N. Radhakrishna Naidu and ors. Vs. S. Govindaswami Naidu and anr.

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Court : Chennai

Decided On : Dec-20-1971

Reported in : (1975)1MLJ212

Appellant : N. Radhakrishna Naidu and ors.

Respondent : S. Govindaswami Naidu and anr.

Judgement :

M.M. Ismail, J.

1. The question involved in this second appeal is the construction of a will executed by one Venugopala Naidu on 14th December, 1932, a registration copy of which has been marked as Exhibit A-1 in. these proceedings. The said Venugopala Naidu had only a daughter by name Sethulakshmi Ammal and he had no son. However, he adopted one Narayanaswami Naidu as his son. Under the will, he gave one house to the adopted son and another house to the daughter Sethulakshmi Ammal. He also provided for his lands to be divided in the proportion of 2 : 1, the adopted son taking a two-third share and the daughter taking an one-third share; with regard to his movables also, he provided that they should be taken equally by the adopted son and the daughter. In Clauses 4 and 5 of the will, he provided for the manner and the extent of the enjoyment of the properties by the daughter and what should happen to the same after her death. In Clause 4, he provided that the daughter should enjoy the property without any right of alienation during her lifetime and if male children were born to her, they would take the property absolutely and without male children if she had a daughter, she should marry that daughter to any son of Narayanassami Naidu of her choice and thereafter the couple and their children would take the property absolutely. In Clause 5 of the will, he dealt with the lands and other movable properties, in addition to the house referred to in Clause 4. In Clause 5 again he repeated that the daughter will have to enjoy the properties without any power of alienation but after her the properties shall be taken by her male heirs or in the absence of male heirs by her female heirs. It is found in this case that the testator died in or about 1937. A son was born to the daughter and her husband the first plaintiff in the suit on 5th January, 1948. But that son died on 29th September, 1948. Thereafter, Sethulakshmi Ammal did not have any further issue. She herself died in February, 1961, after leaving a will marked as Exhibit A-22, dated 27th January, 1961 under which she bequathed all her estate to her husband the first plaintiff in the suit. It is under these circumstances the first plaintiff, the husband of Sethulakshmi Ammal, and the second plaintiff, a tenant under the first plaintiff, instituted the suit for a declaration that the first plaintiff is absolutely entitled to the suit properties and for a permanent injunction restraining the defendants who are the sons of Narayanaswami Naidu, the adopted son of the testator, from interfering with the plaintiff's possession and enjoyment of the properties.

2. After the death of Venugopala Naidu, it appears that Narayanaswami Naidu and Sethulakshmi Ammal exchanged the houses bequeathed to them respectively and it is the exchanged house with reference to which the suit for declaration of title was instituted. The case of the plaintiffs was that on the birth of a child on 5th January, 1948 to Sethulakshmi Ammal and the first plaintiff, the estate under the terms of the will vested in that child and on his death on 29th September, 1948, Sethulakshmi Ammal inherited the same as the heir to the child and whatever interest Sethulakshmi Ammal inherited which was form the very nature of the case, a woman's estate known to Hindu law, became an absolute estate under the Hindu Succession Act, 1956, and consequently she was competent to will away the same in favour of her husband under Exhibit A-22. Alternatively it was contended that even apart from the will, the first plaintiff would be the heir to Sethulakshmi Ammal under Section 15 of the Hindu Succession Act, 1956, and therefore in that capacity also he will be entitled to the properties in question. As against this case of the respondents, namely, the plaintiffs, the case of the defendants was that the child of Sethulakshmi Ammal had only a contingent remainder and the contingency contemplated being the survival of the child, of Sethulakshmi Ammal and the child having died during the lifetime of Sethulakshmi Ammal herself, the child did not take any interest in the properties and consequently there was nothing to be inherited by Sethulakshmi Ammal and Sethulakshmi Ammal's life-interest having come to an end on her death, under the terms of the will, the children of Narayanaswami Naidu would be entitled to take the properties in question. In substance, the controversy between the parties was whether the son of Sethulakshmi Ammal born on 5th January, 1948 took a vested interest at the moment he was born and therefore became a fresh stock of descent or that child would have taken the properties if it had survived Sethulakshmi Ammal and that child not having survived, under the terms of the will, on the death of Sethulaksmi Ammal, the appellants alone became entitled to the properties. The Courts below accepted the case of the plaintiffs in this behalf and decreed the suit as prayed for. Hence, the present second appeal by the defendants in the suit.

3. Mr. K. N. Balasubramaniam, learned Counsel for the appellants, principally advanced two arguments. The first argument was that from the language of the will, Exhibit A-1, it contemplated the children of Sethulakshmi Ammal taking the properties only if they were in existence at the moment of the death of Sethulakshmi Ammal and the son born to Sethulakshmi Ammal not having been in existence at the time of the death of Sethulakshmi Ammal, her son did not acquire any interest in the suit properties. The alternative argument of Mr. Balasubramaniam, was that even assuming that the moment the son was born, that is on 5th January, 1948, the son took a vested interest in the suit properties, the bequest is hit by Section 113 of the Indian Succession Act, 1925, because his interest was liable to be diminished or reduced if other sons were born to Sethulakshmi Ammal. I shall consider these two arguments separately.

4. As far as the first argument is concerned, it is principally based upon the use of the expression, (male varisu or male heir) in Clause 5 of the will. In Clause 4 of the will, the expression used is (male santhathi or male descendant) or (female santhathi or female descendant). In Clause 5, the expression used is (male varisu or male heri) or (female varisu or female heir) Normally speaking, the word (varisu) means only an heir. The question for consideration is, in what sense the testator used the expression (varisu or heir) in Clause 5. Did he intend to make a distinction between ('male santhathi or male descendant) referred to in Clause 4 and male varisu or male heir) referred to in Clause 5 or did he use both the expressions to mean one and the same

thing? If the argument of Mr. Balasubramaniam, is to be accepted, it will mean that the expression male santhathi or male descendant referred to in Clause 4 does not carry the same meaning as the expression (male varisu or male heir) in Clause 5. I have already referred to the fact that Clause 4 deals with the house property only, while Clause 5 deals with house property and the lands and other movables. To accept the argument of Mr. Balasubramaniam, is to introduce a contradiction in the terms of the will in the sense in Clause 4 the testator provided for a devolution in favour of {male santhathi or male descendant) but in Clause 5 which deals not only with the lands and the movables, but also with the house already dealt with in Clause 4, he provided for the devolution in favour of male heirs. In my opinion, when the testator used these two expressions, he did not intend them to have two different senses and he was using the expression in the same meaning. As a matter of fact, if the argument of Mr. Balasubramaniam, is accepted it will in a way support the case of the first plaintiff himself. If, (male varisu or male heir) is to be understood distinct from (male santhathi or male descendant) under the law as was prevailing on the death of Sethulakshmi Ammal, in 1964, admittedly the first plaintiff would be the male heir to Sethulakshmi Ammal under Section 15 of the Hindu Succession Act, 1956 . This is yet another circumstance to show that the argument of Mr. Balasubramaniam, in this behalf is not only not sound, but also will not help the case of the defendants-appellants herein. Therefore, I reject the contention of the learned Counsel for the appellants that the use of the expression (male varisu or male heir) in Clause 5 will lead to the conclusion that the children of Sethulakshmi Ammal would take the interest in the suit properties only if they were alive at the moment of the death of Sethulakshmi Ammal herself. As a matter of fact, there is absolutely no expression or language in the whole of the will to postpone the interests of the children of Sethulakshmi Ammal during her lifetime. It is one thing to say that on the conferment of a life estate on Sethulakshmi Ammal, she was entitled to remain in possession and enjoyment of the properties so long as she was alive and therefore the right to obtain possession of the properties by her children would be postponed for that period. But it is entirely another thing to say that the children of Sethulakshmi Ammal did not acquire any interest in the properties till the moment of her death, because they were not entitled to obtain possession of the properties so long as she was alive.

5. In fact, the Bombay High Court in Ardeshir Dadabhoy Baria and Anr. v. Dadabhoy Rustomjee Baria and Ors. A.I.R. 1945 Bom. 395, had to consider a question of this nature and Blagden, J., pointed out:

It is true, and important to notice, that apart from the last recited provision, no allusion is made Rustomji's sons him surviving' so that the vesting of this interest does not depend on the contingency of their surviving their parents.

In the present case also, there is absolutely no language or expression in the will so as to make the acquisition of interest by the children of Sethulakshmi Ammal depend upon their surviving Sethulakshmi Ammal herself. Mr. Balasubramaniam, for this purpose relied on my decision in K.N. Kumarakrishnan v. Mrs. Sundarambal and Ors. (1968) 81 L.W. 587. In that case, the terms of the will I had to consider were as follows:

After my lifetime all the properties belonging to me shall be in the possession and enjoyment of my wife by name Rajamani Ammal. She shall enjoy the income without any restriction and shall have life estate in all the properties without power of

alienation and for purpose of management she shall possess all such powers as may be necessary for the due protection and preservation of the properties. After the lifetime of my wife Rajamani the properties shall go to my brother-in-law K. Nageswara Iyer, Inspector of Police, Tirupati, or his heirs who shall be entitled to them absolutely and with full powers of alienation.

K. Nageswara Iyer, referred to therein died in 1942, while the testator himself died only in 1959. The question that came to be considered was whether Nageswara Iyer's heirs, for the purpose of giving effect to the terms of the will referred to, will have to be ascertained as on the date of the death of Nageswara Iyer, or as on the date of the death of Rajamani Ammal, life-estate-holder. That question came to be considered in the context that Nageswawara Iyer, left behind daughter's and daughters would become heirs only because of the Hindu Succession Act, 1956, and if the state of law as in 1942 were to be applied, the daughters would not be entitled to have a share as the heirs of Nageswara Iyer. In this context alone, I emphasized the term of the will, 'after the lifetime of my wife, Rajamani 'and held that the persons entitled to take the property as heirs of Nageswara Iyer, had to be determined according to the state of law as it prevailed at the time of the death of Rajamani Ammal. As far as the present case is concerned, there is no such expression that the interest of Sethulakshmi Ammal's children will come into existence only after the lifetime of Sethulakshmi Ammal. Therefore that decision will have no application. Consequently as a matter of construction, my conclusion is that the will with which I am now concerned, did not impose a condition that the children of Sethulakshmi Ammal will take the properties only when they survive Sethulakshmi Ammal and the children who are alive on that date alone will take the interest in the properties. On the other hand, as soon as a child is born to Sethulakshmi Ammal, that child will immediately take the vested interest in the properties, though the right of the child to take possession of the properties and enjoy the same will be postponed during the lifetime of Sethulakshmi Ammal.

6. That takes me on to the second question argued by the learned Counsel for the appellants, namely, whether such a bequest is hit by Section 113 of the Indian Succession Act, 1925. Admittedly, the bequest in favour of Sethulakshmi Ammal's children would be a bequest in favour of unborn persons. Therefore, the law relating to a bequest in favour of an unborn person will be clearly applicable. The history of this branch of law has been set out in Mulla's Hindu Law, Thirteenth Edition, at pages 402-403 as follows:

It was held by the Privy Council in the Tagore case in 1872, that a Hindu cannot dispose of his property by gift in favour of a person who was not in existence at the date of the gift, nor could be dispose of his property by will in favour of a person who was not in existence at the date of the death of the testator. The first enactment which validated gifts and bequests in favour of unborn person was the Hindu Transfers and Bequests Act, 1914. This was an Act of the Madras Legislature. It applied in terms to the whole of the State of Madras and was intended so to apply. It was followed by the Hindu Disposition of Property Act, 1916, which was an Act of the Imperial Legislature. It applied to the whole of British India except the province of Madras for which legislation had already been made by the local Act of 1914. After the Act of 1916, was passed, the High Court of Madras held as to the Madras Act of 1914, that the local Legislature had no power to take away the right of a Hindu domiciled within the local limits of the ordinary original civil jurisdiction of High Court of Madras to be governed by the Hindu law as it stood when the High Courts

Act, 1861, was passed. The fact, however, was that the Hindu law as it then stood did allow gifts and bequests in favour of unborn persons, and the Tagore case had misinterpreted that law. This led to the enactment by the Imperial Legislature of the Hindu Transfers and Bequests (City of Madras) Act, 1921. This Act extends in effect the local Act of 1914 to Hindus domiciled in the City of Madras-It also validates gifts and bequests made by Hindus domiciled in the City of Madras subsequent to the 14th February, 1914 being the date on which the local Act of 1914, came into force. The result is that as between them the Acts of 1914, and 1921 apply to the whole State of Madras, and the Act of 1916 applies to the rest of India..with effect from 1st February, 1960; The Hindu Transfers and Bequests Act, 1914; and The Hindu Transfers and Bequests (City of Madras) Act, 1921, stand repealed: and The Hindu Disposition of Property Act, 1960 has now been made applicable to the whole of India including the State and City of Madras excepting the State of Jammu and Kashmir.

The resulting position is that a Hindu can make a bequest in favour of an unborn child. The result of this is, subject to the limitations in Chapter II of the Transfer of Property Act and Sections 113, 114, 115 and 116 of the Indian Succession Act, no transfer inter vivos or by will of property by a Hindu shall be invalid by reason only that any person for whose benefit it may have been made was' not born at the date of such disposition.

7. Section 113 of the Indian Succession Act, 1925, is as follows:

Where a bequest is made to a person not in existence at the time of the testator's death subject to a prior bequest contained in the will, the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed.

In the decision of the Bombay High Court referred to already, namely, Ardeshir Badshoy Baria and Anr. v. Dadabhoy Rustomjee Baria and Ors. : AIR1945Bom395 . the principle underlying this section has been stated as follows by Blagden, J:

This section was an attempt to import into and adapt for use in this country what used before 1926 to be known in England as the rule in Whitby v. Mitchell (1890) 44 Ch.D. 85', or 'the rule against double possibilities.' As in so many importations, the goods have deteriorated in transit, but (conversely) neither English expression was entirely happy ; the former because the rule existed long before 1890 when Whitby v. Mitchell (1890) 44 Ch.D. 85, was decided, and the latter because it loses in clarity more than all that it gains in succinctness. But the principle is clear enough, however difficult its application in particular cases; it is as I understand it, that a person disposing of property to another shall not fetter the free disposition of that property in the hands of more generations than one. The rule is quite distinct from the rule against perpetuities, though their effects some times overlap.

The same position has been more fully and elaborately stated by the same High Court in Edulji Framroz Dinshaw v. Sir Ciwasji Jehangir : (1955)57BOMLR763 , as follows:

Section 113 and Section 114 of the Indian Succession Act, undoubtedly owe their origin to the English Common Law. Section 114 of the Indian Succession Act incorporates the rule against perpetuities as applicable to testamentary dispositions. The English Common Law did not, however recognise any rule similar to the one contained in Section 113 of the Indian Succession Act. Based as the rule against

perpetuities is on remoteness, the English Law merely refers to the commencement or the first taking effect of limitations and not to the extinction or determination of devises Or limitations. If an estate vests within the period of perpetuity, it is possible in England to limit the estate to unborn persons for life or till the happening of an uncertain event. It may be that in the year 1865, when the Indian Succession Act, was originally enacted by the Indian Legislature, it was intended to incorporate in the statute law of India the rule which was later recognised as the rule in Whitby v. Mitchell (1889) 42 Ch.D. 494. But in modifying the rule, presumably to suit Indian conditions, a modification was made which does not appear to have any counterpart in the English Law. In Whitby v. Mitchell (1889) 42 Ch.D. 494, lands were limited by marriage settlementto the use of the husband and wife successively for life, and with remainder after the death of the survivor to the use of a child, grandchild or remoter issue, or all and every or any one or more of the children, grandchildren or more remote issue of the husband and wife (such child, grandchildren, or more remote issue being born before any such appointment should be made) as the husband and wife should appoint. The husband and wife by a deed appointed part of the settled lands to the use of a daughter for life for her separate use without power of anticipation, and after her demise to the use of such persons as she should by will appoint and in default for use of her children living at the date of the deed. It was held in that case that all limitations, except the one in favour of the daughter for life were void. It appears that when the rule which ultimately crystallized in Whitby v. Mitchell (1889) 42 Ch.D. 494, was in the process of development, it was recognised as a rule which invalidated an estate in land to an unborn person for life with remainder to that person's issue, not because it was obnoxious to the rule against perpetuities, but because it transgressed the old rule of the common law, that a possibility cannot be limited upon a possibility, and it was regarded as immaterial that a prior limitation was made to take effect within the period allowed by the rule against perpetuities. But even in Whitby v. Mitchell (1889) 42 Ch.D. 494, what was regarded as invalid was the remainder in favour of the unborn issue of an unborn person in whose favour an estate in land was created. Section 113 of the Indian Succession Act, even though it may be deemed historically to have been based upon the rule in Whitby v. Mitchell (1889) 42 Ch.D. 494, does not directly invalidate the remainder in favour of the issue of unborn persons. The possibility of an interest in favour of the issue of an unborn person granted under a deed or will was clearly recognised under the English Common Law. But by Section 113 of the Indian Succession Act, estates conferred upon unborn persons subject to prior bequests in so far as they do not comprise the whole of the remaining interest created for the benefit of the unborn persons, are declared void. It is not the limitations which are void, but it is the estate granted in favour of the unborn person which is made void.

It must, therefore, be accepted that Section 113 as enacted in India, whatever may be its historial origin, is a rule relating to the quantum of interest which can be conferred upon unborn persons and has nothing whatever to do with the rule against perpetuities.

6. Without any reference to authority, I am of the view that the contention of Mr. Balasubramaniam, is not sound. What the section requires is that a bequest in favour of an unborn person must comprise the entire remaining interest of the testator which has to be understood in the context of or with reference to a prior bequest. Therefore, subject to the extent of interest created in favour of the first legatee, the bequest in favour of an unborn person must comprise whatever remains as the interest of the testator. This conclusion of mine derives support from the following

statement of law contained in Edulji Framroz Dinshaw v. Sir Cowasji Jehangir : (1955)57BOMLR763 , referred to above:

It is always open to a testator, subject to the provisions of Sections 113 and 114 of the Indian Succession Act, to give a fractional interest in any property, even to an unborn person. A fractional interest in property, provided it is not subject to other conditions or limitations, comprises the whole interest of the testator in the thing bequeathed being the fractional interest. There is no warrant for holding that a fractional interest in property cannot be a 'thing' within the meaning of Sections 113 and 114 of the Indian Succession Act.

Section 113 of the Indian Succession Act deals with the quantum of interest which may be bequeathed in favour of unborn persons. By enacting Section 113 of the Succession Act the Legislature disapproved of any attempt to put limitations upon the estate to be given to persons unborn at the time when the will comes into operation. As observed by their Lordships of the Privy Council in Sopher v. Administrator General, Bengal : (1944)46BOMLR865 , Section 113 as framed 'raises or may raise questions of very great difficulty'. The difficulty in the interpretation of the section is caused by the clause 'the later bequest shall be void, unless it comprises the whole of the remaining interest of the testator in the thing bequeathed'. The expression 'the later bequest' is obviously used with reference to the bequest in favour of unborn persons. That bequest in order to be valid must comprise the whole of the remaining interest of the testator in the thing bequeathed. The expression 'remaining interest' means the entire interest of the testator, less the interest carved out by the prior bequest. In other words, the bequest in favour of unborn persons and the prior bequest between them must exhaust the entire interest of the testator in the thing bequeathed. The section cannot and does not mean that unless the interest bequeathed to an unborn person is in all manner as exhaustive as the interest of the owner of the thing bequeathed, that interest is void. A vested interest granted under a will in favour of an unborn person, possession of which is deferred till the happening of a certain event, is not void by reason of the provisions of Section 113. What that section means is, that where a prior interest is given and a later bequest is provided in favour of an unborn person in the same thing, the completeness of the estate in favour of the unborn person can be limited only to the extent to which a prior valid bequest can limit it. If there are any other limitations which derogate from the completeness of the estate granted in the thing bequeathed, the bequest in favour of an unborn person is void. If the bequest in favour of an unborn person after a prior valid bequest is dependent upon a contingency, the bequest may also be regarded as void. Similarly, any limitation or a condition of defeasance which derogates from the completeness of the estate in favour of an unborn person so as to reduce it to a life estate, or to an estate defeasible on the happening of a contingency renders such estate void. The expression ' remaining interest' therefore connotes an interest which is as complete as an interest which the testator had in the thing bequeathed such interest not being fettered or limited except by and to the extent of the prior estate; but where a vested interest is given in the thing bequeathed in. favour of an unborn person, the vested interest will not be avoided merely by reason of imposition of limitations which restrict enjoyment. The principles which I have set out are,, in my view, borne out by the two decisions which Mr. Maneksha, has referred, to in the course of his argument, and the judgment of the Privy Council reported in Aniruddha Mitra v. Administrator-General of Bengal I.L.R. 76 IndAp 104 : (1949) 2 M.L.J. 35.

In the instant case, what was given to Sethulakshmi Ammal was only a life-interest,

namely, the right to enjoy the properties without any power of alienation. What was given to the children of Sethulakshmi Ammal was the properties absolutely, namely, the entirety of what remained in the testator. The argument of Mr. Balasubramaniam, did not go so far as to say that the son born in 1948 to Sethulakshmi Ammal did not take the entirety of the interest of the testator. All that he contended was that there was a possibility of the extent of the interest being diminished or reduced as a consequence of further children being born to Sethulakshmi Ammal and therefore what was given to the children of Sethulakshmi Ammal or what was given to the first son of Sethulakshmi Ammal would not be said to be the entirety of the remaining interest of the testator. In my opinion, this contention proceeds on a fallacy. The section has nothing whatever to do with the subsequent happening and all that it contemplates and requires is that the bequest to an unborn person must comprise the entirety of the remaining interest of the testator. Therefore, the section concerns itself with the quantum of the extent of interest bequeathed to an unborn person and not with any possible diminution or reduction of the extent of the property by addition to the class of persons for whose benefit the bequest was made. I shall have to refer to a few decisions of the Judicial Committee in this context and I shall do so after referring to certain decisions cited before me as supporting the case of the plaintiffs in the present case.

9. The first decision is that of the Judicial Committee in Bhagabati Barmanya and Anr. v. Kali Charan Singh and Anr. L.R. (1911) 38 IndAp 54 : 21 M.L.J. 387. The relevant clause of the will has been extracted in the head-note itself and it is as follows:

A childless Hindu testator directed that on the death of his mother and wife the sons of his two sisters, 'that is to say their sons who are now in existence as also those who may be born hereafter, shall in equal shares hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established deities and the ancestral rites according to the practice heretofore obtaining.

The question that came to be considered was, the nature of the interest the nephews of the testator took. Dealing with that, the Judicial Committee pointed out:

Their Lordships, however, think it is clear on the construction of this will that the nephews were intended to take a vested and transmittable interest on the death of the testator, though their possession and enjoyment were postponed.

10. The next decision is Kudopa Venkayamma (Minor by her Mother and Guardian Mallina Krishtamma) v. Kakarla Narsamma I.L.R. 40 Mad. 540 : 31 M.L.J. 33. The terms of the will in that case are given in the following head-note itself:

A Hindu bequeathed by his will, dated 1905 a life-estate to his widow and an absolute estate thereafter to S, a son of his daughter then born, and to other sons of the daughter that might be born thereafter. The testator died in 1906 and S died in 1909. In a suit by S's widow against the testator's widow and another son of the daughter born during the course of the suit for a declaration that the plaintiff was solely entitled to the estate after the death of the testator's widow and for an injunction to restrain the widow from wasting the state, and alienating the same....

This Court held that the plaintiff's husband, namely, the daughter's son of the testator who was alive on the date of the death of the testator acquired vested interest under

the terms of the will on the death of the testator; however, he had to share that interest with the son born to the daughter of the testator subsequently. It was in this view, the Court held:

The result will be that the plaintiff as widow of Subbanna is entitled to the widow's interest in such shares as Subbanna would, if living, have taken along with persons who might be been to his mother at the time the distribution takes place, that is to say, the plaintiff as representative of Subbanna will be entitled to share equally with other sons of Subbanna's mother including the sixth defendant who may be born before the death of the first defendant.

11. This decision was followed by this Court in Perianayagi Ammal v. Ratnavelu Mudaliar and Anr. A.I.R. 1924 Mad. 316. In that case one S died in December, 1912 leaving a will dated 11th November, 1911 whereby he bequathed to his daughter L wife of the 1st defendant a house to be enjoyed by her during her life and to devolve on her children at her death. L, the wife of the 1st defendant gave birth to a child on 30th September, 1918. The child died on 1st October, and L herself died on 13th October, 1918. The suit was instituted by her sister to recover the house from the first defendant. This Court held that L had a life-estate and under the terms of the will the property was to go to her children and the moment a child was born, the estate vested in the child and the succession would have to be traced through the child and not through the heirs of the testator. In the course of the judgment, Kumaraswami Sastry, J., elaborately referred to the earlier decisions which have a bearing on this point.

12. The next decision is that of this Court in T.S. Sivarama Aiyar and Ors. v. T.S. Gopalakrishna Chettiar : AIR1925Mad88 . In that case also the will of a Hindu provided that the lands should be managed by his brother and half the income should be enjoyed by him in his own right. The testator gave also one house to his brother. Another house and the other half of his lands were given to the testator's wife and daughter with the right of survivorship to each other, that is, wife and daughter. The will further provided. 'If my daughter does not beget male issue in her lifetime half the land and the house given to my wife and daughter by this will shall after their lives go to my brother and his male heirs. If a male is born to my daughter it will inherit the real property given to my wife and daughter'. The testator died in 1877. A son was born to the daughter in 1881 and the said child died after living for a day. The testator's widow died in 1903 and his daughter in 1918. The question that came to be considered was, whether the daughter's son who lived for a day was intended to be a devisee under the will or it was merely intended to succeed to his mother's estate as on an intestacy. This Court held that the daughter's son as soon as it was born obtained a vested remainder and therefore became the fresh stock of descent. Ramesam, J., after referring to the observations of Lord Davey in Hickling v. Fair (1899) A.C. 15 , stated:

The better principle is to permit the vesting at the earliest possible moment consistent with the language of the testator, i.e., immediately after the person named comes into being, unless there are express words postponing the vesting till after the termination of the preceding life estate. (See also Jarman on Wills, Volume II, page 1667, Halsbury Vol. XXVIII, p. 716, Section 1339).

I therefore agree with the respondent's contention that the will should be construed as giving a contingent remainder to the daughter's sons, such contingent remainder

being converted into a vested remainder after the birth of the first daughter's son, subject to its diminution as the number of daughter's sons is augmented by further births.

13. The next decision is that of this Court in Akkaraju Visvanadhan and Ors. v. Duthalur Anjaneyulu and Anr : AIR1935Mad865 . The terms of the will considered in that case were:

On my death all my movable and immovable properties you should keep in your possession and enjoyment and at the time of your death deliver possession thereof to my daughter Seshamma. During the time you are in possession of the estate you should not make a gift or sale thereof. You should spend the income accruing therefrom not for improper purposes but only for necessary expenses. You should not only keep with you my daughter and my son-in-law and look after them, but also after your death your funeral should be got performed by my daughter and thereafter my daughter and the children to be born to her should enjoy the properties with powers of gift, sale. as long as the sun and moon last.

The testator died within a week after the will was executed. The daughter who was pregnant at the time of the making of the will died four or five months after the testator's death. A male child that was born to her died two or three days either before or after her death. The widow however lived till 1917. The only question argued in the appeal was whether the will created a vested interest in favour of the daughter and her children. On this question, this Court held:

There can be no doubt in my opinion that a vested interest has been created so far as the daughter and her children are concerned and that the estate bequeathed to them was not a mere contingent remainder. The general rule of law is very clear, namely, that the mere fact that the possession of the estate bequeathed is to be given at a future time is not by itself a reason for coming to the conclusion that the estate was not to be vested at the time of the testator's death. This position is not disputed so far as a legacy to a single individual is concerned. The mere interposition of a life estate will not prevent the remainder from being a vested one.

14. In Lakshmana Nadar and Ors. v. R. Ramier : [1953]4SCR848 , the Supreme Court had to consider a similar question. The terms of the will in that case were:

After my lifetime, you, the aforesaid Ranganayaki Ammal, my wife, shall till your lifetime, enjoy the aforesaid entire properties, the outstandings due to me, the debts payable by me, and the chit amounts payable by me. After your lifetime Ramalakshmi Ammal, our daughter and wife of Rama Ayyar Avergal of Melagaram village, and her heirs shall enjoy them with absolute rights and powers of alienation such as gift, exchange, and sale from son to grandson and so on for generations.

The first question that came to be considered was as to the nature of the estate Ranganayaki Ammal took, whether it is a woman's estate as known to Hindu law or a mere life estate. The Supreme Court, on that question, held that the estate taken by Ranganayaki Ammal was only a life estate and not a woman's estate as known to Hindu law. Dealing with the nature of the interest which the daughter took under the will, the Supreme Court pointed out : 'Though the daughter was not entitled to immediate possession of the property, it was indicated with certainty that she should get the entire estate at the proper time and she thus got an interest in it on the

testator's death. She was given a present right of future enjoyment in the property. According to Jarman (Jarman on Wills), the law leans in favour of vesting of estates and the property disposed of belongs to the object of the gift when the will takes effect and we think the daughter got under this will a vested interest in the testator's properties on his death.' With regard to the terms of the will as such, the Supreme Court pointed out as follows:

Considering the will in the light of these principles, it seems to us that Lakshminarayana Iyer, intended by his will to direct that his entire properties should be enjoyed by his widow during her lifetime but her interest in these properties should come to an end on her death, that all these properties in their entirety should thereafter be enjoyed as absolute owners by his daughter and her heirs with powers of alienation, gift, exchange and sale from generation to generation. He wished to make his daughter a fresh stock of descent so that her issue, male or female may have the benefit of his property. They were the real persons whom he earmarked with certainty as the ultimate recipients of his bounty. In express terms he conferred on his daughter powers of alienation by way of gift, exchange, sale, but in sharp contrast to this, on his widow he conferred no such powers.

In my opinion, the above observations of the Supreme Court will clearly apply to the facts of the present case.

15. There is a decision of the Bombay High Court in Nusserwanji Icchaporia and Ors. v. Guicher Munshi and Ors. A.I.R. 1946 Bom. 134, which the Courts below have followed. The following head-note therein gives an indication of the terms of the will in that case:

H executed a will in favour of her deceased sister's son P. The executors were to hand over the funds to P's trustees, who were to create a trust so that the funds may go to the children of P. P was not married till the death of H. Subsequently P married D and had from her a daughter V, who died shortly after her birth. P then died without any issue but left a will leaving the funds to D absolutely.

The question for consideration was, whether the daughter V, who was born, and who died subsequently, took any interest in the property at all. The Bombay High Court pointed out that immediately she was born and came into existence, she became entitled to the bequest and it was immaterial whether she was alive or dead at the termination of the prior life interest or life estate given to P under the will, as in the latter event her representatives would take. Some argument appears to have been advanced, based upon Sections 111, 112 and 113 of the Indian Succession Act, 1925. The learned Judge observed:

The next question is the one on which there has been considerable argument on both sides, namely whether Vilarbanoo. did take under this settlement at all and whether the corpus in the hands of the trustees goes to the estate of Piroz, as one of the heirs of Vilarbanoo,with defendant I as the other heir or whether the gift in favour of Piroz's child or children fails for any reason and that therefore the corpus reverts to the residuary estate of the testatrix Hirabai. The Court has now to see whether Vilarbanoo, did or did not take. I have said the dominant intention was that the trustees were to hand over this share to the children of Piroz. Priroz, during his lifetime did have a child but she predeceased him. The question, therefore is : is there anything in the gift-over to the child or children of Piroz, repugnant to any principle

of law or contrary to any of the sections of the Succession Act which have a bearing on this question? The relevant sections to be considered in this connection are Sections 111,112 and 113, Succession Act.

After having considered these sections, the learned Judge came to the conclusion that there was nothing in those sections which could be said to be repugnant to the daughter taking a vested interest immediately she was born.

16. There are three decisions of the Judicial Committee on Section 113 of the Indian Succession Act. The first decision is Putli Bai v. Sorabji : (1923)25BOMLR1099 . That case was concerned with a will of a Parsi. It is unnecessary to refer to the terms of the will. The section with which the Judicial Committee was concerned was Section 100 of the Indian Succession Act, 1865, corresponding to Section 113 of the Indian Succession Act, 1925.

The Judicial Committee pointed out:

The bequests to the sons, daughters, widows and issue of the testator's sons thus made do not in all possible instances dispose of the subject-matter to which they apply, and so fail to comprise the whole of the remaining interest of the testator. It is obvious that he has reserved contingent rights which might well prove to be of value. The unborn beneficiaries do not take the whole interest undisposed of by reason of the title of his own sons being only for their lives. But the difficulties are not exhausted by these considerations. Clause 15 gives over the share in income or corpus alike of any beneficiary who alienates, in any of a number of ways, and in that event creates a discretionary trust, which may extend, so far as the income is concerned, only to a part of it, for the benefit according to selection by the trustees of some others of a class of beneficiaries somewhat wider than that of those who are to take under the clauses just referred to. The 16th clause also puts an end to the title of every beneficiary who ceases to profess, or marries any one not professing the Zoroastrian faith, and gives the interest over in favour of those who take on the death of such beneficiary. In the face of this clause it cannot be contended successfully that Section 100 is complied with. For the whole of the remaining interest need not pass out of the hands of the trustees if there is a forfeiture of the income of the sons of the testator.

It was argued that, even if these questions may arise, they do not arise now, and that the Court ought to have refused to decide them, in accordance with the principles that declarations are not usually made as to merely future interests. But the interests are not merely future interests. If the argument based on the invalidity of the subsequent limitations just considered is well-founded, the five sons have a present title to the residue subject only to the minor provisions already referred to, which title they are now in a position to enforce.

It follows from this conclusion that in so far as there is a direction in Clauses 10, 11 and 14 implying a postponement of the division of the residue for ten years, or until the death of the last surviving son, that direction is inoperative, the interest to which it attaches being absolute.

It will be clear that in that case there were numerous limitations upon the completeness of the estate given under the will to unborn persons and it was that aspect which led to the conclusion reached by the Judicial Committee.

17. The next decision of the Judicial Committee is Sopher and Anr. v. Administrator-General of Bengal and Anr. , which considered Section 113 of the Indian Succession Act, 1925, itself. In that case, the testator gave under his will an annuity to his wife and the balance of his property to his children, his son's share being double that of the daughter. It was provided in the will that, if any children predeceased the testator, the widow or children of such children were to take the share of the children so dying. As to the corpus the testator directed that distribution should be postponed till after his widow's death and thereafter the estate should be divided into as many shares as there were children and his predeceased children leaving issues and the income should be paid of each share to each child for life and thereafter to the children of such child until they attained the age of 18 years. The testator then directed that the share of any child who died without issue should be applied in the same manner as in the case of income from the property. With regard to Section 113 of the Indian Succession Act, 1925, the Judicial Committee pointed out:

Section 113 of the Act raises, or may raise, questions of very great difficulty, and their Lordships do not propose to attempt to express their views on questions of construction which are not relevant to the present appeal, and on which they have not the advantage of knowing the opinions of the learned Indian Judges. It may be observed that in the present case the attention of the Judge was not called to some of the points arising on the section which were argued on this appeal, and if the Board differs from the judgments under discussion the circumstance may well be due to that fact. The section must, of course, be read and construed in connection with the illustrations to be found in the Act.

After referring to the illustrations, the Judicial Committee observed as follows:

The construction of Section 113 of the Act does not appear to have been much considered in reported cases, and the diligence of Counsel has only resulted in the Board being referred to a single case, which will now be referred to. The case is that of Putlibai v. Sorabji Naoroji Gamadia 28 C.W.N. 737, which came to this Board on appeal. It was decided in 1923 and related to Sections 99, 100,101 and 102 : of the Indian Succession Act (X of 1865) then in force. Section 100 is reproduced in the modern Indian Succession Act as Section 113. The case is valuable as deciding that in interpreting wills with reference to Sections 113, 114 and 115 of the present Act, which are applicable to several different systems of jurisprudence, it is necessary to bear in mind that the words used must be understood with reference to the current meaning of the words apart from such technical considerations as are only appropriate in English law. Their Lordships propose in accordance with this view to construe the words of Section 113 in the light, so far as that may be proper, of the various sections contained in Chapter VII of the Act, relating to 'void bequests' (where Section 113 is found), according to their natural meaning without regard to the numerous decisions of the Courts in this country. Section 113, it will be noted, relates to cases where two factors exist, first, that the bequest is made to a person not in existence at the time of the testator's death (e.g., to unborn persons at that date), and secondly, that there is a prior bequest contained in the will

It further held:

It is at least consistent with that decision to hold (as was argued in that case that if under a bequest in the circumstances mentioned in Section 113 there is a possibility of the interest given to a beneficiary being defeated either by a contingency or by a

clause of defeasance, the beneficiary under the later bequest does not receive the interest bequeathed in the same unfettered form as that in which the testator held it, and that the bequest to him does not therefore comprise the whole of the remaining interest of the testator in the thing bequeathed. That is the conclusion at which their Lordships have arrived on the words of the section read in conjunction with the other sections relating to void gifts.

On the facts of that case, the Judicial Committee held that the interests of a grandchild in the income during the period until the death of the widow was contingent on his surviving his parent and the language of the will showed clearly that no grandchild was to receive any income unless and until he survived his father and further, if no child or grandchild survived the widow there would be an intestacy as regards the surplus income.

18. The same question came to be considered by the Judicial Committee in Aniruddha Mitra v. Administrator-General of Bengal and Ors. (1949) 76 I.A. 104 : (1949) 2 M.L.J. 35. That case dealt with a will containing elaborate terms and the Judicial Committee also in an elaborate judgment considered the effect of Section 113 and the illustrations thereto. The Judicial Committee pointed out therein:

The words of the section are not ambiguous; as pointed out by the Board in Mahomed Syedol Ariffin v. Tech Ooi Gark (1916) 43 I.A. 256 : A.I.R. 1916 P.C. 242 the decision referred to by Lord Maugham in Sopher's case (1944) 71 I.A. 93 : (1944) 2 M.L.J. 20. Illustrations appended to sections of a statute should be accepted, if that can be done as being of relevance and value in construing the text....: It is well settled that just as illustrations should not be read as extending the meaning of a section, they should also not be read as restricting its operation, especially so, when the effect would be to crutail a right which the plain words of the section would confer.

In that case a Hindu governed by the Dayabhaga School of Hindu law died on 7th February, 1933, leaving him surviving his widow Sreemutty Nayani Mitra, his only son, the appellant Aniruddha Mitra and the wife of the appellant, Sreemutty Nivanani Mitra. At the time of the testator's death the appellant and his wife had no children. On 4th July, 1934, the appellant took the second respondent Arabinda Mitra, in adoption as his son. He was born on 19th October, 1932. On 5th July, 1931, the testator executed his last will whereby he appointed the first respondent, the Administrator-General of Bengal, his sole executor with liberty to make over the property to the official trustee for carrying out the trusts. On 24th August, 1936, the appellant was adjudicated an insolvent and his estate vested in the third respondent. On 7th May, 1943, he was granted a conditional discharge. The question for determination in the appeal was whether the residuary bequest in Clause 9 of the will in favour of 'the legitimate son or sons of the testator's son Aniruddha Mitra, whether natural-born or validly adopted ' was, as held by both Courts in India valid, or whether it was invalid by reason of the provisions of Sections 113 and 114 of the Indian Succession Act, and the appellant was entitled to the property as on an intestacy.

19. By Clause 5 of the will, the testator gave a right of residence in the family house and use of furniture therein to his wife, his son and son's wife for their respective lives; by Clause 7 of the will, he allowed maintenance to his wife, his son and son's wife each at the rate of Rs. 700 per month during their lives with a direction for distribution of the amount on the death of the survivor or survivors. Clause 9 of the

will provided:

I further will and direct that the legitimate son or sons of my son Aniruddha Mitra, whether natural-born or validly adopted, shall become entitled to all the rest and residue of my property. If there is only one son of my son such residue shall be made over to such son of my son on his completing the age of twenty - one years and if there are more sons of my son than one then to such sons of my son Aniruddha Mitra in equal shares on the youngest of the said sons completing the age of twenty-one years. Until the youngest of such son or sons of my son attains the age of twenty-one years the executor or trustee shall pay the sum of Rupees seven hundred per month to each of such son or sons of my son Aniruddha Mitra for maintenance and education.

The question for consideration was whether the will was hit by Section 115 of the Indian Succession Act, because the clause in question contemplated distribution on the completion of twenty-one years of age by the son's son and whether the adopted son of the appellant had a vested interest, the moment he was adopted. The Judicial Committee held that the residuary estate in Clause 9 became vested at the moment a son was born to or adopted by the testator's son, and the completion of twenty-one years by the only or youngest son was not a contingency, but was only a postponement of possession which did not affect the actual vesting of the estate. The Judicial Committee also pointed out that even if the bequests in Clauses 5 and 7 of the will amounted to prior bequests of the residue the whole remaining interests of the residue had been bequeathed under Clause 9 and the provisions of Section 113 of the Act had no operation on Clause 9 of the will. It further observed:

Coming to Section 113 of the Act, it was held by Gentle and Ormond, JJ., that the interests created by Clauses 5 and 7 of the will, namely, the bequests with respect to the house and furniture to which rights were given to the testator's wife, his son and his wife, and the life annuities, constituted prior bequests contained in the will within the meaning of Section 113. Their Lordships are not satisfied that Section 113 would apply where the prior bequest referred to can be regarded as a bequest prior to the disposition of the residue; if so, their Lordships think the interests cannot be regarded as prior interests of residue, since the property allocated to meet such bequests does not fall into residue until the interests under Clauses 5 and 7 have determined; but even if the bequests do amount to prior bequests of the residue, their Lordships are satisfied that the whole remaining interests of the residue have been bequeathed under Clause 9 and the provisions of Section 113 have no operation on Clause 9 of the will.

20. The decision of the Judicial Committee in Sopher and Anr. v. Administrator-General of Bengal and Anr. (1944) 71 I.A. 93 : (1944) 2 M.L.J. 20 appears to have caused some difficulty. In the words of a Bench of the Bombay High Court in Framroze Dadabhoy Madon v. Tehmina (1947) 49 Bom.L.R. 88:

The present confusion, which we are told, the decision in Sopher's case (1944) 71 I.A. 93 : (1944) 2 M.L.J. 20 has plunged the legal profession of this city, appears to arise from the fact that for many years precedents of English wills and settlements have been followed in Bombay, without any close appreciation of the precise restrictions placed on the freedom of disposition by the Indian Succession Act and the Transfer of Property Act.

Therefore, attempts were made from time to time to explain away the decision of the Judicial Committee in Sopher's case (1944) 71 I.A. 93 : (1944) 2 M.L.J. 20.

21. In Ardeshir Dadabhoy Baria and Anr. v. Dadabhoy Rustomjee Baria and Ors. A.I.R. 1954 Bom. 395, referred to already, Blagden, J., observed:

But it does seem unfortunate that their Lordships' attention was apparently focussed entirely on Sections 113 and 120, Succession Act, and does not seem ever to have been called to illustration 3 to Section 114.

However in Edulji Framroz Dinshaw v. Sir Cowasji Jehangir : (1955)57BOMLR763 , the same High Court made the following comment on the above observation of Blagden, J.:

Mr. Justice Blagden, expressed a doubt whether in view of the decision of the Privy Council in Sopher v. Administrator, General Bengal (1944) 71 I.A. 93 : (1944) 2 M.L.J. 20, the terms of the third illustration to Section 114 could be regarded as having been in effect repealed. The only point which, however, fell to be decided by Mr. Justice Blagden was whether the interest given to unborn persons under a settlement, which was defeasible under a power of revocation reserved by the settlor and which was also defeasible in the event of unborn beneficiaries predeceasing the sons of the settlor was valid under Section 13 of the Transfer of Property Act. The case was not one under the Indian Succession Act, but arose under the Transfer of Property Act. Again the assumption that the third illustration to Section 114 controls the meaning of Section 113 may be open to doubt. When it is recognised that the rule enacted in Section 113 of the Succession Act, is not a branch of the rule against perpetuities or even of the rule against remoteness, and is primarily concerned with the quantum of interest which may be granted to unborn persons, the criticism by the learned Judge of the judgment of the Privy Council that possibly a reference to the third illustration to Section 114 of the Succession Act, would have induced their Lordships to come to a different conclusion, appears to have little force. If Section 113 which enacts that an estate in favour of an unborn person, when it does not comprise the whole of the interest remaining upon a prior bequest is void, relates only to the quantum of interest which can be conferred upon unborn persons, and is not a branch of the law of perpetuities contained in Section 114, it is difficult to appreciate how for the purpose of construing, Section 113 of the Indian Succession Act, their Lordships of the Privy Council could have been persuaded to seek assistance from the third illustration to Section 114 of the Act. It is true that both Sections 113 and 114 deal with estates in favour of unborn persons. Section 113 deals with limitations which may be validly placed upon the quantum of interest which may be conferred upon unborn persons, while Section 114 deals with the period of vesting of an estate granted to unborn persons, but otherwise those provisions do not deal with restrictions of the same nature or quality.

Coyajee, J., in Nusserwanji Icchaporia and Ors. v. Gulcher Munshi and Ors. A.I.R. 1946 Bom. 134, referred to the decision of the Judicial Committee in Sopher's case (1944) 71 I.A. 93 : (1944) 2 M.L.J 20 referred to already and held that that case was not applicable to the particular facts of the case before him.

22. A Bench of the Bombay High Court in Framroze Daddbhoy Madon v. Tehmina (1947) 49 Bom.L.R. 88, already referred to, sought to distinguish the decision of the Privy Council on the ground that it dealt with Section 113 and other cognate sections

of the Indian Succession Act of 1925, and that decision had no application to the group of sections contained in Chapter II of the Transfer of Property Act, and in particular Section 13. For the purpose of coming to this conclusion, the Court relied on two circumstances. One is there is no section in the Indian Succession Act, 1925, analogous to Section 20 of the Transfer of property Act, and the second is, the expression used in Section 13 of the Transfer of Property Act, was ' extends to the whole of the remaining interest of the transferor in the property' while the expression used in Section 113 of the Indian Succession Act was ' comprises '. Even' this Bench realised:

There is no equivalent section in the Indian Succession Act, 1925, to Section 20 of the Transfer of Property Act, 1882, though illustrations (ii) to (v) of Section 112 of the Indian Succession Act indicate that that section may be intended to have a similar result.

However, with great respect to the learned Judges it is not possible to agree with them that any difference was meant between Section 13 of the Transfer of Property Act and Section 113 of the Indian Succession Act, 1925, because of the different phraseology used in those sections-one stating ' extends to the whole of the remaining interest of the transferor in the property ' and the other stating 'comprises the whole of the remaining interest in the thing bequeathed. ' The truth is, the observations of the Judicial Committee in Sopher's case (1944) 71 I.A. 93 : (1944) 2 M.L.J 20 were based more on the illustrations to Section 113 of the Indian Succession Act and the context and the setting in which that section occurs in the statute than on the language of the section itself and this situation was remedied or rectified by the Judicial Committee itself in its decision in Aniruddha Mitra, v. Administrator-General of Bengal and Ors. (1949) 2 M.L.J. 35 : 76 I.A. 104 as explained already. The Bombay High Court considered all the three decisions of the Privy Council in Edulji Framroz Dinshaw v. Sir Cowasji Jehangir : (1955)57BOMLR763 , and observed:

I may summarise the principles which in my view can be extracted from the pronouncements of the Judicial Committee. They are : (a) where an interest which is to vest on the birth of a devisee, who at the date of the death of the testator is unborn, is granted, subsequent limitations which merely defer enjoyment are not void by reason of the provisions of Section 113; (b) where by reason of a contingency the estate devised in favour of an unborn person subject to a previous bequest may not take effect the bequest is void, as it does not comprise the whole of the remaining interest of the testator in the thing bequeathed ; and (c) where an estate which is to vest in an unborn person subject to a prior bequest is made subject to a condition of defeasance, the bequest is void for the same reason.

23. Therefore, having regard to the principles I have indicated above and the decisions referred to above, I do not have any hesitation in coming to the conclusion that the moment a son was broil to Sethulakshmi Ammal that son acquired a vested interest in the suit properties and he became immediately the fresh stock of descent and consequently on his death, Sethulakshmi Ammal, the mother, as the heir to the son inherited the vested remainder and came to enjoy the same along with her life-interest and by virtue of the operation of Section 14 of the Hindu Succession Act, 1956, what otherwise would be a woman's estate of Sethulakshmi Ammal became an absolute estate capable of being transmitted or bequeathed by her. Therefore, whether it is under the will, Exhibit A-22 of Sethulakshmi Ammal or as an heir, on intestacy of Sethulakshmi Ammal, the first plaintiff is entitled to the properties and

hence the conclusion of the Courts below in this behalf is correct.

24. Under these circumstances, the second appeal fails and is dismissed. There will be no order as to costs. No leave.