

(1934) 12 MAD CK 0014
In the Madras High Court

Naranathatta Uthe Amma and Another	APPELLANT
Vs	
Mavila Mani Amma and Others	RESPONDENT

Date of Decision : 03-12-1934

Acts Referred:

Citation : 157 Ind. Cas. 509 : (1935) 41 LW 465

Hon'ble Judges : Varadachariar, J;Pakenham Walsh, J

Bench : Division Bench

Judgement

1. The plaintiffs-appellants are two members of a Malabar tarwad who claim certain shares in properties which under a partition deed (Ex. A) fell

to the share of one Kannan Nair. This partition was entered into on September 4, 1924 between Kannan Nair, his brother Koman Nair, bis sister

Kunhi Uthamma Amma and her son Krishnan Nair. The two latter are the present plaintiffs. Ex. A divided their tarwad properties into four shares,

three of them being main shares, so to say, allotted to the two brothers and the sister and the fourth, a smaller share allotted to the nephew. The

document contains various provisions giving very large powers of disposition to the sharers in respect of the properties that fell to their respective

shares and detailed provisions are made for the various shares bearing in proportion to the respective shares certain liabilities which were,

therefore, joint. Towards the end of the document there is a clause in the following terms:

If, while respective sharers are enjoying their property as they please in the manner aforesaid, any one sharer dies and if any properties of the

deceased sharer are left behind, such properties shall devolve in equal shares on the others, out of us, living at the time.

2. Kannan Nair having got a share under this document executed a will on September 29, 1924 bequeathing these properties in favour of his wife

and children who are defendants Nos. 1 to 6 in the present case. The 7th defendant is the other sharer Koman Nair. The plaintiffs' contention is

that under the terms of Ex. A, Kannan Nair had no power to dispose of his share by will and that on his death the property must be held to have

devolved in three equal shares upon the plaintiffs and 7th defendant. The learned Subordinate Judge has declined to accept this construction of Ex.

A. He has held that the power of disposition defined in Ex. A will include a power of disposition by will as well and that the clause above quoted

will operate only upon such properties as remain wholly undisposed of, whether inter vivos or by will. Hence this appeal by the plaintiffs.

3. It is unnecessary to consider whether the clause will be inoperative in law or will be void on the ground that it amounts to a gift over of an estate

already given away in absolute terms. Whatever the difficulty may be of reconciling two such clauses in cases where a right is created in a person

for the first time, clauses of this kind are well known in partition arrangements in one form or another; compare *Nirunjan Singh v. Prayag Singh* 8

C. 138 and *Muthuraman Chettiar v. Ponnusamy Udayar* 29 M L J 214 : 29 Ind. Cas. 549 : (1915) M W N 405 : 2 L W 533 : 18 M L T 124.

The argument before us has accordingly proceeded on the assumption that the clause is not void in law and the contentions on both sides were

directed to the construction of the words of disposition contained in the earlier portions of Ex. A. These words are that "the respective persons

shall enjoy the property belonging to their respective shares with absolute right, such as purchase, sale etc., and by effecting improvements as they

please, getting pattas of the respective shares and paying tirwa to the Sircar, hereafter one sharer shall have no manner of right interest, title or

entry in the entire property allotted to the other sharer".

4. It is difficult to conceive of stronger words by which the cessation of anything like a common tenure of these properties could be expressed or

the absolute right of each sharer in the property allotted to his share signified. Though Mr. Govinda Menon during the reply faintly suggested that

these words will not authorise even a gift inter vivos, his senior in opening the appeal was not prepared to go that length. It is not reasonable to

construe these words as relating only to transfer for consideration. The words "purchase and sale" cannot in the context obviously be taken

literally, because no kind of authorisation from one's co-sharers is necessary to enable a co-sharer to make purchases for himself. These words

are therefore really analogous to technical terms describing an absolute estate. In that view it is difficult to see any reason for differentiating between

gifts inter vivos and dispositions by will. Whatever the position might have been in Malabar prior to 1898 wills have certainly been recognised there

ever since 1898 and the Malabar Wills Act provides that a person shall have powers of testamentary disposition over properties which he is

competent to dispose of by gift inter vivos.

5. The appellants' learned Counsel relied on *Advocate-General v. Vitaldoss* 22 Bom. L R 1005 : 58 Ind. Cas. 996; it no doubt lends some

support to this contention. It must, however, be remembered that that case related to a gift in favour of a widow accompanied by a gift to her

daughter and thereafter to certain charity. The widow executed a will in favour of her daughter and the question arose whether the estate conferred

upon the widow was one which she was competent to dispose of by will. The learned Judges almost took it for granted that such powers of

disposition as were conferred upon her by her husband's will only contemplated dispositions inter vivos. It is not clear whether the learned Judges

intended to confine even her power of disposition, inter vivos to dispositions for value or were also prepared to recognise a power of disposition

by way of gift. In the case of gifts by a Hindu in favour of his wife a "limited" estate is well known to the law and may fairly be assumed to have

been contemplated by a testator but such limited estates are admittedly unknown to the Marumakathayam Law and unless the words of a

particular document compel us to differentiate powers of testamentary disposition from powers of gift inter vivos, it will not be legitimate to

introduce any such limitation into that system of law. We do not, therefore, feel that the decision in *Advocate-General v. Vitaldoss* 22 Bom. L R

1005 : 58 Ind. Cas. 996 referred to above is really analogous to the present case. We may mention in passing that in two of the cases decided by

this Court, namely, *Muthuraman Chettiar v. Ponnuswami Udayar* 29 M L J 214 : 29 Ind. Cas. 549 : (1915) M W N 405 : 2 L W 533 : 18 M L T

124 and a recent judgment of one of us and Stone, J. in A.S. No. 232 of 1929 the first impression of the learned Judges when dealing with similar

words, was to hold that these words include a power of disposition by will as well, though the learned Judges left the question open in both those

cases.

6. It is not without significance that Kannan Nair executed a registered will within a month of Ex. A and, being a registered will, it must have been

fairly known to the other parties to Ex. A. Though he lived for nearly four years thereafter, nobody challenged his power of execution of a will. It

may also be pointed out that the effect of the clause on which the plaintiffs rely as also the succeeding clause relating to the share allotted to

individual No. 2 devolving on No. 4 is practically the same as that which would have happened under the ordinary law. This is a further indication

that it is only in the ordinary course of devolution by way of inheritance that these provisions are made, possibly with a view to avoid any ambiguity

as to whether on such devolution the parties are to take the properties in separate shares per capita or jointly per stirpes. But that it was a case of

devolution by inheritance and not succession by survivorship is fairly obvious because the provision is that the persons living at the time shall take in

equal shares. In this view it is all the more clear that it is only the properties undisposed of, whether inter vivos or by will, that will be covered by

this Clause And the language employed, namely, "if any property should remain" is more indicative of properties undisposed of even by will than

properties as they were during the lifetime of each sharer. The appeal, therefore, fails and is dismissed with costs.