other members of his

family, having no right to call for partition, were thought to have no right to control him: if in some cases the result of this doctrine upon the rights of

the other members is to defeat them altogether, the right of alienation cannot in their Lordships' opinion, be limited in other cases merely by reason

that the holder had no right to call for partition.

28. Their Lordships quoted with approval certain observations which the Allahabad High Court had made in *Ajai Verma v. Vijai Kumari* (1939)

43 C.W.N. 594, 599 (P.C.). Those observations were:

He gets the property by virtue of the gift made by his father in his favour under the will. It matters little whether the gift is in favour of a stranger or

in favour of a person belonging to the same stock as the Defendant. The property in the hands of Vijai Verma must be treated as self-acquired

property for the purposes of descent to his heirs.

29. We would next refer to *Lalitha Kumari Devi v. Raja of Vizianagaram* (1952) 66 L.W. 231. At page 242, the learned Chief Justice observed

as follows:

In my opinion all that was laid down by their Lordships in *Ulagalum Perumal's* case ILR (1939) Mad. 443 (P.C.) was that an alienee from a

holder of an impartible estate takes the property as his separate or self-acquired property and not as joint family property. It must not be

overlooked that an impartible estate can be either joint family property or separate property and the rule of succession would differ in each case.

This is clearly pointed out in a later pronouncement of their Lordships in *Anant Bhikappa v. Shankar Ramchandra* ILR (1944.1 Bom. 116 (P.C.).

30. In *Senthathikalai v. Varaguna Rama* ILR (1954) Mad. 500, 508, the matter was re-stated more elaborately. It is better to quote the relevant

passages:

The law relating to impartible estates had to undergo several vicissitudes and some of the observations of the Judicial Committee in the leading

decisions on the point may seem to be irreconcilable. But it may now be taken that the following principles were settled by decisions.

Impartibility is essentially a creature of custom. The junior members of a joint family in the case of ancient impartible joint family estate take no right

in the property by birth and, therefore, have no right of partition having regard to the very nature of the estate that it is impartible Secondly, they have no right to interdict alienations by the head of the family either for necessity or otherwise. This, of course, is subject to Section 4 of the Madras Impartible Estates Act in the case of impartible estates governed by the said Act. The right of junior members of the family for maintenance is governed by custom and is not based upon any joint right or interest in the property as co-owners. This is now made clear by the Privy Council in Commissioner, income tax, Punjab v. Krishna Kishore (1942) ILR 23 Lah. 1 (P.C.) and Raja Krishna Yachendra v. Raja Rajeswararao ILR (1942) Mad. 419 (P.C.). The income of the impartible estate is the individual income of the holder of the estate and is not the income of the joint family. Vide Commissioner of income tax, Punjab v. Krishna Kishore (1942) ILR 23 Lah. 1 (P.C.). To this extent, the general law of Mitakshara applicable to joint family property has been modified by custom and an impartible estate, though it may be an ancestral joint family estate, is clothed with the incidents of self-acquired and separate property to that extent. The only vestige of the incidents of joint family property, which still sticks to the joint family impartible estate is the right of survivorship which, of course, is not inconsistent with the custom of impartibility. For the purpose of devolution of the property and the only right which a member of the joint family acquires by birth is to take the property by survivorship but he does not acquire any interest in the property itself. The right to take by survivorship continues only so long as the joint family does not cease to exist and the only manner by which this right of survivorship could be put to an end to is by establishing that the estate ceased to be joint family property for the purpose of succession by proving an intention, express or implied, on behalf of the junior members of the family to renounce or surrender the right to succeed to the estate. That the property is not held in coparcenery was clearly enunciated by the Judicial Committee by Sir George RANKIN himself in the latest case in Anant Bhikappa v. Shanhar Ramchandra ILR (1944) Bom. 116, 1333 (P.C.) in these terms:

"Now an impartible estate is not held in coparcenery (Sartaj Kuari v. Deoraj Kuari) (1888) ILR 10 All. 272 (P.C.) though it may be joint family

property. It may devolve as joint family property or as separate property of the last male owner. In the former case, it goes by survivorship to that

individual, among those male members who, in fact, and in law are undivided in respect of the estate, who is singled out by the special custom, e.g.,

lineal male primogeniture. In the later case jointness and survivorship are not as such in point ; the estate devolves by inheritance from the last male

owner in the order prescribed by the special custom or according to the ordinary law of inheritance as modified by custom." See also the decision

of the learned Chief Justice and Sri Ravu Janardhana Krishna Ranga Rao Bahadur Vs. The State of Madras and Others, .

31. One contention, which the sons of the Appellant urged before the Tribunal and which Mr. Sundaram Ayyar pressed before us, was that

Sevuga Pandia Thevar took the zamindari not under the Will of his father Sundara Doss Thevar but completely outside it. To support this

contention of his he referred to the decision in AIR 1946 103 (Privy Council) . The facts there were as follows: An estate known as Partabner Raj

was an impartible estate, succession to which was governed by the rule of lineal primogeniture. On 17-5-1925, Raja Hukum Tej Pratab Singh who

was the holder of the estate died. Shortly before his death he had adopted a son called Raja Maha Vindeshri Pratap Singh, or shortly Raja Maha.

The day before he died he also left a Will, the material part of which ran as follows:

I, Raja Hukum Tej Pratap Singh, am the Raja of Partabner. I have been ill for a long time and in spite of treatment I am not getting better. Since

this morning I have, on the other hand, become much worse... To-day, Kunwar Madho Singh has given him (Maha Vindeshri Pratap Singh) to me

in adoption and I have taken him in adoption. After my death, my adopted son, Lal Maha Vindeshri Pratap Singh, shall be the gaddi nashin and the

owner of my entire movable and immovable property. After my death he shall, like myself, have all the powers. . . . therefore, during his minority,

my mother, ... who was my guardian during my minority and who managed the entire estate very well, shall remain the guardian of my adopted son

. . .

32. After the death of Raja Hukum litigation arose. The learned Subordinate Judge who tried the suit held that the document was not a Will within

the definition of the Indian Succession Act. On appeal the High Court reversed the view of the Subordinate Judge. The Privy Council, however, preferred to accept the view of the learned Subordinate Judge.

33. Now when we have to construe a Will, we must look into the terms of that Will and the circumstances surrounding the particular Will. It would

be ordinarily very unsafe to seek to ascertain the wishes of a person who has executed a particular document by referring to the words used by

another person in a wholly different context. This general rule apart, there is one important difference between the Will which Sundara Doss Thevar

executed and the Will of Raja Hukum Taj Pratap Singh which the Privy Council was called upon to construe. As their Lordships pointed out, there

were no direct words of gift in the Will of Raja Hukum Taj Pratap Singh. On the other hand, in the present case, in Clause 1 of his Will Sundara

Doss Thevar has inserted words making a specific bequest of the zamindari. If Sundara Doss Thevar did not want to make the zamindari the

subject-matter of any bequest he need not have mentioned the zamindari at all in his Will. If, however, for the sake of completeness in the

document it was considered advisable to make a reference to the zamindari of Seithur, it would have been sufficient to say that it would devolve on

Sevugapandia Thevar as it had devolved in the past. But, instead of that, we find that the zamindari is specifically mentioned by name and it is dealt

with in the same way as the other properties which Sundara Doss Thevar held. There are express words granting this property with full and

absolute rights to Sevugapandia Thevar. In the circumstances, we are unable to accept the contention, that Sevugapandia Thevar took the

zamindari de hors the Will.

34. Mr. Sundaram Ayyar referred to the preamble of the Will in which the testator said that he had purchased the Elumalai Zamin in order to

provide for his nephew Muthuswami Pandian, that Sevugapandia Thevar was at the time the only person entitled to inherit and that his mother and

daughter were entitled to maintenance and argued that the recital that Sevugapandia was entitled to inherit indicated that Sundara Doss Thevar did

not intend to make any disposition in favour of his son at all.

35. We are unable to agree. The words used in the preamble are merely statements explaining the factual position at the time. They are only

introductory in character and are not words of disposition. On the other hand, we find in clause one express words of disposition in favour of

Sevugapandia Thevar and the effect of those words is in no way cut down by the words in the preamble. That Sevugapandia Thevar was entitled

to inherit did not deprive Sundara Doss Thevar of his power to give. The only thing is that he gave the zamindari to him who would have been

otherwise entitled to take it. In clause six, Sundara Doss Thevar directed that Rs. 2,000 should be paid out of the zamin. Now, it would be a

legitimate question how if he was not making the zamin the subject-matter of his bequest he could have made such a provision. Likewise, in clause

seven, there is a direction that the debts of Sundara Doss Thevar should be paid out of the zamindari of Seithur. Taken together, all this makes it

manifest that the zamindari formed the subject-matter of disposition under the Will.

36. On the question as to what kind of interest a son takes in the self-acquired property of his father which he receives from him by way of gift or

testamentary disposition vis-a-vis his sons, there were, for long, differences of opinion among the High Courts. This was noticed by the Privy

Council in *Lal Bam Singh v. Deputy Commissioner of Partabgarh* (1923) ILR 45 All. 596 (P.C.). At page 604, they summarise the position thus:

It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest made by a

father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddun Gopal*

v. Bam Buksh (1863) 6 Suth.W.R. 71, when it was held that such property would be ancestral, and this has been followed in the later case of

Hazari Mall Babu v. Abaninath Adhurjya (1912) 17 C.W.N. 280. In Madras, upon the whole, the view seems to be that the father can determine

whether the property which he has so bequeathed, shall be ancestral or self-acquired, on the principle of *oujas est dare ejus est disponers* but that

unless he expresses his wish that it should be deemed self-acquired, it is ancestral: see *Tara Chand v. Reeb Ram* (1866) 3 M.H.C.R. 50 and

compare it with *Nagalingam Pillai v. Ramachandra Tevar* ILR (1901) Mad. 429 and other cases. In Bombay, on the other hand, the principle of

intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired: see

Jugmohandas Mangaldas v. Sir Mangaldas Nathubhoy ILR (1886) 10 Bom. 528 and Nanabhai Ganpatrav Dhairyavan v. Achratbai ILR (1886)

12 Bom. 122. At Allahabad, the decision was that such property is self-acquired: see. Parsotom Rao Tantia v. Janki Bai ILR (1907) All. 354

(decided in 1907). Finally, in Oudh in the case of Rameshar v. Rukmini (1909) 14 Oudh Cases, 244 after a review of all the cases, it was held that

where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be

held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death.

37. The controversy, however, has now been set at rest by the decision of the Supreme Court in C.N. Arunachala Mudaliar Vs. C.A.

Muruganatha Mudaliar and Another, . At page 250 it is observed:

In view of the settled law that a Mitakshara father has absolute right of disposition over his self-acquired property to which no exception can be

taken by his male descendants, it is in our opinion not possible to hold that such property bequeathed or gifted to a son must necessarily, and under

all circumstances, rank as ancestral property in the hands of the donee in which his sons would acquire co-ordinate interest.

* * * * *

The property of the grandfather can normally vest in the father as ancestral property if and when the father inherits such property on the death of

the grandfather or receives it, by partition, made by the grandfather himself during his lifetime. On both these occasions the grandfather's property

comes to the father by virtue of the latter's legal right as a son or descendant of the former and consequently it becomes ancestral property in his

hands. But when the father obtains the grandfather's property by way of gift, he receives it not because he is a son or has any legal right to such

property but because his father chose to bestow a favour on him which he could have bestowed on any other person as well. The interest which he

takes in such property must depend upon the will of the grantor. A good deal of confusion, we think, has arisen by not keeping this distinction in

mind. To find out whether a property is or is not ancestral in the hands of a particular person, not merely the relationship between the original and

the present holder but the mode of transmission also must be looked to; and the

property can ordinarily be reckoned as ancestral only if the present holder has got it by virtue of his being a son or descendant of the original owner. The Mitakshara, we think, is fairly clear on this point. It has placed the father's gifts under a separate category altogether and in more places than one has declared them exempt from partition. Thus in chapter I, Section 1, placitum 19, Mitakshara refers to a text of Narada which says: " Excepting what is gained by valour, the wealth of a wife and what is acquired by science which are three sorts of property exempt from partition ; and any favour conferred by a father."

When, however, he makes a gift which is only an act of bounty, he is unfettered in the exercise of his discretion by any rule or dictate of law. It is in these gifts obtained through the favour of the father that Vijnaneswar, following the earlier sages, declares the exclusive right of the sons. We hold, therefore, that there is no warrant for saying that according to the Mitakshara, an affectionate gift by the father to the son. constitutes ipso facto ancestral property in the hands of the donee.

* * * *

Our conclusion, therefore, is that a property gifted by a father to his son could not become ancestral property in the hands of the donee simply by reason of the fact that the donee got it from his father or ancestor.

As the law is accepted and well settled that a Mitakshara father has complete powers of disposition over his self-acquired property, it must follow

as a necessary consequence that the father is quite competent to provide expressly, when he makes a gift, either that the donee would take it

exclusively for himself or that the gift would be for the benefit of his branch of the family. If there are express provisions to that effect either in the

deed of gift or a will, no difficulty is likely to arise and the interest which the son would take in such property would depend upon the terms of the

grant. If, however, there are no clear words describing the kind of interest which the donee is to take, the question would be one of construction

and the Court would have to collect the intention of the donor from the language of the document taken along with the surrounding circumstances in

accordance with the well-known canons of construction. Stress would certainly have to be laid on the substance of the disposition and not on its

mere form. The material question which the Court would have to decide in such cases is, whether taking the document and all the relevant facts

into consideration, it could be said that the donor intended to confer a bounty upon his son exclusively for his benefit and capable of being dealt

with by him at his pleasure or that the apparent gift was an integral part of a scheme for partition and what was given to the son was really the share

of the property which would normally be allotted to him and in his branch of the family on partition. In other words, the question would be whether

the grantor really wanted to make a gift of his properties or to partition the same ? As it is open to the father to make a gift or partition of his

properties as he himself chooses, there is, strictly speaking, no presumption that he intended either the one or the other.

* * *

The testator certainly wanted to make a distribution of his properties in a way different from what would take place in case of intestacy. But what is

really material for our present purpose is his intention regarding the kind of interest which his sons were to take in the properties devised to them.

Here the Will is perfectly explicit and it expressly vests the sons with absolute rights with full powers of alienation by way of sale, gift and exchange.

There is no indication in the Will that the properties bequeathed were to be held by the sons for their families or male issues and although the Will

mentions various other relations, no reference is made to sons" sons at all. This indicates that the testator desired that his sons should have full

ownership in the properties bequeathed to them and he was content to leave entirely to his sons the care of their own families and children.

38. The question we have now to decide is whether when Sundara Doss Thevar bequeathed the zamindari to his son Sevugapandia Thevar he

intended that Sevugapandia Thevar should take it as self-acquired property or as joint family property.

39. Mr. Sundaram Ayyar who appeared for the sons laid emphasis on the fact that in his Will, Sundara Doss Thevar did not say that Sevugapandia

Thevar was to take the property as self-acquired. That is true enough, but from that it does not follow that it must be deemed that Sundara Doss

Thevar said that the property should be joint family property in the hands of Sevugapandia Thevar.

40. Mr. Sundaram Ayyar next said that it is not to be lightly presumed that the testator would have intended either to break the line of succession

by which the property had descended to himself in the past or to alter the character of the property in the hands of the legatee. He also said that

the words of the testator that Sevuga Pandian shall hold and enjoy with absolute rights and from son to grandson and so on in succession are

consistent with the view, that Sundara Doss Thevar intended to make the property joint family property in the hands of his son Sevugapandia

Thevar. It seems to us that the intention of Sundara Doss Thevar is not at all a matter of presumption; we have to find out what the words he used

actually mean. No doubt, like most people he would have desired that his line should last for all time and that his property too should last likewise.

That is a general sentiment, in fact a sentiment so general and widespread as to be by itself insufficient to support any particular construction. As for

the expression with absolute rights and from son to grandson, used by the testator, we shall examine it lower down: here it will suffice to say that

we are unable to agree with Mr. Sundaram Ayyar that it is consistent with a desire on the part of Sundara Doss Thevar that Sevugapandia Thevar

should hold the zamindari as joint family property.

41. In Clause three of this Will, Sundara Doss Thevar stated that should his daughter Muthathal die issueless, the property which he was giving to

her as stridhanam should revert to the zamin. Such a provision, said Mr. Sundaram Ayyar, is inconsistent with the theory that the testator visualized

a situation in which the zamindari would cease to be an integral whole. So, the argument ran, he could not have intended that the legatee should

take the property as self-acquired. As we said before, Sundara Doss might well have desired and might have proceeded on the assumption that

the zamindari would last for an indefinite period of time. But, by making it joint family property in the hands of Sevugapandia Thevar he would have

done nothing at all to ensure the perpetuity of the zamindari. As the law stood then, whatever the manner in which he got the zamindari--whether as

self-acquired or as joint family property --Sundara Doss Thevar could have dealt with it as he chose. The Impartible Estates Act had not been

passed and Sundara Doss Thevar could not have anticipated that such a piece of legislation would be placed on the statute book. If Sundara Doss

Thevar had desired to perpetuate the zamin he would have had to think of other means of producing such a result. By merely making it joint family property he could not have achieved any such purpose. The only difference in 1895 between ancestral impartible property which belonged to a joint family and ancestral impartible property which was self-acquired lay in the manner of its devolution. In the former case it would go by survivorship and in the latter by succession. The provision, therefore, made in clause three that the stridhanam allotted to Muthathal should, on failure of issue, revert to the zamin does not advance the case of the sons. That provision merely throws light on the hopes of the testator.

42. In clause ten of his Will, Sundara Doss Thevar directed that the festivals and charities which were being performed by the two zamins should continue to be performed as in the past. In Clause eleven, he also prohibited his executor from dealing with the pannai lands otherwise than he himself had been doing.

43. These directions, it was suggested, were indicative of the views of the testator. No doubt they are indicative of his views in the sense that he expected things to go on as they had gone on in his time. But, on the question as to whether he desired that Sevugapandia Thevar should take the property as self-acquired property or as joint family property, these provisions throw no light whatever.

44. Yet another contention taken was that as Sevugapandia Thevar would have taken the property even in the absence of a Will as Sundara Doss Thevar himself recognized, it must be assumed that Sevugapandia Thevar took the zamin not as his self-acquired property but only in the same character in which he would have taken as heir. On this argument it will perhaps be sufficient to say that a similar contention was urged before this Court in S.T. Nos. 81 and 82 of 1954 (R. Ramachandran v. G. Kasinatha Iyer and Ors.) and negatived.

45. There are certain considerations on the other side which appear to us to be really decisive. At the time Sundara Doss Thevar made his Will, the zamindari was wholly at his disposal. He could have dealt with it as he chose, either by Will or by transfer inter vivos, and, since he had competent legal advice at the time--be it remembered that the Will was executed in Madurai to which place Sundara Doss must have gone for the

purpose and that the Will was attested by at least three lawyers --it may be legitimately presumed that he knew the full extent of his rights and

powers in relation to the zamindari. He could have given the zamindari absolutely to his son or he could have given him a life estate or, if he chose,

he could have given him even a more limited estate. But he did not do anything of the kind. The words he actually used were:

46. These are the most comprehensive of the words of disposition ordinarily employed. They are normally understood as sufficient to confer a full

and absolute estate--without limitation, restraint or qualification. And, after all, if Sundara Doss Thevar chose to confer an absolute estate on his

son, there would be nothing surprising about it. It is not as though the legatee were a widow or a woman in respect of whom a presumption or at

least an argument could be raised that regard being had to the ordinary actions of Hindus at that time the testator would not have intended to

confer absolute powers. The legatee was his son, and, the testator was also appointing an executor in whom, as the recitals in the Will show, he

had the completest confidence. There is no warrant whatever for assuming that the words actually used were not intended to have their normal and

full effect. In fact, if the estate had not been an impartible zamindari that had in the past descended by lineal primogeniture, the matter would

probably not have been open to argument even.

47. By clause two of his Will, Sundara Doss Thevar left the properties in schedule B to Muthuswami Pandian, his brother's son. In defining the

extent of his interest in the property so granted, the testator used the same expression with absolute rights and from son to grandson and so on

from generation to generation. It was not suggested that the words in this clause conferred anything less than an absolute estate on Muthuswami

Pandian. Similarly, by clause four, Sundara Doss Thevar gave some property to the woman called Chellam who had rendered long and faithful

service to his wives. In respect of that property also the words used are with absolute powers from son to grandson and so on from generation to

generation.. Like-wise by Clause five, Sundara Doss Thevar gave the properties in schedule E to Muthiah Bagavathar. Here too he used the

words with absolute rights and from son to grandson and so on from generation to generation. It is not suggested that either the woman called

Chellam or the Bagavathar got anything less than an absolute estate.

48. Now, the ordinary rule of construction is that the same expression should be construed in the same sense wherever it appears in the same

document, unless of course there is something repugnant in the context. We are unable to see anything in the context which makes it inappropriate

to construe the expression

49. In its ordinary sense which is also the sense in which that expression has been used elsewhere in the document. As we already stated, when

making a disposition in favour of his daughter Muthathal he directed that should she die issueless the property should revert to the zamin. This

clause is important as showing that when he wanted to cut down or limit the extent of his bequest the testator used sufficient words to make his

intention clear. The contrast between the words used in clause three, in relation to Muthathal and the words used in Clauses one, two, four and five

is unmistakable, and, cannot be ignored.

50. There is yet another consideration. The testator gave to Sevugapandia Thevar not merely the zamindari of Seithur but he also made him his

residuary legatee. The relevant passage has been translated as follows:

A schedule belongs to Sevugapandia Dorai. In Seithur Zamin and the said zamin assets belonging to us and in all other properties excluding the

properties attached to B.C.D. and E schedules--all the other movable and immovable properties.

51. The point here is that Sundara Doss Thevar made no distinction as to the manner in which Sevugapandia Thevar would take the zamin and the

manner in which he would take the residuary properties. It has not been contended, and, it cannot possibly be contended, that in respect of the

residuary properties Sundara Doss Thevar intended that Sevugapandia Thevar should take them otherwise than as self-acquired properties. If that

be so, the conclusion is strengthened that Sundara Doss Thevar intended that Sevugapandia Thevar should take the zamindari also in the same

way.

52. Two peculiar considerations should be mentioned. If the intention of Sundara Doss Thevar had been that Sevugapandia Thevar should take the

zamin as joint family property, one naturally asks why did he not say at least,

I give the zamin to Sevugapandia Thevar and from him it shall descend in the same manner as it has done in the past.

53. Again, what other words could Sundara Doss Thevar have possibly used to make an absolute and unqualified grant ? ""We put this question to

Mr. Sundaram Ayyar and he was not able to suggest any other set of words.

54. Mr. Sundaram Ayyar, however, argued that if the matter is ambiguous and if the considerations in support of either view are evenly balanced,

then the appeal must fail, because it is for the Appellant to prove that the decision of the Tribunal was wrong. In this connection he referred to

Nabakishore Mandal v. Upendrakishore Mandal (1981) 42 M.L.J. 253 (P.C.). We have no difficulty about the legal position. But, as we

explained, we have no doubt whatever in our minds that Sundara Doss Thevar intended to make an absolute and unqualified grant.

55. Mr. Sundaram Ayyar next argued that even if it be that Sevugapandia Thevar received the property as self-acquired property, he subsequently

threw it into the hotch-pot and converted it into joint family property. The evidence adduced for this purpose is wholly insufficient. No doubt, in

certain sale deeds, exhibits B-1, B-9, B-10 and B-11, the Appellant purported to act for himself and as guardian of his minor children. But, these

recitals are not, in our opinion, of any consequence. Very often vendees of property, in order to avoid trouble in future, insist that every person

who could possibly set up a claim in respect of the property should join in the document.

56. We are clearly of the view that Sevugapandia Thevar took the zamin as self-acquired property. The appeal is, therefore, allowed, and the

claim of the Appellant in Original Petition No. 185 of 1955 stand allowed. There will be no order as to costs.