APPELLATE CIVIL.

Before Sir Owen Beasley, Kt., *Chief Justice, and Mr. Justice Varadachariar.*

V. KUPPUSAMI PILLAI (FIRST DEFENDANT), APPELLANT,

v.

JAYALAKSHMI AMMAL (PLAINTIFF), RESPONDENT.*

1934, March 15.

Indian Succession Act (*X of* 1865), *sec.* 100, *corresponding to Indian Succession Act* (*XXXIX of* 1925), *sec.* 113—*Omission of, in The Hindu Transfers and Bequests Act* (*VIII of* 1921)—*Hindu Wills Act* (*XXI of* 1870), *sec.* 2—*Effect of, on Hindu wills executed in the City of Madras not bequeathing the full interest in remainder in favour of a person not in existence at the date of testator's death.*

A Hindu testator by his will executed in the City of Madras bequeathed certain properties to his son for life and, after his son's lifetime, to his son's wife for life and, after her lifetime, to certain other persons. The son's wife was not in existence at the date of the testator's death.

Held, (1) that the disposition in favour of the son's wife was void under section 100 of the Succession Act of 1865 (corresponding to section 113 of the Succession Act of 1925) in that the gift in her favour was not of the full interest in remainder, she being a person not in existence at the date of the testator's death, (2) that the omission of section 100 of the Succession Act, 1865, from Act VIII of 1921 cannot take away the effect of the express declaration in section 2 of the Hindu Wills Act, 1870, making section 100 of the Succession Act applicable to Hindu wills executed in the City of Madras.

Dinesh Chandra Roy Chowdhury v. *Biraj Kamini Dasee*, (1911) I.L.R. 39 Calc. 87, explained and distinguished.

APPEAL from the judgment of STONE J., dated the 3rd day of May 1933, in the exercise of the Ordinary Original Civil Jurisdiction of this Court in Civil Suit No. 481 of 1927.

* Original Side Appeal No. 83 of 1933.

KUPPUSAMI PILLAI v. JAYALAKSHMI AMMAL.

S. Doraiswami Ayyar for *Srinivasaraghavan* and *Thyagarajan* for appellant.

K. Narasimha Ayyar for respondent.

Cur. adv. vult.

VARADACHARIAR J.

The JUDGMENT of the Court was delivered by VARADACHARIAR J.—Plaintiff sues for a declaration that certain alienations made by her deceased husband are inoperative beyond his lifetime. She contends that under the will of her father-in-law (Exhibit 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 transactions of her husband, viz., a mortgage dated 5th May 1921 in favour of the first defendant. The first defendant, who is the appellant, contends that, as the plaintiff was not in existence at the testator's death and as the gift under Exhibit A in her favour is not of the full interest in remainder, that disposition is void under section 100 of the Indian Succession Act of 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 first defendant 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". 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 1914 and India Act VIII of 1921. As is well known, the object of that legislation was to do away with the rule in the *Tagore case*(1) 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.

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

(1) (1872) 9 B.L.R. 377 (P.C.).

KUPPUSAMI PILLAI v. JAYALAKSHMI AMMAL.

VARADACHARIAR J.

wife would not offend the rule laid down in the *Tagore case*(1), 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 Indian Succession Act of 1865. As observed in *Sivasankara Pillai* v. *Soobramania Pillai*(2), 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 *Soundararajan* v. *Natarajan*(3) at pages 446, 461 bottom and 462 top, 469 and 470.)

In the arguments before us Mr. Narasimha Ayyar, 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 Kamini Dasee*(4) 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 Mallick* v. *Ranimoni Dasi*(5) the legal effect of that declaration is to write that section into the Hindu Wills Act.

---

(1) (1872) 9 B.L.R. 377 (P.C.). (2) (1908) I.L.R. 31 Mad. 517, 521.
(3) (1920) I.L.R. 44 Mad. 446. (4) (1911) I.L.R. 39 Calc. 87.
(5) (1910) I.L.R. 38 Calc. 188, 197

The argument based upon, *Dinesh Chandra Roy Chowdhury* v. *Biraj Kamini Dasee*(1) 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 Mallick* v. *Ranimoni Dasi*(2), 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 of the 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 of the Hindu Wills Act. The judgment of MOOKERJEE 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:—(i) that the disposition then in question was valid even under the Hindu Law as held in *Nafar Chandra Kundoo* v. *Ratan Mala*

(1) (1911) I.L.R. 39 Calc. 87. (2) (1910) I.L.R. 38 Calc. 188, 197.

KUPPUSAMI PILLAI v. JAYALAKSHMI AMMAL.

VARADACHARIAR J.

Debi(1) and that there was accordingly no contravention of section 3 of the Hindu Wills Act; (ii) 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 MOOKERJEE J. at the bottom of page 95 that "possibly the true intention was to make neither the rule nor the exception applicable to Hindus", or to the expression (on page 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". 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 Pillai* v. *Soobramania Pillai*(2).

Mr. Narasimha Ayyar advanced another contention based on the fact that, both in Madras Act I 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 provisions in section 100 of the Succession Act."

(1) (1910) 15 C.W.N. 66.

(2) (1908) I.L.R. 31 Mad. 517.

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. Muhammadan lawyers too held the same opinion, as will be evident from the controversy that culminated in the passing of the Mussalman Wakf Validating Act (VI of 1913). The Legislature was accordingly persuaded in 1865 to exclude Hindus, Muhammadans and Buddhists 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 Buddhist law. By 1870, however, the Legislature though 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*(1) 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 for the purpose of getting rid

(1) (1872) 9 B.L.R. 377 (P.C.).

KUPPUSAMI PILLAI v. JAYALAKSHMI AMMAL.

VARADACHARIAR J.

of the decision in the *Tagore Case*(1). Madras Act I of 1914 was the first fruit of this movement and India Act XV of 1916 (The Hindu Disposition of Property Act) 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 XV 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 Legislature 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 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 XV of 1916.

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

(1) (1872) 9 B.L.R. 377 (P.C.)

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 Ayyar, 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 VIII 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 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

KUPPUSAMI PILLAI v. JAYALAKSHMI AMMAL.

VARADACHARIAR J.

omission, the *express* declaration in section 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.

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 The Transfer of Property (Amendment) Supplementary 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.

We are therefore of opinion that the disposition in favour of the plaintiff under Exhibit A is void under section 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.

G.R.

APPELLATE CIVIL.

Before Mr Justice Ramesam and Mr. Justice Madhavan Nair.

K. PITCHIAH CHETTIAR (SECOND DEFENDANT), APPELLANT,

v.

G. SUBRAMANIAM CHETTIAR AND TWO OTHERS (PLAINTIFF, FIRST DEFENDANT AND THIRD DEFENDANT), RESPONDENTS.*

1934, February 9.

Indian Contract Act (IX of 1872), sec. 253—Indian Evidence Act (I of 1872), sec. 114—Partnership—Unequal shares in respect of profits—Absence of special agreement to the contrary regarding losses—Same inequality applicable to losses also.

The fair inference that could be drawn from sections 253 of the Indian Contract Act and 114 of the Indian Evidence Act is that, in the absence of a special agreement to the contrary, if unequal shares between partners are admitted in a partnership in respect of the sharing of profits the same inequality of shares apply to losses also.

APPEAL from the judgment of STONE J., dated the 27th day of November 1933, and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in Civil Suit No. 571 of 1931.

* Original Side Appeal No. 2 of 1934.