REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO.5924 OF 2005

DR. K.S. PALANISAMI(DEAD)
THROUGH LRS. … APPELLANT

VERSUS

HINDU COMMUNITY IN GENERAL AND
CITIZENS OF GOBICHETTIPALAYAM
AND OTHERS … RESPONDETNS

WITH

CIVIL APPEAL NO.5925 OF 2005

G.K. PERUMAL(DEAD) THROUGH LRS. & ANR. … APPELLANTS

VERSUS

HINDU COMMUNITY IN GENERAL AND
CITIZENS OF GOBICHETTIPALAYAM
AND OTHERS … RESPONDETNS

WITH

CIVIL APPEAL NO.5926 OF 2005

THIRUGNANASAMBANDAM & ANR. … APPELLANTS

VERSUS

HINDU COMMUNITY IN GENERAL AND

CITIZENS OF GOBICHETTIPALAYAM
AND OTHERS … RESPONDETNS

WITH

CIVIL APPEAL NO.6469 OF 2005

G.K. PERUMAL(DEAD) THROUGH LRS. & ANR. … APPELLANTS

VERSUS

HINDU COMMUNITY IN GENERAL AND
CITIZENS OF GOBICHETTIPALAYAM
AND OTHERS … RESPONDETNS

J U D G M E N T

ASHOK BHUSHAN, J.

These appeals have been filed against the common judgment dated 7th July, 2005 of Madras High Court in Appeal Suit(AS) No.851 of 1989 and Appeal Suit (AS)No.606 of 1989. These appeals arise out of Original Suit No.76 of 1981 instituted by respondent No.1 to these appeals. The parties hereinafter shall be referred to as described in the Original Suit No.76 of 1981.

2. Civil Appeal No.5924 of 2005 has been filed by Dr. K.S. Palanisami who was defendant No.13 in the Original Suit.

Civil Appeal No.5925 of 2005 has been filed by G.K. Perumal and Ramayummal who were defendant Nos.4 and 5 in the Original Suit. Civil Appeal No.5926 of 2005 has been filed by Thirugnanasambandam and Dr. M.R. Sibbian who were defendant Nos.7 and 10 in the Original Suit. Civil Appeal No. 6469 of 2005 has been filed by G.K. Perumal and Ramayummal who were defendant Nos. 4 and 5 in the Original Suit.

3. Brief facts of the case necessary to be noted for deciding these appeals are:

(A) One Palaniappa Chettiar and his wife, Chinammal @ Rangammal possessed considerable properties in Gobichettipalayam Taluk including 29 houses and 96.950 acres of Agriculture land. Rangammal possessed certain agricultural land in Sathy Taluk also. Both Palaniappa Chettiar and his wife, Rangammal jointly executed a Will dated 27.9.1968. It is stated in the Will that couple do not have any issue and there is no hope that they will live long and their relatives are not fit to enjoy the

properties. The Will further stated that on the death of any one of them, survivor shall enjoy the entire property. The Will enumerated various charities to be carried from the income derived from the properties. Three Members Committee was constituted for carrying out the charitable objects. The Will in List No.1 enumerated the details of house properties, agricultural properties in the name of Palaniappa Chettiar and List No.2 contained the house and agricultural properties in the name of Chinammal @ Rangammal. After execution of the Will, on 5.10.1969 Palaniappa Chettiar died. After the death of Palaniappa Chettiar, Rangammal alienated about 10 properties by separate sale deeds which were in her name as well few properties which were in the name of her deceased husband.

(B) Defendant Nos.4 and 5 claimed that Rangammal by a registered Will dated 27.11.1980 bequeathed her entire properties in favour of defendant Nos.4 and 5. Smt. Rangammal died on 24.12.1980. After the death of Rangammal, defendant Nos.4 and 5 made several alienations of the

properties belonging to Rangammal and her deceased husband on the strength of Will dated 27.11.1980.

(C) Respondent No.1 claiming to be representative of Hindu Community in General and Citizens of Gobichettipalayam filed Original Suit No.76 of 1981 impleading Commissioner of Hindu Religious and Charitable Endowment, Madras as defendant No.1, Revenue Divisional Officer, Gobichettipalayam as defendant No.2 and District Munsif, Gobichettipalayam as defendant No.3 along with other defendants who claimed to be transferees from Rangammal. Defendant Nos.4 and 5 were impleaded who claimed a Will dated 27.11.1980 from Rangammal of the entire properties apart from sale deed from Rangammal. Plaintiffs' case in the suit was that Palaniappa Chettiar and his wife, Rangammal by registered Will dated 27.9.1968 created a Trust and made arrangements for due performance of charitable objects. The power of management and administration of the Trust was given in the Will to defendant Nos.1 to 3 who were authorised to deal with the Trust property without any power of alienation. It was

pleaded that Will dated 27.9.1968 was a mutual and irrevocable Will. It was pleaded that Palaniappa Chettiar and his wife during their life time could not have acted in derogation of the Will. The plaintiff further stated that purported Will dated 27.11.1980 was not executed by Chinnammal @ Rangammal in a sound and disposing state of mind and the same was brought by defendant Nos.4 and 5 by fraud, undue influence and coercion. Defendant Nos.6 to 13 are said to be purchasers of some of the items of the suit properties from Rangammal and some from defendant Nos.4 and 5. Plaintiffs pleaded that defendants are trespassers of the trust properties covered under the Will dated 27.9.1968. The plaintiffs were interested in the Trust to be administered by defendant Nos.1 to 3 or other new Trustees to be appointed by the Court. The plaintiffs prayed for necessary arrangements for the management of the Trust requiring defendant Nos.1 to 3 to enter upon their duties as Trustees and take up the management of the Trust or make arrangement for the appointment of other Trustees

for proper management of the Trust. Defendants filed written statements in the suit.

(D) The trial court framed 17 issues in the suit. The trial court held that Will -Ex.P.5 dated 27.9.1968 is not a mutual Will but a joint Will and after the death of Palaniappa Chettiar the Will became irrevocable.

(E) The trial court further held that Will dated 27.9.1968 is a true and valid document. It was further held that plaintiffs were entitled to represent the Hindu Community in General and Citizens of Gobichettipalayam under Order 1 Rule 8 CPC. Trial court further held that Will dated 27.11.1980 claimed by defendant Nos.4 and 5 is not proved and it has not been executed in good, sound and disposing state of mind. Ex.D-109, Will dated 27.11.1980 was held not a true and valid Will. The trial court, came to the conclusion that Trust is not formed under the Will dated 27.9.1968, hence, plaintiffs were not entitled for framing a scheme under Section 92 CPC. The suit was dismissed.

(F) Against the judgment of the trial court dated 2nd February, 1989 two Appeal Suits (AS) were filed in the Madras High Court. A.S.No.851 of 1989 was filed by the plaintiffs against the trial court judgment dismissing the Original Suit No.76 of 1981. A.S.No.606 of 1989 was filed by G.K. Perumal and Ramayummal, defendant Nos.4 and 5 against the judgment of the trial court in so far as it rejected the Will dated 27.11.1980. Both the appeal suits were decided by the Madras High Court by the impugned judgment dated 7th April, 2005. The High Court dismissed the A.S.No.606 of 1989 concurring with the judgment of the trial court in so far as it has rejected Will dated 27.11.1980. A.S.No.851 of 1989 was allowed by the High Court and the judgment of the trial court in so far as it was against the plaintiffs was set aside. The High Court held the Will dated 27.9.1968 as mutual and joint Will. It was held that after the death of Palaniappa Chettiar, Rangammal had no right to alienate any property and all alienations of the properties made by her after the death of Palaniappa Chettiar were null and void.

(G) The High Court disposed of both the Appeal Suits in the following manner:

> *"116.In the result,*
>
> *(i) A.S.No.851 of 1989 stands allowed. The Judgment of the Trial Court in so far as it is against the Plaintiffs and the decree is set aside.*
>
> *(ii) A.S. No.606 of 1989 stands dismissed. The finding of the Trial Court on the issue No.13 framed by it stands confirmed.*
>
> *(iii) The result is, learned Subordinate Judge, Gobichettipalayam or the Judicial Officer having jurisdiction over the matter is permitted to discharge the Receiver after the Receiver submits his accounts and on being satisfied that the Receiver can be discharged.*
>
> *(iv) Learned Judicial Officer having jurisdiction over the case is directed to frame a proper Scheme for the trust and while framing the Scheme, he need not include the District Munsif, Gobichettipalayam as one of the trustees, though the makers of the Will (Ex.A-5) have*

expressed their desire that the District Munsif, Gobichettipalayam should be one of trustees. We are of the view, it will not be proper to induct the District Munsif as one of the trustees as it may happen that litigation in respect of the trust as well as its properties may come up before him in his official capacity and it may not be advisable to induct him as one of the trustees. Learned Judicial Officer is also directed to take into account the wishes of the testators of Ex.A-5 while framing the Scheme, as they wished that the relatives of either of them should be excluded from the enjoyment and management of their properties. While appointing the trustees, learned Judicial Officer is directed to keep in mind that the persons of unimpeachable character and high integrity and at least, some of them, if possible from the community to which Palaniappa Chettiar belongs should be appointed as trustees.; It will be open to the learned Judge to consider the

entrustment of the administration and management of the trust to the Administrative General and Office Trustee (AG & OT) of this Court as he will be functioning under the guidance of this Court.

(v) Since the plaintiffs have not prayed for costs, there will be no order as to costs in both appeals."

4. Civil Appeal No.6469 of 2005 has been filed against the judgment of the High Court in A.S.No.606 of 1989 by which judgment the appeal filed by defendant Nos.4 and 5 has been dismissed. All other three appeals have been filed against the judgment of the High Court in A.s.No.851 of 1989 by which judgment the High Court set aside the judgment of the trial court and decreed the suit of the plaintiffs as noted above.

5. In Civil Appeal Nos.5925 of 2005 and 6469 of 2005, we have heard Shri M.S. Ganesh, learned senior counsel, appearing for the appellants. Mr. K. Ramamoorthy, learned senior counsel has appeared for the appellants in Civil Appeal No.5924 of 2005. Shri R. Balasubramaniam and Shri

Ratnakar Das, learned senior counsel, have appeared in Civil Appeal No.5926 of 2005. For the respondents, we have heard Shri S. Balakrishnan, learned senior counsel and Shri Vikas Mehta, learned counsel.

6. The submissions made by the learned senior counsel for the appellants in first three appeals are almost similar. Separate arguments have also been advanced by Shri M.S. Ganesh in C.A.No.6469/2005. Learned senior counsel for the appellants, Shri M.S. Ganesh contended that the suit filed by the plaintiffs was not maintainable and was barred by Section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959(hereinafter referred to as '1959 Act'). He contended that although trial court has specifically framed issue No.7, as to whether the suit is barred by the provisions of Section 108 of the 1959 Act, but trial court did not properly consider the issue and erred in holding that there is no bar in filing the suit. It was further contended that Will dated 27.9.1968 was not a joint and mutual Will but was only a joint Will. A plain

reading of the Will indicates that after the death of one of the testators, the survivor had absolute right to deal with the property and there was no embargo on the right of survivor to dispose of the property after the death of Palaniappa Chettiar. He submitted that alienations made by Rangammal after death of Palaniappa Chettiar were within her authority and High Court had committed error in holding the said alienations as null and void. It is submitted that Will itself not created any trust. It is contended that two essential conditions for mutual Will, i.e., (i) A surviving testator must have received benefit from the deceased testator and (ii) It should have been executed in pursuance of an agreement that the testators shall not revoke the mutual Will, were not satisfied in the present case. A specific clause in the Will gives liberty to the survivor to revoke the Will and confers an absolute right and title to the properties to the survivor which fully indicates that Rangammal had right to alienate the properties after the death of her husband. The transferees were bona fide purchasers for value.

7. Shri Ramamoorthy, learned senior counsel attacked the judgment of the High Court raising almost similar submissions. Shri Ramamoorthy further contended that the contents of Will makes it clear that absolute right was given to survivor and use of words “carva-cutantiram” in the original Will which is in Tamil language, clearly indicates that absolute right was given to survivor, Rangammal and alienations made by her in favour of defendants were well within her authority. Defendants being bonafide purchasers, who invested money in the property, should have been considered by the High Court and at least purchasers who have purchased from the survivor ought to have been protected. The Will is not a mutual Will but only a joint Will. The Will clearly states that survivor can revoke the Will and execute a new Will.

8. Learned counsel for other appellants have also adopted the above submissions.

9. Shri Ganesh in support of Civil Appeal No.6469 of 2005 submitted that the High Court failed to note that Will

dated 27.11.1980 does not appear to be on the whole an improbable, unnatural and unfair instrument. The High Court failed to notice that mere exclusion of near relations from the Will by the testatrix and preferring the appellants in recognition of their valuable services during her old age cannot be construed as suspicious circumstances. In the Will dated 27.9.1968 it was categorically stated that their properties should not go to their relations. The High Court committed error in relying on the suspicious circumstances as found by the trial court with regard to Will dated 27.11.1980.

10. Learned counsel for the plaintiffs-respondents refuting the submissions of learned counsel for the appellants contends that Will dated 27.9.1968 was mutual and joint Will. The Will was executed by the husband and wife with one mind and with mutual agreement. Charitable disposition of Palaniappa Chettiar is apparent even from his first Will executed on 15th July, 1931 where he disposed of substantial part of his properties for charity. Although, his above

Will was superseded on 15th July, 1956 executed in favour of his wife Rangammal, but both husband and wife after acquiring considerable properties decided to devote their properties to charity. Consequently, the registered Will dated 27.9.1968 was executed. The object and purpose of the Will was to create a Trust of their properties, income of which was to be utilised for the enumerated charities as mentioned in the Will. After the death of Palaniappa Chettiar, Rangammal had no authority to revoke the Will. She had no right of alienation and giving any right of alienation of properties shall be simply defeating the intention of testators as delineated in the Will dated 27.9.1968. Smt. Rangammal was entitled to hold and enjoy the properties upto her life but could not defeat the trust, subsequent alienation after the death of Palaniappa Chettiar, had rightly been ignored by the High Court. It is submitted that the suit is not barred by Section 108 of Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 as contended by the counsel for the appellants. The suit was rightly filed in the representative capacity and

leave of the Court was obtained under Section 92. It is contended that the Will does not create any religious endowment within the meaning of Tamil Nadu Act. The suit under Section 92 was fully maintainable with regard to charitable endowment made by the Will dated 27.9.1968.

11. Learned counsel for the parties have placed reliance on various judgments of this Court, different High Courts as well as judgments of foreign Courts which shall be referred to while considering the submissions in detail.

12. From the submissions made by the learned counsel for the parties and the materials on record following are the main points which arise for consideration in these appeals:

(1) Whether the suit filed by the plaintiff was barred under Section 108 of the Tamil Nadu Hindu Religious and Charitable Endowments Act, 1959 ?

(2) Whether the Will dated 27.9.1968 was a joint Will or a joint and mutual Will, irrevocable after death of one of the testators?

(3) Whether Will dated 27.9.1968 contemplated that after the death of one of the spouse the surviver

shall not possess power of alienation of any of the properties and the word "absolutely with all the rights" used in the Will should be read to mean that surviving testator would have only life interest to enjoy the rent and income?

(4) Whether alienations made by Chinnammal @ Rangammal after the death of Palaniappa Chettiar were in violation of the Will and invalid ?

(5) Whether Will dated 27.9.1968 contemplated a creation of trust and as per the terms and conditions of the Will the trust was to come in the operation after the death of one of the spouse or after the end of the life of the both or from any other eventuality ?

(6) Whether Will set up by defendant Nos.4 and 5 i.e. 27.11.1980 has rightly been held to be not proved by the trial court as well as by the High Court ?

(7) The relief to which, if any, the appellants are entitled in these appeals.

BAR ON SUIT UNDER SECTION 108 OF TAMIL NADU HINDU RELIGIOUS AND CHARITABLE ENDOWMENTS ACT, 1959

13. Learned counsel for the appellant submitted that suit filed by the plaintiff being barred under Section 108 of

1959 Act, the High Court erred in law in decreeing the suit. Learned counsel submitted that trial court had framed an issue No. 7 to the following effect:

> *"Whether the suit is barred by the provision of Section 108 of the Hindu Religious and Charitable Endowment Act."*

14. Trial court had answered the above issue against the defendant. Before the High Court, it does not appear that the appellants have raised the issue pertaining to the bar of the suit under Section 108. After considering the submission of learned counsel for the parties, the High Court had framed only four points of consideration which did not include the bar under Section 108. Learned counsel for the appellant, however, submitted that the issue being issue of jurisdiction, the appellants may be allowed to raise in this appeal. We have permitted the learned counsel for the appellant to raise the issue. Learned counsel for

the appellant submitted that under 1959 Act, Section 108 provides as follows:

> *"No suit or other legal proceeding in respect of the administration or management of a religious institution or any other matter of dispute for determining or deciding which provision is made in this Act shall be instituted in any court of Law, except under and in conformity with, the provisions of this Act. "*

15. Learned counsel further relies on Section 5, according to which, the provisions under Section 92 of the CPC 908 shall cease to apply to Hindu Religious Institutions. Refuting the above submission, learned counsel for plaintiff-respondent contends that the bar under Section 108 is not attracted with regard to suit filed by the plaintiff in view of the fact that suit did not relate to any Hindu Public Religious Institutions. A plain reading of Section 108 indicates bar with regard to suit or other legal proceeding is in respect of the administration or

management of a religious institution. Section 5 on which reliance has been placed is, as follows:

> *"The following enactments shall cease to apply to Hindu religious institutions and endowments, namely:-*
>
> *(a) The Tamil Nadu Endowments and Escheats Regulation, 1817 (Tamil Nadu Regulation VII of 1817);*
>
> *(b) The Religious Endowments Act, 1863 (Central Act XX of 1863);*
>
> *(c) The Charitable Endowments Act, 1890 (Central Act VI of 1890);*
>
> *(d) The Charitable and Religious Trusts Act, 1920 (Central Act XIV of 1920); and*
>
> *(e) Section 92 and 93 of the Code of Civil Procedure, 1908 (Central Act V of 1908)."*

16. Section 3 of the Act contains a heading 'Power to extend Act to charitable endowments'. Section 3 sub-section (1) is as follows:

> *"3.(1) Where the Government have reason to believe that any Hindu or Jain public charitable endowment is being mismanaged, they may direct the Commissioner to inquire, or to cause an inquiry to be*

made by any officer authorised by him in this behalf, into th affairs of such charitable endowment and to report to them whether, in the interests of the administration of such charitable endowment, it is necessary to extend thereto all or any of the provisions of this Act and of any rules made thereunder."

17. Thus unless the provisions of Act are extended to charitable endowments the bar under Section 108 shall not be attracted. There is no case set up by the appellant that suit filed by the plaintiff relates to a religious institution, as contemplated by 1959 Act.

18. In view of the above, we are of the view that suit filed by the plaintiff was not barred as under Section 108 of 1959 Act.

NATURE AND CONTENT OF WILL DATED 27.9.1968

19. The points No. 2, 3, 4 and 5 being inter-related are taken together. Before we proceed to consider the

respective submissions of learned counsel for the parties, it is necessary to look into the Will dated 27.09.1968. As noted above, the Will dated 27.9.1968 was executed by Palaniappa Chettiar and his wife Chinnammal alias Rangammal jointly. The original will is in Tamil Language; an English translation of which has been brought on record as annexure P. 1 in C. A. No. 6469 of 2005 which translation has been referred and relied by learned counsel for both the parties. At the end of the will, there is description of the property, List 1 contain the properties in the name of Palaniappa Chettiar and List 2 contains the properties in the name of Chinnammal alias Rangammal. The entire will(except the description of the properties) is extracted as follows:

"**Ex. A5 dated 27-9-1968**

The Registration of the Will executed by Palaniappa Chettiar and Rangammal:

Doct. No. 76/1968:

Sri Ramajayam

"This Deed of Will executed on this

27th day of September, 1968, corresponding to Tamil 11th day of Purattasi Keelaga year by N. Palaniappa Chettiar son of Sruvalur Angampalayam Narayana Chettiar, residing at Veerapandi Village Cusba, Gobichettipalayam taluk-1 and Chinnammal alias Rangammal wife of Palaniappa Chettaiar and daughter of Karuppanna Chettiar-2 jointly and with full consent WITTNESSETH:

We have executed this Will and register the same in respect of our self acquired properties since we do not have any issue though married long back, that we are not in a position to adopt any one, that there is no hope that we will live long, that our relatives are not fit to enjoy the properties and lay a claim for whatever reason and that no one should go to a Court, claiming right or interest therein.

On the death of anyone of us, the survivor shall enjoy the entire properties, which are our self acquired properties, absolutely with all the rights and after his/her life time, and carry on the under-mentioned charities from and out of the income derived from them without alienating the same.

We have the right to modify, or cancel this Will and to write a new Will

during our life time either jointly or individually.

This deed will come into effect after our life time.

During our life time we shall manage the property ourselves, do the desired charities either jointly or individually.

In case we are not in a position to carry out the desired charities during our life time a committee consisting of the following authorities shall be formed to carry out the following charities:

The details of the charities:

1) A good choultry in the name of us shall be constructed at Palani for Hindus to use the same freely.

Its Administration will be with Endowment Commissioner.

2) A portion of the income from our Properties shall be used for doing morning pooja permanently for Palani Andavar.

3) A portion of the income from our properties shall be spent for feeding the poors at the time of Thai Poosam in our name.

4) At Gobichettipalayam where our life prospered, an Educational Institution in our name shall be

started and its administration will be left either to the Government or Municipality. The expenses therefore shall be met from a portion of income derived from our properties.

5) A Maternity Ward shall be constructed at Gobi in our name from out of a portion of the income from our properties. The administration thereof shall be left to the Government.

The details of 3 member committee to perform the charities.

1. The Endowment Commissioner — Permanent President.

The name of two permanent members:

1. The Revenue Divisional officer, Gobichettipalayam.

2. The District Munsif, Gobichettipalayam.

The above 3 persons shall have no right to sell our properties. They can spend only the income from the properties.

The earlier Will executed in Doct. No.19/56 shall stand cancelled automatically.

In case we have not collected the

amounts due to us or to discharge our debts during our life time, then the said committee shall have the power to collect the same and to discharge the debts. The committee shall lease out or give on rent our lands and houses, collect the income therefrom and utilise the same for the aforesaid charities. All the expenses shall be met only from the income of the properties."

20. The bone of contention between the parties is, as to whether, the Will is a joint Will or a joint and mutual Will. According to appellant, the Will is a joint will, which is revocable by testatrix after the death of her husband. On the other hand, learned counsel for the plaintiff contends that the will being joint & mutual will, there is no right of revocation in the testatrix after the death of her husband. It is contended that the will contains agreement of both husband and wife to settle their property in a particular manner i.e. for charities and the testatrix having obtained the benefit under the will after the death of her husband, cannot be allowed to revoke the will, which revocation is directly in breach of the

agreement between the husband and wife and contrary to the trust created by the will.

21. We thus, first proceed to examine the nature and characteristics of joint will and joint & mutual Will. Though, the laws relating to joint & mutual Wills originated in Roman Dutch Law, which by passage of time have been approved and applied both by English and American Courts. There are ample precedents of our country also adopting the concept of joint & mutual wills. '**Theobald**' on Wills 19th Edition (Sweet & Maxwell) has defined joint Will and mutual Will in para 1-011 and 1-012 in following manner:

> *"1-011. Persons may make joint wills which are revocable at any time by either of them or by the survivor. A joint will is looked upon as the will of each testator, and may be proved on the death of one. But the survivor will be treated in equity as a trustee of the joint property if the equitable doctrine of mutual wills applies. Under this doctrine there must be an agreement for the survivor to be bound by the arrangement between them; but the mere*

fact of the execution of a joint will is not sufficient to establish such an agreement for the survivor to be bound. If this doctrine applies, a legacy to a legatee who survived the first testator, but predeceased the second, does not lapse. Where a joint will is followed by a separate will which is conditional on a condition that fails, the joint will is not revoked even though the subsequent separate will contains a revocation clause. ”

1-012. The term “mutual wills” is used to describe joint or separate wills made as the result of an agreement between the parties to create irrevocable interests in favour of ascertainable beneficiaries. The agreement is enforced after the death of the first to die by means of a constructive trust. There are often difficulties as to proving the agreement, and as to the nature, scope, and effect of the trust imposed on the estate of the second to die.

The revocable nature of the wills under which the interests are created is fully recognised by a probate court; but in certain circumstances equity protects and enforces the interests created by the agreement despite the revocation of his will by one party after the death of the other without having revoked his will, i.e. the survivor's property will be

affected by the trust imposed so as to give effect to the agreement."

22. Halsbury's Laws of England 5th Edition Vol. 102 under the heading 'Testamentary Disposition', in para 9 & 10 defines joint Wills & mutual Wills in following manner:

"9. Joint Wills. A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, and disposing either of their separate properties or of their joint property. It is not, however, recognised in English law as a single will. It is in effect two or more wills, and it operates on the death of each testator as his will disposing of his own separate property; on the death of the first to die it is admitted to probate as his own will and on the death of the survivor, if no fresh will has been made, it is admitted to probate as the disposition of the property of the survivor. Joint wills are now rarely, if ever, made.

10. Mutual wills. Wills are mutual when the testators confer on each other reciprocal benefits, which may be absolute benefits in each other's property, or life interests with the same ultimate disposition of each estate on

the death of the survivor. Apparently, a mutual will in the strict sense of the term is a joint will, but, where by agreement or arrangement similar provisions are made by separate wills, these are also conveniently known as mutual wills. Wills which by agreement confer benefit on persons other than the testators, without the testators conferring benefits on each other, can also be mutual wills. Where there is an agreement not to revoke mutual wills and one party dies having stood by the agreement, a survivor is bound by it.

The doctrine of mutual wills has been said to be anomalous and unprincipled, so that the authorities do not always speak with one voice on what is truly essential to the doctrine or as to the mechanisms by which it operates or as to the consequences of its application. However, it has been held that there is at least clear guidance on what must be established before the doctrine can be invoked in that there must be an irreducible core of a contract between T1 and T2 that in return for T1 agreeing to make will in form X and not to revoke it without notice to T2, then T2 will make a will in form Y and agree not to revoke it without notice to T1. It seems that the precise form and terms of the underlying contract do not have as great a significance as the finding that

> *such a contract actually exists and was entered into.*
>
> *It appears that where it is established that there is a clear agreement in the mutual wills or elsewhere, that the wills are to be mutually binding (whether or not expressed in language of revocation) the law will give effect to that intention by way of a 'floating trust' and the trust so created is not destroyed by the remarriage of the second testator after the death of the first."*

23. One of the earliest English cases, dealing with the mutual Will is ***Dufour vs. Pereira, (1769) 21 ER 332***. In the above case a husband and wife have executed a Will jointly. **Lord Camden** in the above case stated as follows:

> *"The question is, as the husband by the mutual will assents to his wife's right, and makes it separate, whether the second will by the wife is to be considered as void.*
>
> *It struck me, at first, more from the novelty of the thing than its difficulty.*
>
> *The case must be decided by the laws of this country. The will was made here; the parties lived here; and the funds are*

here.

Consider how far the mutual will is binding, and whether the accepting of the legacies under it by the survivor, is not a confirmation of it.

I am of opinion it is.

It might have been revoked by both jointly; it might have been revoked separately, provided the party intending it, had given notice to the other of such revocation.

[421] But I cannot be of opinion, that either of them could, during their joint lives, do it secretly; or that after the death of either, it could be done by the survivor by another will.

It is a contract between the parties, which cannot be rescinded, but by the consent of both. The first that dies, carries his part of the contract into execution. Will the Court afterwards permit the other to break the contract? Certainly not.

The defendant Camila Rancer hath taken the benefit of the bequest in her favour by the mutual will; and hath proved it as such; she hath thereby certainly confirmed it; and therefore I am of opinion, the last will of the wife, so far as it breaks in upon the mutual will, is void.

> *And declare, that Mrs. Camilla Rancer having proved the mutual will, after her husband's death; and having possessed all his personal estate, and enjoyed the interest thereof during her life, hath by those acts bound her assets to make good all her bequests in the said mutual will; and therefore let the necessary accounts be taken."*

24. A Division Bench of Madras High Court, in an early case reported in ***Minakshi Ammal vs. Viswanatha Aiyar, ILR 33 Madras 406,*** had occasion to consider mutual & joint Wills. In the above case, a husband and wife made joint Will in December 1897. The husband died in the year 1899, thereafter in the year 1904, the testatrix executed a gift to her daughter. Plaintiff, claiming to be beneficiary of joint will brought a suit. The issue was, as to whether, at the instance of testatrix the Will was irrevocable or revocable.

25. Chief Justice **Sir Arnold White** after referring to 'Theobald on Wills' stated as follows:

".....With regard to the authorities, so far as I am aware, the only authority which can be said in any way to support the contention advanced by the plaintiff, who is the respondent before us, is a judgment of Lord Camden which is very shortly reported in a case in Chancery decided so long ago as 1769, Dufour v. Pereira, 1 Deck 419. That case, however, was discussed and distinguished in the later case of Walpole v. Oxford, (1797) 30 Eng.,Rep., 1076 and the decision in that case is clearly against the plaintiff's contention that the will is irrevocable. The Privy Council case Denyssen v. Mostert,(1872) LR, 4 PC, App. 236 is an appeal from the Cape of Good Hope, and it turns, at any rate to some extent, on questions of Roman and Dutch Law. So far as I know, there is nothing in that case which helps the contention put forward on behalf of the plaintiff. But the most recent, and, as it seems to me, the clearest exposition of the law on this question is that given by Lord Barnes, Sir Gorell Barnes, as he then was, in the case of Stone v. Hoskins, (1905) LR, Prob. Dn., 194 at page 197, he says: It appears to me that the result is tolerably plain. If these two people had made wills which were standing at the death of the first to die, and the survivor had taken a benefit by that death, the view is perfectly well founded that the survivor cannot depart from the arrangement on his part, because by the death of the other party, the will of that party and the arrangement have become irrevocable; but that case is

entirely different from the present, where the first person to die has not stood by the bargain and her 'mutual will' has in consequence not become irrevocable." By the "mutual will" he means the will made by the survivor. "The only object of notice is to enable the other party to the bargain to alter his or her will also, but the survivor in the present case is not in any way prejudiced. He has notice as from the death."

Applying that principle to the facts of the case before us, we have to see whether it can be said that the survivor has taken a benefit. It was suggested that she took a benefit by the death of the co-testator. That may be. It may be that in this case if the wife died first the husband took a benefit and if the husband died first the wife took a benefit; but the benefit so taken was under the ordinary law and not under the provisions of the will. As I understand the will, there is nothing which gives the surviving testator or testatrix a benefit on the death of the testator or testatrix who predeceases."

26. This Court had occasion to consider the concept of joint Will and mutual Will in ***Kochu Govindan Kaimal & Others vs Thayankoot Thekkot Lakshmi Amma and Others, AIR 1959 SC 71(also reported in 1959(1) Suppl. SCR 1).*** In the above case, three persons executed a Will on 10.02.1906

jointly. They had bequeathed their properties in the manner as indicated in the Will. After their deaths, the question arose whether the Will was a joint Will or a mutual Will? This Court held the Will not to be a mutual Will and while explaining the joint Will and mutual Will following was stated in para 11 & 12:

> *"11. A joint will, though unusual, is not unknown to law. In Halsbury's Laws of England, Hailsham's Edition, Vol. 34, page 17, para. 12, the law is thus stated:*
>
> *"A joint will is a will made by two or more testators contained in a single document, duly executed by each testator, disposing either of their separate properties, or of their joint property. It is not, however, recognised the English law as a single will. It operates on the death of each testator as his will disposing of his own separate property, and is in effect two or more wills".*
>
> *There is a similar statement of the law in Jarman on Wills, 8th Edition, page 41. The following observations of Farewell, J. in Duddell in re; Roundway v. Roundway, 1932-1 Ch 585 at p. 592 are apposite:*
>
> *".....in my judgment it is plain on the authorities that there may be a joint will in the sense that if two*

people make a bargain to make a joint will, effect may be given to that document. On the death of the first of those two persons the will is admitted to probate as a disposition of the property that he possesses. On the death of the second person, assuming that no fresh will has been made, the will is admitted to probate as the disposition of the second person's property.....”

12. It was also argued for the respondents that the will might be construed as a mutual will, but that, in our opinion, is an impossible contention to urge on the recitals of the documents. A will is mutual when two testators confer upon each other reciprocal benefits, as by either of them constituting the other his legatee; that is to say, when the executants fill the roles of both testator and legatee towards each other. But where the legatees are distinct from the testators, there can be no question of a mutual will. It cannot be argued that there is, in the present case, a bequest by the testators to themselves. There is nothing in the will to support such a contention, which would be inconsistent with the position taken by the respondents that there was a settlement of the properties inter vivos converting separate properties into joint properties. In this view, on the death of Kunhan Kaimal his properties vested in the legatees under the will dated February 10, 1906 and therefore neither Kesavan Kaimal nor his transferees under the deeds could lay any claim to them.”

27. A Division Bench of the Madras High Court had occasion to elaborately consider the concept of joint Will and mutual Will in ***Kuppuswami Raja And Anr. vs Perumal Raja And Ors., AIR 1964 Madras 291***. In the Madras case, two brothers Perumal and Chinnappa executed a Will on 31.10.1942. The Will disposed the properties to different relatives. Chinnappa died in the year 1949, Perumal, the surviving brother executed a 'registered Will' dated 09.08.1950, cancelling and modifying the earlier Will, in which the plaintiffs were not entitled to claim any right in terms of the earlier Will.

28. The suit of plaintiff was dismissed by the learned Munsif, which decree was set-aside and suit was decreed in appeal. High Court restored the judgment of the Munsif. In the Letters Patent Appeal, the Madras High Court has restored the judgment, decreeing the suit. After noticing the English, American and Indian cases, the Division Bench of Madras High Court in para 32 has laid down as following:

"*32....We confess that the matter is not*

free from difficulty. But after a careful consideration of all the aspects of the matter, we are inclined to take the view that a joint mutual Will becomes irrevocable on the death of one of the testators if the survivor had received benefits under the mutual Will, and that there need not be a specific contract prohibiting revocation when the arrangement takes the form of not two simultaneous mutual Wills but one single document. In fact in some of the cases referred to above this aspect that if the two testators had executed one single document as one single mutual Will the position may be different is actually adverted to. In our opinion, if one single document is executed by both the brothers using the expressions "our property" "our present wishes" "our Will" and such similar expressions, it is strong cogent evidence of the intention that there is no power to revoke except by mutual consent."

29. The Madras High Court in the above case has returned the findings that Perumal had taken benefit under the joint Will hence, he could not have revoked the Will and executed another Will, modifying the bequeath earlier made.

30. This Court in ***Dilharshankar C. Bhachecha vs The Controller Of Estate Duty, Ahmedabad, (1986) 1 SCC 701,***

had elaborately considered the concept of Joint & mutual Will. The above case was also a case of a joint Will executed by a husband and wife with regard to a Bungalow. Wife died on 03.01.1954, after her death estate duty on her share of the property was paid. Subsequently, on 25.10.1964, the husband also died, after his death, the question arose, as to whether, the estate duty was payable only on half share of husband or the estate duty was payable on entire property, which devolved on husband. The issue was, as to whether, as per the Will, after the death of wife, husband had only limited share in estate or he became full owner of the entire bungalow.

31. The contention of the Revenue was that the Will clearly mentioned that survivor shall be the owner of the house, hence, the husband became the owner of the entire house and the Will was a joint Will with full proprietary right to the husband. The case of the appellant was that the Will was joint & mutual and husband had no right of alienation. High Court held, their being no agreement that survivor

shall not revoke the Will or do nothing to diminish the quantum of the property going into the hands of subsequent legatee, survivor took the absolute interest in the property. This Court after referring to 'Theobald on Wills', 'Halsbury's Laws of England', 'Jarman on Wills' and after referring to several English cases and judgments of this Court and judgment of Madras High Court in ***Kuppuswami Raja (supra)*** *has laid down following in para 50. In para 55 propositions were laid down. Para 50 and 55 are quoted as below :-*

> *"50. Therefore the will must be construed in its proper light and there must be definite agreement found from the tenor of the Will or aliunde that either of the joint executants would not revoke the Will after receiving the benefit under the Will. Such definite agreement need not be express; it can be implied. The terms of the Will have been set out exhaustively. It was undoubtedly a joint Will. The property in question has been described as "our property". The expression 'owner' has also been used in the manner indicated in the sentence "During our lifetime we shall continue to be the joint owners of the land bungalow and blocks with their common bathroom and two privies....and shall be jointly entitled to the rents and income of the*

said land and blocks and the user and rent of the bungalow". The Will goes on further to say that on the death of one of them, the survivor shall become the "owner of...and shall become entitled to the rents and income and user of the said land bungalow and blocks including garage..... ". Therefore it is clear that the ownership which the joint executants contemplated was the user during the life time and entitlement to the rents and income of the same. It is this ownership which was to pass on the death of either of them to the survivor and the Will thereafter goes on to say that "the provisions hereinafter contained shall become effective after the death of the survivor of us". And thereafter after the death it is provided "we hereby devise and bequeath our said furnished bungalow....". The gift of the property to the three grandchildren as owners in full sense is to take effect on the death of the survivor of both the executants. It is clear that the property was intended to be kept intact for the enjoyment of the ultimate legatees and during the lifetime of either of them the property would not in any way be parted with or diminished. This intention, expressed in the implied terms in the bargain in the Will, in our opinion, would be fortified by devising the property to three grandchildren in species i.e. in specific form and not providing for any money or compensation for diminution of any part thereof before coming into effect of the Will in question. If that is the position then,

in our opinion, there is a definite agreement not to revoke the Will by one of the executants after he or she has received the benefit under the Will on the death of either of them."

"55. In view of the above discussion, the following propositions follow:

(1) Whether estate duty was payable on the whole of the property or not would depend on whether the deceased Kamlashankar Gopalshankar had "disposing power" over the share of Mahendraba inherited by him or her death or not?

(2) The above question would depend on the construction of the joint Will — did it create any mutuality among the executants of the joint Will? Whether Kamlashankar Gopalshankar having accepted and after his wife's death, was competent to do anything contrary to the ultimate bequest? Before the death of the first of the executants, the agreement remained contractual one in consideration of mutual promises. It could have been at that stage revoked by mutual agreement or even by unilateral breach, giving rise at the most to an action for damages. But after the death of the first one without revoking his or her own Will makes the joint Will irrevocable by the survivor[see Theobald (supra)]. But there must be an agreement that the Wills would not be revoked after the death of one of the executants or disposition will not be made contrary to the Will after the death of one of the executants. Such an agreement may appear from the Will or may

be proved outside the Will but that is not established by the mere fact that the Wills are in identical terms. If such an agreement is shown, each party remains bound.

(3) A different and separate agreement must be spelled out not to revoke the Will after the death of one of the executants. That agreement must be clear though need not be by a separate writing but must follow as a necessary implication which would tantamount to an express agreement.

(4) The predominant intention of the executants at the time of the execution, after the acceptance of the benefit of the execution makes the Will in this case irrevocable by the survivor of the executants.

(5) Judged by the principles indicated above, in the facts and circumstances of this case, we are of the opinion because of the specific clause that it was intended that the grandsons would receive the benefit in species and there being no provision for making up the deficiency or diminution if any, it must follow that there was mutuality and Kamlashankar Gopalshankar was not competent to dispose of the property in any manner contrary to the ultimate disposition.

(6) The fact that estate duty was paid is non sequitur.

(7) The payment of wealth tax by Kamlashankar Gopalshankaron the whole estate after the death of Mahendraba is

not relevant.

(8) The question of strict construction of the taxing statute and the principle that one who claims exemption must strictly come within the purview is not relevant in this case because the exemption follows on the interpretation of the Will."

32. Before we advert to the Will dated 27.09.1968, it is useful to recall few well settled rules of construction of a Will. Privy Council in an old decision, ***Sreemutty Soorjeemoney Dossee Vs. Denubundoo Mullick (1854-57) 6 MIA 526,*** laid down following rules of construction of a Will.

"The Hindu Law, no less than the English law, points to the intention as the element by which we are to be guided in determining the effect of a testamentary disposition; nor, so far as we are aware, is there any difference between the one law and the other as to the materials from which the intention is to be collected. Primarily the words of the will are to be considered. They convey the expression of the testator's wishes; but the meaning to be attached to them may be affected by surrounding circumstances, and where this is the case those circumstances no doubt must be regarded. Amongst the circumstances thus to be regarded, is the law of the

> *country under which the will is made and its dispositions are to be carried out. If that law has attached to particular words a particular meaning, or to a particular disposition a particular effect, it must be assumed that the testator, in the dispositions which he has made, had regard to that meaning or to that effect, unless the language of the will or the surrounding circumstances displace that assumption."*

33. In ***Rajendra Prasad Bose and another. Versus Gopal Prasad Sen, AIR 1930 Privy Council 242***, laid down that "the duty of the Court is to ascertain the intention from the words used in the document" and it further held:-

> *"...once the construction is settled, the court is bound to carry out the intention as expressed and no other..."*

34. Justice B.K. Mukherjea J., speaking for this court in ***Gnambal Ammal Vs. T. Raju Ayyar and others, AIR 1951 SC 103,*** on construction of the Will laid down following in paragraph 10:-

"10. The cardinal maxim to be observed by Courts in construing a will is to endeavour to ascertain the intentions of the testator. This intention has to be gathered primarily from the language of the document which is to be read as a whole without indulging in any conjecture or speculation as to what the testator would have done if he had been better informed or better advised. In construing the language of the will as the Privy Council observed in Venkata Narasimha Vs. Parthasarathy, 41 , I.A.51 at p.70 (21 I.C. 339 P.C.),

> *"the Courts are entitled and bound to bear in mind other matters than merely the words used. They must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense, and many other things which are often summed up in the somewhat picturesque figure. 'The Court is entitled to put itself into the testator's armchair'……But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language when used by that particular testator in that document. So soon as the construction is settled, the duty of the Court is to carry out the intentions as expressed, and none other. The Court is in no case*

> *justified in adding to testamentary dispositions…… In all cases it must loyally carry out the will as properly construed, and this duty is universal, and is true alike of wills of every nationality and every religion or rank of life."*

35. In the above case, a word of caution was also given in paragraph 9, which is to the following effect:-

> *"9. In course of the arguments, we have been referred by the learned counsel on both sides to quite a large number of decided authorities, both English and Indian, in support of their respective contentions. It is seldom profitable to compare the words of one will with those of another or to attempt to find out to which of the wills, upon which decisions have been given in reported cases, the will before us approximates closely. Cases are helpful only in so far as they purport to lay down certain general principles of construction and at the present day these general principles seem to be fairly well settled."*

36. General principles for construction of a Will have been reiterated by this court in a large number of cases. It shall be sufficient to refer to a three Judge Bench

judgment of this court in ***Navneet Lal alias Rangi Vs. Gokul & Others, 1976 (1) SCC 630***. After referring to judgment of Privy Council and several judgments of this court, certain principles were enumerated in paragraph 8 of the judgment, which is to the following effect:-

> *"8. From the earlier decisions of this Court the following principles, inter alia, are well established:*
>
> *(1) In construing a document whether in English or in vernacular the fundamental rule is to ascertain the intention from the words used; the surrounding circumstances are to be considered ; but that is only for the purpose of finding out the intended meaning of the words which have actually been employed.**(Ram Gopal V. nand Lal)***
>
> *(2) In construing the language of the will the court is entitled to put itself into the testator's armchair (**Venkata Narasimha V. Parthasarathy)** and is bound to bear in mind also other matters than merely the words used. It must consider the surrounding circumstances, the position of the testator, his family relationship, the probability that he would use words in a particular sense. . . . But all this is solely as an aid to arriving at a right construction of the will, and to ascertain the meaning of its language*

*when used by that particular testator in that document. (**Venkata Narasimha's case(supra)** and **Gnambal Ammal V. T. Raju Ayyar)***

*(3) The true intention of the testator has to be gathered not by attaching importance to isolated expression but by reading the will as a whole with all its provisions and ignoring none of them as redundant or contradictory. **(Raj Bajrang Bahadur Singh V. Thakurain Bakhtraj Kuer)***

*(4) The Court must accept, if possible, such construction as would give to every expression some effect rather than that which would render any of the expressions inoperative. The court will look at the circumstances under which the testator makes his will, such as the state of his property, of his family and the like. Where apparently conflicting dispositions can be reconciled by giving full effect to every word used in a document, such a construction should be accepted instead of a construction which would have the effect of cutting down the clear meaning of the words used by the testator. Further, where one of the two reasonable constructions would lead to intestacy that should be discarded in favour of a construction which does not create any such hiatus. (**Pearey Lal V. Rameshwar Das**)*

(5) It is one of the cardinal principles of construction of wills that to the

> *extent that it is legally possible effect should be given to every disposition contained in the will unless the law prevents effect being given to it. Of course, if there are two repugnant provisions conferring successive interests, if the first interest created is valid the subsequent interest cannot take effect but a court of construction will proceed to the farthest extent to avoid repugnancy, so that effect could be given as far as possible to every testamentary intention contained in the will. (**Ramachandra Shenoy V. Mrs. Hilda Brite**)"*

37. The High Court in the impugned judgment has elaborately considered whether a Will is a Joint Will or Joint and Mutual Will. High Court after referring to the large number of cases has come to the conclusion that it is a Joint and Mutual Will, since both the testator and testatrix agreed to devote their properties for carrying out charities, the High Court concluded that intention of both testator and testatrix to give property to charities is manifest from the reading of the Will in its entirety.

38. We fully endorse the view taken by High Court that both the Husband and Wife intended to give property into charities and the Will clearly specified the list of charities and the committee of three persons who was to perform the charities. The mutuality to the above extent is clearly found in the Will.

39. The main bone of contention between the parties as noted above is the extent of right of survivor with regard to alienation of property mentioned in the Will. Whether testator or testatrix intended that after death of one of them, the survivor shall enjoy the properties only as a life estate without any right of alienation or survivor shall take the properties absolutely with incidence of right of alienation. The High Court on the above aspect had devoted substantial part of the judgment and before us also, learned Counsel for the parties addressed the detailed submissions in support of their divergent stands.

40. As noted above, intention of testator/testatrix in testamentary disposition has to be gathered from the Will itself and the words used therein. In the third paragraph, following disposition has been made in the Will:-

> *"...On the death of anyone of us, the survivor shall enjoy the entire properties, which are our self acquired properties, absolutely with all the rights and after his/her life time, and carry on the under-mentioned charities from and out of the income derived from them without alienating the same"*

41. The above in plain words provides that on the death of any of the spouse, survivor shall enjoy the entire properties absolutely with all the rights. What is the connotation of words 'absolutely with all the rights?', whether the above provision in the Will can be read as only life estate i.e. right of enjoyment and receiving of rent, income or absolute right indicates the exercise of all the rights including the right of alienation.

42. The High Court after noticing the contention of Learned Counsel for the defendants formed the opinion that expression 'absolutely' should be read to mean that the surviving testator, namely, Rangammal would have only the life interest. Following has been stated by the High Court in paragraph 58:-

> *"58. Mr. S.V.Jayaraman, learned Senior Counsel for the respondents 4 and 5 and Mr. V.K.Muthuswami, learned Senior counsel for the Respondents 6 and 9 submitted that after the death of one of the testators, the other is given the right of absolute enjoyment and only out of the remaining property, if any, the charities are to be performed. We are of the view, the expression 'absolutely' should be read to mean that the surviving testator, namely, Rangammal would have only the life interest to enjoy the rent and income from the combined properties and she was allowed to use and enjoy the properties subject to the fiduciary duty to keep the properties in tact for charities and she would have no unqualified or unrestricted power to enjoy the properties as she pleases to defeat or to the detriment of the gift over to the charities."*
>
> **(underlined by us)**

43. Shri Ramamoorthy, Senior Advocate, learned counsel for the appellant, have contended that word 'absolutely' as used in the Will indicates absolute right of the survivor to deal with the property and word 'absolute' cannot be read as limited right or life estate for the survivor.

44. It is submitted that the word used in original Will in Tamil language more clearly indicates absolute right to the survivor. Reliance is placed upon ***Govind Raja Vs. Mangalam Pillai, AIR 1933 Madras 80***. The Madras High Court while explaining the similar Tamil word used in a Will in context whether it confers life estate or absolute estate, following was stated:-

> *"...In this second appeal, it is contended on behalf of the appellants (plaintiffs 2 to 4, plaintiff 1 having died during the pendency of the suit and plaintiffs 3 and 4 having been added as his legal representatives) that on a proper construction of Ex.A it should be held that either a life estate in favour of Madurambal with a remainder over in favour of plaintiffs 1 and 2 or an absolute estate in her favour subject to defeasance in the event of her failing to have any issue at the time of her death was really*

> *conferred on her. Having regard to the terms of the earlier portion of the deed which are to the effect, that the done should enjoy the properties absolutely or with all rights, it cannot be reasonably contended that what was conferred upon her was primarily a life estate alone. The tamil word "sarva suthantharamai"..."*

45. In one more part of the Will which is appended at the end after description of the properties is relevant, which is to the following effect:-

> *" ...If any property has been left out, then the same, any property purchased then they also, and if any property is sold by deleting the same, the remaining properties form part of this document.."*

46. The above provision in the Will clearly intends that any property purchased shall treated to be added in the document and further any property sold shall be deleted from the document and the remaining properties form part of this document.

47. The above statement clearly contemplates possibility of sale of any property which shall be deleted from the description of the properties as mentioned in the document. One more aspect of the Will needs to be noted. As extracted above, in the last part of the third paragraph after 'his/her lifetime' word used are “and carry on under mentioned charities from and out of the income derived from them without alienating the same”. Reading the whole paragraph together the word 'his/her lifetime' has been used in reference to survivor who survives after the death of one of the spouses. Thus, after the death of survivor, the Will contemplates that charities shall be carried out of the income derived from the property without alienating the same. Thus, though in the same paragraph, after the death of both the testators, the charities are required to be carried out from the income derived from the properties without alienation of the same, whereas the same restriction i.e. “without alienation” has not been put in the earlier sentence of the same paragraph when the rights

of survivor have been referred to as 'absolutely with all the rights'.

48. High Court in its judgment has cut down/abridged the expression 'absolutely' on the ground of mutual intention of the parties in paragraph 66 of the judgment. High Court, however, at the same time has held that expression 'absolute enjoyment' as employed in the Will as a sort of comfort or cushion to the survivor who meets with an unforeseen or unexpected contingencies, if any absolute necessity arises. Following was stated in paragraph 66:-

> *"66...we are therefore of the view that the said expression 'absolute enjoyment' as employed in the Will as a sort of comfort or cushion to the survivor to meet any unforeseen or unexpected contingencies if any absolute necessity arises but, at the same time, it cannot be stated that the bequest in favour of charities is a mere wish and an absolute interest was granted in favour of the survivor. We therefore hold that the meaning of the expression 'absolutely' should be cut down or abridged considering the mutual intention between the executants in making the Will and there are indications in the Will*

itself to curtail the full implication and import of the expression 'absolutely' when it is used with reference to the survivor..."

49. The intention in testamentary disposition has to be primarily found out from the actual words used in the Will. The court is not entitled to ignore clear words or add something of its own or dilute the meaning of any clear word used in the Will. The solemn duty of the court is to find out the intention of testator and thereafter to give effect to such intention. On the reading of the Will, the intendment of testator/testatrix is clear that survivor shall have absolute right of enjoyment of properties. There is no reason not to give effect to said intendment on the ground that the testator and testatrix have mutually intended to set apart the property for charity and holding that survivor shall have right of disposition be not in the interest of the trust.

50. We do not find any word or any indication in the Will to give a life estate to survivor. The Will clearly

intended that survivor shall have absolute right to the properties and after his/her death; the charity shall be carried out from the income of the properties without alienation of the properties. High Court itself has noticed that testator was a person who was well versed with the law of Wills since two earlier Wills were already executed by Chettiar.

51. We are of the view that testators intended that survivor should be given right of alienation. Why the same word "without right of alienation" could not have been used in the earlier part of the same paragraph when they used the same word in end of the paragraph while providing for carrying out charities after the death of the survivor from the income derived from the properties without alienating the same.

52. We, thus, are of the clear opinion that the Will intended to give survivor absolute right with regard to properties with further intendment that after the death of survivor, the remaining property should be used for

carrying out the charities. The clear intention of testator/testatrix while executing the Will that the charity shall be carried out from the income of the properties is not given up even during life time of survivor. The obligation to use the income of properties for charity is attached with the property described in the Will subject to giving survivor absolute right with regard to properties.

53. In the above context, exposition of law in reference to a mutual Will by Australian High Court in a case ***Birmingham & ors. Vs. Renfrew & Ors., 57 Commonwealth Law Report 666,*** needs to be referred.

54. In the above cases Dixon J. while delivering a concurring opinion elaborated the concept of mutual Will, he has referred to a third element to be inherent in nature of mutual Will which according to Dixon J. had not been earlier expressly considered. Dixon J. stated the third element in the following words:-

"...There is a third element which appears to me to be inherent the nature of such a contract or agreement, although I do not think it has been expressly considered. The purpose of an arrangement for corresponding wills must often be, as in this case, to enable the survivor during his life to deal as absolute owner with the property passing under the will of the party first dying. That is to say, the object of the transaction is to put the survivor in a position to enjoy for his own benefit the full ownership so that, for instance, he may convert it and expend the proceeds if he chooses. But when he dies he is to bequeath what is left in the manner agreed upon. It is only by the special doctrines of equity that such a floating obligation, suspended, so to speak, during the lifetime of the survivor can descend upon the assets at his death and crystallize into a trust. No doubt gifts and settlements, inter vivos, if calculated to defeat the intention of the compact, could not be made by the survivor and his right of disposition, inter vivos, is, therefore, not unqualified. But, substantially, the purpose of the arrangement will often be to allow full enjoyment for the survivor's own benefit and advantage upon condition that at his death the residue shall pass as arranged..."

55. Dixon J. as noted above has held that survivor during lifetime can deal as absolute owner of the property but when he dies, he is to bequeath what is left in the manner agreed upon. The obligation to utilize the property in a manner agreed upon descends upon the asset on the death of survivor and the right of disposition is not unqualified but has to be in accord with manner of disposition.

56. As noted above, the High court in paragraph 66 of the judgment also had considered that expression absolute enjoyment as employed in the Will was a sort of comfort or cushion to the survivor to meet with any unforeseen or unexpected contingencies, if any necessity arises.

57. We, thus, are of the view that giving absolute right to the survivor during his lifetime to deal with the properties in no manner cannot be said to be right given in disregard of object of trust. The charitable purpose of the Will is not lost even if survivor is given absolute right. The obligation of survivor to act in furtherance of object

as agreed by both the testators survives and binds the survivor. Although the Will was irrevocable after the death of survivor but the Will expressly granted absolute right to survivor.

58. In view of the foregoing discussion, we endorse the view of High Court that the Will dated 27.9.1968 was a joint and mutual Will, but with a rider that said joint and mutual Will was with an express condition that survivor shall have absolute right to deal with the property keeping the object of trust alive. Giving of right of disposition to the survivor was also one of the joint decision and agreement between the testator and testatrix which does not diminish the nature and character of Will as joint and mutual Will.

59. Thus, in the present case, unless the alienation by the survivor i.e. Rangammal is held to be completely in breach of object of trust and fraud on trust, the Court is to be slow in disregarding such alienations. In the suit filed by the plaintiff although reference to alienation made by

Rangammal were made and the High Court in its judgment in paragraph 81 has detailed the alienation but the challenge to the alienation before the trial court as well as before the High Court was only on the ground that Rangammal was not competent to alienate the property mentioned in the Will after the death of Palaniappa Chettiar.

60. We are thus of the view that the alienation made by Rangammal in favour of appellants could not have been declared null and void as has been done by the High Court. Alienation made by Rangammal during her lifetime after the death of Palaniappa Chettiar was fully covered by paragraph 3 of the Will as noted above.

61. We are thus of the view that the decision of the High Court in so far as in declaring the alienation made by Smt. Rangammal after the death of Palaniappa Chettiar during her lifetime as null and void deserves to be set aside. Thus alienation made by Smt. Rangammal by registered sale deeds as noticed by the High Court in favour of appellants needs to be deleted from the list of the properties as described

in the plaint and they shall not be included in the trust property by virtue of the Will deed dated 27.09.1968. We, however, add that said deletion is only with regard to alienations made by Smt. Rangammal and not to the alienations made by defendant no. 4 & 5. The Declaration made by the High Court in so far as alienations made by defendant no. 4 & 5 as null and void are maintained.

Creation of Trust by Will dated 27.9.1968

62. The High court has elaborately dealt with the matter of creation of Trust by Will in paragraphs 79 to 80 of the judgment.

63. While noticing the nature and contents of the Will, we have noted above that in the life time of survivor charities have to be carried out from the income derived from properties without alienating the same. With regard to the charities, the Will states that during life time of testator and testatrix the properties shall be managed by themselves and desired charities be carried out either jointly or individually and in case testator and testatrix

are not in a position to carry out the charity during their life time a committee consisting of three members shall perform charity. Following statement in the Will is relevant:

> *"During our life time we shall manage the property ourselves, do the desired charities either jointly or individually.*
>
> *In case we are not in a position to carry out the desired charities during our life time, a committee consisting of the following authorities shall be formed to carry out the following charities:."*

64. A complete reading of the Will indicates that although the testator and testatrix intended to utilise their properties to carry out charities after their life, the Trust as contemplated by the Will to come in operation in following manner:

> *(1) During the life time of testator/testatrix in the event they were not in a position to carry out the desired charity the committee consisting of the Endowment Commissioner, Revenue Divisional Officer, Gobichettipalayam and District Munsif, Gobichettipalayam shall carry out the charities.*

> *(2) After the death of both testator and testatrix, the committee of three members as noted above shall perform the charities.*

65. There is no pleading or material on record to indicate that during life time of Palaniappa Chettiar or Rangammal at any point of time they expressed their inability to carry out the charity or had requested the three members' committee to carry out the charity. Thus, above eventuality as contemplated by the Will never came into existence during the life time of Palaniappa Chettiar and Rangammal but as per provisions of the Will dated 27.9.1968 on the death of survivor i.e. Rangammal on 27.12.1980, the three members committee was obliged to carry out the charities and the Trust came into operation.

Will dated 27.11.1980

66. The trial court framed specific issue No.13 to the following effect:

> *"13.Whether the Will dated 27.11.1980 executed in favour of the defendants 4,5 is genuine and valid ? Whether Chinnammal @ Rangammal had executed that document in a sound and disposing state of mind ?*

67. Issue No.13 was dealt with in great detail by the trial court after considering the entire documentary and oral evidence on records. Defendant Nos.4 and 5 have examined the testators as DW.2 and DW.4, scribe as DW.3 and a Sub-Registrar for proving the Will as DW.6.

68. After considering the oral evidence the trial court held that the Will is not proved. The trial court noticed several suspicious circumstances and discrepancies and it was held that Ex.D-109 has not been executed by Rangammal in a sound and disposing state of mind and the same is not a true and valid document. Defendant Nos.4 and 5 had filed A.S. No.606/1989 challenging the judgment of the trial court. The said appeal was elaborately considered by the High Court in its judgment in paragraphs 86 to 114. The High Court came to the conclusion that Will dated 27.11.1980 alleged to have been executed by Rangammal is not a true and genuine Will of her. The said conclusion has

been arrived at by the High Court after considering entire evidence on record. We find no infirmity in the aforesaid conclusion. The appeal filed by defendant Nos. 4 and 5 has rightly been dismissed. We see no reason to interfere in the judgment of the High Court so far as dismissal of A.S.No.606 of 1989.

Reliefs

I. We have come to the conclusion that Smt. Rangammal-testatrix has the absolute right to deal with the properties mentioned in the Will and alienations made by her during her life time are saved by the Will and the judgment of the High Court holding sales in favour of the appellant as null and void is unsustainable and is hereby set aside. Civil Appeal Nos.5924 of 2005, 5925 of 2005 and 5926 of 2005 are partly allowed and following sale deeds are deleted from the description of the property in the plaint. The Trust shall not include following sale deeds:

(i) Sale deed in favour of Dr. K.S. Palanisami, defendant No.13 dated 11.5.1979, Schedule II, Item No.15 and 16.

(ii) Sale deed in favour of defendant Nos.4 and 5 dated 19.9.1972 and 30.9.1972, second Schedule, Item Nos. 5 and 6 (Ex.B-28 and Ex.B-29).

(iii)Sale deed dated 24.3.1977, first Schedule, Item No.6, in favour of Thirugnanasambandam, defendant No.7 (Ex.B-116) and

(iv) Sale deed in favour of Dr. M.R. Subbian dated 20.2.1970, Schedule II, Item No.2 and 7 (Ex.B-114).

We, however, make it clear that the judgment of the High Court declaring sale deeds executed by defendant Nos.4 and 5 as null and void is maintained. All alienations made by defendant Nos.4 and 5 are null and void and those properties shall be treated as part of the Trust property.

II. Civil Appeal No. 6469 of 2005 stands dismissed.

III. The directions issued by the High Court in paragraph 116 are maintained subject to directions-I as made above. Judicial Officer having jurisdiction over the case who has been directed by the High Court to frame the scheme for the Trust shall frame the scheme expeditiously preferably within a period of three months from the date a copy of this judgment is produced before him. It goes without saying that all steps for identification, protection and management of Trust property shall be undertaken by all concerned.

69. All the appeals are decided accordingly.

.....J.
(A. K. SIKRI)

.....J.
(ASHOK BHUSHAN)

New Delhi,
March 09,2017.