

PETITIONER:
USHA SUBBARAO

Vs.

RESPONDENT:
B.E. VISHVESWARIAH & ORS.

DATE OF JUDGMENT: 08/07/1996

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
NANAVATI G.T. (J)

CITATION:
1996 SCC (5) 201 JT 1996 (6) 607
1996 SCALE (5)308

ACT:

HEADNOTE:

JUDGMENT:

J U D G M E N T

S.C. AGRAWAL J. :-

Special leave granted.

This appeal by the plaintiff arises out of a suit wherein the appellant claimed 1/5 share of her deceased husband in the properties left by her father-in-law, Dr. N.S. Nanjundiah, on the basis of a Will executed by Dr. Nanjundiah on March 13, 1935. The said suit was decreed in full by the trial court. But on appeal, the Karnataka High Court, by the judgment dated April 15, 1994, has set aside the said judgment of the trial court in respect of properties mentioned in Schedules "A", "B" and "D" to the said Will and has confined the decree to properties mentioned in Schedule "C" to the Will. The questions that fall for consideration in this appeal relate to construction of the Will.

Dr. N.S. Nanjundiah (hereinafter referred to as 'the testator') died on July 28, 1938 leaving behind his wife Smt. Nadiga Nanjamma and five sons, namely, B.N. Subba Rao, B.N. Shankar Rao, B.N. Visweswaraiyah, B.N. Rama Rao and B.N. Ganesh. The appellant is the wife of B.N. Subba Rao who died on February 21, 1954 without leaving any issue. Smt. Nadiga Nanjamma died on March 28, 1959. After the death of Smt. Nadiga Nanjamma, the appellant filed the suit giving rise to this appeal.

As indicated earlier, in the Will dated March 13, 1935 the immovable and moveable properties of the testator were specified in four groups specified in Schedules "A", "B", "C" and "D" attached with the Will. Schedule "A" consists of four items of immovable properties. Item No. 1 is house No. 318, 3rd Road, Margosa Avenue, Malleswaram City and items Nos. 2, 3 and 4 are agricultural lands. Schedule "B" consists of shares and securities standing in the name of Smt. Nadiga Nanjamma. Schedule "C" consists of thrift deposit accounts in the Bank of Mysore Limited standing in the names of five sons of the testator. Schedule "D"

consists of shares and securities and fixed deposits in banks. The relevant parts of the Will dated | - March 13, 1935 are set out as under :-

"During my life time I will be An charge and management of my properties. After my life time, if my wife Nadiga Nanjamma should survive me, she the said Nadiga Nanjamma shall be in charge and management of all my properties given in Schedule A, B, C and D together with their accretions and together with my properties acquired by me in Future. My wife, the above mentioned Nadiga Nanjamma will have no power to dispose of any of these properties mentioned in Schedules A, B, C, and D by sale, gift, will, mortgage or hypothecation. She the said Nadiga Nanjamma is entitled to take the produce of the lands mentioned in A Schedule and use the same for the maintenance of herself and her children. She the said Nadiga Nanjamma also entitled to use the interest dividends and incomes of the properties mentioned in B and D Schedules for the same purpose.

With regard to the house (Item no. 1 of the A Schedule) my wife, the abovenamed Nadiga Nanjanma and her children are entitled to live in that house during the life time of my wife, and the said house should not be partitioned during my wife, Nadiga Nanjamma's life time.

Mr. C. Nagappa, B.A., L.L.B., Advocate, Lakshmi Vilas Agrahar, Mysore, one of the Executors and Trustees of this Will, shall be in possession of the lands viz., items Nos. 2, 3 and 4 of the A Schedule, during the minority of my children. The above mentioned Mr. C. Nagappa shall make arrangements for the cultivation of the said lands, for the collection of produce therefrom, for the payment of Kandayam over same and for the delivery of all produce from the lands to my wife, the above mentioned Nadiga Nanjamma and her children.

The properties mentioned in the B Schedule stand in the name of my wife, the abovesaid Nadiga Nanjamma. The income from these properties, as stated above, shall be used for the maintenance, education Upanayanam and marriage of my children, during their minority. After my sons attain the age of majority, the income from the properties mentioned in the B

Schedule only shall be used by my wife, the abovenamed Nadiga Nanjamma, for her own maintenance if she lives separate from any of major sons. The properties of the said B Schedule shall be liable to partition after the demise of my wife, the abovenamed Nadiga Nanjamma, among her surviving children.

With regard to the properties given in the C Schedule, that is, thrift deposits at the Bank of Mysore, Bangalore City, they shall be the property of each of my children on whose respective names those deposits have been made, after they attain their age of majority. Where Upanayanams and marriages are to be performed for my children, if the income from other sources of my property are found insufficient to meet the expenses, my wife the abovenamed Nadiga Nanjamma is entitled to withdraw from the respective deposits not more than rupees three hundred only, (Rs. 300/-) for each Upanayanam and not more than Rupees five hundred only (Rs. 500/-) (for each marriage), during the minority of my children.

With regard to the properties mentioned in B and D Schedules, the investments, that is, stock and shares, may have to be altered in some cases either by conversion or by investment and for the payment of further calls on some of the shares; my wife the abovenamed Nadiga Nanjamma is entitled only to transact the operations of conversion encasement or payment of further calls on shares, as the case may be, and she the abovenamed Nadiga Nanjamma has also powers to reinvest the same in suitable securities, when necessary, through the Bank of Mysore Limited, Bangalore City but the corpus in each case shall remain in tact. Only the interest, dividend or other incomes of the above shares etc. might be used by my wife for the maintenance of herself and her children as stated above.

After any of my sons attain the age of majority if he, the major son, demands partition during the life time of my wife, the said Nadiga Nanjamma, he is entitled to get for his share the thrift deposit in the Bank of Mysore Limited, Bangalore City, standing in his name as mentioned in C

Schedule, and also to get his portion in items 2, 3 and 4 of the A Schedule and his portion in D Schedule Of properties, with the exception of item 1 of A Schedule, the partition being determined according to the prevailing Hindu Law in force at that time. After the life time of both myself and my wife, the said Nadiga Nanjamma, all the properties mentioned in A, B and D Schedules shall be divided equally among my surviving children."

At the time when the said Will was executed all the five sons of the testator were minors and the eldest son, B.N. Subba Rao, the husband of the appellant, was aged 12 years. It appears that there was considerable difference between the age of the testator and his wife. At the time of execution of the Will, the testator was aged about 53 years while his wife, Smt. Nadiga Nanjamma, was aged 28 years. In the Will the testator made the following provision regarding guardianship of the minor sons :

"If some of my sons happen to be still minors at the time of tile demise of myself and my wife, the said Nadiga Nanjamma, my major sons shall be the guardians and Managers of the minor sons' persons and properties. If all my sons, however, happened to be minors at the demise of myself and my wife, the abovenamed Nadiga Nanjamma, I appoint the following gentlemen as Guardians during my children's minority :

(1) Mr. C. Nagappa, C.A., L.L.B., Advocate, Lakshmi Vilas Agrahar, Mysore

(2) Mr. B. Srikanta Rao, No. 9, 3rd Road, Cham-rajpeta Bangalore City.

(3) Mr. B. Ramaswariah, Retired School Master, No. 2, Sunkalpet, Bangalore City.

(4) Mr. M.B. Varadarajengar, Advocate, Sultanpet, Bangalore City, and

(5) Mr. B.R. Subba Rao, Tutor, University College, residing at No. 1493, Kothwal Ramanna Street, Mysore."

The case of the appellant is that the respective shares in the various properties of the testator vested in the five sons of the testator as per the Will, on the death of the testator and that after the death of her husband, B.N. Subba Rao, the appellant is entitled to the share in the properties that had vested in him prior to his death in accordance with the Will. The trial court, namely, the XVII Additional City Civil Judge, Bangalore City, by his judgment dated February 4, 1985, accepted the said plea of the appellant and held that the succession opened on the death of the testator by virtue of which all the sons of the testator became entitled to equal shares in the properties and the recital in the Will that the partition should take place amongst the surviving children after the death of Smt.

Nadiga Nanjamma is really intended to refer to the children surviving the testator. The said view of the trial court has been reversed by the High Court in appeal by the impugned judgment. The High Court has held that right was given to the children surviving the testator to demand partition after the death of the testator subject to the conditions imposed in the Will and in the absence of such a demands the division was to take place after the death of Smt. Nadiga Nanjamma among the children surviving Smt. Nadiga Nanjamma. The High Court further held that since after attaining majority B.N. Subba Rao did not demand partition during his life and Smt. Nadiga Nanjamna continued to manage the properties during her life time and since B.N. Subba Rao had already expired when Smt. Nadiga Nanjamma died, it could not be held that B.N. Subba Rao had a right title or interest in the properties except to demand partition by metes and bounds which specified event did not happen during life time of Smt. Nadiga Nanjamma. On that view the High Court held that the appellant could not claim any right in respect of properties specified in Schedules "A", "B" and "D", but she was held entitled to her husband's interest in Schedule "C" properties.

In view of the said decision of the High Court it is necessary to determine the date when the bequest made in favour of the sons of the testator under the Will vested in the legatees. If it is found that the legacy vested in the legatees on the death of the testator, the appellant) as the legal representative of one of the legatees who died after the death of the testator, would be entitled to claim the interest of her deceased husband as per the said bequest. But if it is found that the bequest was to vest in the legatees only after the death of Smt. Nadiga Nanjamma, the appellant would not be entitled to claim any interest because her husband had pre-deceased Smt. Nadiga Nanjamma.

For the purpose of determining the date of vesting of the interest in the bequest it is necessary to hear in mind the distinction between a vested interest and a contingent interest. An interest is said to be a vested interest when there is immediate right of present enjoyment or a present right for future enjoyment. An interest is said to be contingent if the right of enjoyment is made dependent upon some event. or condition which may or may not happen. On the happening of the event or condition a contingent interest becomes a vested interest. The Transfer of Property 1882 as well as The Indian Succession Act, 1925 recognise this distinction between a vested interest and a contingent interest. Vested interest has been thus defined in Section 19 of The Transfer of Property Act, 1882 :

"Section 19. Where, on a transfer of property, an interest therein is created in favour of a person without specifying the time when it is to take effect, or in terms specifying that it is to take effect forthwith or on the happening of an event which must happen, such interest is vested, unless a contrary intention appears from the terms of the A vested interest is not defeated by the death of the transferee before he obtains possession.

Explanation.- An intention that an interest shall not be vested is not. to be inferred from a

provision whereby the enjoyment thereof is postponed, or whereby a prior interest in the same property is given or reserved to some other person, or whereby income arising from the property is directed to be accumulated until the time of enjoyment arrives or from a provision that if a particular event shall happen the interest shall pass to another person."

Contingent interest is defined in Section 21 of the said Act in the following terms :

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

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

In the Indian Succession Act provision with regard to date of vesting of a legacy when payment or possession is postponed is contained in Section 119 which provides as

"Section 119. Date of vesting of legacy when payment or possession postponed.-- Where by term terms of a bequest the legatee is not entitled to immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatees's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest.

Explanation: An intention that a legacy to any person shall not become vested in interest in him is not to be inferred merely from a provision whereby the payment or possession of the thing bequeathed

is postponed, or whereby a prior interest therein is bequeathed to some other person, or whereby the income arising from the fund bequeathed is directed to be accumulated until the time of payment arrives or from a provision that; if a particular event shall happen, the legacy shall go to another person."

Section 120 of the Indian Succession Act makes the following provision for date of vesting when legacy is contingent upon specified uncertain event :-

"Section 120. Date of vesting when legacy contingent upon specified uncertain event,---(1) A legacy bequeathed in case a specified uncertain event shall happen does not vest until that event happens.

(2) A legacy bequeathed in case a specified uncertain event shall not happen does not vest until the happening of that event becomes impossible.

(3) In either case, until the condition has been fulfilled, the interest of the legatee is called contingent.

Exception.- Where a fund, is bequeathed to any person upon his attaining a particular age, and the will also gives to him absolutely the income to arise from the fund before he reaches that age, or directs the income, or so much of it as may be necessary, to be applied for his benefit, the bequest of the fund is not contingent."

By virtue of Section 119, in a case where bequest is of a vested interest and by the terms of the bequest the legatee is not entitled to immediate possession of the thing bequeathed, the right to receive it at the proper time becomes vested in the legatee on testator's death and in the event of the death of the legatee without having received the legacy the said right to receive it passes to the legal representatives of the legatee. This is however, subject to a contrary intention being expressed in the Will. But in the case of a contingent bequest, Section 120 prescribes that legacy vests in the legatee only after the happening or not happening of the contingency which means that in the event of the legatee dying prior to happening of that contingency no interest passes to his legal representatives. Although the question whether the interest created is a vested or a contingent interest is dependent upon the intention to be gathered from a comprehensive view of all the terms of the document creating the interest, the court while construing the document has to approach the task of construction in such cases with a bias in favour of vested interest unless the intention to the contrary is definite and clear. [See : *Rajes Kanta Roy v. Santi Devi*, 1957 SCR 77, at p. 90]. As regards Wills the rule is that "where there is doubt as to the time of vesting, the presumption is in favour of the early vesting of the gift and, accordingly it vests at the testator's death or at the earliest moment after that date

which, is possible in the contest." [See : Halsbury's Laws of England 4th., Vol. 50, para 589 at p. 395].

In order to determine whether the appellant can claim any right in the properties of the testator, it is, therefore, necessary to examine the nature of the bequest that was made by the testator in favour of his five sons including the deceased husband of the appellant. If it is found that the bequest is in the nature of vested interest, it would vest in the husband of the appellant on the death of the testator and after the death of her husband the appellant as his legal representative, would be entitled to claim her husband's interest in the properties. But in case the bequest is found to be in the nature of a contingent interest which was to vest in the legatees only after the death of Smt. Nadiga Nanjamma, the appellant would not be entitled to claim any interest in the properties since her husband had pre-deceased Smt. Nadiga Nanjamma.

We must, therefore, construe the Will to Find out the intention of the testator in this regard. With regard to construction of Wills the law is well settled that intention has be ascertained from the words used keeping in view the surrounding circumstances, the position of the testator, his family relationship and that the Will must be read as a whole, [See : Gnanambal Ammal v. T. Raju Ayyar and Others, 1950 SCR 949, at p. 955, Navneet Lal Alias Rangi v. Gokul and others, 1976 (2) SCR 924, at pp. 927, 928]. If the Will is thus read, it is found that under the Will Smt. Nadiga Nanjamma was vested with the management of all the properties specified in Schedules "A" "B" and "D" but she had no power to dispose of any of those properties by sale, gift, Will, mortgage or hypothecation. She was entitled to take the produce of the lands mentioned at items Nos. 2, 3 and 4 in Schedule "A" and use the same for the maintenance of herself and her children, She was also entitled to use the interest, dividends and income of the properties mentioned in Schedules "B" and "D" for the same purpose. With regard to properties mentioned in Schedule "C", the testator has directed that where Upanayanams and marriages were to be performed for the children during their minority and income from other sources of his property was insufficient to meet the expenses; Smt. Nadiga Nanjamma could withdraw from the thrift deposit account of the said child not more than Rs, 300/- for Upanayanam and not more than Rs. 500/- for marriage of the child. As regards properties mentioned in Schedules "B" and "D", it was provided that Smt. Nadiga Nanjamma was entitled only to transact the operations of conversion, encashment or payment of further calls on shares, as the case may be, and she had also power to reinvest the same in suitable securities but the corpus in each case had to be kept intact and only the interest, dividend or other incomes of the said shares could be used by her for the maintenance of herself and children as stated above, with regard to the house mentioned at item No. 1 of Schedule "A" it was directed that Smt. Nadiga Nanjamma and the children were entitled to live in it during the life time of Smt. Nadiga Nanjamma and that it would not be partitioned during her life time. As regards the lands mentioned at item Nos. 2, 3 and 4 in Schedule "A" it was provided that during the minority of the children Shri C. Nagappa, Advocate and one the Executors and Trustees of the will, Shall be in possession of the lands and shall make arrangements for the cultivation of the said lands, for the collection of produce therefrom, for the payment of Kandayam over same and for the delivery of all produce from the lands to Smt. Nadiga Nanjamma and her children. As

regards partition of the properties, it was provided that if any of the sons after attaining the age of majority demands partition during the life time of Smt. Nadiga Nanjamma, he would be entitled to get his share of the thrift deposit account in the Bank Mysore Limited, Bangalore City, standing in his name as mentioned in Schedule "C" and he would also to get his portion in properties mentioned at items Nos. 2, 3 and 4 in Schedule "A" and his portion in properties specified in Schedule "D" with the Exception of the property mentioned at items No. 1 Schedule "A" and that the partition would be determined according to the prevailing Hindu Law in force at that time. It was further provided that after the life time of the testator and his wife, Smt. Nadiga Nanjamma, all the properties mentioned in Schedules "A", "B" and "D" shall be divided equally among "my surviving children. With regard to properties mentioned in Schedule "B" it is stated in the Will that the said properties stood in the name of Smt. Nadiga Nanjamma and that income from those properties shall be used for the maintenance, education, Upanayanam and marriage of children, during their minority and after sons of the testator attain the age of majority, the income from the properties mentioned in Schedule "B" only shall be used by Smt. Nadiga Nanjamma, for her own maintenance if she lives separate from any of major sons and that the said properties shall be liable to partition after the demise of Smt. Nadiga Nanjamma among "her surviving children".

Thus according to the Will the right to separate enjoyment of the share in respect of properties mentioned at items Nos. 2, 3 and 4 of Schedule was as well as properties mentioned in Schedules "C" and "D" was available to each of the sons of the testator on his attaining the age of majority and that the right to separate enjoyment of the bequest relating to share in the property mentioned at item No. 1 of Schedule "A" and properties mentioned in Schedule "B" was available only after the death of Smt. Nadiga Nanjamma. But ever during the period the right to separate enjoyment was not available to the legatees the income from the properties was available for the maintenance of the legatees, their education, their Upanayanams and marriages as well as for maintenance of Smt. Nadiga Nanjamma.

The Explanations in Section 19 of the Transfer of Property Act and Section 119 of the Indian Succession Act incorporate the rule that where enjoyment of the property is postponed but the present income thereof is to be applied for the donee the gift is vested and not contingent. In *Rajes Kanta Roy v. Santi Devi* (supra) this Court has pointed out that this rule operates normally where the entire income is applied for the benefit of the donee. In that case, however, under the terms of the settlement the entire income was not available to the donees for their actual use but only a portion thereof was available and the balance was to be used for discharge of debts. It was held that since the donees were sons of the settlor who were under an obligation to discharge his debts out of the properties which devolve upon them, the balance of the income which was meant to be applied for the discharge of the debts was also an application of the income for the benefit of the donees and, therefore, entire income is to be applied for the benefit of the donees. Similarly, in the instant case we find that the income from the properties was to be used partly for the maintenance, education, Upanayanams and marriages of the legatees and partly for the maintenance of their mother, Smt. Nadiga Nanjamma. Since the legatees, as sons were under an obligation to maintain their mother, it must be held that the entire income from the properties was to be applied for

the benefit of the legatees and in accordance with the rule referred to above, the bequest in favour of the legatees must be held to be of a vested interest.

Does the said bequest cease to be a bequest for a vested interest for the reason that the right to separate at items Nos. 2, 3 and 4 in Schedule "A" and the properties specified in Schedules "C" and "D" is not available the legatee obtains majority and the right to separate enjoyment of his share in the property mentioned at item No. 1 in Schedule "A" and the properties specified in Schedule "B" is not available during the life time of Smt; Nadiga Nanjamma ? In our opinion, this question must be answered in the negative. Under the English law where a condition can be fairly read as postponing merely the right of possession or of obtaining payment, transfer or conveyance, so that there is an express or implied distinction between the time of vesting and time of enjoyment, the gift is held to be vested at the earlier date if the rest of the context allows. But where postponement of the gift is on account of some qualification attached to the donee, the gift is Prima facie contingent on his qualification being acquired. A gift to a person "at", "if", "as soon as", "when" or "provided" he attains a certain age, without further context to govern the meaning of the words, is contingent and vests only on the attainment of the required age, this being a quality or description which the donee must in general possess in order to claim under the gift. But if the words of a gift express a distinction between, the gift itself and the event denoting the time of payment, division or transfer, and this time is the attainment by the donee of the age of twenty-one years or other age or is any other event which, assuming the requisite duration of life, must necessarily happen at a determinable time, then prima facie the gift is not contingent in respect of that event. [See : Hulsbury's Laws of England. 4th Edn., Vol. 50 paras 591, 592 and 604, at PP. 396, 397, 405]. The same is the position in India and it has been succinctly brought out in illustration (ii) to Section 119 and illustration (ii) to Section 120 of The Indian Succession Act. The said illustrations are as under :

Illustration (ii) to Section 119

"(ii) A bequeaths to B 100 rupees, to be paid to him upon his attaining the age of 18. On A's death the legacy becomes vested in interest in B."

Illustration (ii) to Section 120

"(ii) A sum of money is bequeathed to A "in case he shall attain the age of 18," or "when he shall attain the age of 18." A's interest in the legacy is contingent until the condition is fulfilled by his attaining that age."

In the present case, the testator in the Will has not used words similar to those contained in illustration (ii) to Section 120. The testator after making the bequest in favour of the legatees has given the direction that a son on attaining majority could demand partition according to the prevailing Hindu law in force at that time to get his portion in items Nos. 2, 3 and 4 in schedule "A" and the thrift deposit standing in his name as mentioned in Schedule "C" as well as his portion in the properties specified in Schedule "D". This is a case where the testator has made a distinction between the gift itself and the event denoting the time of payment, division or transfer, viz., attaining

the age of majority. It falls in the same category as illustration (ii) to Section 119 of The Indian Succession Act and must be held to be a bequest of vested interest in respect of these properties.

Similarly, the direction in the Will excluding the property at item No. 1 of Schedule "A" and the properties mentioned in Schedule "B" for partition during the life time of Smt. Nadiga Nanjamma and that Smt. Nadiga Nanjamma would be entitled to reside in the house at item No. 1 of Schedule "A" and to use the income from the properties mentioned in Schedule "A" for her own maintenance if she lives separate from any of the major sons, only creates a limited life interest in the said properties in favour of Smt. Nadiga Nanjamma and it does not have the effect of rendering the bequest in respect of those properties as a contingent bequest and it continues to be a bequest of a vested interest in those properties. Reference in this context may be made to the decision of the Privy Council in *Rewun Persad v. Radha Beeby*, (1846) 4 M.I.A. 137, where the testator gave his wife a life estate and after her death one moiety of the estate to his brother and the other moiety to his two sons. The brother and one of the sons died during the life time of the widow. It was held that as the share of the sons were vested the widow of the pre-deceased son was entitled to succeed to her husband's share. Similarly, in *Bhogabati Kalicharan*, (1911) 38 I.A. 54, the bequest was to the mother for life, then to the wife for her life and then to the nephews. The Privy Council rejected the contention that there was no vesting in the nephews until the death of the survivor of the mother and the widow and held that the nephews were intended to take a vested and transmissible interest on the death of the testator though their possession and enjoyment were postponed. The same position; is reiterated in illustration (to Section 119 which reads as under :

Illustration (iii) to Section 119
"(iii) A fund is bequeathed to A for life, and after his death to B. On the testator's death the legacy to B becomes vested in interest in B."

The High Court has referred to the following direction by the testator in the Will :

"After the life time of both myself and my wife, the said Nadiga Nanjamma, all the properties mentioned in A, B and D Schedules shall be divided equally among my surviving children."

The High Court has construed the expression "my surviving children" to mean the children of the testator who survive Smt. Nadiga Nanjamma and has held that after the death of Smt. Nanjamma only the children surviving Smt. Nanjamma could claim partition in respect of the premises mentioned in Schedules "A", "B" and 'D'.

The learned counsel for the appellant has urged that in the Will the testator has deliberately used two different expressions, viz., "her surviving children" while dealing with the division of properties mentioned in Schedule "B" after the demise of Smt. Nadiga Nanjamma and the expression "my surviving children" while dealing with division of properties mentioned in Schedules 'A', 'B' and 'D' after the death of Smt. Nanjamma. The submission is that the expression "my surviving children" must mean the children surviving the testator, while the expression "her surviving

children" must mean children surviving Smt. Nanjamma and that all the children surviving the testator are entitled to their share in the properties mentioned in Schedules 'A' 'B' and 'D' after the death of Smt. Nanjamma. In our opinion, nothing much can be made out of the difference in phraseology because if the expression "my surviving children" is construed to mean the children surviving the testator and the expression "her surviving children" is construed to mean the children surviving Smt. Nanjamma, there will arise a contradiction in the Will in so far as partition of Schedule "B" properties is concerned because at one place it is mentioned that properties of Schedule 'B' shall be liable to partition after the demise of my wife, the above mentioned Nadiga Nanjamma, among her surviving children", meaning thereby that the said properties were divisible among the children surviving Smt. Nanjamma while at another place in the Will, it is stated that after the life time of both myself and my wife, the said Smt. Nadiga Nanjamma, all the properties mentioned in A, B and "D" Schedules shall be divided equally among my surviving children, meaning, thereby, that the properties in Schedules "A", "B" and "D" were divisible among the children surviving the testator. The expressions "my surviving children" and "her surviving children" must, therefore, be construed in the same sense. The words "surviving children" normally mean children surviving the testator. The said expression in a particular context could also mean the children surviving Smt. Nadiga Nanjamma. The expression has to be given a meaning which is in consonance with the other parts of the Will. Reading the Will as a whole and keeping in view the direction enabling a son on attaining majority to seek partition of his share in properties at items Nos. 2, 3 and 4 in 'D' it cannot be said that the expression "surviving children" in the context of division of properties mentioned in Schedules 'A', 'B' and 'D' was not used in the normal sense to mean the children surviving the testator.

We are unable to read the Will as indicating a contrary intention to make a departure from the rule regarding vesting of the legacy as contained in Section 119 of the Act. In our opinion, the Will cannot be construed as creating a contingent interest in the sons of the testator so as to postpone the date of vesting of the legacy till after the death of Smt. Nadiga Nanjamma. On a proper construction the Will must be construed as containing a bequest of a vested interest in favour of the sons surviving the testator which means that the legacy vested in the legatees, including the husband of the appellant, at the time of testator's death and after the death of her husband, the appellant is entitled to claim the one-fifth share of her husband in properties mentioned in Schedules "A" "B" and "D" in addition to properties mentioned in Schedule "C" viz. the thrift deposits standing in the name of the appellant's husband in the Bank of Mysore Ltd.

The appeal is, therefore, allowed, the impugned judgment of the High Court is set aside to the extent it denies the appellant one-fifth share in the properties mentioned in Schedules "A" "B" and "D" and it is held that apart from the share in properties mentioned in Schedule "C" the appellant is also entitled to one-fifth share in the properties mentioned in Schedules "A", "B" and "D" as held by the trial court. There is no order as to costs.