

(1934) 03 MAD CK 0025
In the Madras High Court

V. Kuppuswami Pillai

APPELLANT

Vs

Jayalakshmi Ammal

RESPONDENT

Date of Decision : 15-03-1934

Acts Referred:

Citation : AIR 1934 Mad 705 : (1935) ILR (Mad) 15

Hon'ble Judges : Varadachariar, J

Bench : Division Bench

Judgement

Varadachariar, J.—Plaintiff sues for a declaration that certain alienations made by her deceased husband are in operative beyond his lifetime.

She contends that under the will of her father, in-law, (Ex. A, dated 28th August 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 further gift by way of remainder, after her

death to certain other persons. In this appeal we are concerned only with one of the husband's transactions, viz., a mortgage dated 5th May 1921,

in favour of defendant 1. Defendant 1, 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, Succession Act of 1865 (corresponding to Section

113, 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 8 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 defendant 1 is concerned. 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.

2. 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 Madras Act 1 of 1914 and India Act 8 of 1921. As is well known, the object of that legislation was to do away with the rule in *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) I.A. Sup. Vol. 47, 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, in and so far as such provisions governed Hindu wills. But as the act was to apply to the whole of the Presidency and there was no statutory restriction governing the 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, 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 applies to Hindus) and not preclude or defeat the operation of Section 100. 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 *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) I.A. Sup. Vol. 47 because their Lordships of the Privy Council have in that case made a reservation in favour of family settlements.

3. It is unnecessary to deal with this question as we propose to rest our decision on the provisions of Section 100, Succession Act of 1865. As observed in *Sivasankara v. Subramanya* (1908) 31 Mad. 517 the combined effect of Sections 2 and 3, 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 *Soundararajan v. Natarajan* 1921 Mad. 258 at pp. 461, 462, 469

and 470, In the arguments before us, Mr. Narasimha Iyer, the learned Counsel for the respondent contended that notwithstanding Section 2, Hindu Wills Act, Section 100, 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 v. Biraj Kaminia Dasse* (1912) 39 Cal. 87, 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, Hindu Wills Act making Section 100, Succession Act, applicable to Hindu Wills of the class therein described. As pointed out in *Radha Prasad v. Ranimoni* (1911) 38 Cal 188, the legal effect of that declaration is to write that section into the Hindu Wills Act.

4. The argument based upon *Dinesh Chandra Roy v. Biraj Kaminia Dasse* (1912) 39 Cal. 87 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* (1911) 38 Cal. 188, 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 these circumstances, the transfer would be void under the first part of Section 99, Succession Act, but it would be valid under the exception to that section, if the relationship of the 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, 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 *Natarchandra v. Ratnamala* (1911) 7 I.C. 920, and that there was accordingly no contravention of Section 3, Hindu Wills Act; (2) that if Section

99, Succession Act should be held applicable, it must apply as a whole (i.e.), exception, and that the disposition was therefore valid un- including 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) 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.

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

Subramanya (1908) 31 Mad. 517. Mr. Narasimha Ayyar advanced another contention based on the fact that both in Madras Act 1 of 1914 and

in (India) Act 8 of 1921, Section 100, 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 1 of 1911, it was expressly stated that it was

thought undesirable to introduce the highly artificial exceptions contained in Section 13, T.P. Act, and the corresponding provisions in Section 100,

Succession Act.

6. In dealing with this argument, it may be convenient to refer at the outset to the history of certain legislative provisions. 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. Mahomedan 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 1865 to exclude Hindus,

Mahomedans and Buddhists from the operation of the Succession Act. For the same reason, it was declared, even as late as 1882, that nothing in

Ch. 2 T.P. Act, shall be deemed to affect any rule of Hindu, Mahomedan or Buddhist 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 Hindu Wills Act. "When the decision in the *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) I.A. Sup.

Vol. 47 was re-affirmed 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 *Jatindra Mohan Tagore v. Ganendra Mohan Tagore* (1872) I.A. Sup. Vol. 47. Madras Act I of 1914

was the first fruit of this movement and India Act 15 of 1916 introduced similar provisions for the benefit of the other provinces in British India. It

may be noticed, in passing, that while in the statement of Objects and Reasons accompanying the Bill which became the India Act 15 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.

7. 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, 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 1 of 1914 only Section 101 was adopted.

When Madras Act 1 of 1914 was declared ultra vires of the Provincial Legislature so far as it applied to the Presidency town, the Indian

Legislature solved the difficulty by enacting Act 8 of 1921. But, as Mr. Narasimha Ayyar 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 15 of 1916.

8. In determining the effect of the omission to re-produce Section 100, Succession Act, in Madras Act 1 of 1914, it must be remembered that Act

1 of 1914 was applicable to the whole of the Presidency whereas Section 100, 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 shown 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 8

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 Ayyar, the learned Counsel for the appellant, points out that the scope and extent of application of Act 8 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 8 of 1921 shows that, as the only purpose of that legislation was to remove the objection of ultra vires in respect of the Madras Act,

the Indian Legislature merely re-produced the language of the Madras Act. Whatever may be the reason for the omission of Section 100 from Act

8 of 1921, it is not possible to hold that merely by reason of this omission, the express declaration in Section 2, 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.

9. 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 21 of 1929, Section 13 of which subjects the power of the disposition given by Act 8 of 1921 to the limitations

contained in Section 113, Succession Act of 1925 (corresponding to Section 100, Succession Act of 1865). It is true that this amending Act (by

Section 11) extends Section 113, 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 15 of 1916 and by Section 57, Succession Act of 1925, this

provision has been made applicable to Hindu Wills. There is accordingly no reason for assuming that Act 8 of 1921 intended to repeal by

implication so much of the Hindu Wills Act as applied to the corresponding provision in the Success-Act of 1865 to Hindu Wills in the City of

Madras.

10. We are therefore of opinion that the disposition in favour of the plaintiff under Ex. A is void u/s 100, Succession Act of 1865, and this invalidity

is not prevented or cured by Act 8 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.