

(1905) 03 MAD CK 0010
In the Madras High Court

Yethirajulu Naidu

APPELLANT

Vs

Mukunthu Naidu and Others

RESPONDENT

Date of Decision : 16-03-1905

Acts Referred:

Citation : (1905) ILR (Mad) 363 : (1905) 15 MLJ 299

Hon'ble Judges : Arnold White, C.J.;Subrahmania Aiyar, J

Bench : Full Bench

Judgement

Arnold White, C.J.—In these appeals four a question arise for determination. The first question is under the will of the testator, what estate

do the three sons of the testator take in the property described in the will as No. 101, Acharappen Street.

2. The argument on the one side was that this particular property, which may be conveniently referred to as house No. 1, devolved with the rest of

the property (which may be referred to at house No. 2 and house No. 3) devised by the will. On the other side it was contended that the three

sons took an "" absolute"" estate in house No. 1. I feel no doubt that the testator intended that house No. 1 should not devolve in the same way as

house No. 2 and house No. 3. No doubt house No. 1 is included with house No. 2 and house No. 3 under the heading "" Particulars of

properties"", but when the testator deals with the income of the houses pending the final division of his estate, he only provides for the income of

house No. 2 and house No. 3. With regard to the income of these two houses he directs that his executors after making certain monthly payments

(including a sum of Rs. 6 a month as the rent of house No. 1 which he sets apart as the teerva of a certain charity) shall divide it and pay it to the

three sons in equal shares. I think it is quite clear that the words "these properties" when they occur in the last paragraph of the will refer to the properties with which the testator had just been dealing, viz., house No. 2 and house No. 3. The same words occur at the beginning of the will, in the passage where the executors are appointed. No doubt the more natural meaning to give to these words where they thus occur would be to read them as referring to the properties which have just been enumerated which would include house No. 1, They may, however, be read as referring to the properties dealt with in the two following paragraphs, viz., house No. 2 and house No. 3. This construction gives the meaning to the words which I think the testator clearly intended them to have when he uses them at the end of the will, and makes them consistent with the express provision of the will with regard to the dispositions of house No. 1, and houses Nos. 2 and 3, respectively.

3. The effect of the will as regards house No. 1 is to create an estate in English phraseology, in fee simple, or to use the words which have been adopted by the Courts of this country, an absolute estate in the three sons. The three sons took as members of a joint family and their respective interests pass to their representatives not under the will but under the Hindu Law of inheritance. That is to say, the plaintiff and his branch and the 1st defendant and his branch take the property to the exclusion of the 4th defendant whose husband died without male issue.

4. The next question is what interest the three sons take in the income of house No. 2 and house No. 3.

5. I am of opinion that the sons take a limited estate in the income in the nature of an estate for lives which subsists until the death of the last survivor, when this limited estate comes to an end and the property must be divided under the provision of the will which will be dealt with later.

6. I do not propose to discuss in detail the English authorities which were cited in the course of the argument of this case. It has often been

observed that except in so far as the authorities lay down broad canons of construction, they are of little assistance in interpreting a will. If this be

so with reference to wills drawn by experts using well-known terms of art, the observation applies with much greater force to the case of a will like

that with which we have to deal in the present case. So far as the English authorities are concerned I will content myself by saying that in my

opinion the present case falls within the class of cases in which it has been held that under a gift to A and B as tenants in common during their joint

lives and the life of the survivor, if A dies, his share vests in his legal personal representative during B's life (see for instance *Bryan v. Twigg* L.R. 3

Eq. 433) and not within the class of cases in which it has been held that the survivor takes the whole for life (see for instance *Pearce v. Edmeades*

51 R.R. 369 and *M'Dermott v. Wallace* 59 R.R. 441). There is nothing in the will to show that the testator intended that the share of the income

to which a son was entitled should, on his death, pass to his surviving brothers and not to his representative. On the other hand the provisions of

the will with regard to the ultimate distribution of the corpus may be said to point to an intention on the part of the testator that the grandsons

between whom the corpus was to be divided on the death of the last survivor of three sons should not be altogether shut out from any participation

in the income so long as any one of the three sons remained alive. The result is that the three sons take, and the survivor of them takes a limited

estate which subsists till the death of the last survivor and that the interest of a deceased son passes to his representatives. In the present state of

the family the plaintiff and the first defendant take one-third each, and the 4th defendant as the widow of the son of the deceased son, takes a

widow's estate in her husband's one-third.

7. The next question is, as regards houses Nos. 2 and 3, when is the corpus to be divided amongst the grandsons ? I think it is clear that the

testator intended that these properties should not be divided amongst the grandsons until after the death of the last survivor of the three sons.

8. The last question is, does the third defendant, the adopted son of the plaintiff, take any interest under the will as the grandson of the testator. He

was born in the testator's life-time but was not adopted till after his decease. The learned Judge held, though with some doubt, that the 3rd

defendant took no interest under the will. I was at first disposed to take the view adopted by the learned Judge in the Court below, but on further

consideration I have come to the conclusion, for the reasons stated in the judgment of my learned brother which I have had the advantage of

reading, that the adopted son takes as one of the grandsons. I agree that the decree of the learned Judge should be modified in the manner stated

in the Judgment which my learned brother is about to read.

Subrahmania Aiyar, J.

9. The question in the present appeals is as to the construction of certain important provisions of the will of Cota Kothanda Ramaswamy Naidu

who died on the 17th May 1881 and as to the rights of the parties before us with reference to the dispositions made therein. The testator died

leaving three sons of whom the plaintiff is one and the first defendant another. The plaintiff some years after the death of the testator adopted the

third defendant who had been born in the testator's life-time. The second defendant is the son of the first defendant and he also was in existence at

the testator's death. The third son of the testator also had a son born to him in the testator's life-time but both died subsequently, the son, first, and

the grandson, afterwards, the latter leaving the 4th defendant, his widow, as his heir.

10. The provisions of the will requiring consideration are those bearing upon the Immovable properties of the testator, viz., three houses or

bungalows yielding or capable of yielding considerable monthly rent. After referring to the properties in general terms and appointing executors to

administer his estate, the testator first deals with house No. 101, Acharappen Street (which I shall refer to as house No. 1) and then with the two

other house properties (to be referred to as houses Nos. 2 and 3). In regard to house No. 1 the disposition runs thus "As I have fixed the above

mentioned house I live in, No. 101 in Acharappen Street, for the teerva or assessment of the land attached to the charity choultry which I have

built at Sevvapet, therefore my three sons shall use and enjoy this house from son to grandson and so on in succession without possessing

power to give as gift or sell the same and continue to pay rent month by month at the rate of Rs. 6 per month for the teerva of the aforesaid

charity land." In regard to houses Nos. 2 and 3 the testator takes the monthly income thereof at Rs. 530 and after certain specified deductions

therefrom the balance is dealt with as follows :- "The remaining amount whatever it may be shall be divided and paid by my executors to my three

sons in equal shares." As to the corpus itself the disposition runs thus : "My executors shall divide and give away these properties to my own

grandsons, being my sons' sons, after my sons according to their respective

shares. My sons shall have no right whatever to give "" as gift or sell these properties.

11. The first point for determination is as to the nature of the estate given to the three sons in regard to house No. 1. It is obvious that the sons took an absolute estate as the property is given to them to be enjoyed "" from son to grandson""-terms repeatedly recognised not only by the decisions of the courts in this country but also by the decisions of the Judicial Committee as words of purchase and as importing a grant of absolute property under the Hindu Law. Mr. Sivaswami Aiyar's suggestion on behalf of the 1st defendant, that the interest of the sons in this house is only similar to what is given to them in the net income of the other two houses, is on the face of it quite untenable. That the testator draws as clear a distinction as can be between this house and houses Nos. 2 and 3 with reference to the disposition thereof is manifest from, among other things, the testator excluding the rent derivable from this house from that which he makes payable to the three sons. The term "" these properties"" in the concluding part of the will refers only to those houses the income whereof was referred to and dealt with in the parts of the will just preceding this passage. The corpus of the property thus indicated is given to the grandsons absolutely and the fact that the testator does not attempt to qualify their power of dealing with the properties in the matter of alienation is decisive against the contention that the concluding disposition has any reference to house No. 1, for in regard to it he had already introduced a clause restraining alienation altogether.

12. The remaining point for consideration in connection with this house is whether the sons took it as tenants in common as contended on behalf of the fourth defendant. The decision of the Judicial Committee in Jogeshwar Narain Deo v. Ramachund Dittt and Ors. L.R. 23 1.A. 37 point out that the principle of joint tenancy as obtaining in England is quite foreign to the Hindu Law and that, when property is gifted to more than one, in the absence of anything in the grant to the contrary, the presumption is that the donees take as tenants in common. But as implied in that decision itself joint ownership of another description is of course not only not foreign to the Hindu system, but quite familiar to it, viz., that special kind of which the joint holding by the members of an undivided Hindu family is the type. And

in cases like the present, the question for determination is but one of intention to be ascertained with reference to the terms of the particular will. If the grant is to persons who are incapable of forming a Hindu joint family, they can of course take only as tenants in common. If on the contrary the grant is to persons who constitute such a family, even then it may be that the prima facie view is that they take in severalty and that those who argue in favour of the opposite construction have to show some clear foundation for it in the terms of the will. Of course the donees here, the sons, were persons who could be, and were, members of a joint family. In fact in one part of the will the testator himself observes : "" Therefore I and my sons are members of an undivided family."" And as to the terms of the gift they are clear to the effect that the donees were to take not in severalty but in co-parcenary. That the distinction between the two was perfectly clear to the mind of the testator is beyond question, for where he wishes them to take as tenants in common he uses apt expressions, as the words in equal shares"" in the paragraph relating to the income and "" according to their respective shares "" in the paragraph relating to the division of the corpus of houses Nos. 2 and 3, while with reference to the house under consideration he directs common enjoyment without any possibility of division, the reason for such disposition being that the house had been used as the residence of the family and it was the testator's wish to perpetuate such use. As, however, the condition against alienation is void as repugnant to the absolute estate given to the sons, it follows that the fourth defendant's contention referred to above is unsustainable and that the property was taken by the three sons with rights of survivorship incident to a Hindu, co-parcenary, that on the death of the fourth defendant's husband without male issue and without having become divided from his uncles, the house became vested in the plaintiff and the first defendant and their male issue and therefore that the fourth defendant can claim no share in this property.

13. Passing now to the case of houses Nos. 2 and 3, it is unquestionable that the testator gave to his sons an interest in their incomes only subject to the deductions specified in the will. That the donees took their interests as tenants in common is likewise certain, as the phrase "" in equal shares"" used in reference to this gift obviously implies. I consider it quite

unnecessary to examine the numerous English decisions cited with reference to this question in the argument by Mr. Sivaswami Aiyar. It is sufficient to say that they turn more or less on the words of the instrument in the particular cases and do not furnish any general rule which can be relied on as helpful in construing the present will. Moreover, in such of them as were held to be cases of joint tenancy, it was of a description unknown to the Hindu Law. I would only add that *Bryan v. Twigg* L.R. 3 Eq. 433 relied on by Mr. Tirunarayanachariar on behalf of the fourth defendant lays down a principle which may properly be applied in the circumstances here, for the gift of the income in the present instance being to the sons in equal shares and not to them each for his life only, the language is virtually similar to that in the above case. According to the principle of that decision the division of the income among those entitled will not cease until the time for the division of the corpus arrives, which will not be so long as any of the sons of the testator is alive. And as already observed inasmuch as the testator intended that the sons should take as tenants in common, the share of each must be taken to vest in him and his representative while the title to payment subsists. The fourth defendant therefore is entitled to receive her husband's share of the income as his heir.

14. Now lastly as to the corpus of these two houses, that is in the most express terms left to the testator's grandsons by his sons, and only to them.

That the second defendant and the deceased* husband of the fourth defendant as the grandsons in existence at the death of the testator became

entitled to their respective shares whatever they might turn out to be has of course never been controverted. The dispute is as to whether the third

defendant has any right to a share in the houses under consideration. Though at first I was inclined to take a different view, further consideration

has led me to the conclusion that the contention of Mr. Ramachandra Rau Sahib on behalf of the third defendant, that he became entitled on his

adoption to an equal share with the other two grandsons, is well founded. No doubt in this view the adopted son who is only a substitute for an

aurasa son is placed in a better position than an aurasia son conceived and born after the testator's death; for such an aurasia son could not take

any interest in the houses in question according to the decision in the *Tagore* case, and notwithstanding the Hindu Wills Act, having regard to

Alangamonjori Dabee v. Sonamoni Dabee ILR 8 C. 637 wherein it was held on appeal that the Hindu Law on the point had not been modified by the provisions of the said Act. This view may seem anomalous but it is not really so. For the effectuation of a gift with reference to such an adopted son as the third defendant is on the analogy of a gift to an appointee under a power given by the donor. In Bai Motivahoo v. Bai Mamoobai and Anr. L.R. 24 I.A. p. 93 the Privy Council upheld a power given by a testator to another to appoint by will the person who was to take the property of the testator, relying for the recognition of such a power on the analogy of the power to adopt that may be given by a husband to his widow and declared that gifts made under a power to appoint will be valid so far as they may be made to persons in existence at the death of the testator. Just as in that case the gift takes effect on the appointment being made so in the present case the gift takes effect on the adoption being made. The conditions necessary are that the donee must, as required in that case, have been in existence at the death of the testator and must, in the circumstances of the present case, have also acquired the status of a grandson prior to the time when the division of the corpus could take place. I should, however, not be supposed as suggesting that the condition that the donee should have been in existence at the death of the testator could be insisted on even in the case of a son adopted to the testator himself. For according to the observations of the Privy Council in the Tagore case 9 B.L.R. 377 at p. 397 such an adopted son would be taken in point of law as in existence at the testator's death or his case would be treated as an exception to the rule of Hindu Law about the existence of the donee at the donor's death. It only remains to observe that I do not understand the words "' my own grandsons being my sons' sons'" in the will to indicate an intention to exclude grandsons by adoption. The suggestion uniformly made in the argument, and in which I entirely agree, is that these words were meant to prevent illegitimate sons of the sons putting forward pretensions to a share under the terms of the will in question.

15. For all the foregoing reasons, I would substitute for the declarations made by the learned Judge the following: (1) declare that the plaintiff and his adopted son, the third defendant, on the one hand and the first defendant and his son the second defendant on the other, are entitled to house

No 1 in Acharappen Street as members of a coparcenary with the right of survivorship incident to such holding under the Hindu Law subject to the payment of Rs. 6 per mensem on account of the teerva payable in respect of the land attached to the charity choultry at Sevvapet founded by the testator, (2) declare that out of the income of the houses No. 1/21, 1st line Beach and No. 86, Poonamallee Road, (subject to the deductions mentioned in the will) for the life of the longest liver of the testator's sons, the plaintiff and his representatives are entitled to a third share, the first defendant and his representatives are likewise entitled to a third share and the fourth defendant is entitled to the remaining third share as her husband's heir, (3) declare that the second and third defendants are respectively entitled to a third share in the aforesaid two houses Nos. 1/21 and 36 and that the fourth defendant is entitled to a widow's estate in her husband's remaining third share therein, but that these three defendants are not entitled to call for division and delivery of their respective shares until the demise of the last surviving son of the testator.

16. The costs of all the parties will be paid out of the estate.