

(1934) 03 MAD CK 0007
In the Madras High Court

V. Kuppusami Pillai

APPELLANT

Vs

Jayalakshmi Ammal

RESPONDENT

Date of Decision : 15-03-1934

Acts Referred:

Succession Act, 1865 — Section 100

Citation : 154 Ind. Cas. 537 : (1934) 40 LW 570

Hon'ble Judges : Beasley, C.J;Varada Chariar, J

Bench : Division Bench

Judgement

1. Plaintiff sues for a declaration that certain alienations made by her deceased husband are inoperative beyond his life-time. She contends that

under the will of her father-in-law (Ex. A, dated August 28, 1901) her husband was given only a life-interest in the properties in question, that she

was given a life-interest by way of remainder after her husband's death, with a farther gift by way of remainder, of after her death, to certain other

persons. In this appeal we are concerned only with one of the husband's transactions, vis., a mortgage dated May 5, 1921, in favour of the 1st

defendant. The 1st defendant, who is the appellant, contends that as the plaintiff was not in existence at the testator's death and as the gift under

Ex. A in her favour is not of the full interest in remainder, that disposition is void u/s 100 of the Indian Succession Act, 1865, (corresponding to

Section 113 of the Succession Act of 1925) and that the plaintiff, therefore, cannot maintain the suit. The learned Judge on the . original side held

that as a result of Act VIII of 1921, the disposition in favour of the plaintiff was valid and he has accordingly given her a declaration in terms of her

prayer in the plaint so far as the mortgage in favour of the 1st defendant is concerned.

2. The judgment under appeal proceeds on the footing that the disposition would have been void under the Succession Act, but it holds that this

result is

prevented by the Act of 1921, because that saves bequests from being defeated by the fact of non-existence at the time of death.

3. This line of argument was not pressed on us by the learned Counsel for the respondent, apparently because it does not give sufficient effect to

the word "only" which is deliberately used in Section 3 of Madras Act I of 1311 and India Act VIII of 1921. As is well known, the object of that

legislation was to do away with the rule in the Ta-gore case [Jotendromohan Tagore v. Ganendromohan Tagore 18 W.R. 359 : 9 B.L.R. 377 ; I

A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 82 and care was accordingly taken to indicate by the word "only" that this was all that was intended. It was

not its purpose to do away with other statutory provisions, if and so far as such provisions governed Hindu wills. But as the Act was to apply to

the whole of the Presidency and there were no statutory restrictions governing Hindu wills outside the Presidency Town, it was considered

expedient to embody in the Act itself the rule against perpetuities. The effect of this legislation will be dealt with more fully later on. It may,

however, be observed at this stage, that Section 100 of the Succession Act applies to several communities who are not governed by any rule

prohibiting gifts in favour of unborn persons merely on the ground of their non-existence and the removal of this prohibition in the case of Hindus

can only put them on the same footing with those communities (so far as that section applied to Hindus) and not preclude or defeat the operation of

Section 100.

4. It was suggested before us on behalf of the respondent that even under the law as it stood prior to 1914 the provision in favour of the son's wife

would not offend the rule laid down in the Tagore case, because their Lordships of the Privy Council have in that case made a reservation in favour

of family settlements. It is unnecessary to deal with this question as we propose to rest our decision on the provisions of Section 100 of the

Succession Act of 1865, As observed in Sivasankara v. Subramanya 31 M 517 the combined effect of Sections 2 and 3 of the Hindu Wills Act is

that a disposition permitted by the Succession Act may be invalidated, but a

disposition invalid under the Succession Act cannot be validated by any rule of Hindu Law. (See also Soundarrajan v. Natarajan 62 Ind Cas. 987 : 44 M. 446 470 : 40 M.L.J. 354 : 29 M.L.T. 210 : (1924)

M.W.N. 210 : 13 L.W. 662 bottom and 462 Page of 44 M.--[Ed] top, 469* and 470.

5. In the arguments before us Mr. Narasimha Iyer (the learned Counsel for the respondent) contended that notwithstanding Section 2 of the Hindu

Wills Act, Section 100 of the Succession Act of 1865 must not be held to invalidate the bequest in question, if it would be otherwise valid under

the Hindu Law and he relied on the decision in Dinesh Chandra Roy Chowdhury v. Biraj Kaminia Das 11 Ind. Cas. 67 : 39 C 87 : 14 C.L.J. 20 :

15 C.W.N. 945 in support of this contention. If this contention were correct, he was unable to suggest how any effect could be given to the

express declaration in Section 2 of the Hindu Wills Act making Section 100 of the Succession Act applicable to Hindu wills of the class therein

described. As pointed out in Radha Prasad v. Ranimoni 8 Ind. Cas 1061 : 33 C 183 : 15 C.W.N. 113 : 13 Cri. L.J. 185 the legal effect of that

declaration is to write that section into the Hindu Wills Act.

6. The argument based upon Dinesh Chandra Roy Chowdhury v. Biraj Kaminia Das 11 Ind. Cas. 67 : 39 C 87 : 14 C.L.J. 20 : 15 C.W.N. 945 is

not really supported by that decision. The disposition there in question had been made by a testator to the would-be wife of his son. The son

married only after the testator's death, but the girl he so married had in fact been born before the testator's death. The disposition was, therefore,

not in favour of an unborn person [in which case it might be invalid according to the decision in Radha Prasad v. Ranimoni 11 Ind. Cas. 67 : 39 C

87 : 14 C.L.J. 20 : 15 C.W.N. 945 and the only objection raised was that the lady did not answer the description of "son's wife" at the date of the

testator's death. In those, circumstances, the transfer would be void under the first part of Section 99 of the Succession Act, but it would be valid

under the exception to that section, if the relationship of daughter-in-law could be held to fall within the meaning of the word "kindred". On behalf

of the party who attacked the validity of the disposition, it was contended that the exception to Section 99 cannot be availed of in that case, as the

result of that course would be to enable a Hindu testator to make a disposition

which he could not have made, before 1870, and this it was contended, was opposed, to Section 3 of the Hindu Wills Act. The judgment of Mukerjee, J., in that case, therefore, deals mainly with Section 3 of the Act and not with Section 2. The appellant's argument was repelled on two grounds: (1) that the disposition then in question was valid even under the Hindu Law as held in *Nafar Chandra v. Ratnammal* 7 Ind. Pas. 921 15 C.W.N. 66 : 13 C.L.J. 85 and that there was accordingly no contravention of Section 3 of the Hindu Wills Act, (2) that if Section 99 of the Succession Act should be held applicable, it must apply as a whole (i. e.) including the exception and that the disposition was, therefore, valid under the exception to Section 99. This being the effect of the judgment, it does not seem to us right to attach undue significance to the guarded observation of Mukerjee, J., at the bottom of p. 95* that possibly the true intention was to make neither the rule nor the exception applicable to Hindus, or to the expression (on p. 94 Pages of 39 C. [Ed.]) of an "inclination" in favour of the view that the true intention of the Legislature was to leave matters where they were before the enactment of the Hindu Wills Act.

7. As pointed out already, this view fails to give effect to Section 2 of the Hindu Wills Act and is opposed to the decision of this Court in *Sivasankara v. Subramanya* 31 M 517 .

8. Mr. Narasimha Iyer advanced another contention based on the fact that both in Madras Act 1 of 1914 and in India Act VIII of 1921 Section 100 of the Succession Act has not been reproduced while Section 101 (enacting the rule against perpetuities) has been reproduced. One may go further and point out that in the statement of objects and reasons accompanying the Bill which became Madras Act I of 1914, it was expressly stated that it was thought undesirable to introduce the highly artificial exceptions contained in Section 13 of the Transfer of Property Act and the corresponding revisions in Section 100 of the Succession Act.

9. In dealing with the argument, it may be convenient to refer at the outset to the history of certain legislative provisions.

10. It has long been the opinion of many eminent Hindu lawyers that the

indefinite tying up of property by way of gift to or for the benefit of unborn generations was quite in conformity with Indian ideas and systems of law. Muhammadan lawyers, too, held "the same opinion as will be evident from the controversy that culminated in the passing of the Wakf Validating Act of 1913. The legislature was accordingly persuaded in 1885, to exclude Hindus, Muhammadans and Budhists from the operation of the Succession Act. For the same reason, it was declared, even as late as 1882, that nothing in the Second Chapter of the Transfer of Property Act shall be deemed to affect any rule of Hindu, Muhammadan or Budhist Law. By 1870, however, the legislature thought fit to enact that in certain parts of India (including the Presidency Towns) Hindu Wills should be subject to the operation of certain sections of the Succession Act. But as it was still a matter of controversy what exactly were the limits under the Hindu Law of a person's powers of disposition, a limited saving clause was inserted as Section 3 of the Hindu Wills Act, When the decision in the Tagore case 18 W.R. 359 : 9 B.L.R. 377; I A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 82 (P.C.) was reaffirmed by their Lordships in successive pronouncements, it turned out that the power of disposition permitted to Hindus was considerably narrower than under the Succession Act and the Transfer of Property Act. It was accordingly considered necessary to resort to legislation of getting rid of the decision in the Tagore case 18 W.R. 359 : 9 B.L.R. 377 ; I A. Sup. Vol. 47 : 2 Suther 692 : 3 Sar. 82. Madras Act I of 1914 was the first fruit of this movement and India Act XV of 1916 introduced similar provisions for the benefit of the other provinces in British India.

11. It may be noticed, in passing, that while in the statement of objects and reasons accompanying the Bill which became the India Act XI of 1916, its effect was stated to be to enable Hindus ""to make dispositions of their property to the same extent and subject to the same limitations as other communities in British India,"" the Madras Bill was described by its framers as intended to carry out the wishes of a testator ""subject to the very same limitations which exist under the English Law."" It thus happened that in the India Bill both Section 100 and Section 101 of the Succession Act were reproduced and in the final Act these two sections were specifically referred to, whereas, in the Madras Bill and in Madras Act I of 1914,

only Section 101 was adopted. When Madras Act I of 1914 was declared ultra vires of the Provincial legislatures so far as it applied to the

Presidency town, the Indian Legislature solved the difficulty by enacting Act VIII of 1921. But, as Mr. Narasimha Iyer points out, the Indian

Legislature when dealing with this matter thought fit to adopt the language of the Madras Act instead of following that of Act XV of 1916.

12. In determining the effect of the omission to reproduce Section 100 of the Succession Act in Madras Act I of 1914, it must be remembered that

Act I of 1914 was applicable to the whole of the Presidency whereas Section 100 of the Succession Act had been declared by the Hindu Wills

Act to be applicable only to wills executed in the City of Madras or relating to immovable property in the City. And as the extract already quoted

from the statements of objects and reasons will show, the sponsors of the measure were not prepared to make Section 100 applicable to the

whole of the Presidency. This is very different from enacting that Section 100 shall not continue to apply even to cases to which it had already been

declared applicable by the Hindu Wills Act. This certainly is not the effect of the Madras Act. It was argued, with some justification, that as the

India Act VIII of 1921 dealt only with the law applicable to the City of Madras, the omission of Section 100 even from that Act has greater

significance. But Mr. Doraiswami Iyer (the learned Counsel for the appellant) points out that the scope and extent of application of Act VIII of

1921 are not even as to the City of Madras identical with those stated in the Hindu Wills Act because, the former relates to wills executed by

persons domiciled in Madras and is not like the latter, limited to wills executed in the city or relating to immovable property in the city. Even apart

from this difference, the frame of Act VI of 1921 shows that, the only purpose of that legislation was to remove the objection of ultra vires in

respect of the Madras Act, the Indian Legislature merely reproduced the language of the Madras Act. Whatever may be the reason for the

omission of Section 100 from Act VIII of 1921, it is not possible to hold that merely by reason of this omission, the express declaration in a. 2 of

the Hindu Wills Act making Section 100 applicable to Hindu Wills in the City of Madras must be deemed to have been taken away. This will be

carrying the doctrine of repeal by implication far beyond its legitimate limits.

13. Though it may not be permissible to refer to later legislation to control the effect of a clear enactment in an earlier statute, it is in the circumstances above explained, not without significance that when the attention of the legislature was pointedly directed to this subject in 1929, it made the position clearer by Act XXI of 1929, Section 13 of which subjects the power of disposition given by Act VIII of 1921 to the limitations contained in Section 113 of the Succession Act of 1925 (corresponding to Section 100 of the Succession Act of 1865). It is true that this Amending Act (by Section 11) extends Section 113 of the Succession Act even to dispositions outside the City of Madras and to this extent makes a new provision. But the importance of Sections 11 and 13 of the Act of 1929 lies in this, that they indicate that the legislature did not consider it inappropriate to apply Section 113 to Hindu wills. This is also clear from the fact that by Section 3 of Act XV of 1916 and by Section 57 of the Succession Act of 1925 this provision has been made applicable to Hindu wills. There is accordingly no reason for assuming that Act VIII of 1921 intended to repeal by implication so much of the Hindu Wills Act as applied the corresponding provision in the Succession Act of 1865 to Hindu Wills in the City of Madras.

14. We are, therefore, of opinion that the disposition in favour of the plaintiff under Ex. A is void u/s 100 of the Succession Act of 1865 and this invalidity is not prevented or cured by Act VIII of 1921. The appeal must, therefore, be allowed and the suit dismissed even as against the appellant. The appellant will have the costs of this appeal but we do not propose to interfere with the order as to costs of the trial Court.