
(1958) 10 MAD CK 0028
In the Madras High Court
Case No : S.T. Appeal No. 10 of 1956

V.T.S. Sevugapandia Thevar	Vs	APPELLANT
V.T.S. Thyagasundaradas Thevar and others		RESPONDENT

Date of Decision : 15-10-1958

Acts Referred:

Citation : (1959) ILR (Mad) 601

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

Bench : Division Bench

Advocate : V. Vedantachari and T. Rangaswami Ayyangar, for the Appellant; 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 O. P.

No. 185 of 1955. 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. Savugapandia 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 S. 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 S. 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.

2. 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 S. 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 S. 45 applied and the sons were

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

3. 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 Tallakulam, Madurai Dt. He then states that he owned (1) the zamindari of

Seithur, as impartible, ancestral property, descending by lineal primogeniture, (2) 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 (3) several other properties, moveable 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 11 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 recognises 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.

4. We now get Cl. (1) of the will which has been translated as follows :

Our son Sevugapandia Dorai avergal shall take the properties set out in A schedule herein after our life time 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.

5. The property set out in Schedule A is the zamindari of Seithur.

6. By Cl. (2) 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 Cl. (3) he gives 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 Cl. (4) 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 Cl. (5) he makes a bequest of the properties set out in Schedule E to one Muthiah Bhagavathar. The will provides that this Bhagavathar was

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

10. By Cl. (6) he makes the bequest of a sum of Rs. 2,000 to Dr. Van Allan for the construction of a hospital. By Cl. (7) he directs that certain

debts he had contracted and any others that he might contract ""might 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.

11. By Cl. (6) he appoints Nagappa Swami Kuppachi Naicker, Zamindar of Peraioor to be the executor of his will. By Cl. 9 certain directions are

given to the executor, but these are not now material.

12. By Cl. (10) 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.

13. In Cl. (11) 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.

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

15. 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.

16. Some thirty one years previously the Privy Council had ruled thus in the well-known Sivaganga case 9 M.I.A. 539:

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

course of descent of separate acquired property; but if there is a copartnership between the different members of the united family survivorship

follows :

Upon the principle of survivorship, the right of the copartners 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.

17. In 1888 the Privy Council decided in Sartaj Kuari's Case 10 All. 272, that the holder of an impartible estate was competent to make a gift of

a part of 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 Venkayamma v. Stree Rajah

Yanumula Boochia Venkondora 13 M.I.A. 333, and observed.

This is a clear opinion that, though an impartible estate may be for some purposes spoken of as joint family property, the coparcenary 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.

18. In *Beresford v. Ramasubba* 13 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 *Surtaj Kuaris* Case 10 All. 272, and, applying that decision of the Privy Council they upheld in alienation by way of a lease which had been made by the Zamindar of Kangundi.

19. It must be remembered that at the time *Sundara Doss Thevar* executed his 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.

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

21. In 3 CWN 415 (Privy Council) commonly known as the first *Pitapur* case, the Privy Council decided two points,

1. That the case of *Sartaj*, which was a case of direct inter vivos gift, covered by analogy the case of alienation by will.
2. That the law as laid down in *Sartaj*, which was a case from the North-western provinces, also applied in Madras, notwithstanding the older

Madras decisions, Madras being under the Mitakshara law.

22. Next in Chronological order comes Lalram Singh v. Dy. Commissioner of Partabgarh L.R. 50 IndAp 265. 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, Rajah Rampal Singh and Dirgaj Kuar, the mother of the Rajah Rampal Singh,

Babu Lachman Singh, the second son of Rajah Hanwant Singh, and his heirs and representatives shall succeed to the entire Rampur Raithula

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

villages which he has received under S. 8, during the life time of Raja Rampal Singh and his mother, Dirgaj Kuar.

23. 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.

24. In Ulagalum Perumal v. Subbalakshmi 71 M.L.J. 1=44 L.W. 168, 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 settle takes 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. Rani Subbulakshmi ILR

1939 Mad. 443=49 L.W. 621 (P.C.). The facts of the case are thus summarised in the judgment of their Lordships:

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 recognised as belonging to owners of impartible estates by the decision of this Board in the case in *Sartaj Kuari v. Deoraj Kuari* 15 I. A. 51. 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.

25. 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* (1), 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.

26. Their Lordships quoted with approval certain observations which the Allahabad High Court had made in AIR 1939 22 (Privy Council) . 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 Varma must be treated as self-acquired property for the purposes of descent to his heirs.

27. We would next refer to *Lalitha Kumari Devi v. Raja of Vizianagaram* 66 L. W. 231 at 242, the learned Chief Justice observed as follows:

In my opinion all that was laid down by their Lordships in *Ulagalum Perumals*"

Case ILR 1939 Mad. 443=49 L.W. 621 (P.C.), was that an

alienee from a holder of an impartible estate take 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 Ramachandra ILR 1944 Bom. 116.

28. In Senthathikalai Pandiya v. Varaguna Rama Pandiya 66 L.W. 671 at 675 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 S. 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. Dewan Krishna Kishore 681. A. 155=54 L. W. 635 and Raja Velugoti Sarvagna Kumar a Krishna

Yachendra Bahadur Varu v. Raja Rajeswararao 68 I.A. 181=I.L.R. 1942 Mad. 419=53 L.W. 65. 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. Dewan Krishna

Kishore 681. A. 155=54 L. W. 635. 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 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 coparcenary was clearly enunciated by the Judicial Committee by Sir George Rankin himself, in the latest case in *Ananth Bhikappa v. Shankar Ramachandra* ILR 1944 Bom. 116 at P. 133, in these terms; "Now an impartible estate is not held in coparcenary (*Rani Sartaj Kuari v. Rani Deoraj Kuari* 10 All. 272, 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 latter 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 Venkatarama Aiyar, J., in *Sri Ravu Janardhana Krishna Ranga Rao Bahadur Vs. The State of Madras and Others*, .

29. One contention, which the sons of the appellant urged before the Tribunal and which Mr. Sundaram Aiyar pressed before us, was that Sevuga Pandia Thevar took the zamindari not under the will of the 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 17th May, 1925 Raja Mukum Taj Pratap Singh who was the

holder of the estate died. Shortly before his death he had adopted a son called Raja Maha Vindeshri Pratab 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 Taj Pratap Singh, as the Rajah 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... Today Kumar 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 Pratab Singh shall be the " gaddi nashin " and the

owner of my entire moveable 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....

30. After the death of Rajah 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.

31. Now, when we have to construe a will we must look to 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 dehors the will.

32. Mr. Sundaram Aiyar 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.

33. 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 (1) 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 (6) 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 (7) there is a direction that the debts of Sundara Doss Thevar should be paid out of the zamindari of Seithur. Taken together all that makes it manifest that the zamindari formed the subject matter of disposition under the will.

34. 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 *Lalram Sing v. Dy. Commissioner of Partabgarh* 50 I.A. 265. At page 274, 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 of 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 Muddum Copal

v. Ram Busksh 1863 3 Sut. 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 Baba v. Abaninath Adhuriya 17 Cal. W.N. 280, decided in 1912, 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 "" cujus est dare ejus est

disponere "" but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral : See Tarachand v. Eseb Ram 3 M.H.C. 50,

and compare it with Nagalinga v. Ramachandra 24 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 Jaganmohandas v.

Sir Mangaldas Nathubhoy 10 Bom. 528 and Manabai v. Achratbai 12 Bom. 122. At Allahabad the decision was that such property is self-

acquired : see Parsotham Rao Tania v. Janki Bai 29 All. 354, (decided in 1907). Finally, in Oudh in the case of Rameshwar v. Rukmin 15 Oudh

Cases 244 (decided in 1909) 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 such son takes an interest which passes to his heirs at his death.

35. The controversy, however, has now been set at rest by the decision of the Supreme Court in Arunachala Mudaliar v. Murnganatha Mudaliar

(1953) 2 M.L.J. 796. At page 799 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 coordinate 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, Sec. 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 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 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 of the family on partition? In other words, the question would be whether the grantor 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.

36. 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.

37. Mr. Sundaram Aiyar 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.

38. Mr. Sundaram Aiyar 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 Aiyar 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.

39. In Cl. (3) of his 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 Aiyar, is inconsistent with the theory that the testator visualised 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

as Sundara Doss Thevar himself recognised it must be assumed that Sevugapandia icient to say that a similar contention was urged before this

Court in (R. "Ramachandra v. G. Kasinatha Iyer and others S.T. Nos. 81 and 82 of 1954) and negatived.

42. 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 :

43. 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 Sundaradoss 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 notions 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

completes 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.

44. By Cl. (2) of his will Sundara Doss Thevar left the properties in Sch. 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 Cl. (4) 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."" Likewise, by Cl. (5) Sundara Doss Thevar gave the properties in Sch. E to Muthiah Bhagavathar. 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

Bhagavathar got anything less than an absolute estate.

45. 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 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 (3) in relation to Muthathal and the words used in clauses 1, 2, 4

and 5 is unsustainable, and, cannot be ignored.

46. 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 moveable and immovable properties.

47. 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.

48. Two peculiar considerations should be mentioned. If the intention of Sundara Doss Thevar had been that Sevuga Pandia Thevar should take

the zamin as joint family property, one naturally asks why he did 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."" 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 Aiyar and he was not able to suggest any other set of words.

49. Mr. Sundaram Aiyar, 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

Nahakishore Mandal v. Upendrakishore Mandal, 42 M.L.J. 253=15 L.W. 417. We have no difficulty about the legal position. But, as we

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

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

threw it into the hotchpot and converted it into joint family property. The evidence adduced for the purpose is wholly insufficient. No doubt in

certain sale deeds, Exs. 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. We are clearly of the view that Sevuga Pandia Thevar

took the zamin as self-acquired property. The appeal is therefore allowed, and the claim of the appellant in O. P. No. 185 of 1955 stands allowed.

There will be no order as to costs.