
(1934) 12 MAD CK 0032
In the Madras High Court

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

Date of Decision : 03-12-1934

Acts Referred:

Citation : AIR 1935 Mad 337 : (1935) 68 MLJ 372

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—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 the 4th September, 1924, between Kannan Nair, his

brother Koman Nair, his sister Kunhi Uthama 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 sharers bearing in proportion to the respective shares

certain liabilities which were theretofore joint. Towards the end of the document there is a clause in the following terms:

If, while the 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 the 29th September, 1924, bequeathing these properties in favour of his

wife and children who are defendants 1 to 6 in the present case. The seventh 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 seventh 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 *Ram Nirunjun Singh v. Prayag*

Singh I.L.R.(1881)Cal. 138 and *Muthuraman Chettiar v. Ponnusamy Udayar* (1915) 29 M.L.J. 214. 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 sharer 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. Vithaldas (1919) 22 Bom. L.R. 1005. It no doubt lends some support to his

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 Marumakkattayam 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. Vithaldas (1919) 22 Bom. L.R. 1005,

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. Ponnusami Odayar (1915)29 M.L.J. 214 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 those 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.