

(1987) 02 MAD CK 0018

In the Madras High Court

Case No : S.A. No's. 1825 and 2154 of 1980

Pravin Kumar

APPELLANT

Vs

P. Rajeswaran and Others

RESPONDENT

Date of Decision : 27-02-1987

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100

Evidence Act, 1872 — Section 103

Succession Act, 1925 — Section 2(H), 213, 74, 87, 92

Citation : AIR 1988 Mad 132 : (1987) 100 LW 895 : (1987) 2 MLJ 481

Hon'ble Judges : Srinivasan, J

Bench : Single Bench

Advocate : T.R. Mani and R. Gandhi, for the Appellant; K. Sampath, for the Respondent

Judgement

1. In these second appeals by defendants 1, 4, 5, and 6, the questions which arise for consideration relate to the genuineness and validity of two

wills marked as Exs. A-3 and A-2, the former executed by one Jimmarammal, the mother of plaintiff and defendants I to 6 and the latter executed

by her paramour Prakasam Pillai, the father of plaintiff and defendants 1 to 6, Jimmarammal was admittedly the owner of the suit property. She

died on 16-12-1971. It is stated that she left a will dated 27-11-1971, the genuineness of which was challenged by the defendants in the courts

"below. Under the said will, Jimmarammal granted power to Prakasam Pillai, whom she described as her*" in other words as the

paramour*. The relevant portion of the will granting power to the said Prakasam Pillai reads as follows :-

*(Matter in vernacular omitted)

2. Prakasam Pillai executed a will dated 4-4-1977 the truth of which was under

challenge before the Courts below. Under the said will, he gave suit items 1 and 2 to the plaintiff and distributed the other items among the other children. He also gave an extent of 40 cents of land to the 7th defendant, whom he described as his third wife. After his death on 1-11-1977, the present suit was instituted on 18th February 1978 by the first respondent in the two appeals for recovery of possession of items 1 and 2, of the I Schedule properties and moveables set out in Schedule VIII of the plaint. He also claimed future mesne profits at the rate of Rs. 200/- per month. His specific case in the plaint was that Jimmarammal executed the will dated 27-11-1971 bequeathing all her properties to her seven children and directed Prakasam Pillai to divide the properties and allot a share to each of the children. As regards the will of Prakasam Pillai, the averment in the plaint is that the said document was only a family arrangement or partition deed. The plaintiff stated in paragraph 6 of the plaint that he ratified the arrangement with respect to the extent of 40 cents allotted to 7th defendant and waived his claim over the same. The plaintiff alleged that the first defendant was in possession of the properties allotted to his share and was bound to deliver the same to the plaintiff. As regards movables, the plaintiff alleged that they belonged to Prakasam Pillai and according to the document dated 4-4-1977, they belong to the plaintiff. In the plaint, there was a specific allegation that Jimmarammal was a Hindu, though the plaint described the plaintiff and defendants 1 to 6 as Christians.

3. Defendants 1 and 3 filed a separate written statement in which they had raised an objection that the plaintiff was not entitled to maintain the suit in the absence of a probate of the will relied upon by him. It was stated by the defendants that Jimmarammal was not a Hindu, but she was originally a Buddhist and it was learnt that she had become a Christian later. A reference is made to the Death Register in which she was described as a Christian. It is also stated that the plaintiff had deliberately described Jimmarammal as a Hindu only for the purpose of avoiding the taking of a probate. The allegation regarding family arrangement was denied by the defendants. It was stated that Prakasam Pillai was not in sound and disposing state of mind when he executed the document dated 4-4-1977, it is not necessary to refer to the other contentions raised in the Written

statement of defendants 1 and 3.

4. Defendants 4 to 6 filed a separate written statement in which they did not make any reference to the allegation that Jimmarammal was a Hindu.

They went on to dispute the genuineness and validity of the two wills referred to in the plaint, Again it is unnecessary to refer to C6 other averments

in the written statement of defendants 4 to 6 which related to the details of the properties.

5. The trial court held that Jimmarammal must be taken to be a Hindu for the purpose of succession to her estate. The trial court upheld the

genuineness of the wills of Jimmarammal and Prakasam Pillai. However, with regard to the document dated 4-4-1977 executed by Prakasam

Pillai, the trial court proceeded on the footing that the said document did not deal with the properties owned by Prakasam Pillai and, I therefore, it

did not require probate. The trial court held that the defendants had no right to question the correctness of the allotment made by Prakasam Pillai

with reference to the properties. With regard to the movable, the trial-court held that the plaintiff was entitled to 1/7th share therein. Ultimately, the

trial court granted a decree in favour of the plaintiff for recovery of possession as regards items 1 and 2 of Schedule I and a decree for division of

1/7th share in the movables described in Schedule VIII to the plaint.

6. There were two appeals before the learned District Judge, Tirunelveli, one by the first defendant and the other by defendants, 4 to 6. The

learned District Judge framed three points for consideration as follows

(1) Whether Ex. A-3 is true and valid?

(2) Whether Ex. A-2 is unjust and unenforceable?

(3) To what relief is the plaintiff entitled?

Point No. 1 was answered by the learned District Judge in favour of the plaintiff on the footing that Jimmarammal was not a Christian. He also

found that the will Ex. A-3 was a genuine one. The Second point was answered against the defendants on the footing that Ex. A-2.wasa family

settlement Consequently, the learned appellate judge dismissed the appeals preferred by defendants 1 and 4 to 6.

7. In those second appeals, the contention challenging the genuineness of the two documents Exs. A-2 and A-3 cannot be accepted as they are

purely questions of fact. Both the Courts below have relied upon the evidence of P.Ws. 2 and 3 in support of the execution of Exs. A-2 and A-

3 and there is no ground for interfering with the appreciation of the said evidence. I hold that Exs. A-2 and A-3 are genuine.

8. With reference to Ex. A-3, the question will arise whether Jimmarammal was a Hindu or a Christian, if she was a Christian, Ex. A-3 requires

probate and it cannot be looked into until it is probated. In the plaint, she is described as a Hindu. Before the filing of the suit, the only document in

which any reference was made to her religion was Ex. A-1, which is an extract from the death register. As soon as she died, information was given

with reference to her death to the appropriate authorities by the first defendant. It has been held by this court entries in a death register cannot be

used as evidence to prove the religion of a party. (Vide Gurusami Nadar Vs. Irulappa Konar and Others, . But, the relevant fact in this case is that

the information was given by the first defendant, who has been examined as D.W. 2. It is not necessary to rely upon the entry in the death register

as such. But, the court should take into account the fact that D.W. 2, one of the sons of the deceased Jimmarammal described her as a Christian

soon after her death. This fact assumes importance because admitted, there was no dispute at that time with reference to (the properties left

by Jimmarammal). It cannot be stated that the first defendant had any notice at that time to give false information about the religion of Jimmarammal.

The trial-court, has referred to Ex. A-1 and observed that the first defendant was interested in probating the will and, therefore the information

given by him with regard to her religion cannot be accepted as a true version. I am unable to agree with the said reason the question of probating

the will did not arise at the time of the death of Jimmarammal. The first defendant could not have derived any advantage by describing her as a

Christian, and thereby necessitating a proceeding for probating the will. That will, Ex. A-3, did not give any property to any of the children of

Jimmarammal immediately but it made a provision for the properties being distributed by Prakasam Pillai among the children on a later date. The

control was left with Prakasam Pillai to decide as to which property was to be taken by which child. The first defendant could not have expected

on that date that Prakasam Pillai would allot a lesser share to him or would effect an unfair partition among the children. As on the date of

Jimmarammal's death the position of the 1st defendant would have been the same whether she was a Hindu or a Christian. At any rate, it is

sufficient to refer to the fact that there was no dispute among the parties on the date of death of Jimmarammal in order to prompt a party to give a

false description of her religion. There is no other documentary evidence before the Court to prove the religion of Jimmarammal. Neither Ex. A-2

nor A-3 specifically refers to the religion of Jimmarammal. Ex. A-3, however, contains certain matters which are relied upon by learned counsel for

the first defendant to prove that Jimmarammal, was a Christian. Ex. A-3 gives the name of Jimmarammal's father as Androise Appusamy. Learned

counsel for the first defendant says that Androise is a Christian name. There is a recital in n Ex. A-3 which refers to the fact that the first defendant

had married a person belonging to another religion and that he was residing separately. The relevant recital reads thus :-

(Matter in vernacular omitted - Ed.)

9. Learned counsel points out that if she had referred to the marriage of her son the first defendant as a then necessarily it should indicate

that she was a Christian. If she was a Hindu, she would have had no objection to her son marrying a Hindu. It is clear from the evidence on record

that the first defendant had married a Hindu. There is another aspect of the matter, which will be relevant to be taken into account. Prakasam Pillai

was not admittedly married to Jimmarammal. He was only a paramour if Jimmarammal was a Hindu, she would not have allowed her children to

be brought up as Christians when she had not married the person from whom the children were born. It should not be forgotten that she was a

woman having lot of properties. If she had no means and if she depended for her livelihood only on her paramour, then she would have either

adopted the religion of the paramour or allowed the children to adopt that religion. In this case, it is admitted that all the Children are Christians. In

fact, the plaint described the plaintiff as well as defendants I to 6 as Christians. It is only because the plaintiff, Prakasam Pillai, Jimmarammal and

other children were living as Christians the first defendant had to live away when he married a Hindu. This circumstance has completely been

ignored by the Courts below.

10. The next piece of evidence available on record is the admission of P.W. 2 that

Jimmarammal was buried according to Christian rites. While referring to the admission of P.W. 2, the trial court says that Jimmarammal could not be converted into a Christian after her death and that she had no control over her burial. Unfortunately, the trial court overlooked the fact that in this country or at any rate in this part of the country, the sentiments of family members would be not to wound any feelings or sentiments which were entertained by deceased at least for a few days after the death. If Jimmarammal had lived throughout as a Hindu, no member of the family would have dared to bury her according to Christian -rites.

The very fact that Jimmarammal was buried according, to Christian rites, goes a long way to show that she must have lived as a Christian and that her religion was Christianity. Mr. Sampath, appearing for the plaintiff, contends that there is no evidence to prove that she was buried in a cemetery and that no Christian would be buried elsewhere. I cannot accept this reasoning. It is not shown before the Courts below or this court that a Christian should be buried only in a Christian cemetery. If the parties had chosen to bury her at a place which they consider proper, then that would not mean that she was not a Christian. Mr. Sampath also relies upon the fact that in the written statement of the first defendant, he had stated that she was a Buddhist in the beginning and got converted later as a Christian. It is argued that having pleaded conversion, the burden was on the defendants to prove such conversion and they have not let in any evidence in this case to prove such conversion. It is the argument of learned counsel for the plaintiff that in the absence of any proof by production of Baptism Certificate or any entry in the register of Christian churches, Jimmarammal cannot be taken to be a Christian. I am of the opinion that it is not open to the plaintiff to raise such an argument. The plaintiff came to court with a definite case that Jimmarammal was a Hindu. The burden is on him to prove the same. If he fails to do so, he cannot abandon his own case and turn round to adopt that of the defendant for claiming the relief. (Vide T.S. Govindaraj Vs. A.B. Kandaswami Goundar and Another, and Subramania Mudaliar Vs. Ammapet Co-operative Weavers Production and Sales Society Ltd., .

11. The lower Appellate Court while dealing with this aspect of the matter simply paraphrased the reasoning given by the trial court and held that

the fact of the burial of Jimmarammal as a Christian would have no relevance to the question whether she was a Christian or not. The lower court has thrown the burden on the defendants to prove conversion which they have set up in the written statement. As pointed out earlier, the burden was on the plaintiff to prove that Jimmarammal was a Hindu. Having regard to the circumstances referred to above, I have no hesitation in holding that Jimmarammal was only a Christian and not a Hindu. Though the question whether Jimmarammal was a Hindu or a Christian is one of fact the findings arrived at by the Courts below are as they have ignored the relevant evidence on record. Hence, the findings are not binding on me in second appeal.

12. Once it is held that Jimmarammal was a Christian, it follows that Ex. A-3 required to be probated and cannot be looked into by any court of law without a probate. Ex. A-3 is not admittedly probated. Hence, the very basis of the plaintiff's claim that he is entitled to the suit items 1 and 2 goes. He cannot get a decree in the suit for recovery of possessing of items 1 and 2. The suit has to be dismissed on that ground.

13. However, I propose to deal with the arguments advance with reference to Ex. A .2 for the sake of completion. As regards genuineness of Ex.

A-2, I have already held that the same is genuine. The only question that remains to be considered is whether Ex. A2 is valid. It is contended by

Mr. Mani, appearing for the appellant that Ex. A-2 being a will executed by a person who is admittedly a Christian requires probate and in the

absence of a probate, Ex. A-2 cannot be looked into. The argument proceeds that if Ex. A-2 goes out of the scene, the power conferred upon

Prakasam Pillai must be deemed to have failed as one which his not been exercised. In the event of the failure of the power, the properties must be

taken by Jimmarammal's, heirs equally. The lower appellate court has taken the view that Ex. A 2 is a family settlement. But., the learned Judge

has not chosen to give any reason in support of his conclusion. Though be, holds that allotment of 40 cents of land to the 7th defendant was not

authorised by Jimmarammal's will, the learned Judge has held that the other portions of Ex. A-2 were enforceable by the plaintiff. Mr. Sampath

appearing for the plaintiff contends that Ex. A 2 represents a family arrangement. He refers to the fact that even in Ex. A-3 Jimmarammal had

expressed her desire that there should be no dispute among her children in the matter of sharing the properties. He also refers to the fact that the first defendant was living away from the family after marrying a Hindu. Mr. Sampath relies upon the recitals found in Ex A-2 which refer to a decree obtained by Prakasam Pillai on 3-10-1960 and a release executed by one of the daughters Violet Crazy on 2-0--1976. He places reliance upon the recital to the effect that Prakasam Pillai wanted to make the arrangement -under Ex. A 2 in order to avoid any dispute between the children. Mr. Sampath contends that it is not necessary that a family arrangement should be a bilateral arrangement or that it should be an arrangement between members of a Hindu joint family. He relies upon the decision in Smt. Mania Vs. Deputy Director of Consolidation, U.P. and Others, , Sahu Madho Das and Others Vs. Mukand Ram and Another, , Maturi Pullaiah and Another Vs. Maturi Narasimham and Others, and M.N. Aryamurthy and Another Vs. M.D. Subbaraya Setty (Dead) through L. R. and Others, . Those decisions do not help him in the present case. There can be no quarrel with the proposition laid down by the Allahabad High Court in the aforesaid case that a family arrangement can be oral and a document executed in pursuance thereof will be only a record of the same. In the Second of the cases referred to above, the Supreme Court held that a family arrangement should, as a matter of law be implied from a long course of dealings between the parties and that the conduct of the various members of the family is relevant to show that their acting's, viewed as whole, suggest the existence of a family arrangement. In the third case referred to above, the Supreme Court held that bona fide disputes, present or possible, which may not involve legal claims would be sufficient for validating a family arrangement and that members of a joint Hindu family may, to maintain peace or to bring about harmony in the family, enter into a family arrangement. It was laid down in that case that if a family arrangement was entered into bona fide and the terms thereto are fair, in the circumstances of a particular case, the Courts will more readily give assent to such arrangement than to avoid it. In the last of the cases cited above, the Supreme Court had to consider whether a will executed by Hindu father in respect of joint family property could operate as a valid arrangement, though inoperative as a will. After referring to the decision in Maturai Pullaiah v. Maturi Narasimham, AIR 1956 SC 1836

referred to supra, the Supreme Court said, ""It will be, therefore, seen that, in the first place, there must be an agreement amongst the various members of the family intended-to be generally and reasonably for the benefit of the family. Secondly, the agreement should be with the object either of compromising doubtful or disputed rights, or for preserving the family property, or the peace and security of the family by avoiding litigation, or for saving its honour. Thirdly, being an agreement, there is consideration for the same, the consideration being the expectation that such an agreement or settlement will result in establishing or ensuring amity and good-will amongst the relations."" After succinctly laying down the three essential requisites for a valid family arrangement. It was found that there was nothing in the will, the pleadings or the evidence which went to show that there was any occasion for agreeing for a family arrangement or that the motivation which is necessary for a family arrangement was ever present in the minds of the testator and his sons when the will was executed.

14. In the present case, there is absolutely no evidence to the effect that Ex. A-2 was brought about pursuant to an agreement between Prakasam Pillai and his children. Nor is there any evidence that Prakasam Pillai ever consulted any member of the family or, any friend of the family before executing Ex. A-2. The recital which is usually found in all the wills that it is executed in order to avoid a dispute among the members of the family on a later date, will not lead to an inference that it was the result of a family arrangement. When there is no evidence of any oral arrangement, Ex. A-2 cannot be treated as a record of the same. In fact, the pleading in this regard is as vague as possible. The only reference to a family arrangement is made in the plaint in paragraph 5. There is no sentence in which the plaintiff alleges that the deed, referring thereby to Ex. A-2, is only a family arrangement or partition deed. Even there he is not specific about the character of the document. On the facts of the case, it is clear that Ex. A-2 represents only the decision taken by Prakasam Pillai on his own with reference to the distribution of the properties. In fact, there is an express indication in Ex. A-3 that Jimmarammal wanted Prakasam Pillai to appoint the properties by means of a will so that it could take effect on his death. It is only pursuant to such direction, Prakasam Pillai executed Ex. A-2. Ex. A-2 is not stamped and it is registered as a will

in Book 111. Prakasam Pillai has described it as a will in four places in the document itself. He has made the arrangement to take effect on his

death. Hence, I hold that Ex. A-2 is only a will and it is not a family arrangement.

15. The question whether a will which is executed in furtherance of a power of appointment requires probate has to be "considered. Before

referring to the provisions of Indian Succession Act, it will be necessary to refer to some general principles relating to powers. A power has been

defined by Mozley and Whiteley's Law Dictionary as "An Authority to dispose of any real or personal property independently of or even in

defeasance of any existing estate or interest therein. The person entitled to exercise the power (who is called the donee of the power) may have no

interest in the property in question, in which case the power is called a power collateral or in gross, or he may himself have an interest in the

property, and the power is then called- a power coupled with an interest, or a power appurtenant or appurtenant, e.g., in case of a parent having a

life interest in property, with power to appoint the property (either by deed or will) to his children after his death. The exercise of the power is-

called an appointment ; and the persons taking the property under such an appointment are called appointees, and not grantees or assigns".

16. A Division Bench of the Andhra Pradesh High Court had occasion to deal with the law of powers at some length~ in *Jaldu Anantha*

Raghurama Arya Vs. Jaldu Bapanna Rao and Others, . It will be apposite to refer to the following passages in the said judgment: - -

Before We examine the various authorities called in aid by the counsel on either side, we may mention that the right of a testator to grant a power

of appointment to a person designated in the will authorising to regulate the final devolution of the estate at the termination of the interest previously

created has been recognised by the " Courts of this land, the Privy Council as far back as *Bai Motivahoo v. Bai Mamobai*, (1897) 24 Ind App

93 (P.C.) thereby sanctioning a great extension of the testamentary powers. Legislative sanction was given to this by enacting Explanation to

Section 69 of the Indian Succession Act. ""

Again it is observed that

The principle that could be gathered from the various authorities is that if the will gives an indication that the testator or testatrix intended to create

a gift in favour of the objects of benevolence and the power conferred upon the appointee is only one of selection it will be regarded as in the nature of a trust. This intention must be sufficiently apparent on the will. If there is no gift-over or express disposition in default of the exercise of that power a gift may be implied to the class equally in default of appointment or "the appointment is construed in the manner the appointee would select". But the absence of a gift-over does not necessarily disclose that a trust was created. It is not in absolute rule of law but only one of construction and is only an aid in gathering the intention of the testator, Where a power of selection is in the nature of a trust cast on the donee of that power if the selection is not made, the members of the class take equally. The Court will not permit the objects of the power to suffer by negligence or conduct of the donee of power but would put into effect the intentions of the testator and this fasten on the property a trust for their benefit. In such a situation, the court will not permit the intention of the testator to be defeated by the donee of power not executing it. If there is uncertainty as to the objects or subject of bounty or to the mode of distribution of the property it may be regarded as a naked power. If it, is mere power it lapses if it is not executed. Where the intention of the testator to benefit a person is reasonably clear and the subject-matter of the gift is also mentioned, the power given to an appointee will be in the nature of a must so that the non-exercise of it will not defeat the gift. The passages in Jarman on Wills", pages 660 to 662 (8th Edition) which contain the correct legal principles on the topic bear out the views expressed by-is above".

17. Farewell defines, a power as -"an authority reserved by, or limited to, a person to dispose, either wholly or partially. Of real or personal property, either for his own benefit or for that of others". According to Farewell, the donee of a power has a right of disposition over the properties subject to the power which may be either limited or unlimited, according to the terms upon which it is granted, the principle enunciated by Farewell was accepted in Abdul Halim Khan v. Saadat Khan, AIR 1928 Ouh 1. It is observed in that case that a donee of a power, when he exercises the said power, must be deemed in the eyes of law to transfer the property to the appointee and that it must be considered as equivalent

to transferring the property of the testator in favour of the persons appointed or adopted. It is equated to a disposition of a property of the testator

under the terms of the will. After extracting the definition of "power" from the Text Book of Farewell, the court observes. "It is, therefore, clear

that a power amounts to a right of disposition in respect of a particular property. Being a right of disposition over a particular property in a

particular way, it cannot be considered to be merely an obligation. It is indeed a very valuable right in relation to a particular property and must be

considered as equivalent to an advantage derived under the will.

18. The same view was expressed much earlier by this court in *In re. Lakshminarayanammal*, ILR (1902) Mad 515 when a question arose with

regard to payment of court-fee u/s 11 of the Court-fees Act. It was held that the power of appointment created by the will was property within the

meaning of S. 11 of the Court-fees Act and the estate of the testatrix was liable to probate duty in respect thereof.

19. Theobald in his 14th Edition on Wills observes that the principles which govern Wills of immovables are in general applicable to the exercise by

will of powers of appointment over immovables. A testamentary appointment made in execution of a power cannot be recognised until the will is

duly probated. This position is made clear by Farewell in his Text Book on Powers. He refers to the decisions *Ross v. Ewer*, (1744) Atk 156, *l*

Wms. Executors 56, et seq., 8th edition; and *Sug. on powers* at page 466, as authorities for the proposition.

20. In *Re Marquis of Bath's Settlement : Thynne v. Stewart*, (1914) 111 LT 153 it was held that estate duty was payable on an estate which was

obtained under a will in execution of appointment. The reasoning was that the persons who took under the will got the estate by virtue of the will,

and that their shares passed under that will. It is, therefore, clear that when a will is executed, in pursuance a power granted to the testator, the

property passes under that will" and it cannot be said that the will does not require probate.

20A. Under the Indian Succession Act, two kinds of powers are mentioned: (1) a general power of appointment, and (2) a special power of

appointment. A power is general when property is bequeathed to a person in trust for any person or persons as she shall by any deed or will

appoint. He may appoint the property to himself. Such a power of appointment is almost as good as ownership. In a special power the objects for

whose benefit the power is created are specified. Section 91 of the Indian Succession Act provides that a bequest of the estate of a testator

includes any property which he may have power to appoint by will to any object he may think proper. This section deals with general power.

Section 92 of the Act deals with special power. It enacts that when any property is bequeathed to or for the benefit of certain objects, or for the

benefit of certain objects in such proportion, as a specified person may appoint, if the power is not exercised, the property belongs to all objects of

the power in equal shares.

21. Illustration to S. 92 assumes importance in the present case. The illustration is as follows : -

A, by his will, bequeaths a fund to his wife, for her life, and directs that at her death, it shall be divided among his children in such proportions as

she shall appoint. The widow dies without having made any appointment. The land will be divided equally among the children"-

In this case, Ex. A-3 grants not only power to Prakasam Pillai for distributing the property among the children of Jimmarammal, but it also gives

him a benefit of enjoyment of the property for himself. It will not be doing any violence to the language of Ex. A-2 if it is construed as conferring a

life estate to Prakasam Pillai for his own benefit coupled with a power to distribute the estate after his life-time among the children born to

Jimmarammal and Prakasam Pillai.

22. Reference must also be made to S. 69 of the Indian Succession Act. The section reads thus :-

Every will shall be revoked by the marriage of the maker, except a will made in exercise of a power of appointment, when the property over

which the power of appointment is exercised would not, in default of such appointment, pass to his or her executor or administrator, or to the

person entitled in case of intestacy.

Explanation :- Where a man is invested with power to determine the disposition of property of which he is not the owner, he is said to have power

, to appoint such property".

This section makes clear that the Indian law has recognised the validity of

conferring power on a person to distribute the property to another person.

23. Now we turn to the provisions of S. 213 of the Indian Succession Act. Under that section, no right as executor or legatee can be established in

any court of justice unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted

letters of administration with the will or with a copy of an authenticated copy of the Will annexed. It is argued on behalf of the plaintiff that he is not

claiming any right to the property by virtue of the will of Prakasam Pillai, but such right had been conferred on him by Jimmarammal herself in Ex.

A-3. It is also contended that Ex. A-2 should also be deemed to be the will of Jimmarammal for purposes of law. Reliance is placed upon the

decision of the Privy Council in *Bai Motivahoo v. Bai Mamoo bai*, (1897) 24 Ind App 93. In that case, a Hindu testator gave the whole of his

immovable estate on certain trusts which were to stand valid during the lifetime of his daughter and her children, but were to become void if there

were no children. It was provided that in the former case, the estate was to be divisible amongst the heirs of the children on the expiration of the

trusts and in the latter, to be delivered to such persons as his daughter may direct it to be delivered by making her will. In the first instance, it was

held by justice Farran, sitting on the original side of the Bombay High Court that an absolute estate was conferred on the daughter as the proviso in

the will amounted to a gift of the residue in her favour. Accordingly, he passed a decree declaring that the appellant and the respondent in that case were,

during their joint lives, entitled in equal share to the rental income from the immovable property and that the survivor of them was entitled during her

life to the entirety of the income. It was also declared that the gift contained in the will was in favour of such person as the respondent might by her

will direct. On appeal, the decree was confirmed by a Bench, but with a variation whereby the gift to such person as the respondent might by will

direct was upheld, but it was directed that such person so named shall be a person who was in existence at the death of the testator in the

pleadings named. It was the correctness of that judgment which was challenged before the Privy Council. Though the Privy Council held that the

English law of Powers should not be applied generally to Hindu wills, they

recognised the validity of an appointment made by a will pursuant to the grant of power in a testament. The Privy Council observed as follows: -

The leading case on Hindu wills is the Tagore's case (1872) 9 Beng. LR 377. It is unnecessary to refer to the particulars of the will in that case.

Two rules applicable to the will now under consideration are laid down in the judgment of the committee : one is ""that a person capable of taking

under a will must be such a person as could take a gift inter vivos, and contemplation of law be in existence at the death of the testator"". (1872) Ind

App Supp 47. The other-is that the first taker under the will may take for his lifetime. (1872) Ind App Supp 47. And it is said (1872) Ind App

Supp 47 "" The analogous law in this case is to be found in that applicable to gifts; and even if will are not universally to be regarded in all respects

as gifts to take effect upon death, they are generally so to be regarded as to the property which they can transfer and the persons to whom it can

be transferred"". These appear to their Lordships to be the limits of the analogy between will sand gifts inter vivos which have been recognised.

They are not aware of any authority in support of Mayne's contention, as they understood it, that in the present case there would not be such a

transfer of possession to the person who would take by virtue of the power as is necessary to enable it to be validly exercised. It appears to them

to follow, from the first taker being allowed to have only a life interest, that his possession is sufficient to complete the executory be quest which

follows the gift for fife. The result of the decisions is that, according to settled law, if the testator here had himself designated the person who was to

take the property in the event of Mamoo dying childless, the, bequest would be good. The remaining question is whether his substituting Mamoo

and giving her power to designate the person by her will is contrary to any principle of Hindu law. There is an analogy to it in the law of adoption.

A man may by will authorised his widow to adopt a son to him to do what he had power to do himself, and although there is here a strong religious

obligation, their Lordships think that the law as-to adoption shows that such a power as that now in question is not contrary to any principle of

Hindu law. Further, they think that the reasons which have led to a test amenders, power becoming part of the Hindu law are applicable to this

power, and that it is their duty to held it to be valid. But whilst saying this they

think they ought also to say that in their opinion the English law of powers is not to be applied generally to Hindu wills. Their Lordships will humbly advise her Majesty to affirm the decree of the Appellant Court with a merely verbal variation for the purpose " of mere clearly expressing the evident intention of the High Court." I do not see how this decision can help the plaintiff in the present case. It was on a construction of the will, Farran, J. held that the daughter got an absolute estate. That was not accepted by the Division Bench or the Privy Council. But, the Privy Council took the view that even if the daughter did not get an absolute estate; she had the power to appoint the property. I am of the opinion that the decision of the Privy Council does not help the plaintiff, but on the other hand, it may help the defendants in the present case.

24. The next decision that is relied upon by learned counsel for the plaintiff is that of Allahabad High Court in Alakh Narain Singh and Others Vs.

Thakur Dayal Singh and Others, . In that case, a widow executed a will, in accordance with the Nvishes of her husband dividing-die property

equally among her two daughters and giving them power to enjoy the profits thereof during their lifetime and the will was acted upon by the

daughters after the death of the widow and was also recognised in judicial as well as revenue proceedings. It was held that the will so executed by

the widow was valid and could be regarded as the will of her husband himself. The question arose in that case whether the testamentary capacity

of the widow should be the criterion or the capacity of the husband was the criterion, it was held that when the widow executed the will, she did so

only on the direction of the husband and on his behalf. She was only disposing of the property of the husband by virtue of the power granted by the

husband. It was, therefore, held that even though the widow had only limited estate, she could dispose of the property absolutely because of the

power vested in her. That cannot help the plaintiff in the present case.

24A. The decision of a Bench of this Court in Yethrajulu Naidu v. Mukunthu Naidu, ILR (1905) Mad 363 is next relied upon, In that case, a

Hindu died in 1881 leaving him surviving three sons. One of the sons was the plaintiff and another son was the first defendant. The third son died

and his daughter-in-law was one of the defendants. The second defendant was the son of the first defendant and the third defendant was the

adopted son of the plaintiff. The deceased had left a will by which he disposed of three" houses. The disposition with regard to house No. 1 was in

these terms,;.....therefore my three sons shall use and enjoy this house from son to grandson and so on in succession with out power to give as gift

or sell their same"" subject to a payment of a small rent in respect thereof for charity. As regards houses 11 and III, the will provided that out of a

total income of Rs. 530, deducting the expenses of Rs. 181/- the remaining amount whatever, it may, be shall be divided and paid by his executors

to his three sons in equal shares. It was also provided that his executors shall divide and giveaway these properties to his own grandsons" being his

sons" sons after his sons according to their respective shares and his sons shall have no fight whatever to give as gift or to is sell these properties.

The plaintiff brought the suit for construing the will. It was held under the will, house No. 1 vested absolutely in the three sons as members of joint

Hindu family and that the law of inheritance in undivided Hindu family applied. It was also held that a son"s son having died without male issue, his

interest passed by survivorship to the plaintiff and the first defendant to the exclusion of his widow, who was the fourth defendant. It was also held

that the third defendant, who was the adopted son of the plaintiff to6kan interest under the will as grandson of the testator. Justice Subramania

Ayyar compared the position of the adopted son to that of an appointee under a power given by the donor, as regards the effectuation of the gift

and held that the gift to an appointee will be good if he be a person in existence at the testator"s death. In that connection, Subramania Ayyar, J.

referred to the decision in Bai Motivahoo v. Bai Mamoobai, (1897) 24 Ind App 93 (PC) and placed reliance on the same. The observations made

by Subramania Ayyar, J. will be really against the contention of the present plaintiff. They read as follows - -

..... For the effectuation of a gift with reference to such an adopted sons as the third defendant is on the analogy of a gift to an appointee under

a power given by the donor. In Bai Motivahoo v. Bai Mamoobai (1897) 24 Ind App 93 (PC), the Privy Council upheld a power given by a

testator to another to appoint by will the person who was to take the property of the testator, relying for the reorganisation, of such a power on the

analogy of the power to adopt that may be given by a husband to his widow and declared that gifts made under a power to appoint will be valid so

far as they may be made to persons in existence at the death of the testator. Just as in that case: the gift takes effect on the appointment being made so in the present case the gift takes effect on the adoption being made"".

(Underlining mine).

If the principle laid down by Subramania Ayyar, J. is to be applied to the present case, the gift in favour of the plaintiff takes effect on the

appointment being made, that is, on the coming into force of the will of Prakasam, Pillai viz., Ex. A-2. If that is so, the plaintiff derives his title under

Ex. A-2 and not directly under Ex. A-3 as contended by him..

25. The next decision that is relied upon by learned counsel is that of the Privy Council in *Bai Shirinbai v. Ratanbai*, 40 MIJ 277 : AIR 1921 PC

47. The only question that arose for consideration before the Privy Council related to the validity of the power granted by the testator in favour of

his wife. The contention was that the power was void for uncertainty. On a construction of the will., the Privy Council held that the testator gave his

wife a general power of testamentary disposition, and not merely a power exercisable in manner specified in oral directions, and therefore, that

power was not void for uncertainty. That case has no relevance to the present case.

26. There can be no doubt that the present suit by the plaintiff for recovery of possession of specific items of property is based upon the allotment

made by Prakasam Pillai under Ex. A-2. But for Ex. A-2, the plaintiff cannot make a claim for the specific items. He will, therefore be covered by

the language of S. 213 of the Indian Succession Act which refers to right claimed under the will. The right claimed by the plaintiff in the present suit

is clearly under the will, Ex. A-2 executed by Prakasam Pillai. As Prakasam Pillai was admittedly a Christian, Ex. A-2 requires probate. The

plaintiff is, therefore, precluded from, establishing any right under the will before probate is granted.

27. It is contended on behalf of the defendants that Ex. A-2 is not valid as it amounts to a fraud on powers and that Prakasam Pillai has exceeded

his powers in making a distribution of the property in the manner in which he has done. It is not in dispute that a major "share of the property is

given to the plaintiff under Ex. A-2. However, it is contended by learned counsel for the plaintiff that it is an equitable division in the circumstances

in which the family was situated. But, there is no evidence in support of the same. As I have already rejected the case of family arrangement put forward by the plaintiff, it cannot be contended that the distribution made by Prakasam Pillai under Ex. A-2 was an equitable distribution even though it was not an equal distribution. It is already seen that an extent of 40 cents of land was given to the 7th defendant by Prakasam. Pillai, which he was not entitled. There is a clear prohibition, in Ex. A-3 against the distribution of the property to any person other than the children of Jimmarammal. A perusal of Ex. A-3 will also show that Jimmarammal intended that all her children should get equal share in the properties. In fact, she has made a provision that the first defendant, who was living away from the family, should also be given a slider.

It is no doubt true that there is a clause in Ex. A-3 which reads that nobody is entitled to object to the decision of Prakasam Pillai in the matter of division. That can, in the context, only mean that the mode of division as effected by Prakasam Pillai cannot be objected to by anybody. But, if Prakasam Pillai chooses to make an unfair or unequal partition, that can certainly be challenged by the persons concerned. When Prakasam Pillai did not choose to make a division in accordance with the desire of Jimmarammal as expressed in Ex. A-3, it has to be held that the exercise of the power has not been validly made. It is seen from Halsbury's Laws of England, Fourth Edition, Volume 36, page 620, paragraph 967 that. "'An appointment tainted by fraud is void although the persons prejudiced by it may nevertheless given effect to it'". A person who has a limited power must exercise it in good faith for the end designed, otherwise the execution is a fraud on the power, and so void. Fraud in this connection does not necessarily imply any moral turpitude. It is used to cover all cases in which the purpose of the appointment is to effect some object that is beyond the purpose and intent of the power, whether this be selfish or, in the appointer's belief, a more beneficial mode of disposition of the property and more consonant with that which the believes to be the real wish of the donor of the power under the circumstances existing at the date of the appointment. The true intention of the donor must be ascertained from the instrument creating it, and not otherwise, even if the appoint or is also the donor. (Vide paragraph 962 of Halsbury's Laws of England, Fourth Edition, Volume 36, page 615). On the facts of, the present case, I have

no hesitation to hold that the power conferred on Prakasam Pillai was not exercised in accordance with the intention of the donor of the power

viz., Jimmarammal Consequently, Ex. A-3 is void in law.

28. Then comes the question relating to the moveables. In the plaint, the plaintiff has stated that at the time of the death of Prakasam Pillai he was

possessed of movables described in Schedule VIII, which as per the document dated 44-1977 belonged to him. The existence of movables was

disputed in the written statement. The trial court in paragraph 9 of its judgment observed as follows : -

.....Properties listed in the 8th schedule are movable properties. There is nothing on record to show that these movable properties were actually

owned by Jimmarammal. It therefore follows that properties covered by Schedules I to 7 were alone those left behind by Jimmarammal".

Again in paragraph 15, the trial court refers to the movable in these terms : -

The inventory of the movables is taken by the Commissioner Exhibits C I to C3 relate to the movable items in the various rooms in the occupation

of the 1st defendant. They are the items scheduled in the plaint. The plaintiff is entitled to 1/7th share in the 8th schedule items. Just to avoid a not

her suit. I am inclined to grant decree for partition of 8th schedule properties provided plaintiff pays court fee". The learned Appellate Judge has

confirmed the said decree with reference to movables. He has also relied upon the report of the Commissioner.

29. The existence of the movables is proved by the report of the Commissioner. I do not find any error in the decree of the courts below for 1/7th

share in favour of the plaintiff with regard to the movables.

30. However, the decree granting possession of items 1 and 2 in favour of the plaintiff as prayed for by him has to be set aside. In the normal

course, the suit must be dismissed as it is one for recovery of possession. But, learned counsel on both sides are agreeable to my passing a

preliminary decree for partition and allotment of 1/7th share in all the suit properties in favour of the plaintiff. I do not think that interests of justice,

will be served by dismissing the present suit and driving the plaintiff to file a separate suit for partition. The plaintiff has paid in, this suit more court

fee than will be required in a suit for partition. Following the finding given by me that the plaintiff is not " entitled to claim any specific properties by

virtue of Ex. A-2,1 hold that the plaintiff is entitled to 1/7th share in aliA6 suit properties described in Schedules I to VIII. Similarly, defendants 1

to 6 will also be entitled to 1/7th share each in the suit properties the 7th defendant will not be entitled to any share in any of the suit properties.

There will be a preliminary decree for partition and separate allotment in favour of the plaintiff of 1/7th share in the suit properties. The second

appeals are allowed to the extent indicated above, and the decrees of the Courts below are set aside and in their place, there will be a preliminary

decree for partition as stated above. Parties are at liberty to apply to the trial court for a final decree including accounting for the income from the

properties. Both parties will bear their respective costs throughout.

31. Order accordingly.