

S. Sukumar Vs. S. Gopal,

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Court : Chennai

Decided On : Aug-08-2002

Reported in : (2002)3MLJ647

Judge : P. Shanmugam and ;K. Sampath, JJ.

Appeal No. : A.S. No. 824 of 1986

Appellant : S. Sukumar

Respondent : S. Gopal, ;s. Badrinarayana, ;A.S. Loganathan, ;c.P. Subramanian,
;g. Thiagaraja Mudaliar and Bros

Advocate for Def. : P.K. Sivasubramanian, Adv. for For Respondent 1 and
;M.S.K. Rajasekaran, Adv. For Respondent 2

Advocate for Pet/Ap. : R. Subramanian, Adv. for ;G.V. Srinivasalu, Adv.

Judgement :

K. Sampath, J.

1. The short point for consideration in the appeal is as to the scope of Ex.A-1, which is a settlement deed executed by one Seshachala Chetty, the grandfather of the plaintiff and the second defendant, and father of the first defendant. Under the said document, he gave absolute rights in favour of his wife and in case, during her life time she did not alienate or deal with the property, his grandsons through

his two sons would have to take the property equally. The document further provided that in case the second son Gopal, who is the first defendant in the suit, had no issue whatsoever, he should be allowed to live in 123, Audiappa Naicken Street, George Town, Madras, for his life time and further the settle should allow her daughter Saraswathi to enjoy two rooms in any of the houses free of rent for her life time.

2. The plaintiff/appellant filed the suit for declaring that he is entitled to an undivided half share in the suit property bearing Door No.129, Audiappa Naicken Street, Madras-600 001; consequent direction to the first defendant to hand over possession of two rooms in the second floor portion of the said premises without any rent or hindrance; directing the third defendant to put the plaintiff in possession of the western shop portion of the ground floor of the premises on the ground of own use and occupation; directing the fifth defendant to pay the plaintiff and the second defendant a sum of Rs.6660/- towards arrears of rent for the period 1-11-1979 to 30.11.1982 with subsequent interest at 6% per annum from the date of plaint till realisation; to direct the fifth defendant to put the plaintiff in possession of the eastern portion in the ground floor of the premises on the ground of wilful default in the payment of rent; and to direct defendants 3 to 5 to pay the cost of the suit.

3. According to the plaintiff, the suit property originally belonged to his grandfather Sooraseshachalam Chetty; he executed a deed of settlement dated 10-3-1959 in respect of the suit property and another property bearing Door No.13, Manikanda Mudali Street, Madras-1, in favour of his wife Soora Lakshmanamma @ Varalakshmiammal, grandmother of the plaintiff and the second defendant; she was granted absolute powers to alienate the property in any manner she might desire; however, it was provided in the settlement deed that if the property was left unalienated by her, the settlor should enjoy the income from the property for his life time and after the life time of the settlor and the beneficiary, the remaining properties if not alienated by then, would go to the plaintiff, the second defendant and any son that might be born to their son Ramachandra Chetty and also the sons of the first defendant in equal shares with full powers of alienation; (The other details have already been set out.); the settlee was in possession and enjoyment

of the suit property and the other property; she sold the other property and at the time of her death on 2.5.1978, only the suit property was available; the settlor pre-deceased his wife; the father of the plaintiff and the second defendant Ramachandra Chetty died on 4-4-1982; as per the terms of the settlement, the plaintiff and the second defendant alone were entitled to the suit property and the first defendant had no right whatsoever to claim any interest in the suit property except the right of residence till his death; defendants 3 to 5 were the original tenants under the settlor. It is not necessary to notice the details of the pleadings relating to defendants 3 to 5. Suffice it to say that the plaintiff and the second defendant took rent control proceedings against defendants 3 and 5 and by order dated 14-11-1979 the learned Rent Controller dismissed the petition holding that there existed some bona fide doubt as to the persons entitled to receive the rent from the tenants. By the same order he allowed the application filed by the third defendant for deposit of the rent in default. As per the terms of the settlement deed, the plaintiff and the second defendant are alone entitled to the suit property. The first defendant stealthily took over two rooms in the second floor, with the result, the plaintiff and the second defendant were greatly handicapped. In these circumstances, the suit came to be filed.

4. The first defendant filed a written statement contending inter alia as follows:

The interpretation of the settlement deed by the plaintiff is incorrect, that the plaintiff had significantly suppressed the condition stipulated in the settlement deed and that if the beneficiary was to pre-decease the settlor, the property was to vest in the plaintiff and the second defendant. In as much as the beneficiary had not pre-deceased the settlor, the condition not having been fulfilled, the plaintiff and the second defendant could not have any right under the subsequent disposition. The intention of the settlor in providing the defeasance clause was to provide the benefit by way of life interest on the settlor and therefore the ulterior disposition failed and the plaintiff and the second defendant had no manner of right in the suit property. The ulterior disposition which was repugnant to the prior disposition by way of absolute gift was void. Further, the first defendant had been provided the right of residence in the suit property during his life time without mentioning the portions to be occupied by him and therefore, the plaintiff could not

claim possession against him. Defendants 3 to 5 were statutory tenants. The first defendant as heir was entitled to a share in the property. He was occupying the property in his own right. The suit was devoid of merit.

5. The second defendant supported the case of the plaintiff. Defendants 3 to 5 filed their written statements. It is not necessary to notice their contentions.

6. The learned Second Additional Judge, City civil Court, Madras, framed the necessary issues and on the basis of the oral and the documentary evidence, held that under the settlement deed, the beneficiary got absolute rights, that the subsequent clause giving rights to the plaintiff, the second defendant and the sons, if any, of the first defendant, was repugnant and therefore void. He concluded on the settlement deed that all the heirs of the beneficiary would be entitled to a share in the suit property. According to the learned Judge, the plaintiff was not entitled to the reliefs as prayed for. The learned Judge rejected the case of the plaintiff against defendants 3 to 5 also and by judgment and decree dated 12-12-1984, dismissed the suit. It is as against that, the present appeal has been filed.

7. Mr. R. Subramanian, learned Counsel for the plaintiff, submitted that what is contained in Ex.A-1 settlement is not a repugnant clause, but a defeasance clause, that there could be no prohibition against such a clause in a deed, that the settlement deed only provided that in case there was any property left behind unalienated by the beneficiary, the settlor's grandsons would have to take the property, that the first defendant was issueless and that in those circumstances, the plaintiff and the second defendant together became entitled to the suit property.

8. In support of this contention that the disposition in Ex.A-1 as to what is to happen in case the beneficiary left any property without encumbering, he relied on the following decisions:

1. RAMASWAMI CHETTI VS. VENKATAMMAL 77 L.W. 691

2. JABAMALAI MARIAMMAL VS. MADALAIMUTHU THEVAR 79 L.W. 141

3. NAVANEETLAL VS . GOKUL

4. CHIKKARAJ VS . K.N. VISWANATHAN

9. Mr. P.K. Sivasubramanian, learned Counsel appearing for the first defendant/first respondent submitted that the clause in the document Ex.A-1 providing for disposition in favour of the beneficiary's grandsons is repugnant to the earlier clause giving the property absolutely to the settlee/beneficiary and rightly did the lower Court hold that once absolute estate was given under the document, there was no question of providing for disposition in favour of anybody else. The learned Counsel relied on the following decisions:

1. OFFICIAL RECEIVER, WEST TANJORE VS. SAMUDRAVIJAYAN CHETTIAR AND OTHERS AIR 1939 Mad 509

2. PUGALUMPERUMAL PILLAI VS. THANGATHAMMAL AIR 1949 Mad 690

3. THE COMMISSIONER OF INCOME-TAX, GUJARAT VS . KESHAVLAL LALLUBHAI PATEL

10. Mr. M.S.K. Rajasekaran, learned Counsel for the second defendant/second respondent referred to The Interpretation of Wills and other Unilateral Documents by Lord Denning in his Discipline of Law and submitted that the latter clause was not a repugnant clause and the property subject matter of the suit having not been alienated by the settlee/beneficiary during her life time, the subsequent clause being only a defeasance clause, the persons mentioned in the subsequent clause should take the property as per the said disposition.

11. The settlement deed mentions that differences had arisen between the parties therein and their sons and daughters-in-law and even during the life time of the settlor ill treatment had been meted out to them and the settlor had a feeling that after his life time, the beneficiary would not be properly treated by their sons and their wives and he was anxious that proper provision should be made to the beneficiary even during his life time and he had decided to make the settlement out of his own free will and desire. The further portion of the settlement deed runs as follows:

'In consideration of love and affection which the settlor bears towards the beneficiary, he the settlor settles house ground and premises No.13, Manikanda Mudali Street, George Town, Madras, and house ground and premises No.123, Audiappa Naicken Street, George Town, Madras, and more particularly described in the schedules A and B on the beneficiary absolutely subject to the following conditions and covenants hereinafter contained the settlor has put the beneficiary in possession of the said properties and the beneficiary has taken possession of the same and the beneficiary shall enjoy the said properties absolutely for herself and shall pay the taxes thereon and keep the properties in proper condition meeting herself the expenses of repairs, etc. The beneficiary shall have absolute powers to alienate the said properties in any manner whatsoever as she desires. The beneficiary shall have also power to ask her sons to vacate the properties and give vacant possession of the portions in their occupation. In case the properties if not alienated by then and subject to any encumbrances whereto the beneficiary might have created thereon. The settlor shall enjoy the income from the said properties for his life time. After the life time of the settlor and the beneficiary, the properties if any remaining shall be taken by their grandsons Sukumar aged about 8 years and Badrinarayana aged about 7 years, sons of Ramachandradev and such other sons that may be born to him and the sons of my second son Gopal any born, in equal shares absolutely with full powers of alienation. In case my second son Gopal has no issue whatsoever, he shall be allowed to live in premises No. 123, Audiappa Naicken Street, George Town, Madras, for his life time. The beneficiary shall allow her daughter Saraswathi to enjoy two rooms in any of the houses free of rent for her life time.'

12. Admittedly, the settlee sold away one of the houses even during her life time. The suit property alone remained. The daughter Saraswathi is stated to be no more. The first defendant has no issue.

13. The question is whether the latter clause giving the unalienated property to the grandsons can be given effect to?

14. In JEBAMALAI MARIAMMAL's case 79 LW 141 the learned Judge has made an exhaustive study of the subject with case law and commentaries. It is

worthwhile to refer to them and also other citations on the point.

15. In 39 Halsbury's Laws of England, Third Edition page 1080 para 1611, the statement of law is given as follows:

'An interest apparently in fee simple in real estate, or an interest in personal estate, may be made subject to defeasance, or may, on the context of the whole Will, be cut down in a life interest; or a life interest may be extended to an absolute interest, or may be reduced by the context to an estate until remarriage or It is, however, a settled rule of construction that a clear gift is not cut down by anything subsequent in the Will which does not with reasonable certainty indicate the intention of the testator to cut it down.'

It is necessary that the subsequent clause should be as clear as the first, that is the meaning of the words which cut down a prior gift should be clear, as the words which conferred it.

16. In the same volume at page 1090 para 1623 it is further stated as follows:

'Where there is a clear absolute gift followed by words purporting to confer a power of disposition, with a gift over if the power is not exercised, the absolute gift takes effect, and the gift over is inconsistent with it and is void.'

Thus, where personal estate is given, in terms which cover an absolute estate, to a named donee, and then further interests are given merely after or on the termination of that donee's interest is and not in defeasance of it, his absolute interest is not cut down and the further interest fail, and an absolute interest is not cut down by precatory words, unless these words create an imperative obligation.

Where there is an absolute gift of property followed by a gift over of the property after the death of the donee, or after his death, without issue or without leaving children, or of that part of the property of which he shall not have disposed, the absolute gift prevails and the ultimate gift is repugnant and void. It may, however, appear sufficiently clear on the construction of the Will as a whole that a gift which is in terms absolute is in fact intended as a gift of a life interest only; and the construction is not prevented merely by the fact that the gift over is of `whatever

remains' or in similar terms. When a will conferring an absolute interest is varied by codicil an intention may appear that the donee is to take a life interest or a life interest with a power of disposition. If, there is a doubt as to what interest the donee takes, other provisions inconsistent with an absolute gift, such as a restriction on alienation, or a gift over on the donee disposing, or failing to dispose of the property, may show that he is to take a life interest only.'

17. Williams on Wills, Third Edition (1967) Chapter 84, page 541 at page 545, says as follows:

'Where there is a clear absolute gift followed by words purporting to confer a power of disposition (COMBER VS. GRAHAM (1830) 1 Russ & M. 450 ; BROOK VS. BROOK (1856) 3 Sm. & G. 280 ; HOWORTH VS. DEWELL (1860) 29 Beav. 18; McKenna v. McCarten (1915) 1 I.R.282 ; LAMBE VS. EAMES (1871) 6 Ch.App.597 (to be at her disposal in any way she may think best for the benefit of herself and family: an absolute gift); Re Hutchinson and Tenant (1878) 8 Ch. D. 540 with a gift over if the power is not exercised, the absolute gift takes effect, and the gift over is inconsistent with it and void (Re Mortlock's Trusts (1857) 3 K&J; 456 ; Doe d. Herbert v. Thomas (1835) 3 Ad. & El.123 ; Re Iverson (1956) 19 W.W.R. 524. A devise in fee simple to a wife with the intention that she may enjoy the same during her life and by her Will dispose of the same as she thinks proper gives her a fee simple estate. (Doe d. Herbert v. Thomas supra) nor is an absolute gift cut down by an expression of a wish as to how she shall dispose of the property. (Re Humphrey's Estate (1916) 1 IR 21 ; Ostrom v. Bendall (1956) 19 WWR 535. An absolute gift is not necessarily cut down by a direction for settlement. (Re Bannister, Heys-Jones v. Bannister (1921) 90 LJ.Ch. 415. A gift over in default of disposition by an absolute owner is void. An absolute gift of property followed by a gift of so much of that property as the first donee shall not have disposed of is an absolute gift in the first instance and the gift over is void. (Bowes v. Goslett (1857) 27 LJ Ch.249 ; Re Jones, Richards v. Jones (1898) 1 Ch.438 ; Re Dunstan, Dunstan v. Dunstan (1918) 2 Ch. 304 ; Re Ferguson (1957) V.L.R. 635 ; Re White (1961) O.R.590 ; Richie v. Magree (1964) A.L.R.649 ; Re Burton, Public Trustee v. Burton (1965) N.Z.L.R. 712.

18. In The obald on the Law of Wills, Thirteenth Edition, page 447, paragraph 1239, it is stated as follows:

'Where there is an absolute gift, a superadded power to dispose of the property by Will or at the donee's death does not cut down the absolute gift. And this is the case, though there may be a gift over in default of the donee disposing of the property. And even a superadded power to dispose of the property among a particular class will not cut down the absolute interest previously given.'

19. JOYEE, J. in SANFORD VS. SANFORD (1901(1) Ch.939) has given a stern warning.

'The rule is to construe a Will ut res magis valeat quam pereat and to give effect, so far as possible, to all the words used by the testator. It has been said by the Court of Appeal that the true way to construe a Will is to form an opinion apart from the decided cases, and then to see whether these decisions require any modification of that opinion, not to begin by considering how far the Will in question resembles other Wills upon which decisions have been given.'

20. In BHIADAS SIVDAS VS. BAI GULAB AIR 1922 PC 193 : 46 Bom 153 , the Judicial committee considered a Will left by a Hindu, who appointed his wife his executrix, constituted her the owner of his property and provided that she should leave whatever might remain after her death to her two daughters as she liked. By Clause 18 of the Will he directed his widow to defray the expenses of a religious object out of the rents of the property left to her and authorised her to apply the surplus income for the maintenance of herself and her daughters. She was given an express power to mortgage or sell and by another clause the daughters were to be the executrices upon her death with power to deal with and manage the entire property. Their Lordships held that the widow took an absolute estate. The limitations which followed were not sufficient to displace the effect of the clause which constituted her the absolute owner of the property.

21. In SARAJU BALA DEBI VS . JYOTIRMOYEE DEBI , a Hindu executed three documents, whereby he conveyed to his daughter, her sons and their sons successively and her daughters immovable properties subject to a fixed rent with

the right to transfer by sale or gift under certain conditions. The conditions were:

1. The properties were not to pass to the heirs of the grantee's daughters;
2. they were not to be transferred by gift except to a limited extent for religious purposes, and
3. the grantor and his heirs were to have a right of pre-emption under certain circumstances.

The Privy Council held that the grantee took an absolute estate. Their Lordships examined the conditions and held that they were to be disregarded as being repugnant restrictions.

22. In OFFICIAL RECEIVER, WEST TANJORE VS. SAMUDRAVIJAYAN CHETTIAR AND OTHERS AIR 1939 Mad 509 it has been held by a Bench of this Court that,

'where the instrument contains recitals that the donor conveyed property to the donee on account of affection, in consideration of service and because they are the donor's only heirs and with power to enjoy the same with all rights, the intention of the donor is to create absolute estate and any subsequent words which are repugnant to an absolute title must be ignored.'

23. In THAYALAI ACHI AND OTHERS VS. KANNAMMAL @ PONNAMMAL ACHI AND ANOTHER 68 MLJ 707 : 41 LW 604 , the testator provided by his Will as follows:

'After my death my wife P, enjoying with all powers of alienation by gift, exchange or sale the movable and immovable properties belonging to me. shall herself discharge the debts payable by me. I have hereby given full authority to the said P for effecting sales, etc. after my death in respect of my immovable and movable properties either for the purpose of discharging the debts or for any other reason. If after the alienations that may be made by my wife P for the purpose of discharging the aforementioned expenses, there be any property movable or immovable left at the time of her death the same shall be taken after her death by

N.'

It has been held that the wife took an absolute estate under the Will, but if she did not dispose of the property during her life time or by Will the property passed to N and that the bequests were not void because of repugnancy or uncertainty.

24. The decision in THAYALAI ACHI AND OTHERS VS. KANNAMMAL @ PONNAMMAL ACHI AND ANOTHER 68 MLJ 707 : 41 LW 604 recognises this principle that a legatee under the first clause shall take an absolute estate under the Will, but that if she did not dispose of the property during her life time the property would pass to the legatee specified in the latter clauses.

25. In PUGALUMPERUMAL PILLAI VS. THANGATHAMMAL AIR 1949 Mad 690, the relevant portions of the gift deed by father in favour of his daughter were as follows:

'As I have given away to you the property in the schedule herein worth Rs.1500/- as `stridhanam' gift, you shall hold and enjoy the aforesaid property hereditarily and from son to grandson and so on as long as the Sun and Moon last. After your life time, your issues if there are any, shall get the aforesaid property. If you have no male or female issue, the aforesaid property shall revert to me and to my male heirs. I shall, till my life time reside jointly with you in the thatched house.'

It was held that the daughter took an absolute estate in the properties.

26. In TIRUCHENDUR SRI SUBRAMANIASWAMI TEMPLE VS. RAMASWAMY PILLAI (1950) 1 MLJ 300 : 63 LW 193 , the testator had stated in the Will as follows:

'I have bequeathed to my son Picha Pillai, the right to all my properties and moneys, etc. and he shall solely enjoy them. If he or his son has no child, the said properties shall pass to Subramaniaswami at Tiruchendur.' The Privy Council held that the latter provision for the devolution of the property in case the son should die without issue, was not in any way intended to limit the character of the absolute estate clearly indicated in the Will and that the latter provision was void as being repugnant.

27. In RAJ BYRANG BAHADUR SINGH VS. THAKURAIN BAKTHRAJ KUER (1953) 1 MLJ 108 SC it has been held that,

'these words it cannot be disputed, are descriptive of a heritable and alienable estate in the donee, and they connote full proprietary rights unless there is something in the context or in the surrounding circumstances which indicate that absolute rights were not intended to be conferred. In all such cases the true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.' 'But it can be said without hesitation that it was not the intention of the testator to confer anything but a life estate upon Bhuj Singh in respect of the properties covered by the Will. The clause in the Will imposing total restraint on alienation is also a pointer in the same direction. In cases where the intention of the testator is to grant an absolute estate, an attempt to reduce the powers of the owner by imposing restraint on alienation would certainly be repelled on the ground of repugnancy, but where the restrictions are the primary things which the testator desires and they are consistent with the whole tenor of the Will, it is a material circumstance to be relied upon for displacing the presumption of absolute ownership implied in the use of the word 'Malik.'

28. 'If there is a conflict between the earlier clause and the later clauses and it is not possible to give effect to all of them, then the rule of construction is well established that it is the earlier clause that must override the later clauses and not vice versa.' - RADHA SUNDAR DUTTA VS . MOHD. FAHADUR RAHIM

29. In SAHEBZADA MOHAMMAD KAMGARH SHAH VS . JAGDISH CHANDRA DEB DHABAI DEO , in the matter of construction of documents, the following principles have been set out:

1. The intention of the parties to a document of grant must be ascertained first and foremost from the words used in the disposition clause, understanding the words used in their strict, natural grammatical sense and that once the intention can be clearly understood from the words in the disposition clause thus interpreted it is no business of the courts to examine what the parties may have said in other portions

of the document.

2. If it does appear that the latter clauses of the document purport to restrict or cut down in any way the effect of the earlier clause disposing of property the earlier clause must prevail.

3. If there be any ambiguity in the disposition clause taken by itself, the benefit of that ambiguity must be given to the grantee, the rule being that all documents of grants must be interpreted strictly as against the grantor.

4. Where the operative portion of the document can be interpreted without the aid of the preamble, the preamble ought not and must not be looked into.

30. In *NARAYANDAS VS . ARUMUGHAMMAL* it was held that the second clause which was one of defeasance should not be rejected as repugnant but should be construed as cutting down the earlier absolute estate. That again was a case of the first legatee dying without alienating in terms of the absolute powers of alienation conferred on her. The main dispute centered round the question whether the bequests in favour of the daughters could be held to be valid and not void as repugnant.

31. In *PEARYLAL VS . RAMESWAR DAS* a testator executed a Will, a portion of which provided that on his death his wife and his adopted son will become Malik of all the properties, that the wife should live in the house and the adopted son should get all the proprietary rights just like the testator and that no other person will have any right or claim to his properties. The adopted son predeceased the testator and the wife executed a Will bequeathing the property in dispute to her brother's grandson. The question arose whether the legatee under the wife's Will got any title. The argument that the wife got under the Will a mere life estate without power of alienation was rejected by the Supreme Court. The Supreme Court observed:

'If the argument of the learned Counsel for the appellant be accepted, this Court would be rewriting the Will for the testator and introducing words which were not there; it would be cutting down the meaning of the words which the testator

designedly used to convey a larger interest to his wife. Where apparently conflicting disposition can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of construction which does not create any such hiatus.'

That case turned more upon the question whether the bequest in favour of the adopted son was one of defeasance or a repugnant clause.

32. In RAMASWAMI CHETTIAR AND ANOTHER VS. VENKATAMMAL AND OTHERS 77 L.W. 691 it has been held that,

'It cannot be said that there should be a distinction in the matter of construction between a partition deed and other documents inter vivos or by way of a testamentary disposition. In both the cases the extent of rights obtained by a party should be determined on a true construction of the document. It is true that in an ordinary partition deed, there would be no occasion for providing for the destination of the property after the life time of the sharers. But, a partition deed, sometime where under may take the form of a family arrangement, where under benefits might be conferred not merely on the immediate parties to the partition, but on the persons as well.'

In that case, a partition deed between A and his son S provided that A should enjoy certain properties with a right to create mortgages, othis and waram leases but with no power of sale or gift; that if, beyond creating mortgages, othis and waram leases, A were to execute sales or gifts, such sales or gifts would not be valid and that if A were to marry again and by that marriage he got other heirs, these heirs alone should take the properties after his life time and after performing his obsequies and they should also discharge the debts. If A were to marry again but did not get a male heir, S should, after the life time of the first, perform his obsequies and take the properties with absolute right. It was contended that on its terms, an absolute estate on A must be implied.

It was held that,

'A took under the partition arrangement a mere life estate with power to mortgage, lease, etc. Such power did not extend so as to enable him either to sell or to make a gift of the properties. It is well recognised in law that there can exist a life estate with powers of disposition.'

In the same judgment it has been observed as follows:

'It is a cardinal rule of interpretation of documents that effect should be given to the expressed intentions of the testator, which has to be gathered on a reading of the entire document. It can also be stated as a well recognised principle that even where the bequest is dependent upon a contingency, it will not necessarily prevent vesting of the estate till that contingency happens.'

33. 'It is also well settled that the rules stated in respect of a Will are applicable to other documents disposing of property.' - RAMKISHORELAL VS . KAMALNARAYAN . The essential difference, if at all we call it a difference between the construction of a Will and other documents, is that, in the will, if the intention is shown, the mode of expression of that intention and the form and language are unimportant, while in the case of other instruments, technical words may be necessary for the purpose of giving expression to the intention. In his Treatise on Wills, Jarman has this to say:

'There are certain rules of construction common to both deeds and Wills; but as, in the disposition of property by deed, an adherence to settled forms of expression is either rigidly exacted by the Courts, or maintained by the practice of the profession, the rules to which the construction of deeds has given rise are comparatively few and simple. But the peculiar indulgence extended to testators, who are regarded as 'inopes consilii' has exempted the language of Wills from all technical restraint, and withdrawn them in some degree from professional influence. By throwing down these barriers, a wide field is laid open to the caprices of language; though at certain points, we have seen its limits are ascertained by rules sufficiently definite, and we are guided through its least beaten tracks by general principles.'

We should also note that all the parts of a will are to be construed in relation to each other, and so as, if possible, to form one consistent whole, but where several parts are absolutely irreconcilable, the latter must prevail.

34. RAMACHANDRA VS . HILDA BRITE In the matter of the construction of a Will, authorities or precedents are of no help as each Will has to be construed in its own terms and in the setting in which the clauses occur.

'It is one of the cardinal principles of construction of Wills that to the extent that it is legally possible effect should be given to every disposition contained in the Will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the Will. It is for this reason that where there is a bequest to A even though it be in terms apparently absolute followed by a gift of the same to B absolutely 'on' or 'after' or 'at' A's death, A is prima facie held to take a life interest and B an interest in remainder, the apparently absolute interest of A being cut down to accommodate the interest created in favour of B.'

35. In JEBAMALAI MARIAMMAL AND ANOTHER VS. A. MADALAIMUTHU THEVER AND ANOTHER 79 L.W. 141 itself the terms of the Will provided that after the life time of the testatrix the properties were bequeathed to her husband A who should take it as absolute owner and enjoy with full rights of alienation by gift or otherwise and that after A's death, their son B shall become absolute owner, etc. On the question whether the Will should be construed as creating an absolute estate in favour of A followed by a repugnant clause which should be held to be void, or whether on a construction of all the clauses together it should be held that there is no intention to confer an absolute estate but only a life estate in favour of A and the later bequest in favour of the plaintiff, B, is not a repugnant provision but is an independent bequest to take effect on the death of A. It was held that,

'the intention of the testatrix is to maintain the absolute estate in favour of her husband. The subsequent bequest in favour of the son would take effect only if the

husband died without alienating the property. But, if he had alienated, the validity of the alienation must be upheld in view of the express terms of the Will as otherwise the intention of the testatrix would be frustrated.

A distinction between a defeasance clause and the repugnant one is very often a nice one and the important test is to determine whether the predominant intention of the testator is to confer and maintain as absolute estate and then add limitations and restrictions in obvious derogation of the incidents of such an absolute ownership and estate conferred under the earlier clause. But, if the intention expressed or necessarily implied on reading all the clauses of the Will, is to modify the absolute estate, the absolute estate is to be given effect to as a life estate with a power of appointment.'

36. In NAVNEET LAL @ RANGI VS . GOKUL AND OTHERS the following principles are laid down:

'(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed.

(2) In construing the language of the Will the Court is entitled to put itself into the testator's armchair and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense. But all this is solely as an aid to arriving at a right construction of the Will, and to ascertain the meaning of its language when used by that particular testator in that document.

(3) The true intention of the testator has to be gathered not by attaching importance to isolated expressions but by reading the Will as a whole with all its provisions and ignoring none of them as redundant or contradictory.

(4) The Court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions

inoperative. The Court will look at the circumstances under which the testator makes his Will, such as the state of his property of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy, that should be discarded in favour of a construction which does not create any such hiatus.

(5) To the extent that it is legally possible, effect should be given to every disposition contained in the Will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a Court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the Will.'

In that case, the testator was residing with his wife J and a relative G. G was held in great love and affection by the testator who was keenly anxious for the welfare both of J and of G. There was yet another feature which was prominent in the Will. The testator was apprehensive of his only brother and his nephew, who 'might trouble his wife and G after his death'. It was stated in the Will that J was to be the 'malik' of the testator's entire estate and she was to have all the proprietary powers. The transfer of absolute estate to her was, however, inconsistent with some other terms used in the Will. Thus, under the Will, in the event of J predeceasing the testator, G was to be the absolute owner and have the 'power of making all sorts of transfers.' In contrast to this, though J was made malik after the testator's death nothing was stated about her 'power of making all sorts of transfers'. The transfer of only the life estate was also consistent with the description of G, in the Will, as testator's heir (waris) after his death. In the light of entire tenor of the Will and accompanying circumstances, it was held that the intention of the testator would best be achieved by holding that there was a devise of a life estate to his wife and an absolute estate thereafter to G.

37. In CHIKKARAJ VS . K.N. VISWANATHAN , a Division Bench of this Court held that in a case where the father had life interest in his share with full powers of alienation in his life time, but did not alienate, his son and daughters got absolute interest and that the interests of son and daughters were vested interest and not contingent.

38. Lord Denning in *The Discipline of Law* has observed that whenever there is a choice, choose the meaning which accords with reason and justice. The learned Lord has referred to a case decided by him and two other learned Judges: A grandfather aged 86 made a Will leaving his residuary estate, among others, to the child or children of his daughter Constance Jebb. The daughter was aged 47 and not married. She had no child of her own body but she had an adopted child Roderick. It was a legal adoption by order of the Court. The grandfather knew all about the adoption. He had seen the child in his pram. The Chancery Judge who tried the case held that on the authorities 'child' meant a legitimate child of the mother's body and did not include an adopted child. On appeal, the Appellate Court rejected the method of interpretation. The Will did benefit the adopted child. It was observed as follows:

'In construing this Will, we had to look at it as the testator did, sitting in his armchair, with all the circumstances known to him at the time. Then we have to ask ourselves: 'What did he intend?' We ought not to answer this question by reference to any technical rules of law. Those technical rules have only too often led the Courts astray in the construction of Wills. Eschewing technical rules, we look to see simply what the testator intended. The only legitimate purpose (of previous cases) is to use them as a guide towards the meaning of words so as to help in the search for the testator's intention. They should never be used so as to defeat his intention. (Re Jebb (1966) Ch. 666 see also Re Allsopp 1968 Ch.39 'Looking at this Will in the light of the surrounding circumstances it seems to me quite plain that when the testator spoke of the 'child or children of my said daughter', his intention was to refer to the adopted child, Roderick, or any further adopted children that she might have. He did not contemplate that she might marry and have a child of her own. But if the extreme improbability had taken place that she had married and had a legitimate child, I think that child would be

included too.'

39. Again, the cardinal rule of interpretation for deeds as for other instruments is to gather the intention from the words of the document and for that purpose the language of the entire deed has to be taken into consideration. The interpretation to be adopted should be to give effect to all the parts and not to reject any of them. The document has to be read as a whole and no portion is to be omitted. At the same time under the guise of adopting a rule of harmonic construction of reconciling all the clauses together there is no justification for adopting a construction, which in its effect destroys the operative force of the clear words contained in the first clause. We should also remember the caution administered by Joyee, J. in SANFORD VS. SANFORD (1901) 1 Ch. 939 that the true way to construe a document is to form an opinion apart from the decided cases and then see whether these decisions require any modification of that opinion, not to begin by considering how far the document in question resembles other similar documents upon which decisions have been given.

40. Again, when the words are clear and unambiguous, there is no scope for drawing upon hypothetical considerations or supposed intentions of the parties.

41. Lord Denning was a Portiaman. Portia of the Merchant of Venice, avoided an unjust decree and turned the tables on Shylock. Let us be 'Portiamen'. Let us avoid an unjust decree as did Portia, so as to do what justice and equity require.

42. According to Mr. R. Subramanian, learned Counsel for the appellant, the settlor wanted to exclude his sons and daughters-in-law as they were not treating the settlor and the settlee properly and kindly and the settlor had a feeling that after his life time the settlee would not be treated properly. By this very submission it would be clear that the settlor wanted to secure the rights of the settlee and that she should get absolute rights. In our view, it is wholly unnecessary to travel beyond this. Under the document the settlor is retaining the right to enjoy the income from the properties during his lifetime and the beneficiary gets absolute rights thereafter. Any residuary disposition is only in the nature of repugnancy and it was not and could not have been the intention of the settlor to create any problem whatsoever among the legal representatives after the life time of the

settlee in case she left behind any property unalienated. It should also be looked at from another point of view. The settlor has said that in case his son, the first defendant, did not have any issue, the property should go to the sons of the other son, deceased Ramachandra. He did not differentiate between son and daughter so far as the first defendant was concerned. May be the first defendant did not have any children. But that by itself cannot be a ground for denying him any right in the property. That should be the case so far as the settlor's deceased son Ramachandra was concerned. It is on record that besides the plaintiff and the second defendant he has left behind daughters.

43. One other aspect also to be noticed in this connection is that the first defendant under the settlement deed is given a right to enjoy the property/to reside in the property during his life time, without mentioning the portions to be occupied by him, whereas Saraswathi is to occupy only two rooms. This can also be interpreted to mean that the sons of his brother do not have any present right in the property. Further, as already mentioned, the plaintiff himself has a number of sisters. If we attempt to give effect to the latter clause and banish intestate succession from the arena, the plaintiff's sisters also will be denied their share in the property. On reading all the clauses of the settlement deed and taking the surrounding circumstances into consideration, the cordiality or the absence of it in the family, we are of the view that the dominant intention expressed or necessarily implied of the settlor was to confer a permanent and absolute right on the beneficiary and that it has to be given effect to. On the death of the beneficiary, intestacy will result and all the heirs will be benefitted.

44. We are also of the view that the suit itself is premature. The plaintiff does not get any present right and the prayer is also not tenable. Consequently, the appeal fails and the same is dismissed. However, there will be no order as to costs.