REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 8365 OF 2002

K. Naina Mohamed (Dead) through L.Rs. ……..Appellants

Versus

A.M. Vasudevan Chettiar (Dead) through L.Rs. and others ……Respondents

J U D G M E N T

G.S. Singhvi, J.

1. This appeal is directed against the judgment of the learned Single Judge of Madras High Court, who allowed the second appeal preferred by respondent Nos.1 and 2 – A.M. Vasudevan Chettiar and A.M. Nagamian Chettiar, set aside the judgment of District Judge, Tiruchirappalli (hereinafter described as 'the lower appellate Court') and restored the decree passed by Subordinate Judge, Tiruchirappalli (hereinafter described as 'the trial Court') in a suit filed by them for directing Rukmani Ammal, her son,

A.B.M. Ramanathan Chettiar and appellant – K. Naina Mohamed (defendant Nos.1 to 3 in the suit) to execute sale deed in their favour in respect of property bearing Municipal Door No.58, Walaja Bazaar Street, Woriur, Tiruchirapalli Town and Talluk (hereinafter described as, 'the suit property').

2. The suit property belonged to one Smt. Ramakkal Ammal wife of Pattabiraman of Uraiyur of Tiruchirapalli. She executed registered Will dated 22.9.1951 in respect of her properties and created life interest in favour of her two sisters, namely, Savithiri Ammal and Rukmani Ammal with a stipulation that after their death their male heirs will acquire absolute right in 'A' and 'B' properties respectively subject to the rider that they shall not sell the property to strangers. Clauses 4, 10 and 11 of the Will and details of 'A' and 'B' properties (English translation of the Will and details of the properties were made available by the learned counsel after conclusion of the arguments), which have direct bearing on the decision of this appeal read as under:

> "(4) My sisters i) Savithri Ammal, wife of A.R. Manickam Chettiar, residing at Madukkur, Pattukkottai Taluk, Thanjavur District and ii) Rukumani Ammal, wife of A.B. Muthukrishna Chettiar, residing at Bazaar Street, Karur, Karur Taluk shall inherit and enjoy House Properties detailed hereunder after my life during their lifetime without encumbering the same during

their life time and receive the income therefrom equally among them after paying the taxes.

(10) After my lifetime if any one of my sisters die that sister's share of 'A' & 'B' mentioned properties shall go to the male heirs of the deceased person. After demise of both sisters, the male heirs of Savithiri Ammal shall obtain 'A' property in equal shares and the male heirs of Rukumani Ammal shall obtain 'B' property subject to conditions specified in clause 11 hereunder with absolute rights.

(11) As and when Savithiri Ammal's male heirs get and enjoy 'A' property and as and when Rukmani Ammal's heirs get and enjoy 'B' property, if any one of them wants to sell their share, they have to sell to the other sharers only as per the market value then prevailing and not to strangers.

'A' Property Details

The Terraced House with tiled Verandhas including open backyard with water pump and meter at Walaja Bazaar Street, Thamalvaru Bayamajar, Woriur, 3rd Block, A Ward, Puthur Circle, Tirchirapallai Town to the West of Bazaar lying North to South, to the North of 'B' Item Property hereunder and the backyard of Muthu Veerswami Chettiar to the East of Padmaji Lane and to the South of the House belonging to Krishnammal, wife of Venogopal Naidu bounded on the

NORTH BY : Survey No.2069
SOUTH BY : Survey No.2067
EAST BY : Survey No.2065 and
WEST : Survey No.2088

situate within the Registration District of Tirchirapalli and Sub-Registration District No.3 Joint Sub-Registrar.

'B' Property Details

Tiled House and vacant site on the above said Walaja Bazaar Street, bearing Municipal Door No.58 lying to the West of Bazaar lying South to North, to the North of House of Muthu

> Veerasami Chettiar, to the East the aboe Muthu Veerasami Chettiar's backyard, to the South 'A' item Property running 126 feet from East to West and 12 feet on the Eastern side from South to North and 8 feet on the Western Side from South to North comprised in T.S. No.2067"

3. Savithiri Ammal died in February 1979. After about two years, one of her three sons, namely, A.M. Krishnamurthy filed a suit (O.S. No.473 of 1981) for partition of his share in `A' property. He impleaded Rukmani Ammal as one of the defendants. The suit was disposed of in terms of the compromise arrived at between the parties, which envisaged that the plaintiff therein and his brothers will divide `A' property among themselves and `B' property will be the absolute property of Smt. Rukmani Ammal and her descendants.

4. Soon after disposal of O.S. No.473 of 1981, Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar executed registered sale deed dated 9.12.1982 in favour of the appellant in respect of the suit property. Respondent Nos.1 and 2 challenged the same in O.S. No.226 of 1983. They pleaded that in view of the restriction embodied in clause 11 of the Will, Rukmani Ammal and her son could not have sold the property to a stranger. They prayed that the sale deed be declared void and defendants in the suit be directed to execute sale deed in their favour.

5. Rukmani Ammal and her son contested the suit by asserting that the Will executed by Ramakkal Ammal did not obligate them to sell the property to the plaintiffs; that clause 11 of the Will was liable to be treated as void because the same was against the rule against perpetuity and the law of alienation; that Rukmani Ammal was in need of money for maintaining herself and, therefore, her son gave up his right in the suit property facilitating alienation thereof in favour of K. Naina Mohamed. They further pleaded that before executing the sale deed, an offer was made to the plaintiffs to purchase the suit property but they refused to do so.

6. In a separate written statement filed by him, appellant – K. Naina Mohamed pleaded that the Will did not provide for joint possession and enjoyment of the properties by two sisters and that clause 11 of the Will cannot be relied upon by the plaintiffs for claiming pre-emption. He also questioned the legality of the restriction contained in clause 11 of the Will on alienation of the property to the strangers by asserting that the said clause violated the rule against perpetuity.

7. Respondent No.1 examined himself as P.W.1 and one Srinivasan as P.W.2 and produced nine documents which were marked as Exhibits A1 to A9. Rukmani Ammal and her son neither appeared in the witness box nor produced any documentary evidence. Appellant K. Naina Mohamed examined himself as D.W.1 and one Thangavel as D.W.2, but he did not produce any document.

8. The trial Court negatived the appellant's challenge to the Will by observing that being a purchaser from one of the legatees, he does not have the locus to question legality of the Will. The trial Court held that clause 11 is valid and binding on the legatees and it does not violate the rule against perpetuity. The trial Court further held that K. Naina Mohamed had purchased the property with notice of the clause relating to pre-emption and as such he is bound by the same.

9. Rukmani Ammal and her son did not challenge the judgment and decree of the trial Court but the appellant did so by filing an appeal. The lower appellate Court agreed with the trial Court that the appellant before it was not entitled to challenge the Will but opined that the restriction contained in clause 11 of the Will was void and not binding on Rukmani

Ammal and her son. The learned lower appellate Court referred to the judgments of Allahabad and Oudh High Courts in **Askar Begum v. Moula Butch** AIR 1923 All 381 and **Doss Singh v. Gupchand** AIR 1921 Oudh 125 and held that after creating absolute right in favour of male heirs of her two sisters, the executant did not have the power to impose restriction on alienation of their respective shares. The learned lower appellate Court also referred to the judgment of this Court in **Rukmanbai v. Shivaram** AIR 1981 SC 1881 and held that the suit filed by two sons of Savithiri Ammal was pre-mature.

10. Respondent Nos.1 and 2 challenged the appellate decree in Second Appeal No.360/1989. While admitting the appeal, the High Court framed the following substantial question of law:

> "Whether the first appellate court is correct in holding that the restriction, namely the pre-emption clause in the Will is not valid?"

11. The learned Single Judge analysed the pleadings and evidence of the parties, referred to clauses 10 and 11 of the Will and held that the restriction contained therein does not violate the rule against perpetuity. He rejected the appellants' plea that right of pre-emption was not available to respondent

Nos.1 and 2 against Rukmani Ammal and restored the decree passed by the trial Court.

12. Shri S. Balakrishnan, learned senior counsel appearing for the appellant made three fold arguments. Learned senior counsel pointed out that Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar died during the pendency of the second appeal before the High Court and argued that the same stood automatically abated because legal representatives of the deceased were not brought on record. Shri Balakrishnan relied upon the judgments of this Court in **State of Punjab v. Nathu Ram** AIR 1962 SC 89, **Deokuer and another v. Sheoprasad Singh and others** AIR 1966 SC 359, **Madan Naik v. Hansubala Devi** AIR 1983 SC 676, **Amar Singh v. Lal Singh** (1997) 11 SCC 570, **Amba Bai v. Gopal** (2001) 5 SCC 570 and **Umrao v. Kapuria** AIR 1930 Lahore 651 and argued that the High Court committed serious error by granting relief to respondent Nos.1 and 2 without insisting on the impleadment of the legal representatives of Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar. Learned senior counsel further argued that the restriction contained in clause 11 on alienation of the property was to operate only within the respective branches and it was not obligatory for the male heirs of one branch to sell the property to the male

heirs of the other branch. An alternative argument made by learned senior counsel is that the restriction contained in clause 11 of the Will against alienation of the property is *ex facie* violative of the rule against perpetuity and the trial Court and the High Court committed serious error by relying upon the same for the purpose of nullifying the sale deed executed by Rukmani Ammal and her son A.B.M. Ramanathan Chettiar. The last argument of the learned senior counsel is that in view of the compromise arrived at between the parties in OS No.473 of 1981, Rukmani Ammal and her son became absolute owner of 'B' property and their rights cannot be regulated or restricted by the conditions enshrined in the Will.

13. Shri R. Sundaravaradhan, learned senior counsel appearing for the respondents supported the impugned judgment and argued that the appellant is not entitled to seek a declaration that the second appeal filed by respondent Nos.1 and 2 stood abated on account of non-impleadment of the legal representatives of Rukmani Ammal and her son, who died during the pendency thereof. Learned senior counsel submitted that rules contained in Order XXII of the Code of Civil Procedure are required to be interpreted liberally so as to avoid abatement of the pending matters. He then argued that the second appeal did not abate on account of death of Rukmani

Ammal and her son, A.B.M. Ramanathan Chettiar because in terms of the Will executed by Smt. Ramakkal Ammal, Rukmani Ammal got life interest only and her son, who became absolute owner neither challenged the decree passed by the trial Court nor contested the second appeal. Learned counsel then referred to the definition of term 'legal representatives' contained in Section 2(11) of the Code of Civil Procedure and argued that the appellant, who had purchased the suit property will be deemed to be legal representative of the deceased because he represented their estate. In support of this argument, Shri Sundaravaradhan relied upon the judgments of this Court in **Mohd. Arif v. Allah Rabbul Alamin** AIR 1982 SC 948 and **Ghafoor Ahmad Khan v. Bashir Ahmed Khan** AIR 1983 SC 123. Learned senior counsel submitted that the restriction contained in clause 11 of the Will was not absolute inasmuch as it was open to the male heirs of Savithiri Ammal and Rukmani Ammal to transfer the property within the family. Learned counsel placed strong reliance on the judgments of the Privy Council in **Mohammad Raza and others v. Mt. Abbas Bandi Bibi** AIR 1932 PC 158 and of this Court in **Ram Baran Prasad v. Ram Mohit Hazra** AIR 1967 SC 744 and **Zila Singh v. Hazari** AIR 1979 SC 1066 and emphasized that the object of the restriction on alienation of the properties to strangers was to protect the interest of the family and there was no violation

of the rule against perpetuity.

14. We have considered the respective submissions and perused the records. We shall first deal with the question whether the second appeal filed by respondent Nos.1 and 2 stood abated due to their alleged failure to bring on record the legal representatives of Rukmani Ammal and her son A.B.M. Ramanathan Chettiar, who died on 23.6.1989 and 21.6.1995 respectively i.e. much before the disposal of the second appeal. A reading of the judgment under challenge shows that neither the factum of death of Rukmani Ammal and her son was brought to the notice of the learned Judge who decided the appeal nor any argument was made before him that the second appeal will be deemed to have abated on account of non impleadment of the legal representatives of the deceased. The reason for this appears to be that Rukmani Ammal and her son A.B.M. Ramanathan Chettiar, who had also signed the sale deed as one of the vendors did not challenge the judgment and decree of the trial Court and only the appellant had questioned the same by filing an appeal. A.B.M. Ramanathan Chettiar did not even contest the second appeal preferred by respondent Nos.1 and 2. Before this Court, the issue of abatement has been raised but the memo of appeal is conspicuously silent whether such a plea was raised and argued

before the High Court. Therefore, we do not think that the appellant can be allowed to raise this plea for frustrating the right of respondent Nos.1 and 2 to question alienation of the suit property in violation of the restriction contained in clause 11 of the Will. Here, it is necessary to mention that by virtue of the Will executed by her sister, Rukmani Ammal got only life interest in the property of the testator and her male heir, A.B.M. Ramanathan Chettiar got absolute right after her death. Therefore, during her life time, Rukmani Ammal could not have sold the property by herself. This is the precise reason why she joined her son in executing the sale deed in favour of the appellant. If an objection had been taken before the High Court that legal representatives of A.B.M. Ramanathan Chettiar have not been brought on record, an order could have been passed under Rule 4 of Order XXII which reads as under:

> "The Court whenever it thinks fit, may exempt the plaintiff from the necessity of substituting the legal representatives of any such defendant who has failed to file a written statement or who, having filed it, has failed to appear and contest the suit at the hearing; and judgment may, in such case, be pronounced against the said defendant notwithstanding the death of such defendant and shall have the same force and effect as if it has been pronounced before death took place."

15. The definition of the term 'legal representative' contained in Section 2(11) of the Code of Civil Procedure also supports the argument of the

learned counsel for the respondents that the second appeal cannot be treated as having abated because the appellant who had purchased the property was representing the estate of the deceased. In **Mohd. Arif v. Allah Rabbul Alamin** (supra), this Court considered a somewhat similar issue and held as under:

> "It is true that the appellant did not prefer any appeal to the District Court against the original decree but in the first appeal he was a party respondent. But that apart, in the second appeal itself Mohammad Arif had joined as co-appellant along with his vendor, Mohammad Ahmed. On the death of Mohammad Ahmed all that was required to be done was that the appellant who was on record should have been shown as a legal representative inasmuch as he was the transferee of the property in question and at least as an intermeddler was entitled to be treated as legal representative of Mohammad Ahmed. He being on record the estate of the deceased appellant qua the property in question was represented and there was no necessity for application for bringing the legal representatives of the deceased appellant on record. The appeal in the circumstances could not be regarded as having abated and Mohammad Arif was entitled to prosecute the appeal."
>
> (emphasis supplied)

In **Ghafoor Ahmad Khan v. Bashir Ahmed Khan** (supra), this Court reversed the order of Allahabad High Court which had dismissed the second appeal preferred by the appellant as having abated on the ground of non-impleadment of the heirs of the sole respondent by observing that during his life time, the respondent had transferred the property (subject

matter of appeal) to his wife by way of gift and as such the case would fall under Order XXII Rule 10 CPC.

Reference may also be made to the Division Bench judgment of Calcutta High Court in **Haradhone v. Panchanan** AIR 1943 Calcutta 570. That was a case under Bengal Tenancy Act, 1885. The proprietor of the land, Sir Bejoy Chand Mehtab filed suit for settlement of rent in respect of the tenure. The defendants contested the suit by saying that the lands constituted their niskar holding and that the same were wrongly recorded as liable to be assessed to rent under the plaintiff. The Assistant Settlement Officer decreed the plaintiff's claim. He held that the tenancy was not a niskar one and it was liable to be assessed to rent. Learned special Judge, who heard the appeal preferred by the defendants' confirmed the finding recorded by the Assistant Settlement Officer on the issue of nature of the property but set aside the decree so far as it settled the amount of rent and remanded the case to the Assistant Settlement Officer. Learned special Judge also held that the defendants were no longer in possession of the suit land. The defendants challenged the appellate judgment by filing an appeal before the High Court. During the pendency of the appeal, the plaintiff granted a putni, which included the suit lands to Panchanan Palit. The

putnidar applied for impleadment as a party in the appeal and his prayer was granted. Thereafter, the original plaintiff died, but no substitution was made in his place. It was argued before the High Court that the appeal abated against the plaintiff because his legal representatives were not brought on record. The Division Bench of the High Court held that after giving up the estate in a permanent putni lease, the proprietor of the estate ceased to be the landlord of all subordinate tenures and he did not have the right to institute a proceeding under Section 105 of the Act. The High Court then referred to Order XXII Rules 2 and 10 and held as under:

> "The position of the parties after the creation of the putni in this case therefore became as follows: (1) The putni having been created pendente lite the defendants-appellants were entitled to prosecute their appeal as against the plaintiff Maharaja alone ignoring the transfer pendente lite; the transferee pendente lite would have have been bound by the ultimate result of the litigation. (2) The defendants-appellants were entitled also to bring on record the transferee pendente lite under Order 22, R.10, Civil P.C., in the place of the Maharaja plaintiff-respondent; (3) Had the proceedings been instituted after the creation of the putni, the Maharaja plaintiff would not have been competent to institute the proceeding under S. 105 of the Act. This shows that the interest of the plaintiff involved in the suit came to or devolved upon the holder of the putni within the meaning of O. 22, rule 10, C.P.C, (4) The relief awarded by the decree appealed from was that the tenancy was not a rent free one but was liable to assessment of rent; and this being the nature of the relief involved in the appeal, it was the immediate landlord having permanent interest who was vitally concerned with it, and not the superior landlord who had permanently leased out his interest. In our opinion, therefore, the right to appeal survived the deceased plaintiff and it did survive against

> the putnidar respondent alone within the meaning of order 22, rule 2, C.P.C. We, therefore, hold that the appeal is competent without the legal representative of the deceased Maharaja being brought on the record."
>
> (emphasis supplied)

The judgments on which reliance has been placed by Shri Balakrishnan are clearly distinguishable. In **State of Punjab v. Nathu Ram** (supra), this Court held that where the appeal preferred by the State Government against an award passed by the arbitrator under the Land Acquisition Act in favour of two brothers stood abated against one brother on account of non-impleadment of his legal representatives, the same did not survive against the other brother because the award was joint and indivisible. After taking note of the provisions contained in Order XXII Rule 4 and Order I Rule 9, the Court observed:

> "(6) The question whether a Court can deal with such matters or not, will depend on the facts of each case and therefore no exhaustive statement can be made about the circumstances when this is possible or is not possible. It may, however, be stated that ordinarily the considerations which weigh with the Court in deciding upon this question are whether the appeal between the appellants and the respondents other than the deceased can be said to be properly constituted or can be said to have all the necessary parties for the decision of the controversy before the Court. The test to determine this has been described in diverse forms. Courts will not proceed with an appeal (a) when the success of the appeal may lead to the Court's coming to a decision which be in conflict with the decision between the appellant and the deceased respondent and therefore which would lead to the Court's passing a decree which will be

> contradictory to the decree which had become final with respect to the same subject-matter between the appellant and the deceased respondent; (b) when the appellant could not have brought the action for the necessary relief against those respondents alone who are still before the Court and (c) when the decree against the surviving respondents, if the appeal succeeds, be ineffective, that is to say, it could not be successfully executed."

In **Madan Naik v. Hansubala Devi** (supra), this Court was called upon to consider the correctness of an order passed by the learned Single Judge of Patna High Court who set aside dismissal of an application made by the appellant in the matter of abatement of the appeal and remitted the matter to the lower appellate Court for disposal of the appeal on merits. While approving the order of the learned Single Judge, this Court referred to Order XXII Rules 4 and 11 CPC and observed:

> "Order 22 Rule 11 of the Code of Civil Procedure read with Order 22 Rule 4 makes it obligatory to seek substitution of the heirs and legal representatives of deceased respondent if the right to sue survives. Such substitution has to be sought within the time prescribed by law of limitation. If no such substitution is sought the appeal will abate. Sub-rule (2) of Rule 9 of Order 22 enables the party who is under an obligation to seek substitution to apply for an order to set aside the abatement and if it is proved that he was prevented by any sufficient cause from continuing the suit which would include an appeal, the court shall set aside the abatement. Now where an application for setting aside an abatement is made, but the court having not been satisfied that the party seeking setting aside of abatement was prevented by sufficient cause from continuing the appeal, the court may decline to set aside the abatement. Then the net

> result would be that the appeal would stand disposed of as having abated. It may be mentioned that no specific order for abatement of a proceeding under one or the other provision of Order 22 is envisaged; the abatement takes place on its own force by passage of time. In fact, a specific order is necessary under Order 22 Rule 9 CPC for setting aside the abatement."

In **Amba Bai v. Gopal** (supra), this Court considered whether non impleadment of the legal representatives of the defendant in a suit for specific performance was sufficient to deny them right to contest the matter at the stage of execution. The facts of that case were that the suit filed by Laxmi Lal for specific performance against one Radhu Lal was dismissed by the trial Court but was decreed by the appellate Court. During the pendency of the second appeal preferred by Radhu Lal, plaintiff Laxmi Lal died and his legal representatives were brought on record. However, the legal representatives of Radhu Lal who too died before the dismissal of the appeal were not brought on record and this fact was not brought to the notice of the High Court. When the legal representatives of Laxmi Lal filed execution case against the legal representatives of Radhu Lal, an objection was raised on the latter's behalf that the judgment rendered by the High Court was nullity. The trial Court rejected the objection. The revision preferred by the legal representatives of Radhu Lal was allowed by the High Court and it was held that the decree passed in the second appeal was a nullity as it had been

passed against a dead person. The High Court accepted the theory of merger and ruled that the execution proceedings were liable to be dismissed. This Court reversed the order of the High Court and held:

> "In the instant case, there is no question of the application of the doctrine of merger. As the second appellant Radhu Lal died during the pendency of the appeal, and in the absence of his legal heirs having taken any steps to prosecute the second appeal, the decree passed by the first appellate court must be deemed to have become final. By virtue of the order passed by the first appellate court, the plaintiff's suit for specific performance was decreed. Failure on the part of the legal heirs of Radhu Lal to get themselves impleaded in the second appeal and pursue the matter further shall not adversely affect the plaintiff decree-holder as it would be against the mandate of Rule 9 Order 22 of the Code of Civil Procedure. The impugned order is, therefore, not sustainable in law and the same is set aside and the appeal is allowed. The executing court may proceed with the execution proceedings."

In **Amar Singh v. Lal Singh** (supra), this Court held that where more than one person was entitled to property covered under the Will, the relief is joint and inseparable and if the appeal stood abated against the first respondent, the same shall stand abated against the remaining respondents as well. In **Umrao v. Kapuria** (supra), the learned Single Judge of Lahore High Court held that where legal representatives of the successful plaintiff were not brought on record, the whole appeal stood abated.

16. In none of the aforementioned cases, a question similar to the one raised in this appeal was examined and decided. Therefore, the proposition laid down therein cannot be made basis for declaring that the second appeal preferred by respondent Nos.1 and 2 stood automatically abated due to non-impleadment of the legal representatives of Rukmani Ammal and her son, A.B.M. Ramanathan Chettiar, despite the fact that the appellant, who represented the estate of the deceased in his capacity as a purchaser had not only challenged the judgment of the trial Court by filing an appeal but also contested the second appeal.

17. The next issue which needs consideration is whether the restriction enshrined in clause 11 of the Will executed by Ramakkal Amal can be declared as void on the ground that it violates the rule against perpetuity. This rule has its origin in the Duke of Norfolk's case of 1682. That case concerned Henry, 22nd Earl of Arundel, who had tried to create a shifting executory limitation so that one of his titles would pass to his eldest son (who was mentally deficient) and then to his second son, and another title would pass to his second son, but then to his fourth son. The estate plan also included provisions for shifting the titles many generations later, if certain conditions were to occur. When the second son, Henry, succeeded to one

title, he did not want to pass the other to his younger brother, Charles. The latter sued to enforce his interest. The House of Lords held that such a shifting condition could not exist indefinitely and that tying up property too long beyond the lives of people living at the time was wrong. In England, the rule against perpetuity was codified in the form of the Perpetuities and Accumulations Act, 1964 and in the latest report of the British Law Commission, a new legislation has been recommended. (http://www.lawcom.gov.uk)

18. In India, the rule against perpetuity has been incorporated in Section 114 of the Indian Succession Act, 1925 which reads thus:

> "114. **Rule against perpetuity.**– No bequest is valid whereby the vesting of the thing bequeathed may be delayed beyond the life-time of one or more persons living at the testator's death and the minority of some person who shall be in existence at the expiration of that period, and to whom, if he attains full age, the thing bequeathed is to belong."

However, as will be seen hereinafter, the principle enshrined in the aforesaid section does not have any bearing on this case.

19. In **Ram Baran Prasad v. Ram Mohit Hazra** (supra), this Court considered whether covenant of pre-emption contained in an arbitration

award violates the rule against perpetuity and whether the same is binding on assignees or successor-in-interest of the original contracting parties. The factual matrix of that case was that two brothers, Tulshidas Chatterjee and Kishorilal Chatterjee owned certain properties in the suburbs of Calcutta. In 1938, Kishorilal sued for partition of the properties. The matter was referred to arbitration. The arbitrators gave award, which was made rule of the court. Under the award, two of the four blocks into which the properties were divided by the arbitrators were allotted to Tulshidas and the remaining two blocks to Kishorilal. In the award there was a clause to the following effect:

> "We further find and report with the consent of and approval of the parties that any party in case of disposing or transferring any portion of his share, shall offer preference to the other party, that is each party shall have the right of pre-emption between each other."

After the arbitration award became rule of the court, Tulshidas sold some of the portion of his properties to Nagendra Nath Ghosh. This was done after Kishorilal refused to pre-empt the same. Later on, Kishorilal sold his two blocks to Rati Raman Mukherjee and others. The Mukherjees sold the property to the plaintiff-respondents. Nagendra Nath also sold the property to defendant No.1. Thereupon, the plaintiffs filed suit for pre-empting the transaction between Nagendra Nath Ghosh and defendant No.1. The trial Court held that the covenant of pre-emption was not hit by the rule against

perpetuities and was enforceable against the assignees of the original parties to the contract. Accordingly, a decree was granted to the plaintiffs. The defendants took the matter in appeal to the Calcutta High Court which was dismissed. Before this Court, it was argued that the covenant for pre-emption was merely a personal covenant between the contracting parties and was not binding against successors-in-interest or the assignees of the original parties to the contract. While rejecting the argument, the Court referred to various clauses of the award and observed:

> "It is obvious that in these clauses expression "parties" cannot be restricted to the original parties to the contract but must include the legal representatives and assignees of the original parties and there is no reason why the same expression should be given a restricted meaning in the pre-emption clause."

The Court then considered whether covenant of pre-emption offends the rule against perpetuities and is, therefore, void and not enforceable. After noticing the definition of "perpetuity" given by Lewis, the Court held that the rule against perpetuity concerns rights of property only and does not affect the making of contracts which do not create interest in property. The Court then referred to Sections 14 and 54 of the Transfer of Property Act and observed as under:

> "The rule against perpetuity which applies to equitable estates in English law cannot be applied to a covenant of pre-emption

> because Section 40 of the statute does not make the covenant enforceable against the assignee on the footing that it creates an interest in the land."

The Court further held that the covenant of pre-emption was not violative of the rule against perpetuity and could not be declared as void.

The same view was reiterated in **Shivji v. Raghunath** (1997) 10 SCC 309. In that case, the Court found that the restriction contained against alienation of the property was not absolute and held that the same was not violative of the rule against perpetuity. After noticing the ratio of the judgment in **Ram Baran Prasad v. Ram Mohit Hazra** (supra), the Court held:

> "……when a contract has been executed in which no interest in praesenti has been created, the rule of perpetuity has no application. As a result, the agreement is in the nature of a pre-emptive right created in favour of the co-owner. Therefore, it is enforceable as and when an attempt is made by the co-owner to alienate the land to third parties."

20. Reverting to the case in hand, we find that by executing Will dated 22.9.1951, Smt. Ramakkal Ammal created life interest in favour of her two sisters with a stipulation that after their death, their male heirs will acquire absolute right in 'A' and 'B' properties respectively subject to the condition

that if either of them want to sell the property then they shall have to sell it to other sharers only as per the prevailing market value and not to strangers. The restriction contained in clause 11 was not absolute inasmuch as alienation was permitted among male heirs of the two sisters. The object of incorporating this restriction was to ensure that the property does not go out of the families of the two sisters. The male heirs of Savithri Ammal and Rukmani Ammal did not question the conditional conferment upon them of title of the properties. Therefore, the appellant who purchased 'B' property in violation of the aforesaid condition cannot be heard to say that the restriction contained in clause 11 of the Will should be treated as void because it violates the rule against perpetuity.

21. In re. MACLEAY 1875 M. 75, a similar question was considered and answered in negative. The facts of that case were Margarette Mayers, by her will, after a gift to her brother Henry on condition that he settled it on his wife and children, and the gift of a like sum to his sisters, made the following devise:-

> "I give to my dear brother John the whole of the property given to me by my dear aunt Clara Perkins, consisting of the manor of Bletchingley, in the county of Surrey, and the Pendell Court Mansion, with the land belonging to it, on the condition that he never sells it out of the family."

The testatrix then gave legacies to her nephews and nieces named in the Will, and after a legacy to a servant, gave the residue of her estate and effects to her "dear brothers" and "dear sisters." John Perkins Mayers, the devisee under the Will contracted with Sir George Macleay for the sale to him of the property comprised in the devise, with a proviso that the intending purchaser should be at liberty to apply for registration of the hereditaments in the Office of Land Registry, and that in the event of its being found impossible to obtain such registration, the contract should be void. In the course of investigation of the title, a doubt arose whether in view of the condition enshrined in the Will, a marketable title existed in favour of the vendor. The Registrar made a reference to the Court under Section 6 of the Transfer of Land Act. It was suggested that the restriction contained in the Will was void being repugnant to the quality of the estate. Sir G. Jessel, M.R. referred to several earlier judgments and observed:

> "The law on the subject is very old, and I do not think it can be better stated that it is in *Coke* upon *Littleton*, in *Sheppard's* Touchstone, and other books of that kind, which treat it in the same way. *Littleton* says (1): "If a feoffment be made upon this condition, that the feoffee shall not alien the land to any, this condition is void, because when a man is enfeoffed of lands or tenements he hath power to alien them to any person by the law. For if such a condition should be good, then the condition should oust him of all the power which the law gives him, which should be against reason, and therefore such a condition is void." Then he says (2): "But if the condition be such that the feoffee shall not alien to such a one, naming his name, or to

any of his heirs or of the issues of such a one, or the like, which conditions do not take away all power of alienation from the feoffee, then such condition is good." So that, according to *Littleton*, the test is, does it take away all power of alienation? I think it is fair to make one remark, which is made in the case of *Muschamp* v. *Bluet* (3), cited in *Jarman* on Wills (4), and adopted by Lord *Romilly* in the case I am going to refer to, of *Attwater* v. *Attwater* (5) – that it must not, in fact, take away all power, because, if you say that he shall not alien except to *A. B.*, who you know will not or cannot purchase, that would be in effect restraining him from all alienation, and, as is very well said in many cases, and is said in a passage in *Coke* to which I am about to refer, you cannot do that indirectly which you can do directly. I had occasion to refer, in the case of *Jacobs* v. *Brett* (6), to a practice which was said to prevail in the Court of Common Pleas, and where I said it never could have been considered by that Court as being intended as the infringement of so salutary a rule. The condition, therefore, whatever it may be must not really take away all power, either by express words or by the indirect effect of the frame of the condition. That is the effect of the rule as laid down by *Littleton*. Then *Coke* says (1): "If a feoffment in fee be made upon condition that the feoffee shall not infeoff *J. S.* or any of his heirs, or issues, & e. this is good, for he doth not restrain the feoffee of all his power: the reason here yielded by our author is worthy of observation. An in this case, if the feoffee infeoof *J. N.* of intent and purpose that he shall infeoof *J. S.*, some hold that this is a breach of the condition, for *quando aliquid prohibetur fieri*, *ex director prohibetur et per obliquum*." That was Coke's notion: and I hope it has not altogether departed from our Courts. Then he says: "If a feoffment be made upon condition that the feoffee shall not alien in mortmain, this is good, because such alienation is prohibited by law, and regularly whatsoever is prohibited by the law may be prohibited by condition, be it *malum prohibitum* or *malum in se*," and there he stops.

So that, according to the old books, *Sheppard's* Touchstone being to the same effect, the test is whether the condition takes away the whole power of alienation

substantially: it is a question of substance, and not of mere form.

Now, you may restrict alienation in many ways. You may restrict alienation by prohibiting a particular class of alienation, or you may restrict alienation by prohibiting a particular class of individuals, or you may restrict alienation by restricting it to a particular time. In all those ways you may limit it, and it appears to me that in two ways, at all events, this condition is limited. First, it is limited as to the mode of alienation, because the only prohibition is against selling. There are various modes of alienation besides sale; a person may lease, or he may mortgage, or he may settle; therefore it is a mere limited restriction on alienation in that way. Then, again, it is limited as regards class; he is never to sell it out of the family, but he may sell it to any one member of the family. It is not, therefore, limited in the sense of there being only one persons to buy; the will shews there were a great many members of the family when she made her will; a great many are named in it; therefore you have a class which probably was large, and was certainly not small. Then it is not, strictly speaking, limited as to time, except in this way, that it is limited to the life of the first tenant in tail; of course, if unlimited as to time, it would be void for remoteness under another rule. So that this is strictly a limited restrain on alienation, and unless *Coke* upon *Littleton* has been overruled or is not good law, this is a good condition.

It is said that the very point occurred in *Doe* v. *Pearson* (1) and *Attwater* v. *Attwater* (2), and it appears to me that the point did occur in both those cases. In *Doe* v. *Pearson* the gift was a gift in fee upon this special proviso and conditions, "that in case my said daughters *Ann* and *Hannah Collett*, or either of them, shall have no lawful issue, that then and in such case, they and she having no lawful issue as aforesaid shall have no power to dispose of her share in the said estates so above given to them, except to her sister or sisters, or to their children." Here it is "family", which is a larger term. In the next place, here it is "sell" only, there it was "dispose", which is probably the largest term known to the law. So that the power of

alienation was very much more restricted in *Doe* v. *Pearson* than it is in the case before me. But the full Court there held, after a very long and elaborate argument, Lord *Ellenborough* giving judgment and going into the authorities very carefully, that the condition was good; and he says (3): "As to the first, we think the condition is good; for, according to the case of *Daniel* v. *Ubley* (4), though the Judges did not agree as to the effect of a devise", and so forth, "yet in that case it was not doubted but that she might have had given her a fee simple conditional to convey it to any of the sons of the devisor; and if she did not, that the heir might enter for the condition broken." Now that is a stronger case still; because, as Lord *Ellenborough* and the other Judges of the Queen's Bench read *Daniel* v. *Ubley* (1), all the Judges agreed, n the time of Sir W. Jones, that it was good to give a woman a fee simple with a condition to convey it to one of the sons of the devisor; that is, she could not convey it to anybody else; it was limited. There Mr. Justice *Doderidge* said (2) "He conceived she had the fee, with condition, that if she did alien, that then she should alien to one of the children," which is a very limited class; and he finally concluded by saying that "her estate was a fee with a liberty to alienate it if she would, but with a condition that if she did alienate, the she should alienate to one of her sons." So that the case of *Daniel* v. *Ubley* is also stronger than the present. In the first place, it was a prohibition, not merely against selling, but against all alienation; and in the next place, the class was limited to one of the sons of the devisor; but yet the Judges gave an opinion that it would be good, and following that old authority, Lord *Ellenborough* and the Judges of the Queen's Bench, in *Doe* v. *Pearson* (3), in the year 1805, held that the condition was valid.

Now taking that altogether, seeing that he has no quarrel with *Doe* v. *Pearson* (2), seeing that he takes it that *Coke's* assertion is good law, the key to that judgment must be found in the latter observations, where he says: "It appears to me, also, that this is the true construction of the words used by the testator; it is, in truth, an injunction never to sell the hereditaments devised at all. The words 'out of the family' are merely descriptive of the effect of the sale;" and, so read, it

> does not conflict with the older authorities to which I have had occasion to refer. I must consider that case, recognizing, as it does, those older authorities as being good law, to have proceeded on the particular wording of that will, and more especially on the latter clause. I do not say that the clause does have the same effect on my mind that it had upon the mind of my predecessor; but still it is useless to criticize a question of construction when you come to the conclusion that the Judge is intending not to lay down a new rule of law, but is simply construing the particular instrument before him.
>
> Therefore, I consider that the case of *Attwater* v. *Attwater* (3) does not affect the law of the case, and that this being a limited restriction upon alienation, the condition is good."
>
> (emphasis supplied)

22. In **Mohammad Raza and others v. Mt. Abbas Bandi Bibi** (supra), the Privy Council confirmed the judgment of the Chief Court of Oudh which had ruled that when a person is allowed to take property under a conditional family arrangement, he cannot be heard to complain against the restriction on alienation of the property outside the family. The appellant before the Privy Council was a purchaser of the property belonging to Smt. Sughra Bibi which she got in furtherance of compromise arrived at between the parties in a suit brought against her cousin. The Privy Council held that even though it may not be possible to hold that Sughra Bibi took nothing more than a life estate, the restriction against alienation to strangers was valid. The relevant portions of that judgment are extracted below:

"……But assuming in the appellants' favour that she took an estate of inheritance, it was nevertheless one saddled, under the express words of the document, with a restriction against alienation to "a stranger". Their Lordships have no doubt that "stranger" means anyone who is not a member of the family, and the appellants are admittedly strangers in this sense. Unless therefore this restriction can for some reason be disregarded, they have no title to the properties which can prevail against the respondent.

On the assumption that Sughra Bibi took under the terms of the document in question an absolute estate subject only to this restriction, their Lordships think that the restriction was not absolute but partial; it forbids only alienation to strangers, leaving her free to make any transfer she pleases within the ambit of the family. The question therefore is whether such a partial restriction on alienation is so inconsistent with an otherwise absolute estate that it must be regarded as repugnant and merely void. On this question their Lordships think that Raghunath Prasad Singh's case (1) is of no assistance to the appellants, for there the restriction against alienation was absolute and was attached to a gift by will. It is in their Lordships' opinion, important in the present case to bear in mind that the document under which the appellants claim was not a deed of gift, or a conveyance, by one of the parties to the other, but was in the nature of a contract between them as to the terms upon which the ladies were to take. The title to that which Sughra Bibi took was in dispute between her and Afzal Husain. In compromise of their conflicting claims what was evidently a family arrangement was come to, by which it was agreed that she should take what she claimed upon certain conditions. One of these conditions was that she would not alienate the property outside the family. Their Lordships are asked by the appellants to say that this condition was not binding upon her, and that what she took she was free to transfer to them.

The law by which this question must be judged is their Lordships think prescribed by S.3, Oudh Laws Act, 1876, and

> failing the earlier clauses of the section which seem to have no application, "the Courts shall act according to justice, equity and good conscience," which has been adopted as the ultimate test for all the provincial Courts in India. Is it then contrary to justice, equity and good conscience to hold an agreement of this nature to be binding? Judging the matter upon abstract grounds, their Lordships would have thought that where a person had been allowed to take property upon the express agreement that it shall not be alienated outside the family, those who seek to make title, through a direct breach of this agreement, could hardly support their claim by an appeal to those high sounding principles and it must be remembered in this connection that family arrangements are specially favoured in Courts of equity. But apart from this it seems clear that after the passing of the Transfer of Property Act in 1882, a partial restriction upon the power of disposition would not, in the case of a transfer inter vivos, be regarded as repugnant: see S.10 of the Act. In view of the terms of this section, and in the absence of any authority suggesting that before the Act a different principle was applied by the Courts in India, their Lordships think that it would be impossible for them to assert that such an agreement as they are now considering was contrary to justice, equity and good conscience."
>
> (emphasis supplied)

23. We may now notice two judgments in which the nature of the right of pre-emption has been considered. In **Bishan Singh v. Khazan Singh** AIR 1958 SC 838, this Court while interpreting the provisions of Punjab Pre-Emption Act, 1913 referred to the judgment of Mahmood J., in **Gobind Dayal v. Inayatullah** ILR 7 Allahabad 775 and summed up law relating to right of pre-emption in the following words:

> "(1) The right of pre-emption is not a right to the thing sold but a right to the offer of a thing about to be sold. This right is called the primary or inherent right. (*2*) The pre-emptor has a secondary right or a remedial right to follow the thing sold. (*3*) It is a right of substitution but not of re-purchase i.e., the pre-emptor takes the entire bargain and steps into the shoes of the original vendee. (*4*) It is a right to acquire the whole of the property sold and not a share of the property sold. (*5*) Preference being the essence of the right, the plaintiff must have a superior right to that of the vendee or the person substituted in his place. (*6*) The right being a very weak right, it can be defeated by all legitimate methods, such as the vendee allowing the claimant of a superior or equal right being substituted in his place."

24. In **Zila Singh v. Hazari** (supra), this Court again considered the nature of the right of pre-emption under the Punjab Act and observed:

> "…….. The correct legal position is that the statutory law of pre-emption imposes a limitation or disability upon the ownership of a property to the extent that it restricts the owner's right of sale and compels him to sell the property to the person entitled to pre-emption under the statute. In other words, the statutory right of pre-emption though not amounting to an interest in the land is a right which attaches to the land and which can be enforced against a purchaser by the person entitled to pre-empt."

25. In the light of the above, we shall now consider whether clause 11 of the Will executed by Smt. Ramakkal Ammal is violative of the rule against perpetuity. If that clause is read in conjunction with clauses 4 and 10 of the Will, it becomes clear that two sisters of the testator, namely, Savithiri Ammal and Rukmani Ammal were to enjoy house properties jointly during

their life time without creating any encumbrance and after their death, their male heirs were to get the absolute rights in 'A' and 'B' properties. The male heirs of two sisters could alienate their respective shares to other sharers on prevailing market value. It can thus be said that Smt. Ramakkal Ammal had indirectly conferred a preferential right upon the male heirs of her sisters to purchase the share of the male heir of either sisters. This was in the nature of a right of pre-emption which could be enforced by male heir of either sister in the event of sale of property by the male heir of other sister. If the term 'other sharers' used in clause 11 is interpreted keeping in view the context in which it was used in the Will, there can be no manner of doubt that it referred to male heirs of other sister. The only restriction contained in clause 11 was on alienation of property to strangers. In our view, the restriction which was meant to ensure that the property bequeathed by Smt. Ramakkal Ammal does not go into the hands of third party was perfectly valid and did not violate the rule against perpetuity evolved by the English Courts or the one contained in Section 114 of the Indian Succession Act, 1925. As a corollary, we hold that the trial Court and the High Court did not commit any error by relying upon clauses 10 and 11 of the Will for granting relief to respondent Nos.1 and 2.

26. The argument of the learned counsel for the appellants that the restriction enshrined in clause 11 was limited to the shares of the male heirs of two sisters sounds attractive in the first blush but a careful and conjoint reading of clauses 4, 10 and 11 makes it clear that the testator had intended to prevent transfer of property to anyone other than the heirs of her two sisters. In terms of clause 4, the two sisters were to enjoy the house property jointly without encumbering the same during their lifetime. After their death, the male heirs of Savithri Ammal were to get 'A' property in equal shares and male heirs of Rukmani Ammal were to get 'B' property subject to the condition specified in clause 11 which envisages that in case of alienation, the male heirs of either sister had to sell the property to other sharers as per the prevailing market value and not to strangers. Since the intention of the testator was to impose a restriction on alienation of property, clauses 10 and 11 cannot be interpreted in a manner which would permit violation of that condition.

27. We also do not find any substance in the argument of Shri Balakrishnan that in view of the compromise decree passed in O.S. No.473/1981, Rukmani Ammal became owner of the property in her own right and respondent Nos.1 and 2 were not entitled to invoke the Will

executed by Smt. Ramakkal Ammal for questioning the sale deed executed in favour of the appellant. The record of the case does not show that any such plea was raised in the written statement filed in O.S. No.226/1983. From the impugned judgment it is not clear that any such argument was raised before the High Court. Therefore, it is extremely doubtful that whether the appellant can be allowed to raise such a plea first time before this Court. Moreover, for the reasons best known to him, the appellant did not produce before the trial Court, copy of the compromise decree passed in O.S. No.473/1981 and without going through the same it is not possible to hold that Rukmani Ammal had acquired independent right to sell the suit property to the appellant.

28. In the result, the appeal is dismissed. However, the parties are left to bear their own costs.

….……J.
[G.S. Singhvi]

…..…..……..J.
[Asok Kumar Ganguly]

New Delhi
July 7, 2010.