

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.6412 OF 2002

P.K. Mohan Ram

.....Appellant

Versus

B.N. Ananthachary and others

.....Respondents

JUDGMENT

G.S. Singhvi, J.

1. This is an appeal for setting aside judgment dated 27.2.2001 passed by the learned Single Judge of Madras High Court in Second Appeal No. 1090/1983 and Civil Miscellaneous Petition No.8137/1983 whereby he reversed the judgments and decrees of the trial Court and the lower appellate Court and dismissed the suit filed by the appellant for partition of his 1/17th share in the suit property.

2. Shri K. Perumal Iyer, who owned the suit property, executed Settlement Deed dated 27.3.1969 in favour of the appellant, respondent Nos.1 and 2 and 13 others and declared that from the date of execution he and the beneficiaries shall enjoy the land and house etc. without creating any encumbrance or making any alienation whatsoever. He further declared that during his life, he will collect the rental income from the land and house and after paying the municipal taxes, remaining income would be spent by him according to his choice; that after his death, the property shall be sold at the prevailing market price by all 16 beneficiaries and out of the sale proceeds, a religious trust should be created by paying Rs.4,000/- to Devasthanam of Sri Prasanna Venkatesa Perumal in the office of the Saurashtra Sabha at Madurai for the purpose of taking out annual procession of Perumal in the sacred streets on Amavasai day in the month of Margazhi; that the honors of the temple should be bestowed upon beneficiary Nos.1 and 2 and, after them, upon their heirs; that from the sale proceeds, the beneficiaries shall purchase an immoveable property of Rs.4,000/- in the name of Balu G. Perumal Iyer Feeding Charities and all 16 trustees shall provide for feeding of his relatives on the day of the procession of the deity (Perumal) and that if there is delay in purchasing the immovable property, the beneficiaries shall be free to advance the money on interest for the purpose of generating income which could be used for feeding; that his last rites shall be performed

by beneficiary Nos.1 and 2 and all 16 persons shall together spend Rs.2000/- from their personal funds for that purpose. The settlor also indicated that he had mortgaged the land and house to Ramaseshan and Co. vide Mortgage Deed dated 24.3.1969 for a sum of Rs.1500/- which shall be redeemed by him and in the event of death before redemption, all 16 beneficiaries shall discharge the debt. The settlor further ordained that after deducting Rs.8,000/- from the sale price, the balance amount should be divided into 17 shares of which beneficiary Nos.1 and 2 shall take three shares and beneficiary Nos.3 to 16 shall take one share each. If any one of 16 beneficiaries was to die before sale of the property, the remaining persons were to get absolute right to sell the property. The settlor finally recorded that he shall have no right whatsoever to cancel the 'Settlement Deed' for any reason whatsoever or alter the terms thereof.

3. Shri K. Perumal Iyer died on 4.12.1972. After his death, the appellant filed a suit (O.S. No.626/1972) for appointment of receiver to carry out the directions mentioned in the 'Settlement Deed'. The trial Court decreed the suit, but on appeal, the High Court reversed the decree of the trial Court and dismissed the suit with an observation that the same shall not operate as *res judicata* against the fresh suit which may be filed by the plaintiff (appellant herein). After disposal of the appeal, the appellant filed O.S. No.858 of

1979 for partition of his 1/17th share in the suit property and for grant of a declaration that in view of the negative covenant contained in the 'Settlement Deed', the settlor had no right to execute Revocation Deed dated 27.2.1970 or Will dated 30.7.1972. In the written statement filed by defendant Nos.1 and 2 (respondent Nos.1 and 2 herein), it was claimed that the appellant and his brothers and sisters obtained the 'Settlement Deed' by playing fraud and on discovery thereof, Shri K. Perumal Iyer executed 'Revocation Deed' and then executed the 'Will' whereby he bequeathed the property in their favour. They also pleaded that the suit filed by the plaintiff (appellant herein) is barred by Order II Rule 2 of the Code of Civil Procedure (CPC) because the earlier suit filed by him for appointment of receiver for carrying out the directions contained in the 'Settlement Deed' was dismissed by the High Court in A.S. No. 374/1974.

4. On the pleadings of the parties, the trial Court framed as many as 12 issues including the following:

1. Whether the will in favour of defendants 1 and 2 is valid and binding?
2. Whether the document dated 27.3.1969 is not a settlement?
3. Whether the cancellation deed dated 27.2.1970 is true and valid?
4. Whether the suit is barred by res judicata?

5. Whether the suit is barred under Order II Rule 2 of C.P.C.?
6. Whether the settlement deed was brought into existence due to fraud and misrepresentation?

5. After considering the pleadings and evidence of the parties and hearing their advocates, the trial Court vide its judgment dated 24.4.1982 held that document marked Ex.A-2 was 'Settlement Deed' and not 'Will' and that the same was not executed as a result of fraud or misrepresentation and that the settlor did not have the right to execute 'Revocation Deed' Ex.B-2 and 'Will' Ex.B-3. The trial Court further held that the second suit filed by the plaintiff is not barred by *res judicata* or Order II Rule 2 CPC. In the end, the trial Court declared that the plaintiff is entitled to partition of the suit property and accordingly passed a preliminary decree in his favour.

6. Respondent Nos.1 and 2 challenged the judgment and decree of the trial Court in Appeal Suit No.102/1982, which was dismissed by the lower appellate Court vide judgment and decree dated 10.3.1983. However, the second appeal preferred by them was allowed by the learned Single Judge, who held that even though Ex.A-2 was titled and described as 'Settlement Deed', in reality it was a 'Will' executed by late Shri K. Perumal Iyer. The learned Single Judge further held that the appellant herein has no right in the

suit property because the settlor had bequeathed the same in favour of respondent Nos.1 and 2 herein.

7. Shri R. Sundaravaradhan, learned senior counsel appearing for the appellant submitted that the impugned judgment is liable to be set aside because the learned Single Judge misinterpreted Ex.A-2 and held it to be a 'Will' ignoring the specific stipulation contained therein that it was a 'Settlement Deed'. Learned senior counsel referred to Section 19 of the Transfer of Property Act and argued that the transfer of the property rights in praesenti coupled with an unequivocal inhibition against cancellation/amendment thereof clearly shows that Exhibit A-2 was a 'Settlement Deed' and not a 'Will'. In support of his arguments, Shri Sundaravaradhan relied upon the judgments of this Court in **Rajes Kanta Roy v. Santi Debi** 1957 SCR 77, **A. Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai** (1985) 4 SCC 85 and **Namburi Basava Subrahmanyam v. Alapati Hymavathi and others** (1996) 9 SCC 388 and of Madras High Court in **Gangaraju v. Pendyala Somanna** AIR 1927 Madras 197, **Venkatasubramaniya Iyer v. Srinivasa Iyer** AIR 1929 Madras 670.

8. Shri M.S. Ganesh, learned senior counsel appearing for the respondents supported the impugned judgment and argued that the learned Single Judge rightly treated Ex.A-2 as a 'Will' because the settlor did not create any right in praesenti in favour of the appellant and the prohibition contained therein against cancellation/modification of 'Settlement Deed' was not inconsequential. Shri Ganesh emphasized that the rights created in favour of the beneficiaries were contingent and were to become operative after the death of the settlor and, as such, the learned Single Judge rightly treated Ext. A-2 to be a Will. Learned senior counsel placed reliance on the judgment in **Vynior's case**, Trin. 7 Jac. 1 Rot. 2629 (printed in the English Reports, Volume LXXVII, King's Bench Division VI), as also the judgments of Calcutta and Madras High Courts in **Sagar Chandra Mandal v. Digamber Mandal and others** (1909) 9 CLJ 644, **Ramaswami Naidu and another v. Gopalakrishna Naidu and others** AIR 1978 Madras 54, **Ponnuchami Servai v. Balasubramanian and others** AIR 1982 Madras 281 and **Poongavanam v. Perumal Pillai and another** (1997) 1 MLJ 169 and argued that interpretation placed by the learned Single Judge on Ex.A-2 is in consonance with the law laid down by this Court and different High Courts. Shri Ganesh also referred to the judgment of this Court in **Rajes Kanta Roy v. Santi Debi** (supra) and submitted that the contingent right, if

any, created in favour of the plaintiff-appellant could not be made basis for treating Ex.A-2 as 'Settlement Deed'.

9. For deciding the question raised in this appeal, it will be useful to notice the contents of Ex.A-2. The English translation of the document produced by Shri M.S. Ganesh, learned senior counsel for the respondents, which was accepted by learned senior counsel appearing for the appellant as correct, reads thus:

“Document No.753/1969
Settlement Deed of land and house property of the value
of Rs.20,000/-

XXXXXXXXXXXXXXXXXXXX

The settlement deed executed by me in respect of the land and house etc. in favour of these 16 persons is as follows: I did not beget any male or female issue. My wife Ponnammal died about 3 years ago. In accordance with the terms of the partition deed dated 29.1.1937, bearing Ramanthapuram R.O.1 162.43 to 48. 701/1937 between my brothers Balu K. Ramaswamy Iyer and Balu K. Nannaiyer and me, I got as my share the undermentioned land and house etc. valued at Rs.20,000/-. Since then I have been in uninterrupted possession and enjoyment of the same on payment of municipal taxes and so on. You 16 persons being my relatives and considering your welfare and mine and out of my love and affection for you, I settle this property on you 16 persons by executing this settlement deed. From this day onwards I and you shall enjoy the under mentioned land and house etc. without creating any encumbrance or making any alienation whatsoever. During my lifetime I shall collect the rental income from the under mentioned land and house etc. and after paying the municipal taxes, with the remaining income I shall spend my life as I wish till the end of my days. After my death, you 16 persons shall

become eligible and have absolute right to sell the under mentioned land and house at the prevalent market price. Out of the sale proceeds thus received, you should create a religious trust by paying Rs.4,000/- to the Devasthanam of Sri Prasanna Venkatesa Perumal in the office of the Saurashtra Sabha at Madurai for the purpose of taking out annual procession of Perumal in the sacred streets on Amavasai day in the month of Margazhi. The honors at the temple should be bestowed upon persons 1 and 2 among you and after them upon their heirs. Further, from the sale proceeds, you should purchase an immoveable property for Rs.4,000/- in the name of Balu G. Perumal Iyer Feeding Charities and you 16 persons as trustees should provide for feeding of my relations on the day of the procession of the deity (Perumal). Should there be any delay in purchasing the immovable property, you 16 persons would be fully entitled to advance money on interest or by mortgage to generate income for the feeding. Upon my death, whoever among 1 and 2 of you is present shall perform my last rites and all you 16 persons shall together spend upto Rs.2,000/- from your personal funds for that purpose. During my life time, I myself shall redeem the mortgage of the undermentioned land and house which I had mortgaged to Rameseshan & Co. of Madurai by a mortgage deed dated 24.3.1969 for a sum of Rs.1500/-. In the event I die before redeeming the mortgage, you 16 persons shall discharge that debt. As mentioned above, after deducting Rs.8,000/- from the sale price, the balance amount should be divided into seventeen shares. 1 and 2 among you shall take three shares, 3 to 16 among you shall take one share each. 1 and 2 among you shall divide the three shares equally between you. If anyone of you 16 persons dies before the sale of the property, the remaining persons excluding the deceased shall have the absolute right to sell the property. I shall have no right whatever to cancel this settlement deed for any reason whatsoever or to alter these terms. I execute this settlement deed of my own free will.”

(emphasis supplied)

10. Sections 19 and 21 of the Transfer of Property Act, 1882 (for short, 'the 1882 Act') which elucidate the expressions "vested interest" and "contingent interest" in the context of transfer of property read as under:

“19. Vested interest.— Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the transfer.

A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.— An intention that an interest shall not be vested is not to be inferred merely from a provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives, or from a provision that if a particular event shall happen the interest shall pass to another person.

21. Contingent interest. – Where, on a transfer of property, an interest therein is created in favour of a person to take effect only on the happening of a specified uncertain event, or if a specified uncertain even shall not happen, such person thereby acquires a contingent interest in the property. Such interest becomes a vested interest, in the former case, on the happening of the event, in the latter, when the happening of the event becomes impossible.

Exception. – Where, under a transfer of property, a person becomes entitled to an interest therein upon attaining a particular age, and the transferor also gives to him absolutely the income to arise from such interest before he reaches that age, or directs the income or so much thereof as may be necessary to be applied for his benefit, such interest is not contingent.”

A reading of the plain language of the above reproduced sections makes it clear that an interest can be said to be a vested interest where there is immediate right of present enjoyment or a present right for future enjoyment. An interest can be said to be contingent if the right of enjoyment is made dependent upon some event which may or may not happen. On the happening of the event, a contingent interest becomes a vested interest.

11. In **Rajes Kanta Roy v. Santi Debi** (supra), this Court considered the distinction between ‘vested interest’ and ‘contingent interest’ in the backdrop of dispute between the widow and two sons of Ramani Kanta Roy, who possessed considerable properties. Two suits filed by the parties in relation to the suit property ended in compromise decrees. On account of the alleged violation of compromise decree, Santi Debi filed an application for execution and prayed for issue of a direction for release of the arrears of her monthly allowances. She also prayed for attachment and sale of the immovable properties. Appellant, Rajes Kanta Roy filed objections under Section 47 of the Code of Civil Procedure. The same were rejected by the Subordinate Judge. Appeal filed by him was dismissed by the Calcutta High Court. One of the questions considered by this Court was whether the interest created by the deed executed by Ramani Kanta Roy was a vested or

contingent interest. The Court referred to Sections 19 and 21 of the Transfer of Property Act and Sections 119 and 120 of the Indian Succession Act, Williams on Executors and Administrators (13th Edition) Vol.2, p.658, Jarman on Wills (8th Edition) Vol.II, p.1390 and p.1373 and observed:

“Apart from any seemingly technical rules which may be gathered from English decisions and text-books on this subject, there can be no doubt that the question is really one of intention to be gathered from a comprehensive view of all the terms of a document. Learned Solicitor-General frankly admitted this, and also that a court has to approach the task of construction in such cases with a bias in favour of a vested interest unless the intention to the contrary is definite and clear. It is, therefore, necessary to consider the entire scheme of the deed of trust in the present case, having regard to the terms therein, and to gather the intention therefrom.”

The Court then referred to different portions of the deed executed by Ramanai Kanta Roy and observed:

“Now, there can be no doubt about the rule that where the enjoyment of the property is postponed but the present income thereof is to be applied for the benefit of the donee the gift is vested and not contingent. (See Explanation to s.19 of the Transfer of Property Act, Explanation to s.119 of the Indian Succession Act. See also Williams on Executors and Administrators, 13th Ed., Vol.2, p.663, para.1010, and Jarman on Wills, 8th Ed., Vol.II, p.1397). This rule operates normally where the entire income is applied for the benefit of the donee. The distinguishing feature in this case is that it is not the entire income that is available to the donee for their actual use but only a portion thereof. But it is to be observed that according to the scheme of the trust deed, the reason for limiting the enjoyment of the income to a specified sum thereof, is obviously in order to facilitate and bring about the discharge of the debts. As already explained the underlying scheme of the

trust deed is that the enjoyment is to be restricted until the debts are discharged. Whatever may be said of such a provision where a donee is not himself a person who is under any legal obligation aliunde to discharge such debts, the position in this case is different. The two sons are themselves persons who, if the settlor died intestate, would be under an obligation to discharge his debts out of the properties which devolve upon them. It is only the surplus which would be legally available for division between them. In such a case, the balance of the income which is meant to be applied for the discharge of the debts is also an application of the income for the benefit of the donees. It follows that the entire income is to be applied for the benefit of the donee and only the surplus, if any is available to the donees. Hence the provision in the trust deed that lots I to IV are to devolve on Rajes and lot V on Ramendra and that the surplus income of each of these lots after the discharge of the debts is also to devolve in the same way, clearly operates as nothing more than the present allotment of these properties themselves to the donees subject to the discharge of debts notionally in the same proportion. Thus, taking the substance of the entire scheme of this division between the two sons the position that emerges is as follows. (1) Specified lots are earmarked for each of the two sons. (2) The present income out of those lots is to be applied for the discharge of the debts after payment of specified sums therefrom by way of monthly payments to the two sons and presumably such application is to be notionally pro rata. (3) Any surpluses which remain from out of the income of each of the lots are to go to the very person to whom the corpus of the lot itself is to belong on the termination of the trust. (4) In the event of any of the two sons dying before the termination of the trust, his interest in the monthly payments out of the income is to devolve on his heirs. These arrangements taken together clearly indicate that what is postponed is not the very vesting of the property in the lots themselves but that the enjoyment of the income thereof is burdened with certain monthly payments and with the obligation to discharge debts therefrom notionally pro rata, all of which taken together constitute application of the income for his benefit.

It may be noticed at this stage that one of the features of a contingent interest is that if a person dies before the contingency disappears and before the vesting occurs, the heirs of such a person do not get the benefit of the gift. But the trust deed in question specifically provides in the case of Rajes – with whose interest alone we are concerned – that even in the event of his death it is his heirs (then surviving) that would take the interest. It has been urged that the provision in cl.12(a) in favour of the heirs then surviving is in the nature of a direct gift in favour of the heir or heirs who may be alive at the date when the contingency disappears. But even so, this would make no practical difference. It is to be remembered that in this case the parties belong to the Dayabhaga school of Hindu Law – and this is admitted before us. It is also to be remembered that up to the third degree in the male line the principle of representation under the Hindu Law operates. The net result of the provision, therefore, is that whenever the alleged contingency of discharge of debts may disappear the person on whom the interest would devolve would, in the normal course, be the very heir (the lineal descendant then surviving or the widow) of Rajes. The actual devolution of the interest, therefore, would not be affected by the alleged contingency. That being so, it is more reasonable to hold that the interest of Rajes under the deed is vested and not contingent.

This view is confirmed by the fact that under the compromise decree which is now sought to be executed, both the judgment-debtors, Rajes and Ramendra, created a charge for the monthly payment to Santi Devi and agreed to such charge being presently executable. This shows clearly that they themselves understood the interest available to them under the trust as a vested interest.”

(emphasis supplied)

12. In **Usha Subbarao v. B.N. Vishveswaraiah** (1996) 5 SCC 201, a two-Judge Bench was called upon to consider whether the appellant is entitled to share of her husband in the properties left by her father-in-law,

Dr. N.S. Nanjundiah on the basis of a Will executed by him. The appellant pleaded that the respective shares of the sons of the testator including her husband vested in them as per the Will and after the death of her husband, she is entitled to the share of her husband. The trial Court held that the succession opened on the death of the testator by virtue of which all his sons became entitled to equal shares in the properties and the recital in the Will that the partition should take place amongst the surviving children after the death of Smt.Nadiga Nanjamma is really intended to refer to the children surviving the testator. This view of the trial Court was reversed by the High Court and the suit was dismissed. This Court referred to Sections 19 and 21 of the 1882 Act, Sections 119 and 120 of the Indian Succession Act and reiterated one of the propositions laid down in **Rajes Kanta Roy v. Santi Devi** (supra) by making the following observations:

“Although the question whether the interest created is a vested or a contingent interest is dependent upon the intention to be gathered from a comprehensive view of all the terms of the document creating the interest, the court while construing the document has to approach the task of construction in such cases with a bias in favour of vested interest unless the intention to the contrary is definite and clear.”

The ratio of the above noted two judgments was followed in another two-Judge Bench in **Kokilambal v. N. Raman** (2005) 11 SCC 234.

13. Having noticed the distinction between vested interest and contingent interest, we shall now consider whether Ex.A-2 was a Settlement Deed or a Will. Although, no strait-jacket formula has been evolved for construction of such instruments, the consistent view of this Court and various High Courts is that while interpreting an instrument to find out whether it is of a testamentary character, which will take effect after the life time of the executant or it is an instrument creating a vested interest in praesenti in favour of a person, the Court has to very carefully examine the document as a whole, look into the substance thereof, the treatment of the subject by the settlor/executant, the intention appearing both by the expressed language employed in the instrument and by necessary implication and the prohibition, if any, contained against revocation thereof. It has also been held that form or nomenclature of the instrument is not conclusive and the Court is required to look into the substance thereof.

14. Before proceeding further, we may notice the judgments on which reliance was placed by learned counsel for the parties. In **Gangaraju v. Pendyala Somanna** (supra), the learned Single Judge was called upon to construe deed dated 27.2.1917 executed by one Kristnamma. The learned Single Judge referred to the contents of the document and observed:

“The document on the face of it is of a non-testamentary character. It was so stamped and so registered. It is called a dakal dastaveju, which means a conveyance or settlement deed. It is true that a document which is not a Will in form, may yet be a Will in substance and effect; but as was held in Mahadeva Iyer v. Sankarasubramania Iyer (1), if an instrument is a deed in form, in order to hold that it is testamentary or in the nature of a Will, there must be something very special in the case; and unless there are circumstances which compel the Court to treat an instrument in the form of a deed as a Will, the Court will not do so. The leading argument of the appellant is that the document created no estate in praesenti. A more literal translation of the fourth sentence in para 2 of the document is:

Therefore, on account of my affection for you, I have arranged that after my death the property shall belong to you.

It is certainly very difficult to derive from these words any immediate interest created in favour of the plaintiff. But the line between a Will and a conveyance reserving a life estate is a fine one, and it would be hard to define in some cases where the document has been held to be non-testamentary, wherein the personal interest which was transferred consists. A more easily applied test is that of revocability. There is nothing in the suit document to show that Kristnamma reserved the right to revoke it. On the contrary there is an undertaking not to alienate any part of the property during his lifetime. I consider that this is equivalent to a promise not to revoke the instrument, because if the executant intended to reserve that right he could not consistently have parted with the right to alienate. The same intention to give finality to the deposition is suggested by Ex.3, which is a conveyance of a portion of the property executed jointly by Kristnamma and the plaintiff. The fact that the plaintiff was required to join is significant, and in the schedule the property is described as that which was conveyed by Kristnamma to him. This document seems also to lend some colour to the view that an immediate conveyance of interest was intended in Ex.F. I think that Kristnamma had the intention not to revoke the conveyance and this has always been regarded as one of the most important tests.”

(emphasis supplied)

15. In **Venkatasubramaniya Iyer v. Srinivasa Iyer** (supra), the question considered was whether the document marked Exhibit – C is a Settlement or a Will. The learned Single Judge answered the question in the following words:

“....A question of that kind is one that has to be decided primarily on the terms of the document itself. It was executed by a widow, the mother of the plaintiff, and is styled a settlement in favour of the plaintiff. It recites certain family arrangements by which certain moveables are divided between the widow and the plaintiff, and the widow retains certain immovable property for herself. It deals with property to an extent of over three velis left to her by her husband under his will absolutely and recites that, in respect of that on account of the request made to her by her son for the benefit of his minor son, the present defendant and out of favour to himself and in consideration of the arrangement that he would not during her lifetime encumber or alienate the rights that would come to him in the property after her death, she on her side undertakes to meet all her own expenses till her death out of the income and not to alienate the property. Thus the document prohibits both parties from alienating the rights retained or given thereby. It directs that after the widow's death, the plaintiff and his heirs shall enjoy the property with all absolute rights. It further provides that if the widow fails to pay the kist on the property, the plaintiff shall pay and may recover from her out of her income, and that the pattah for the property shall be transferred to the plaintiff. The document is styled a settlement and registered.

It is contended by the appellant that the document is a will since the only operative portion of it is that which bequeaths the property to the plaintiff and his heirs after the death of the widow. Both the lower Courts have rejected this contention and

held the document to be a settlement. I think it is clear from the tenor of the document that it is not a will. It mentions considerable property which is not disposed of by it at all. It does more than bequeath property to the plaintiff after the widow's death. He obtains by it certain rights in presenti, for example, the right as covenanted with him that the widow will not alienate the property during her lifetime. He himself is given the right to recover the unpaid kists from her income and to have the pattah transferred to his name. There is no language indicating that the widow was retaining with her any power to revoke the document, while the surrender of her right to alienate during her lifetime indicates that she did not reserve any power to revoke. These points combined with the facts that the parties intended the document to be a settlement and styled it as such and that it was handed over to the plaintiff and not retained with the widow are sufficient to indicate that the widow was merely retaining a life-interest in the property and was transferring to the plaintiff the vested remainder. It is not of much help to refer to reported rulings in a case of this kind when the decision has to be based on the wording of a particular document, but documents of very similar wordings were held to be settlements and not wills in *Rajammal v. Authiammal* [1910] 33 Mad. 304 and in *Gangaraju v. Somanna* A.I.R. 1927 Mad. 197. These come nearer to the present case than those in *Venkatachala Chetty v. Govindaswamy Naicker* A.I.R. 1924 Mad. 605, *Thakur Ishri Singh v. Baldas Singh* [1884] 10 Cal. 792 quoted by the appellant. I can see no ground for holding that the lower appellate Court made any error of law in regarding Ex. C. on the face of it as a settlement and not a will.”

(emphasis supplied)

16. In **Ramaswami Naidu v. Gopalakrishna Naidu** (supra), the High Court laid down the following broad test for construction of document:

“The broad tests or characteristics as to what constitutes a will and what constitutes a settlement have been noticed in a number of decisions. But the main test to find out whether the document

constitutes a will or a gift is to see whether the disposition of the interest in the property is in praesenti in favour of the settlees or whether the disposition is to take effect on the death of the executant. If the disposition is to take effect on the death of the executant, it would be a will. But if the executant divests his interest in the property and vests his interest in praesenti in the settlee, the document will be a settlement. The general principle also is that the document should be read as a whole and it is the substance of the document that matters and not the form or the nomenclature the parties have adopted. The various clauses in the document are only a guide to find out whether there was an immediate divestiture of the interest of the executant or whether the disposition was to take effect on the death of the executant.”

“If the clause relating to the disposition is clear and unambiguous, most of the other clauses will be ineffective and explainable and could not change the character of the disposition itself. For instance, the clause prohibiting a revocation of the deed on any ground would not change the nature of the document itself, if under the document there was no disposition in praesenti.”

(emphasis supplied)

17. In **Ramaswami Naidu v. M.S. Velappan and others** (1979) 2 M.L.J.88, the Division Bench of the Madras High Court referred to the documents which were subject matter of consideration before it and observed:

“In the instant case the first plaintiff was already in charge of the properties as trustee to perform the obligations created under it and continued them after the lifetime of Meenakshi Ammal. There are also positive words whereby it was made

clear that the properties should be vested in Velappan and his heirs for them to enjoy the same absolutely.....

These two dispositive clauses create an interest *in praesenti*. The question is whether the postponement of such proprietary rights already vested in Velappan and his heirs, to the lifetime of Meenakshi Ammal, would make any difference. The *Explanation* to Section 19 of the Transfer of Property Act, providing that a vested interest is not defeated by the death of the transferee before he obtains possession, makes the legislative intent clear that such a vested interest, merely for the reason that it becomes vested after the lifetime of the settlor, would not make it a settlement not being *in praesenti*. We are therefore unable to agree with the contention that the interest that Velappan, the first plaintiff, obtained under the instrument is not a vested one and that it could be defeated because it is postponed till after the lifetime of Meenakshi Ammal.

In the instant case the document itself is styled as a settlement deed. It has been registered. The right to enjoy the properties and secure the benefits and the temple honours as trustee under it have become a *fait accompli* even during the lifetime of Meenakshi Ammal. There is therefore no ambulation in the matter of the vesting of the interest in the first plaintiff by any declaration or use of words either express or implied.”

(emphasis supplied)

18. In **A. Sreenivasa Pai and another v. Saraswathi Ammal alias G. Kamala Bai** (supra), this Court considered whether by virtue of Settlement Deed executed by appellant A. Sreenivasa Pai in favour of his mother-in-law Padmavathi Ammal, the latter became absolute owner of the properties described in the plaint ‘A’ schedule and upon her death, her daughter S. Lakshmi Ammal acquired title to the said properties under the law of

inheritance being the sole heir of the deceased. While dealing with the issue, the Court referred to the terms of Settlement Deed and held that A. Sreenivasa Pai desired to give the properties to V. Sreenivasa Pai absolutely subject to the life interest conferred on Padmavathi Ammal and he had no intention to give the properties to be enjoyed by Padmavathi Ammal and by her heirs from generation to generation.

19. In **Namburi Basava Subrahmanyam v. Alapati Hymavathi and others** (supra), this Court observed that the nomenclature of the document is not conclusive and the Court has to find whether the document confers any interest in the property in praesenti so as to take effect intra vivos and whether an irrevocable interest thereby is created in favour of the recipient, all those to be gathered from the recitals of the documents as a whole and observed:

“The said recital clearly would indicate that the settlement deed executed on that date is to take effect on that day. She created rights thereunder intended to take effect from that date, the extent of the lands mentioned in the Schedule with the boundaries mentioned thereunder. A combined reading of the recitals in the document and also the Schedule would clearly indicate that on the date when the document was executed she had created right, title and interest in the property in favour of her second daughter but only on her demise she was to acquire absolute right to enjoyment, alienation etc. In other words, she had created in herself a life interest in the property and vested the remainder in favour of her second daughter. It is settled law that the executant while divesting herself of the title to the

property could create a life estate for her enjoyment and the property would devolve on the settlee with absolute rights on the settlor's demise. A reading of the documents together with the Schedule would give an indication that she had created right and interest in praesenti in favour of her daughter Vimalavathy in respect of the properties mentioned in the Schedule with a life estate for her enjoyment during her lifetime. Thus, it could be construed rightly as a settlement deed but not as a Will. Having divested herself of the right and title thereunder, she had, thereafter, no right to bequeath the same property in favour of her daughter Hymavathy. The trial court and the learned Single Judge rightly negatived the claim. The Division Bench was not, therefore, correct in law in interfering with the decree of the trial court."

20. In **Vynior's case** (supra) Lord Coke said "if I make my testament and last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." This statement of law was relied upon by the Division Bench of Calcutta High Court in **Sagar Chandra Mandal v. Digamber Mandal and others** (supra). In that case, the court was called upon to consider the true character of the instrument which was described as a Will. After noticing the contents of the documents, the Division Bench referred to **Vynior's case** and observed:

"As to the true character of the instrument propounded by the appellant we think there can be no reasonable doubt that it is a will. A will is defined in section 3 of the Indian Succession Act as the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death. Section 49 then provides that a will is liable to be revoked or altered by the maker of it, at any time when he is

competent to dispose of his property by will. If therefore an instrument is on the face of it of a testamentary character, the mere circumstance that the testator calls it irrevocable, does not alter its quality, for as Lord Coke said in *Vynior's Case*. "If I make my testament and last will irrevocable, yet I may revoke it, for my act or my words cannot alter the judgment of the law to make that irrevocable which is of its own nature revocable." The principal test to be applied is, whether the disposition made takes effect during the lifetime of the executant of the deed or whether it takes effect after his decease. If it is really of this latter nature, it is ambulatory and revocable during his life. [*Musterman v. Maberley, and in Bonis v. Morgan*]. Indeed, the Court has sometimes admitted evidence, when the language of the paper is insufficient, with a view to ascertain whether it was the intention of the testator that the disposition should be dependent on his death. [*Robertson v. Smith*]. Tested in the light of these principles, there can be no doubt that the instrument now before us is of a testamentary character. It is described as a will and states explicitly that as after the death of the testator, disputes might arise among his relations with regard to the properties left by him, he made the disposition to be carried into effect after his demise. The terms and conditions are then set out, paragraph by paragraph, and in each paragraph the disposition is expressly stated to take effect after his demise. Against all this, reliance is placed on the sixth paragraph, in which the testator says that he would be at liberty to mortgage the properties and not to sell them absolutely. Such a restraint as this upon his own power of alienation during his lifetime would be obviously void. It does not indicate any intention to make the deed irrevocable."

21. In the light of the above, we shall now consider whether the trial Court and lower appellate Court rightly treated Ex. A-2 to be a Settlement Deed and the contrary finding recorded by the learned Single Judge of the High Court is legally unsustainable. A careful reading of Ex.A-2 shows that in the title itself the document has been described as Settlement Deed.

By executing that document, Shri K. Perumal Iyer expressed his intention, in no uncertain terms, to settle the property in favour of 16 persons who were none else than his own relatives and declared that 'from this day onwards I and you shall enjoy the land and house without creating any encumbrance or making any alienation whatsoever.' This was an unequivocal creation of right in favour of 16 persons in praesenti. Though, the beneficiaries were to become absolute owners of their respective shares after the death of the settlor, the language of the document clearly shows that all of them were to enjoy the property along with settlor during his lifetime and after his death, each of the beneficiaries was to get a specified share. In the concluding portion, the settlor made it clear that he will have no right to cancel the Settlement Deed for any reason whatsoever or to alter the terms thereof. The mere fact that beneficiary Nos. 1 and 2 and after them their heirs were to receive honours at the temple or that shares were to be divided after disposal of the property cannot lead to an inference that Ex.A-2 was a 'Will'. If Ex.A-2 is read as a whole, it becomes clear that it was a 'Settlement Deed' and the trial Court and the lower appellate Court did not commit any error by recording a finding to that effect. As a sequel to this, it must be held that the High Court committed serious error by setting aside the concurrent judgments and decrees of the two courts.

22. The judgments in **Vynior's case** and those of the Calcutta and Madras High Courts on which reliance was placed by the learned senior counsel for the respondents turned on their own facts and cannot be relied upon for declaring that Ex. A-2 was a 'Will'.

23. Although, in their written statement respondent Nos.1 and 2 did plead that Ex. A-2 was executed by Shri K. Perumal Iyer due to fraud or misrepresentation, no evidence was led by them to substantiate that allegation. Therefore, we do not find any valid ground or justification to entertain that plea.

24. In the result, the appeal is allowed. The impugned judgment is set aside and those of the trial Court and the lower appellate Court are restored. The parties are left to bear their own costs.

.....
.....J.
[G.S. Singhvi]

.....J.
[Asok Kumar Ganguly]

New Delhi
March 15, 2010