
(1920) 12 MAD CK 0008
In the Madras High Court

S. Soundararajan and Others

APPELLANT

Vs

C.M. Natarajan and Others

RESPONDENT

Date of Decision : 16-12-1920

Acts Referred:

Succession Act, 1925 — Section 101

Citation : AIR 1921 Mad 258 : (1921) ILR (Mad) 446 : (1921) 13 LW 662 :
(1921) 40 MLJ 354

Hon'ble Judges : John Wallis, C.J.; Ramesam, J

Bench : Full Bench

Judgement

John Wallis, C.J.—This is an appeal from a Judgment of Coutts Trotter, J. upholding the provisions of the will of the late C. Ratna Mudali

which have been questioned on the ground that they are opposed to the Hindu Law notwithstanding the passing of Madras Act 1 of 1914, and

also as infringing the provisions of Section 101 and S. in of the Indian Succession Act which have been applied by the Hindu Wills Act, 1870, to

wills made by Hindus in a Presidency Town. The case has been very fully argued before us and the appellants have taken the fresh ground that

Madras Act 1 of 1914, if not wholly ultra vires is ultra vires, in so far as it purports to affect the Presidency Town where the rules of Hindu Law as

to succession and inheritance were made applicable by the Supreme Court Charter which could only be modified by the legislative authority of the

Governor-General in Council under the provisions of the Indian Councils Act, 1861 read with Section 11 of the Indian High Courts Act, 1861.

The respondents on the other hand have put forward the fresh contention that, assuming the disposition in the will to be invalid, it shows an

intention on the part of the testator to make an absolute gift of her share to each

of his three daughters and to sever such share from his estate, and that consequently the disposition comes within Section 126 of the Indian Succession Act which embodies what is sometimes referred to as the rule in *Lassence v. Tierney* (1849) 1 Mac. & G. 551. Mr. Radhakrishniah also raised the contention on behalf of some of the daughter's daughters who were born during the life-time of the testator that they were in any view entitled to take under the will, but it will be unnecessary to go into this question in the view we take of the case.

2. The material provisions of the will are as follows. "They (the residuary trust funds) are vested in trustees in trust to apportion the residuary trust funds into as many equal parts or shares as there may be daughters of mine living at the time of my decease or who having predeceased me shall have left issue her or them and me surviving and to pay the income of each of such equal parts or shares to my said daughters respectively during their respective lives and from and after the decease of each of my said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for all the children of such daughter who shall attain the age of twenty-one years in equal shares and if there shall be only one such child the whole to be in trust for that one child and in the event of any of my said daughters dying without leaving lawful issue her or them surviving I direct that my trustees shall stand possessed of the share or shares so appropriated to her or them as aforesaid upon trust for all the children of the other or others of my said daughters who shall attain the age of twenty one years as tenants in common in equal shares per stirpes provided always and I hereby declare that if any daughter of mine shall die in my life-time leaving lawful issue living at the time of my death such issue as shall attain the age of twenty-one years shall take and if more than one as tenants in common in equal shares per stirpes the share which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me".

3. This disposition undoubtedly infringes the established rule of Hindu Law as to gifts to unborn persons, and I agree with the learned Judge that according to the current of decisions in India this rule was not affected by the Hindu Wills Act, and that the observations of Lord Moulton in *Ranimoni Dasi v. Radha Prasad Mullick* ILR (1914) C. 1007 even if they be taken

to show that the question may still be open before the highest tribunal, afford this Court no sufficient ground for refusing to follow the current of Indian decisions on this question until they are overruled by higher authority.

4. The next question is as to whether this objection is cured by Madras Act I of 1914. The objection that that Act was altogether ultra vires of the

Local Legislature which the learned Judge rejected, has not been pressed before us. The words "peace and good Government" or "peace order

and good Government" are to be found in the early commissions authorizing the summoning of Legislative Assemblies in the colonies as well as in

the later statutes for the larger colonies, and according to their well understood meaning confer general legislative competence. It is unnecessary to

pursue the subject further.

5. The objection to the recent Act in so far as it affects the Presidency Town which was not taken at the trial, is of a more serious character.

Article 22 of the Charter of the Supreme Court whose jurisdiction was confined to the Presidency Town provided "That the said Supreme Court

of Judicature at Madras, shall have full power to hear and determine all Suits and Actions that may be brought against the Inhabitants of Madras.

Yet nevertheless, in the cases of Mahomedans or Gentoos, their inheritance and succession to Lands, Rents and Goods, and all matters of

Contract and Dealing, between Party and Party, shall be determined, in the case of the Mahomedans, by the Laws and Usages of the

Mahomedans; and, where the Parties are Gentoos, by the Laws and Usages of the Gentoos, or by such Laws and Usages as the same would have

been determined by, if the Suit had been brought, and the Action commenced in a Native Court; and where one of the Parties shall be a

Mahomedan or Gentoo, by the Laws and Usages of the Defendant.

6. Section 11 of the High Courts Act, 1861 applied the provisions of the Supreme Court Charter to the High Court consistently with the provisions

of the Act itself and the Letters Patent to be issued under it, and "subject to the Legislative powers in relation to the matters aforesaid of the

Governor General in Council." Thus by this statute of the Imperial Parliament the Governor General in Council or the Indian Legislature was made

the proper authority to alter the provisions of the charter. It was only under the

provisions of this section of the High Courts Act that the Indian Legislature could have altered the provisions of the Supreme Court Charter, as it was expressly prohibited by Section 22 of the Indian Councils Act, 1861 from modifying the provisions of the Indian High Courts Act. The Local Legislature, also, was expressly prohibited from doing so by the proviso to Section 42 of the Indian Councils Act which provided that it should not have the power of making any laws or regulations which should in any way affect any of the provisions of this Act, or of any other Act of Parliament in force, or hereafter to be in force in the Presidency," words which clearly includes the Indian High Courts Act.

7. It is unnecessary to refer to the provisions of the consolidating Government of India Act, 1915, further than to say that it substantially

reproduces in Section 112 the provisions of the Supreme Court Charters now in question. Now it seems clear that under the Indian Councils Act

and the High Courts Act of 1861 it was within the legislative competence of the Governor General in Council to alter the rules of Hindu Law as to

succession and inheritance within the Presidency Towns, as was done to some extent when the provisions of certain sections of the Indian

Succession Act were made applicable to Hindu Wills in the Presidency Towns. It seems equally clear that it was not within the legislative

competence of the Governor in Council of a Presidency to pass such a measure. The only logical position appears to me to be that rules of Hindu

Law as to succession and inheritance in force in the Presidency Towns were beyond the legislative competence of the Local Legislature and that

consequently Madras Act of 1914 was ultra vires in so far as it purported to affect the Presidency Town. We have not been referred to any

decided case in which this point was considered, but that the difficulty was realized appears from the saving clause in Madras Act I of 1902, nor is

there any reason to assume that it was overlooked by the learned lawyer who introduced the Bill into the Legislative Council.

8. It follows this disposition cannot take effect as regards, all the beneficiaries who were born after the testator's death.

9. Even if it could be held that this objection to the disposition is cured by Madras Act I of 1914, there remains the still more fatal objection that it

contravenes the provisions of Section 101 of the Indian Succession Act which

Madras Act I of 1914 does not purport to affect, and consequently cannot take effect at all u/s 102 of the Act, as held by this Court in *Sivasankara Pillai v. Subramania Pillai* ILR (1908) Mad. 617 which must be taken to have been affirmed by the Privy Council for the same reasons, as Lord Machaughten merely stated that the appeal would be dismissed. In that case a disposition not differing materially from this except in one respect was held bad as infringing the provisions of Section 101. In the present case the vesting is postponed for the lifetime of persons living at the testator's death and a period of twenty-one years whereas under the section the vesting, may only be delayed for such lifetime "" and the minority of some person who shall be in existence at the expiration of that period. "" "" Minority is defined in Section 3 as the status of a "" person who shall not have completed the age of eighteen years."" The present disposition therefore offends, against the section, unless, as held by the learned trial judge, the effect of the Indian Majority Act has been to alter the age of minority referred to in the section and make it twenty-one years. Now all that the Indian Majority Act does is to provide that Every minor of whose person or property or both a guardian, other than a guardian for a suit within the meaning of Chapter XXXI of the CPC has been or shall be appointed or declared by any court of justice before the minor has attained the age of eighteen years, and every minor of whose property the superintendence has been or shall be assumed by any Court of Wards before the minor has attained that age, shall notwithstanding anything contained in the Indian Succession Act (No. 10 of 1865) or in any other enactment be deemed to have attained his majority when he shall have completed the age of twenty-one years and not before. "" Now giving the fullest effect to this section and even reading it as modifying the definitions of minor and minority in Section 3 of the Indian Succession Act, I can see no sufficient grounds for holding that the construction of Section 101 is affected thereby. Section 101 invalidates any disposition by which the vesting "" may be delayed "" beyond the lifetime of a person living at the testator's death and the v minority of some person who shall be in existence at the expiration of that period. Now even under the modified definition of minority, the vesting now in question will be delayed, unless every one of the minors in whose favour the disposition is made

has a guardian appointed or has his property taken under the management of the Court of Wards before he attains the age of eighteen. At the time of the testator's death it was of course possible that such an event might happen, but it was possible not to say probable that it would not. In these circumstances I find it impossible to say that the disposition is not one by which the vesting "may be delayed" beyond the prescribed period. I am therefore unable with great respect to agree with the learned Judge that Section 3 of the Indian Majority Act as amended must be read as re-enacting a fresh age of majority for Section 101 of the Indian Succession Act, and as providing as regards Hindus generally that the vesting may be postponed for lives in being and three years after the minority, of the persons referred to.

10. The result u/s 102, which is in accordance with the rule established in English cases cited in *Hancock v. Watson* (1902) A.C. 14 that the whole disposition in favour of the daughters' children fails. In these circumstances it is unnecessary to consider at any length the further objection u/s 111, a rather unfortunate section which was enacted to give statutory effect to the decision in *Edwards v. Edwards* (1852) 15 Beav 357 which was in part overruled after the passing of the Indian Succession Act by the House of Lords in *Omahoney v. Burdelt* (1874) L.R. 7 H.L. 388 and *Ingrain v. Soutten* (1874) L.R. 7 H.L. 408. I may say that I am not, as at present advised, prepared to accept the contention of the appellants that the present disposition should be regarded as giving a legacy "if a specified uncertain event shall happen" and as mentioning "no time for the occurrence of that event" within the meaning of the section. The construction contended for would avoid dispositions which are recognised as valid in Section 101, and would admittedly make illustration (c) to that section bad law. The present disposition would be perfectly free from objection in England and I am not satisfied that it is invalid in India except by virtue of the more stringent provisions of Section 101 of the Indian Succession Act or the rules of Hindu Law.

11. It only remains to deal with the contention put forward for the first time at the hearing of the appeal by Mr. Venkatrama Sastri for the respondent that the case comes within Section 126 of the Indian Succession Act which provides "Where a testator absolutely bequeaths a fund,

so as to sever it from his own estate, but directs that the mode of enjoyment of it by the legatee shall be restricted so as to secure a specified

benefit for the legatee, if that benefit cannot be obtained for the legatee, the fund belongs to him as if the will had contained no such direction."" The

section is intended to embody what is known as the rule in *Lassence v. Tierney* (1849) 1 Ma. and G. 551 and *Mr. Venkatarama Sastri* for the

respondent and *Mr. Krishnasawmi* for the appellant have taken us through all the cases in which the Court of Chancery has applied or refused to

apply the rule. I shall not attempt to discuss or distinguish them, but shall respectfully follow what was said by *Rigby L.J.* in *re Hancock* (1901) I

Ch. 482. "" I think there is to be gathered from the general line of authority one clear principle that if a gift is absolute in the first instance, and the

provisions that follow are a mere settlement of that gift, then the settlement, if it is effectual, will have operation, reducing what appears to be an

absolute gift to a life estate only. If, however, the settlement for any reason fails, then in so far as it fails, there is no intestacy, but an interest in the

nature of a reversion to the person who is the object of the previous absolute gift."" The rule is explained in the same way by *Page Wood. V.C.* in

Rucker v. Scholefield (1863) 1 H. and M. 36 a case decided in 1862, and illustration (a) to Section 126, which was enacted in 1865, expressly

deals with a gift of the residue to the testator's daughters with a direction that their shares shall be settled upon themselves respectively for life and

be paid to their children after their death. To bring the case within the rule there must be an absolute gift and a settlement of that gift on the donee,

and there may be such a settlement even where there is a gift over on failure of issue of the donee. Thus in the case already cited in *re Hancock*

which was affirmed by the House of Lords in *Hancock v. Watson* (1902) A.C. 14 there was a gift to *Susan Drake*, and the property was settled

on trust to pay the income to her for life and after her death on trust for her children who should attain twenty-five, and then upon trust for the

children of the testator's brother *Charles*. It was held in that case that there was an absolute gift to *Susan Drake* which upon her death passed to

her representatives in consequence of the failure of the settlement to take effect. To ascertain whether there is such an absolute gift the whole Will

must be looked at. As to this *Lord Davey* observed at page 22 ""Of course as *Lord Cottenham* pointed out in *Lassence v. Tierney* (1849) 1 Ma

L.C. 551 if the terms of the gift are ambiguous, you may seek assistance in construing it-in saying whether it is an absolute gift or not--from the other parts of the Will including the language of the engrafted trusts.

12. Applying these tests to the present case we find that the trustees are to stand possessed of the residuary trust funds on trust to apportion them into as many equal parts or shares as there are daughters, and to pay the income of each of such shares to his daughters respectively, and from and after the decease of each of the said daughters to stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for all the children of such daughter who shall attain the age of 21 years in equal shares. Then in the event of one of such daughter dying without issue there is a gift over of the share so appropriated to her in trust for the children of the testator's other daughters.

13. Seeing that the residuary trust funds are thus to be apportioned into as many equal shares as there are daughters and that each daughter is referred to as having had a share appropriated to her, I think the words of the Will are sufficient to show an intention to confer an absolute gift on each of the daughters in the first instance followed by a settlement of each such daughter's share on her for life and after her on all her children attaining 21, with a gift over if this last disposition fails. It has been said that this is a Hindu Will and must be construed as such, but so construing it, I think it shows a clear intention to confer an absolute gift on each daughter and to make a settlement in regard to it. It seems to me exactly the sort of settlement a modern Hindu would be inclined to make upon his daughters.

14. In these circumstances effect must be given to the section which has been made applicable to Hindu Wills in the Presidency towns. The result is that the plaintiffs take no interest in the shares of their mother's sisters, and that the 3rd and 4th defendants would be entitled to inherit the share of their mother Yasodammal but for the compromise they have entered into with their own brothers the 1st and 2nd defendants; that the 5th defendant succeeds to the share of his mother Rajammal; and that if they had appealed the 6th, 7th and 8th defendants would have been entitled to succeed to the share of their mothers-Nilayathakshi Ammal but for the compromise which has been sanctioned with their brothers the 1st and 2nd and 3rd plaintiffs.

15. After the arguments had been closed and judgment reserved, an application was made to us on behalf of the plaintiffs to allow an issue to be raised as to whether the defendants were estopped from contending that their mothers each took more than a life estate on the ground that they had accepted counsel's opinion to that effect and entered into a family arrangement to abide by it. Paragraphs 11 and 12 of the plaint merely state that the testator's widow and daughters had been in enjoyment of the estate and that after the widow's death in 1910 it had been in the possession of the testator's only surviving daughter Nitayathakshi Ammal who after her mother's death is alleged in paragraph 12 to have received and kept all the incomes derived from the estate as the devisee of the income of one third of the properties under the will and as the heir at law to her deceased father the testator. There is no allegation of any family settlement having been arrived at and paragraph 19 merely prays that Court will construe the Will of the testator and declare the rights of the parties thereto. In these circumstances I am of opinion that there would be no sufficient grounds for allowing a fresh issue to be raised even if the affidavit disclosed a stronger case than it does for the existence of such family arrangement. The appeal will be dismissed and costs will be payable out of the estate in the same way as the costs of the suit.

Ramesam, J.

16. This is an appeal against the judgment of Coutts Trotter J. in a suit brought for the construction of the will of one Ratna Mudaliar. The testator died at Madras in 1904 leaving a widow and three daughters and most of the properties affected are situate in Madras. The Will is Exhibit A dated 24-4-1897, is in English and is printed at page 1 of the documents and is also quoted at length in the judgment of my Lord the Chief Justice. It is therefore unnecessary to set it forth fully. The intentions of the testator regarding the residue of his estate after the death of his widow are, apart from legal difficulties, clear enough, and are admitted on all hands. At present it is sufficient to state them generally as that his property should be divided into three parts and each share is to be allotted for the benefit of a daughter, and on their attaining the age, of 21, of her children. The main question is--Whether there are any legal obstacles to the carrying out of his intentions and this depends on various subsidiary questions of law.

17. Before dealing with these, I will briefly narrate the subsequent events up to the date of suit (1918). The widow died in 1910. The first daughter

Yasoda died in 1907, leaving two sons (1st and 2nd defendants) and two daughters (3rd and 4th defendants). Of these, the two daughters and the

elder son were born before the testator's death. The testator's second daughter Rajam died in 1908 leaving an only son (5th defendant) and no

daughters. The 3rd daughter Neelayatakshi died in 1918, leaving three sons the plaintiffs and three daughters (6-8 defendants). None of the

children of the 2nd and 3rd daughters was in existence at the death of the testator and all of them are still minors. Thus, out of the eleven grand

children of the testator, eight of them were not in existence at his death. Throughout the rest of my judgment, I shall refer to these as the eight

younger grand children and to the other three as the three elder grand children.

18. I will now proceed to deal with the various questions of law in their logical order as far as possible.

19. The first question is whether the rule of Hindu Law which was Laid clown in the Tagore Case 9 B.L.R. 177 viz. ""that a person capable of

taking under a Will must be such a person as could take a gift intervivos and therefore, must either in fact or in contemplation of law be in existence

at the death of the testator"" and which has been always recognised as applicable to the Madras Presidency (as in Gana Sambandha v. Velu (1899)

28 Mad. 271 Ramasami v. Glenna (1901) 24 Mad. 448 and by implication in Sivasankara v. Soobrahmania (1908) 31 Mad. 517 has been

abrogated, in the case of Hindu Wills governed by the Hindu Wills Act (XXI of 1970), by S. ILR (1881) C 167 of that act which, by extending, to

such Wills, Sections 100 and 101 of the Indian Succession Act (X of 1865), seems to recognise the validity of bequests to persons unborn at the

death of the testator, apart from those sections) notwithstanding Section 3 of the former Act which seems to aim at keeping up the disabilities of

Hindu testators. That it was so abrogated, was the opinion of Wilson J (afterwards Right Honourable Sir Arthur Wilson) in Alangamonjori v.

Sonamane I.L.R.(1881) C 157. But the opposite view has prevailed (vide the extra judicial opinion of Pontifex J in Gaily Nath v. Chunda Nath

(1882) 8 Cal. 378 Alangamonjori v. Sonamoni ILR (1882) Cal. 637 reversing Wjlson J's decision in Alangamonjori v. Sonamonee I.L.R(1881)

.C 157, *Jairam v. Kuvarbai* ILR 9 Bom. 491 and *Yethirajulu v. Mukund* ILR (1905) Mad. 363 . Mr. Venkatarama Sastri, the learned Vakil who

appeared for the defendants 1, 2 and 5 invited us to reconsider the point, having regard to the doubts expressed by Moore, J in *Yethirajulu v.*

Mukund I.L.R.(1905) . Mad. 363 and the remarks of Subrahmania Aiyar J. in *Subbareddi v. Doraisami* (1906) 16 M.L.J. 461 and to adopt the

view of Wilson J. If one of my slight judicial experience may venture to express an opinion differing from that of that eminent Judge whose great

authority is entitled to the utmost deference and weight, I am inclined to follow the above decisions. The gist of his criticism, at page 163, of the

other view, is that Sections 99, 100 and 101 of the Succession Act remain inoperative.

20. As to this I may observe (1) so far as Section 101 is concerned, to hold that the rule in the Tagore case has not been affected by the Hindu

Wills Act does not necessarily amount to making"" Section 101 inapplicable to a Hindu Will as was supposed by Wilson, J. Cases of bequests to a

class may well be conceived in which, while the bequest to some members of the class is void on the ground that they were not in existence at the

testator's death, the bequest to the whole class including those in existence at the testator's death is void u/s 101 of the Indian Succession Act.

Such a case actually occurred in *Sivasankara Pillai v. Subramania Pillai* ILR (1908) Mad. 517 where at page 521, Sir V. Bhashyam Aiyangar's

argument that Section 101 does not apply was negatived and their Lordships White, C.J. and Sankaran Nair, J. actually applied Sections 101 and

102 to a Hindu Will and held the whole disposition in favour of the grandsons void, though it was clear that the disposition was also void under the

Hindu Law rule so far as such of the testator's grandsons who were unborn at his death were concerned. This case in *S"vasankara Pillai v.*

Subramania Pillai (1908) 31 Mad. 517 was affirmed by their Lordships of the Privy Council in *Subrahtnan a Pillai v. Murugesam Pillai* (1912) 17

C W.N. 183 . Later on, it will be seen that this case itself affords another illustration of the successive application of the Hindu Law rule and

Sections 101 and 102 of the Indian Succession Act.

21. (2) It need not be assumed that the Hindu Law rule will exist for all time. As a matter of fact we now know that Madras Act I of 1914 apart

from the question of ultra vires considered infra (for the Madras Presidency) and India Act XV of 1916 (for the rest of India) has done away with

the rule in the Tagore case and there is free scope for the application of Sections 99, 100 and 101 of the Succession Act and they need not remain

inoperative any more in the case of Hindu Wills.

22. I may mention that, although Lord Moulton seems to leave the point open in *Ranimoni Dasi v. Radha Prasad Mullick* I.L.R.(1914) . Cal., 1007

Lord Macnaughten refers, in *Bhagabathi v. Kali Charan* ILR (1911) Cal. 468 to ""the well-known doctrine of Hindu Law that a gift to an object

not in existence is absolutely void"". The case was from Bengal (where the Hindu Wills Act applies) and went on throughout on the footing that the

gift to the sisterssons (born after the testator's death) was void. There is also the anomaly that a Hindu Will relating to properties outside the

Presidency Town is governed by the Hindu Law rule or not according as he died in Madras or not, if the respondents' contention is accepted.

23. I now pass on to the question whether Madras Act I of 1914 (commonly called Mr. Seshagiri Aiyar's Act) which purports to get rid of the

Hindu Law rule relating to unborn persons, in the Madras Presidency is ultra vires of the local legislature. The first ground of the argument that

legislation of this character is not "" for the peace and good Government "" as required by Sections 42 of 24 and 25 Vict. Ch. 67 has been only

formally raised here and was not elaborately argued. For the reasons given by the learned Judge I agree that there is nothing in this contention. But

a second ground has been addressed before us which was not raised before the learned Judge who had therefore no opportunity of considering it.

But this fact does not preclude the appellant from raising it before us. The argument before us seeks to make the Act ultra vires, only so far as the

Presidency Town of Madras is concerned, and may be stated as follows. The Government of India Act 39 and 40 George III C, 70, Section 2

authorises the establishment at Madras by Royal Charter of a Supreme Court having jurisdiction over the Presidency Town of Madras. The

Charter was issued on 26th December 1800. In Clause 22 of the said Charter, there is a direction that all matters of inheritance and succession

shall be determined, where the parties are gentoos (an archaic term for Hindus) by the laws and usages of gentoos. The High Court of Madras was

constituted by Letters Patent issued under the authority conferred by 24 and 25 Vict. Ch. 104, Section 1 and under S. 5 of the same Act the

Supreme Court was abolished. u/s 9 the High Court was vested with the jurisdiction of the abolished Court. u/s 11 the provisions of the Charter of

the Supreme Court became applicable to the High Court and to the Judges thereof subject to the legislative powers in relation to the matters

aforesaid of the Governor-General of India in Council". Thus the local legislature has no power to modify the provisions of the Charter. The same

result is obtained by Sections 22 and 42 of 24 and 25 Vic. Ch. 67 (The Indian Councils Act 1861) which define respectively the powers of the

Governor-General in Council and of the Governor of Madras in Council. The proviso to Section 42 says that the Governor in Council shall not

have the power of making any laws or regulations which shall in any way affect any of the provisions of the Act or any other Act of Parliament in

force or hereafter to be in force in such Presidency. The enactment by the local legislature of Madras Act I of 1914 would be to affect, so far as

the Presidency Town of Madras is concerned, Section 11 of the High Courts Act (24 and 25 Vict. Ch. 67). The learned vakils for the respondent

attempted to meet this argument in three ways.

(a) u/s 42 of the 24 and 25 Vic. Ch., 67 taken with Section 5 of the amending Act 55 and 56 Vic. Ch., 14 the local legislature may repeal or

amend any law made by the Governor-General in Council, so far as it affects this Presidency and Madras Act I of 1914 only amends Hindu Wills

Act XXI of 1870. The reply to this argument is it does not amend Act XXI of 1870; but, whether it does so or not, it certainly affects Section 11

of the High Courts Act,

(b) u/s 43, Clause 5 of the Indian Councils Act the Local Legislature may, with the sanction of the Governor-General make laws affecting the

religion or religious rights and usage of any class of Her Majesty's subjects in India and the law of Succession is, to Hindus, a religious matter and

this is the reason for the policy underlying Clause 22 of the Charter and similar legislation in 21 George III, Clause 70, Section 17 (for the Supreme

Court of Fort William) and 37 George III, Clause 142, Section 13 (for the Recorder's Court of Madras): He relies on Ilbert's Government of

India page 354. The reply to this is that it is doubtful whether legislation of this

character falls under Clause 5 of Section 43. But assuming that it does fall, Section 43, which is a permissive provision cannot override Section 42. The Section 108 of Sir, C. Ilbert's digest in his "" Government of India "" which has since become Section 112 of the consolidating Act 5 and 6 George v. Ch. 61, is against this contention.

(c) "The laws and usages of the Gentoos" in Clause 22 of the Charter means Hindu Law as it exists at any time and as modified by even the local

legislature. But this assumes that the local legislature can affect the clause in the Charter and thus affect Section 11 of the Act of Parliament. The

fallacy of this argument is patent and it has not been even seriously pressed.

24. Thus I hold that Madras Act I of 1914 is ultra vires of the local legislature in so far as the Presidency Town is concerned. The result is that the

bequest over to the eight younger grandchildren of the testator fails. The bequest to the three elder grand children however, remains unaffected.

25. The next contention raised by Mr. Krishnaswami Aiyar, the learned vakil for the appellant who argued this portion of the case relates to the

construction of Section 2 of Mr. Seshagiri Aiyar's Act. He contends that the Act ought not to be construed so as to apply retrospectively to wills

mads before the Act, even for the purpose of validating dispositions in such wills that may become vested after the act.

26. In the view I have taken that Mr Seshagiri Aiyar's Act is ultra vires of the local Legislature in so far as the Presidency Town of Madras is

concerned, it is unnecessary to consider this question which may not be of much importance hereafter.

27. The next grounds (urged by the learned Advoeate-Gener-al), attacking the bequests over to the grand childern are two in number and are

based on,

(1) Sections 101 and 102 of the Indian Succession Act and.

(2) Section 111 of the Indian Succession Act.

28. I will first take up the contention based on sections 101 and 102 of the Succession Act. Section 101 enacts what is generally known as the rule

against perpetuity and Section 102 enacts for India the rule in Leake v. Robinson, (1817) 2 Mac. 363. It is conceded on all hands that the words "

may be delayed" in the section refer to possibility and not to the actual events that may happen. 3c Mad., 517 . The difference between the rival

contentions of the parties turns on the construction of the word "minority" which has been defined in the Succession Act to mean the status of a

person who shall not have completed the age of eighteen years (Section 3). u/s 6 of the Hindu Wills Act this definition controls the meaning of the

term "minority" in Section 101 even when the section is applied to Hindu Wills.

29. But it is contended for the respondent that, as the Indian Majority Act (IX of 1875) Section 3 makes it possible that certain individuals may

attain their majority at the age of 21 and not at the age of 18, the word "minority" in Section 101 of the Succession Act should be construed as the

age of 21. Now it may be conceded, that, having regard to the words "not withstanding anything contained in the Indian succession Act (No X of

1865) or in any other enactment "in Section 3 of Act IX of 1875, that the words "beyond the life-time of one or more persons living at the

testator's decease, and the minority of some person, etc.," may, in the cases of certain persons mean-when they attain the age of 21. But this is

only a possibility. The fact that in certain events some persons may attain majority at the age of 21 instead of at the age of 18 cannot lead to a

construction of the word "minority" in Section 103 of the Succession Act as equivalent to the "age of 21." In the present case all the eight younger

grand-children of the testator are minors and it is conceded that in the case of seven of them, neither guardians have been appointed nor the Court

of Wards have assumed superintendence of their properties so as to alter the age when they can attain majority, from 18 to 21. I am of opinion

that there is a great possibility that the vesting of the bequest to the eight younger grand children under the terms of the will may be delayed beyond

their minority and that being so the bequest to them is void on this ground also. If so, Section 102 of the Indian Succession Act makes the bequest

over, to all the eleven grand children including the three elder ones, void. Mr. Radhakrishnayya, the learned vakil who appeared for the defendants

3 and 4 contended that S 101 of the Succession Act cannot be applied to this will so as to attract the operation of Section 102 in this way, as the

bequest of the eight younger grand children has already been found to be void under the Hindu Law rule. The fact that the bequest was found to be

void for another reason is not a ground for refusing to apply Section 101 of the Succession Act and to hold that it is void also under this section.

This very argument was urged by Sir. V. Bashyam Iyengar In *Sivasankara Pillai v. Subramania Pillai* (1908) I.L.E. 31. Mad. 517 which was

rejected by the learned Judges at page 521 as I have already mentioned in the earlier part of the judgment. Mr. Radhakrishnayya also contended

that the bequest over may be construed to be a bequest to the three elder grand children only and he relied on the case of *Bhagabate Bartnanya v.*

Kalicharan (1911) I.L.B. 38 Cal. 468 and on *Dias v. De Dvera* (1879) L.R. 5 A.C. 123 cited therein. In view of Lord Macnaughten's remarks at

page 472 "" But however this may be, it has been assumed throughout that the testator intended children born after his death to be included in the

gift. And there Lordships propose to deal with the case on that assumption,""-I do not think the case supports the contention. The conclusion in that

case in favour of those in existence at the testator's death was reached on the ground that the failure of the bequest over to the others was due only

to the Hindu Law rule and does not attract the application of the rule in *Leake v. Robinson* (1817) 2 Mer. 363 (Section 102 of the Succession

Act). There was no suggestion, in that case, of the application of Section 100 or Section 101 of the Succession Act. This contention therefore fails.

I must therefore hold and I regret my having to differ from Courts Trotter, J., on this point, that the bequest over to all the testator's grandchildren

fails as it offends the rule against perpetuity.

30. The next contention of the learned Advocate General is based on Section 111 of the Succession Act. I may premise by saying that the

discussion of this contention is academic and does not arise unless a view of Section 101 different from mine ultimately prevails. As the point has

however been fully argued I shall state my conclusions on the applicability of the section. The section is based, as has been pointed out by their

Lordships of the Privy Council in *Bhupendra Krishna Chose v. Amarendra Nath Dey* (1915) I.L.B. Cal. 43. on *Edwards v. Edwards* (1852) 15

Beav. 861. This last case was afterwards partly overruled by the House of Lords in *Omahony v. Burdelt* (1874) L.R. 7 H.L. 388 which was

commented on by Lord Shaw of Dumfermline in *Chum Lal Parvati Shanker v. Bai Sambath* (1874) L.R. 7 H.L. 388 ""as one which emerged

through a thicket of technical decisions to a ground of plain and pre-eminent good sense"". But in the circumstances of this case, unlike, *Ghunni Lal*

Parvati Shanker v. Bai Samarlh ILR (1914) 38 Bom, 399 which was a case arising in Surat and was not governed by the Hindu Wills Act, the

learned Advocate General is within his rights in asking us to abandon the "ground of plain and pre-eminent good sense" and to apply Section 111

of the Succession Act. It is conceded on both sides that at least so far as the eight younger grand-children are concerned, the attaining of the age

of 21, is a specified uncertain event within the meaning of this section. The dispute centred round the meaning of the phrase "the period when the

fund bequeathed is payable or distributable." Now it will be noticed that in each of the wills in the five illustrations to the section all of which are

based on the rules stated by Romilly, M.R. in *Edwards v. Edwards* the last legacy is of an alternative character substituting in certain events, a

different legatee in the place of the legatee in the immediately preceding bequest. With reference to this fact the learned vakil for the respondent

contended that the section must be limited to legacies which may be termed substitutional. He also relied on the remarks of Romilly, M.R. in

Edwards v. Edwards, where he says "The principle which regulates such cases is to be found in the often expressed decisions of the Court to

avoid a contention so inconvenient as one which must suspend the absolute vesting of the subject of the gift during the whole life of the legatee or

devisee, etc.," on the remarks of Lord Selborne in *O' Mahony v. Burdett* (1874) L.R. 7 H L 388, where the noble Lord says "It is manifest that

when a testator as in *Golland v. Leonard* 1 Sw. 161, has directed payment or distribution to be made at a certain time so that a trust intended by

him to continue until that time shall then come to an end and has proceeded to substitute other devisees or legatees through the medium of the same

trustees etc...." and on the language of the same noble Lord in *Ingram v. Sullen* (1874) L.R. 7 H.L. 408, where he refers to "alternative divesting

clauses." He also contends that in case the section is applicable, "The period when the fund bequeathed is payable or distributable" is, for each

daughter's 1/3 rd either when the eldest or the youngest grandchild attains the age of 21 (Vide Lindley, L.J. in *Holford v. Holford* (1894) 3 Ch. 30

or if the fund is to be taken distributively, for each grandchild's fraction, when he or she attains the age of 21. In support of this he relies on

illustration (c) to Section 101 of the Act. The appellant on the other hand, objects to the reference to the English Cases for throwing light on the

section. He relies on Lord Macnaughten's remarks in *Norendranath Sircar v. Kamalahasini* I.L.R.(1896) Cal. 563 relying on *Bank of England v.*

Vagliano (1891) A.C. 197. He contends that the period of distribution is, in the case of each daughter's 1/3rd, her death. The case of *Manohar v.*

Kasissar (1897) 3 C.W.N. 478 is like the case in illustration (c) to Section 111 and does not help him.

31. Now I am willing to adopt the mode of construction contended for by the appellant but I come to the conclusion sought for by the respondent.

The period of payment in the section is in my opinion the period when the last payment (which is not of an alternative character) is directed in the

will. Before the appellant can say that the daughter's death is the period of payment or distribution contemplated in the section, he must point out a

direction in the Will to pay on the daughter's death. There is none such in this Will, as there is in illustrations (a) and (b) to the section, where there

is a bequest to B on the death of A, I may point out that this construction of Section 111 leads to (1) in the case of substitutional legacies, as in the

illustrations to the section, the results arrived at in *Edwards v. Edwards* (1852) 15 Beav. 357—results intended by the Legislature, however

undesirable they may be and (2) in cases where there are no substitutional legacies—to a reading which is somewhat tautological but which, on that

ground is not absurd but on the other hand, leads us to the ground of preeminent good sense. My conclusion is supported by the illustration (c) to

Section 101 where the "time for the division of the fund" is said to arrive at the latest at the expiration of 18 years from the death of B. I may add

that that the period of payment or distribution may be the time when a person attains a certain age is also shown by illustration (c) to Section 111

and 3 C.W. N. 478.

32. Even assuming that Section 111 should be construed in the way desired by the appellant, I am not satisfied that, so far as the three elder

grandchildren are concerned, the time of their attaining the age of 21, can be said to be a specified uncertain event within the meaning of the

section. The uncertainty or certainty of an event, as contemplated by the section is with reference to the time of its happening and not, with

reference to the question whether it will happen at all. As Romilly, M. R. points out in *Edwards v. Edwards* (1852) 15 Beav 357 death is the most

certain of all things and can only be made contingent by reference to its taking place before a particular period. That the uncertainty (?) is with reference to time is shown by the words "" and no time is mentioned in the will for the occurrence of that event."" It may be one is uncertain, how long the three elder grandchildren will live but if they live long enough, the time when each of them attains the age of 21, was known with absolute certainty at the date of the testator's death. The idea of mentioning a time for the occurrence of an event, when one knows with absolute certainty the time of its happening," provided it happens at all, is incongruous. On this ground, I hold that, on any construction, Section 111 cannot affect the legacies to the three elder grandchildren.

33. The last contention to be noted in the case was raised by the respondent and was based on Section 126 of the Succession Act. This section

and the next S. (127) which may be described as supplementing it together enact in India, what is called the rule in *Lassence v. Tierney* (1849) 1

Mac. &G. 551, the former section laying down what may be called the positive branch of it and the latter section the negative branch. Each side

diligently collected all the English cases in which a conclusion similar to the one sought was reached and relied on them in support of the present

contention. Thus the respondent relied on *Whittel v. Dudin* (1820) 2 J. & W. 279 , *Hulme v. Hulme* (1857) 9 Sin. Rem. 644 *Ring v. Hardwik*

(1840) 2 Beav. 352 *Gerard v. Butter* (1857) 20 Beva. 154, *Kellett v. Kellett* (1861) 3 H.L. 260 *Davles v. Merceron* (1876) 4 Ch. D. 182,

Cooke v. Cooke (1837) 38 Ch. D. 202 *Hancock v. Walson* (1901) 1 Ch. 482 , affirmed by the House of Lords in (1902) A.C. 14 *Rooper v.*

Williams (1910) 1 Ch. 329 , *Fair v. Convell* (1915) 1 Ch. 867, *Hunter v. Bush* (1915) 1 Ch. 867, *Moryoseph v. Moryoseph* (1920) 2 Ch. 33 ,

Administrator General of Bengal v. Apcar I.L.R.(1878) . Cal. 553 *Haliburton v. Administrator General of Bengal* I.L.R.(1394) Cal. 188 . The

appellant relied on the following cases, *Lassence v. Tierney* (1819) 1 Mac. & Govr. 551, *Scavin v. Watson* (1847) 10 Beav. 200 *Kay v. Winder*

(1819) 12 Boav. 610, *Whitehead v. Bennett* (1853) 22 L.J. Ch.p. 1020, *Rucker v. Scholfeld* (1812) H.I and M. 36 , *Savage v. Tyers* (1872) 7

Ch. A. 356 , *Harris v. Newton* (1877) 46 L.J. Ch. 268 *Richards Re: Williams v. Gorvin* (1833) 50 L.T. 22 *In re Houghton* (1881) 53 L.J. Ch.

1018 and also on Jarman Wills pp. 11 83-4 and 1459.

34. I think the decisions in most of the above cases are consistent but there is a conflict (?) in some of the dicta very often only apparent. Instead of

attempting "the futile task of reconciling all the observations and reasonings in the above cases I shall content myself with a few observations.

(When I say the rule I mean the positive branch of the rule).

(a) Where there is a distinct positive gift of an absolute estate in favour of the prior devisee in terms and the intention is express, the rule certainly applies.

(b) Where the will in terms gives clearly a life estate only, it does not apply e.g., *Scawin v. Watson* (1847) 10 Beav. 200

(c) The difficulty arises only where the words of bequest in favour of the prior devisee are ambiguous and are apparently consistent with either an

absolute estate or a life estate, but have to be construed as conferring the life estate with reference to the settlements that follow if and when they

are valid (Per Lord Gottenham in *Lassence v. Tierney* (1819) 1 Mac. & Govr. 551.) In such a case if the words of bequest can be construed,

apart from the settlements that follow, as conferring an absolute estate and the latter clauses relating to the settlement are used, to cut down that

absolute estate into a life estate for the purpose of giving effect to them, then the rule applies (See per Rigby, L.J. in 1901 ICh. D. 491 . In all such

cases other circumstances in the will are taken hold of as a guide :-e. g.

(1) The fact that the prior devisee shall have the income only for his life does not prevent the application of the rule. Lord Davey in *Hancock v.*

Watson. (1902) A.C. 14 at p. 28

(2) The fact that there is a connected series of settlements following the first devisee may be a ground for not applying the rule Page-Wood V.C. in

Fucker v. Scholefield (1882) 1 H. & M. p. 36 But I should think that where there are plain words conferring an absolute estate earlier, as was

conceded by Pagewood V.C. in that case at page 41 where he says "" If these words stood alone they would suffice to vest the absolute estate in

the five daughters"", the series of settlements ought not to matter for they only "" cut down"" the absolute state to use the phrase of Rigby, L.J. in

Hancock v. Watson and Malins V.C. in *Davis v. Merceron* 187 (5) 4 Ch. B. 132 .

(3) The mere fact that there is a gift over to some person other than a child of the first devisee does not prevent the application of the rule

(Hancock v. Watson, where Charles was unconnected with Susan.)

(4) Where the gifts over exhaust all possible contingencies that may furnish a reason for not applying the rule (per Lord Gottenham in Lassence v.

Tierney (1849) 1 M. & G. 55 and if they do not, the rule may be applied Kellett v. Kellett (1868) 3 H.L. 16 per Lord Cairns.

In the present case it is admitted that no provision is made in the will for the contingency when the daughter's children do not reach the age of 21.

(5). Though the fact that the medium of trust was employed by the testator was used as a reason for not applying the rule (In re-Houghton) it is

now settled that the fact does not matter (see Hunter v. Bush (1918) 2 Ch. p. 63 per Younger, J).

(6). The intention to sever completely from the testator's estate is an important reason for applying the rule (see Sargant, J. in Fair v. Convell

(1915) 1 Ch. 867 and Lord Davey in, Hancock v. Watson (1902) A.C. 14 The language of Section 126 of the act as contrasted with Section 125

is significant in this connection.

(7). I concede there must be some dispositive words in favour of the prior devisee. The words in Ring v. Hardwick (1840) 2 Beav 352 are "" make

a division between all and every of my four children."" I think the word ""apportion"" in the present will is a stronger word than "" make a division

even though not followed by the words ""between or to my daughter "" as ""apportion "" involves the idea of allotting a portion to certain persons.

8. The fact that the share allotted to the prior devisee is referred to in the later settlement as his or her share is also a good ground for applying the

rule, (Ring v. Hardwick (1840) 2 Beav. 352) In the present case the one-third apportioned to the daughter was referred to lower down in three

places as the share appropriated to the daughter). Pagewood V. C. concedes in Ruckey v. Scholfield (1832) 1 H. & M. 36 that this word

appropriate"" confers an absolute estate.

9. An express statement that the subject matter should, on failure of the bequest over, come back to the residue of the testator's estate is a reason

for not applying the rule (per Lord Hatherly in Savage v. Tyres (1872) 7 Ch. A. 356 ; but if the provision is meaningless it can be disregarded and

the rule ought to be applied *Rooper v. Williams* (1910) 1 Ch. 320 per Joyce, J.

10. In *Harris v. Newton* (1877) 46 L.J. Ch. 263 (a decision of Malins V.C.) there was no gift to the daughter in case she was not married.

11. In *Whitehead v. Rennet* (1853) 22 L.J. Ch, 1020 (decided by Kinderly V.C.) though there was an investment for the benefit of the daughter

the estate of the daughter has necessarily to be construed as a life estate as the gift over to the daughter's children as to a moiety was valid and

only that to the grandchildren failed for remoteness. The same remarks apply to *Williams v. Gorvin* (1883) 50 L.T. 22 (Pearson, J.) explained by

Romer, J. in *Kay v. Dewhirst* (1898) 1 Ch. 95 and *Kay v. Winden* (1849) 12 Beav 610.

12. The whole provisions of the will may, be taken together (per Lord Cottenham in *Lassence v. Tierney* (1849) 1 Mac & G. 560 and Lord Davy

in *Hancock v. Watson* (1902) A.C. 11. Applying those tests, I am unable to distinguish this case from *Hancock v. Watson* (1901) 1 Ch. 491.

35. The appellant finally contended that this is a Hindu's will and that he could not have intended to give an absolute estate to the daughters and he

relied on (1874) L.R. 2 I.A. 7 (Privy Council) *Radha Prasad Mallick v. Raw Maw, Dassi* (1908) ILR 35 C. 896 and *Narasimma v. Parthasarathy*

I.L.R.(1903), M. 105 . Apart from the fact that the notions of Hindus with respect to estates to be conferred on Hindu females especially

daughters have undergone considerable change in this Presidency during the last 40 years and this court has in several cases, construed gifts to

females simply as absolute estates, I think that, in this particular will there are enough indications in the testator's mind that the daughters in the first

instance or daughter's daughters (if the gifts over are valid) should be given absolute estates. The daughter's daughters and the daughter's sons are

treated alike and all are referred to generally as daughter's children (see 31 Mad. 179). The fact that the testator gives to daughter's children (not

sons only,) per stirpes (not per capita) also shows this. The result will be that each daughter's one-third passed to her heirs-that is, in the case of

the 1st and 3rd daughters of testator to their daughters who get the limited estate of a Hindu female in inherited property and in the case of the 2nd

daughter to her son 5th defendant absolutely. But it may be observed that so far as ""Yesoda's "" one-third"" is concerned, the sons and daughters

have entered into a compromise and we sanctioned the compromise. A similar arrangement has also been made with respect to the third daughter's share between her sons (plaintiffs) and her daughters (6th to 5th defendants) and we have sanctioned this compromise also. In fact the main object of this litigation is to cut down the 5th defendant's one-third share to one sixth which is all that he will get if appellant's contention succeeds as daughter's sons take, by inheritance per capita and not per stirpes. I agree with the learned Chief Justice that the application made by the Advocate General after the close of the case for sending this back for enquiry on the ground that the daughters having taken legal opinion enjoyed only life estates by mutual agreement is an after thought and ought not to be allowed. The appeal will be dismissed. I agree with the order as to costs in the judgment of my Lord the Chief Justice.