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should be dismissed without costs on either side, the plaintiffs having admitted that the late husband of the first defendant was not disqualified from inheriting along with the plaintiffs. Except as above arranged by the parties it appears to their Lordships that all the appeals should be dismissed with costs, and their Lordships will so accordingly humbly advise His Majesty.

Since the hearing of these appeals some of the parties, their Lordships understand, have entered into compromises. On production of the proper evidence, effect to these compromises will be given in the Order in Council confirming this report.

Solicitors for appellants: *T. L. Wilson & Co.*

Solicitors for respondent: *Douglas Grant; Chapman Walker and Shephard.*

A.M.T.

PRIVY COUNCIL.*

1925, July 16.

SOUNDARA RAJAN AND OTHERS (PLAINTIFFS),

v.

NATARAJAN AND OTHERS (DEFENDANTS).

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT MADRAS.]

Will—Will of a Hindu—Perpetuity—Time at which test to be applied—Invalid gift over—Construction—Absence of previous absolute gift—Indian Succession Act (X of 1865), ss. 101, 102, 126.

A Hindu died in 1904 being survived by his three daughters: the first daughter had four children, three born before and one after 1904, the third daughter had six children, all born after 1904, the second daughter had one child, a son T.

* PRESENT:—Viscount HALDANE, Lord WARRINGTON and Lord BLANESBURGH.

born after 1904, and as a guardian of property was appointed in 1910 he did not attain his majority under section 3 of the Indian Majority Act, 1875, until he was 21 years of age instead of at 18. The deceased by his will directed the trustees thereby appointed to "apportion" his residuary trust fund into as many equal shares as there were daughters who should survive him or had predeceased him leaving issue, to pay the income from each of such shares to the daughters for life respectively, and after the death of each daughter to hold the share "so appropriated to such daughter as aforesaid upon trust for the children of such daughter who shall attain the age of 21 years."

Held (1) that the bequests to the children of daughters were invalid under section 101 of the Indian Succession Act, 1865 The test of perpetuity laid down by section 101 was to be applied at the testator's death, and at that date it was not certain whether the gift to some of the children would vest within the lifetime of persons then existing and the minority, ending at 18; it was not material that T. did not attain his majority until he was 21. The bequests being to a class and being invalid as to some members failed also as to the children born before the death of the testator under section 102.

(2) That the will read as a whole did not show an intention that the daughters should take an absolute estate in the shares, and that consequently section 126 of the Act did not apply.

(3) That therefore there was an intestacy as to the residuary trust fund, subject to the life interests of the daughters.

Having regard to Act VIII of 1921 it was not necessary to consider whether Madras Act I of 1914 was *ultra vires* of the Provincial Legislature.

APPEAL (No. 14 of 1923) from a decree of the High Court in its Appellate Jurisdiction (December 16, 1920) affirming a decree of the Court in its Ordinary Jurisdiction (November 16, 1919).

The litigation related to the construction and effect of the will, dated April 24, 1897, of C. Ratna Mudaliar, a Hindu domiciled in the City of Madras, who died in December 1904. He was survived by a widow and three daughters. The first daughter had four children, three of whom were born before the death of the

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testator, and one after that date; the second daughter had one child, a son Tirugnanasambandam (respondent No. 4) born after 1904; the third daughter had six children, all born after 1904. By an order of the Court made in 1910 upon petition, a guardian of the person and property of respondent No. 4 had been appointed.

The terms of the will appear from the judgment of the Judicial Committee.

The suit was brought in the High Court by the appellants, the minor sons of the testator's third daughter, against the respondents, the other grandchildren of the testator. The plaintiffs claimed construction of the will, administration of the estate and ancillary relief.

At the hearing of the suit, which took place before COUTTS TROTTER, J., the argument was confined to the construction and effect of the will, the parties intimating that a decision on that question probably would determine all matters between the parties; upon appeal the argument and decision were similarly limited. The plaintiffs contended that the trusts declared by the said will in favour of the testator's grandchildren were invalid and that there was an intestacy as to the residuary trust fund. COUTTS TROTTER, J., made a decree declaring, by paragraph 1, as follows:

"1. That, having regard to the Madras Act I of 1914 and the effect of the Indian Majority Act, IX of 1875, which is to retain a single age of majority for purposes of section 101 of the Indian Succession Act and section 5 of the Madras Act I of 1914, and according to the true construction of the will of the said C. Ratna Mudaliar, deceased, dated April 24, 1897, all the bequests contained in the said will are valid."

The decree also declared when the legacies to the grandchildren vested, and ordered that the further hearing be adjourned.

Upon appeal the defendants, alternatively to the contention that the bequests were valid, relied upon section 126 of the Indian Succession Act, 1865, 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 to the legatee, if that benefit cannot be obtained by the legatee, the fund belongs to him as if the will had contained no such direction."

The learned Judges (WALLIS, C.J., and RAMESAM, J.) did not agree with the view of the trial Judge as to the effect of the Indian Majority Act, 1875, and of Madras Act I of 1914 (which Act they held to be *ultra vires* of the Provincial Legislature), and were of opinion that the dispositions in favour of the grandchildren failed as the result of section 101 and section 102 of the Indian Succession Act, 1865. They held, however, that upon the true construction of the will the intention of the testator was to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement of the gift, and that consequently, under section 126 of the Indian Succession Act, 1865 (which was made applicable by the Hindu Wills Act, 1870), the daughters of the testator took absolutely.

The learned Judges made a decree which in terms confirmed the decree of COUTTS TROTTER, J., though the effect of the judgments delivered was to vary that decree. The case is reported at I.L.R., 44 Mad., 446.

Clauson, K.C., and *Narasimham* for the appellants.—Upon the true construction of the will the testator's daughters took only life interests; there was no gift of the corpus to the daughters. Reference was made to *Lassence*

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v. *Tierney*(1) and to Jarman on Wills (6th edn.), vol. 2, page 1459. The Appellate Court rightly held that the bequests were invalid under Hindu Law and having regard to section 101 and section 102 of the Indian Succession Act, 1865. Section 101 invalidates a bequest when the vesting "may be delayed" beyond the period stated. The test must be applied at the death of the testator. It is therefore not material that owing to events which afterwards occurred the minority of respondent No. 4 was extended. There was an intestacy as to the fund subject to life interests of the daughters.

Upjohn, K.C., *Sir Walter Schwabe*, K.C., and *A. M. Talbot* for the respondents.—If the gifts to the grandchildren are invalid, then under section 126 of the Indian Succession Act, 1865, the daughters each take a third share of the fund absolutely. The will, read as a whole, shows an intention that they should do so; the provisions in favour of the grandchildern are in the nature of a settlement: *Hulme* v. *Hulme*(2), *Ring* v. *Hardwick*(3), *In re Merceron's Trusts, Davies* v. *Merceron*(4), *Whitehead* v. *Rennett*(5). But the bequests to the grandchildren were valid. Under Act VIII of 1921, enacted since the hearing below, the gifts to grandchildren not born at the death of the testator were not invalid by Hindu Law. That Act gives retrospective validity to Madras Act I of 1914, and therefore it is not necessary to consider whether the Madras Act was *ultra vires*. Section 101 of the Indian Succession Act, 1865, is re-enacted both by Madras Act I of 1914 and Act VIII of 1921, as to Madras Hindus. The intention was that section 102 should not apply to them. Apart from section 102,

(1) (1849) 1 Mac. & G., 551.
(2) (1889) 9 Sim., 644, 649, 650.
(3) (1840) 2 Beav., 352.
(4) (1876) 4 Ch.D., 182.
(5) (1853) 22 L.J., Ch., 1020.

the principle embodied in that section does not apply in India: *Bhagabati Barmanya* v. *Kalicharan Singh*(1). Further, under Indian decisions, neither section 101 nor section 102 applies to a Hindu: *Cally Nath Naugh Chowdhry* v. *Chunder Nath Naugh Chowdhry*(2), *Alangamonjori Dabee* v. *Sonamoni Dabee*(3). In any case the bequest to respondent No. 4 was valid. As a guardian had been appointed he did not attain his majority, under section 3 of the Indian Majority Act, 1875, until he was twenty-one. He being the only child of the second daughter was the sole member of his class, consequently section 102 has no operation as to him.

Clauson, K.C., replied.

The JUDGMENT of their Lordships was delivered by

Viscount HALDANE.—The questions which arise for decision on this appeal relate to the construction and validity of the provisions of a will, dated 27th April 1897, and made by a Hindu, C. Ratna Mudaliar, who died in 1904. He left a widow and three daughters. One of these daughters, Yasodammal, died in 1907; another, Rajammal, in 1908; and the third, Nilayathatchi Ammal, in 1918. Yasodammal had four children, three of them, two sons and a daughter, born before the death of the testator in 1904, and one of them, born afterwards in 1907. Rajammal, the second daughter, had a son Tirugnanasambandam, who was born in 1907. This child was constituted a Ward of Court in 1910. Nilayathatchi Ammal, the third daughter, had six children, three sons and three daughters, all born after 1904. Of these various families the three sons of the third daughter were plaintiffs in the suit and are appellants to-day. The others were defendants and are now respondents.

(1) (1911) I.L.R., 38 Calc., 468 (P.C.); 38 I.A., 54.
(2) (1882) I.L.R., 8 Calc., 378. (3) (1882) I.L.R., 8 Calc., 157.

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It will be convenient first of all to set out the material portions of the will :—

"I give devise and bequeath all my estate and effects immovable and movable unto my Trustees Upon Trust that my Trustees shall sell, call in and convert into money the same or such part thereof as shall not consist of money and shall with and out of the proceeds of such sale calling in and conversion and with and out of my ready money pay my funeral and testamentary expenses and debts and shall stand possessed of the residue of such proceeds Upon Trust to set apart thereout and invest in promissory notes of the Government of India such a sum or sums of money as when so invested as aforesaid will produce by the income thereof a monthly sum of rupees one hundred and to pay such income monthly to my wife C. Andalammal during her life and from and after her decease to stand possessed of the said sum and the investments for the time being representing the same Upon the Trusts hereinafter declared concerning the residue of my estate. And as to the residue of my estate I direct that my Trustees shall at their discretion invest the same in any of the modes of investment in which trustees are by law authorized to invest trust funds and shall stand possessed of the said residuary trust monies and the investments for the time being representing same (thereinafter called "the residuary trust funds"). 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 of 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 lifetime leaving lawful issue 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."

The suit was instituted in the High Court of Madras for a due construction of the will and for administration. The plaintiffs, the present appellants, were, as already stated, grandsons of the testator and children of his third daughter. Their case is that they, along with the sons of the other two daughters, are entitled to succeed to the testator's residuary estate subject to an annuity to the widow and to mere life estates given to the three daughters, who are all now dead. For they contend that the trusts in favour of grandchildren, following in the will on those for the daughters for life, are void by the law of India. The case of the respondents, on the other hand, is that the trusts introduced in favour of grandchildren were validly created by the will, or alternatively, that the three daughters of the testator in the result took his residue absolutely.

The case was tried before COUTTS TROTTER, J., who decided in substance (1) that the testator gave only a life estate to each of his three daughters, and not an absolute estate, remarking "It seems to me clear that what the testator wished to do was to divide the income of his estate into three shares for the benefit of his three daughters respectively during their lifetime, and thereafter the corpus of each share should belong to such of the children of each daughter as should attain the age of twenty-one years"; (2) that under the provisions of section 3 of the Hindu Wills Act, 1870, and the rules laid down by the Lords of the Judicial Committee in the case of *Tagore* v. *Tagore*(1), and other

(1) (1872) L.R.I.A., Sup., 47

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decisions, the gifts to the grandchildren of the testator born after his death were void; but that the provisions of the Madras Act I of 1914, which were not in his opinion *ultra vires* of a Provincial Legislative Council, validated the bequest in this respect. The learned Judge was further of opinion that the testator's will did not, for reasons which he gave, contravene the Indian rule against perpetuities in view of the provisions of Act IX of 1875, as amended by the Guardians and Wards Act, 1890.

There was an appeal to the Appellate Civil Jurisdiction of the High Court of Judicature at Madras. Before judgment on that appeal was delivered certain compromises were made between certain of the parties, for the division between them of what might be the fruits of this litigation. Into the terms of the compromise it is not, however, necessary, at this stage of the suit, to enter.

The appeal was heard by the Chief Justice (Sir JOHN WALLIS) and RAMESAM, J. These learned Judges did not agree with the view of the trial Judge as to the effect of the Indian Majority Act, 1875, and of the Madras Act I of 1914 (which they held to have been *ultra vires* of the Provincial Legislature). They were accordingly of opinion that the disposition of the will could not take effect as regards beneficiaries born after the death of the testator, and, as the provisions in favour of issue of daughters were obnoxious to section 101 of the Indian Succession Act, 1865, they thought that the whole disposition in favour of the daughters' children failed as a result of section 102 of that Act. They held, however, that upon the true construction of the will the intention of the testator was, in the first instance, to make an absolute gift in favour of each of his three daughters, the provisions which followed being a mere settlement

of the gift thus absolutely made, and that consequently under section 126 of the Indian Succession Act, 1865, the daughters of the testator took absolutely, when these provisions failed of effect. That section, made applicable to the testator's will by the Hindu Wills Act (XXI of 1870), is as follows:—

"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."

This is an enactment in statutory form of a principle which was already familiar to English lawyers. The case of *Lassence* v. *Tierney*(1), shows that where, reading the will as a whole, the intention to confer an absolute estate in the first instance is expressed or implied, and following on that absolute estate there is a provision for settlement which in the event cannot be operative, then the words of prior intention prevail and the absolute estate takes effect notwithstanding the failure of the provision for settlement that follows. In India the words in section 126 must be followed as laying down the principle, but the principle is not substantially different from what was expressed in *Lassence* v. *Tierney*(1). Their Lordships have given consideration to the terms of the will in the present case. The material directions are those to the trustees

"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 or me surviving."

The trustees are then 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

(1) (1849) 1 Mac. & G., 551.

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stand possessed of the share of the residuary trust funds so appropriated as aforesaid to such daughter upon trust for the children of such daughter who shall attain the age of 21 years."

The testator then directs that in the event of any of the daughters dying without leaving lawful issue the trustees are to

"stand possessed of the share or shares so appropriated to her or them as aforesaid"

on trust for her children who shall attain twenty-one. He goes on to introduce a proviso under which, if a daughter dies in his lifetime leaving lawful issue, such issue as shall attain 21 years are to take the share

"which would have been so appropriated as aforesaid to such daughter of mine and her issue if she had survived me."

Reading the will as a whole their Lordships are unable to agree with the conclusion about the construction of these clauses come to by the appellate Court. They think that the first trust for apportionment directs merely division of the fund into as many equal parts or shares as there are daughters living at the testator's death, or sets of issue then living of daughters then dead.

The words of apportionment are introduced for merely arithmetical purposes and so far do not dispose of property. In order to find the interest given under the will it is necessary to proceed to the further words, and these, in the case of a daughter, confine her interest to a right to income for life. They are followed by words of disposition in favour of the children and issue. This view of what may be called the apportionment clause is even more apparent as regards the suggested gift to issue of a deceased daughter. There is no unqualified gift to them by the apportionment clause. The effective gift in the later words of the will is to such of a deceased daughter's *children* as attain 21. And if, of this will it could be said that the testator had

used the words "issue" and "children" interchangeably then the limitation to such children only as attained 21 would, if there were a prior gift to them without that qualification, be merely otiose. If so much cannot be said then there is no room for the operation of the rule. Their Lordships are, therefore, unable to find in this will the absolute bequests required by section 126. They think that the three daughters took only for life, and that it must remain to be seen whether the later gifts in favour of their children or other issue are validly made under Hindu Law.

Turning to this question, the first observation to be made is that the will has apparently been drawn by some one familiar with English Law, but not with the Indian statutes which apply. If it were only a question of the English rule against perpetuities, there would be no objection to the will. But there comes in section 101 of the Indian Succession Act of 1865. Under this section no bequest is valid whereby the vesting of the thing bequeathed *may* be delayed beyond the lifetime of one or more persons living at the testator's decease, and the minority (ending at 18) of some person who shall be in existence at the expiration of that period and to whom, if he attains full age, the thing bequeathed is to belong. The validity of the gifts now in question must be scrutinized as at the death of the testator, i.e., 1904, and if section 101 then applied the disposition subsequent to the lifetime of the testator's daughters was invalid, for the children of the daughters take only in classes, and by section 102 of the Succession Act, if a bequest is made to a class of persons, with regard to some of whom it is inoperative by reason of the rules contained in section 101, the bequest is wholly void. It being plain that this bequest, tested as at the testator's death, made delay beyond the lifetime of the daughters and the minority of some of

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their children possible, the bequest in favour of the children was inoperative. It was suggested, however, that this section had no application to the will of a Hindu by reason of the fact that, as is shown by the *Tagore* case(1), any disposition in such a will is invalid if the disponee is an unborn person at the testator's death. The section, it was said, is only applicable to dispositions which are not otherwise ineffective. One answer to this was that in 1914 the Madras Act above referred to was passed which purported to get rid of the difficulty caused by the *Tagore* case(1), decision. This Act provides by section 3 that a disposition shall not be invalid by reason only that the transferee or legatee is an unborn person at the date of the transfer, or the death of the testator. Questions were raised, as has already been observed, in the Courts below as to the validity of the Madras Act, but these questions are now superseded by the Act of the Indian Legislature, Act VIII of 1921, which has validated the law contained in the Madras Act, and repeats in section 5 a provision identical with section 101 of the Succession Act, 1865. The result is to make that section applicable to this will, upon a view which was not contested before their Lordships if the Madras Act or the Act of 1921 were treated as operative. Now in that section, as has been already said, a "minor" means any person who shall not have completed the age of eighteen years. It was however, pointed out by the respondents that, by the Majority Act, 1875, every minor of whose person or property a guardian has been or shall be appointed by any Court of Justice, and every minor under the jurisdiction of any Court of Wards, shall, notwithstanding anything contained in the Indian Succession Act or in any other enactment, be deemed to have attained his

(1) (1872) L.R.1.A., Sup., 47.

majority when he shall have completed his age of 21 years and not before; and this is accompanied by a provision that every other person domiciled in British India shall be deemed to have attained his majority when he shall have completed his age of 18 years and not earlier. These provisions do not, however, in the opinion of their Lordships, help the respondents. At the testator's death—for this purpose the relevant date—it was not clear, and could not be certain, whether all or any of the members of the classes in whose favour the disposition was made would ever have guardians appointed. The provision of the will fixing 21 in every case as the age of vesting was, therefore, in contravention of section 101, and the whole gift is invalid under section 102. Their Lordships are unable to agree with the views expressed in some detail on this point by the learned Trial Judge.

Their Lordships are of opinion, for the reasons they have given, that the appeal must succeed. There will be a declaration that the appellants are entitled to their respective shares in the property in suit as upon an intestacy, subject to the life estates (now at an end) in favour of the testator's daughters. This will be without prejudice to the compromises referred to in the decree appealed from, and to the sanction given to them by that decree. The case must go back to the High Court for further inquiry on that footing. Their Lordships do not think it necessary to interfere with the orders as to costs made in the Courts below. They think that the costs of this appeal should, in the same way, be payable out of the estate.

They will humbly advise His Majesty accordingly.

Solicitor for appellants: *H. S. L. Polak.*

Solicitor for respondents: *Douglas Grant.*

A.M.T.