Malabar Wills Act, 1898

TAMILNADU
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Act 5 of 1898

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Malabar Wills Act, 1898(Tamil Nadu Act 5 of 1898)Statement of Objects and Reasons - Malabar Wills Act, 1898 (V of 1898). - The honourable Mr. Justice Bashyam Iyengar, the member in charge of the Bill, in introducing the Bill as amended by the Select Committee, in the Madras Legislative Council said:-As you are all aware this measure is one which is applicable only to that portion of Her Majesty's subjects in this presidency who are governed by the Marumakkathayam or the Aliya-santhana Law of Inheritance and the object of this Bill was in the main, originally no more than to remove certain doubts which were entertained in certain quarters as to the testamentary power of persons governed by the Aliyasanthana or Marumakkattayam Law of Inheritance, over their self-acquired property. It is, of course, undoubted that a Hindu, whether he be governed by ordinary Hindu Law or by the Aliyasanthana or Marumakkathayam system of Inheritance, cannot make a will of what is known as joint family property; but the power of a Hindu governed by the ordinary Hindu Law to make a will of his separate or self-acquired property has long been judicially recognised. But for some reasons or other, which was never very intelligible to merit was doubted whether a Hindu governed by the Marumakkathayam or the Aliyasanthana Law of Inheritance could exercise a power of testamentary disposition over even his self-acquired and separate property. That he could exercise no such power over what is regarded as tarwad or joint property is very clear; but inasmuch as even self acquired property of a member of a Malabar tarwad passes on his death by survivorship to the surviving members of the tarwad, notwithstanding that during his lifetime he may make an absolute gift of his self-acquired or separate property, some doubt was entertained whether he could regulate by testamentary disposition succession to property which was his self-required property after his death. It was conceded and it was un-doubted law that the other members of the family had no community of interest with him in his self-acquired property or separate property. But notwithstanding that inasmuch as on his death it passed to the surviving members of his family, a doubt was entertained whether he could exercise testamentary power of-disposition over that property although he could, by act inter vivos, make an absolute disposition thereof. Of course the self-acquired property of a member of a tarwad passed by survivorship to the surviving members of the family not by reason of any community of property between him and other members of his family during his lifetime but only in the sense in which an heir can succeed to the property of a person only if the heir survives that person. Though on principle it would seem that

a person governed by the Marumakkatayam or the Aliyasanthana system of Inheritance has as undoubted a right to dispose of his self-acquired or separate property by will as any Hindu governed by the Mitakshara system of Inheritance, still doubts were entertained in certain quarters; and the object of this Bill was only a declaratory one in order to remove such doubts. But in connection with this proposal the Secretary of State suggested that this opportunity might be availed of to regulate the exercise of the power of making a win by prescribing certain formalities as to the making and attestation of wills, compliance with which formalities should be made obligatory.The power of making a will as a form of disposition of property was judicially recognised to form as much a portion of the customary law in Malabar as in any other part of the presidency. The Secretary of State suggested that when the power of making a will in Malabar was to be declared and doubts removed as to the testamentary power of persons governed by the Marumakkathayam or Aliyasanthana Law of Inheritance to dispose of property which they could give by act inter vivos that opportunity might also be taken to prescribe certain legislative rules for making, execution and attestation of wills; and hence it is that the bill as subsequently altered and introduced in the Council contains several rules as to the mode of execution and attesting wills and revoking the same. It always struck me as anomalous that when Hindus in other parts of the presidency outside the Presidency Town are at liberty to make nun-cupative wills, restrictions should be placed upon the people in the Western Coast in regard to the exercise of their power of testamentary disposition by requiring that they should make their wills only in writing duly signed and attested. Of course, for my own part, I should have preferred a measure of this kind applicable not only to Hindus governed by Aliyasanthana or the Marumakkathayam system of inheritance, but all Hindus in this presidency governed by the ordinary Hindu Law. However that may be there is no reason why this Bill which prescribes such formalities in the case of Western Coast people alone be objected to. I was placed in charge of the Bill, shortly after it was referred to the Select Committee, and in the Select Committee the Bill has been considerably revised. It has been divided into three parts. The preliminary part containing definitions of certain words and expressions, the second part being in the nature of substantive law and the third part in the nature of processual law which lays down rules which, in my opinion, may as usefully be extended to the whole of the presidency. This Bill is in a great measure based on the provisions of the Hindu Wills Act, which, as the Hon'ble Members of this Council are aware, is applicable only to wills made by Hindus in Madras and to wills made outside Madras so far as they relate to immovable property in Madras. Section 4 of this Bill, is, as far I am aware, the first legislative declaration of the principle that every person of sound mind and not a minor may by means of a will dispose of property which he could legally alienate by gift inter vivos, and be deemed competent so to dispose of such property when the Courts recognise that form of disposition by will. Though there is nothing specific about it in Hindu law, the extent of the power of disposition could be determined only by the substantive law applicable to the case of gift inter vivos.Even in the Hindu Wills Act the declaration is not in the positive form, but it is only a declaration that no Hindu shall be deemed competent to dispose of property which he could not have disposed of by act inter vivos. It is rather strange that this measure has attracted no public attention even in Malabar, and, for my own part, before the British legislature enacts this provision, namely, that the power of disposition by will is the same as the power of disposition by gift inter vivos, public opinion should be consulted and it should be ascertained how far such a principle, which no doubt is fully recognised by the English system of jurisprudence, can be safely adopted in this country. No doubt under the English system of jurisprudence as it now exists, though not as it

existed formerly, the Law of Inheritance is entirely subordinated to the power of disposition by will. But under certain systems of jurisprudence in Europe and under the Mahammadan Law here, the power of disposition by will cannot be exercised so as to defeat the Law of Inheritance in its. entirety. Under certain systems of jurisprudence the power of disposition by will can be exercised only in respect of a portion of one's property, and under the Mahammadan Law, as you all know, a testator can by will disinherit his heirs only to the extent of one-third of his properly. The English system of inheritance is entirely different, and before such a rule as this is adopted and receives the stamp of legislative declaration, it would certainly have been desirable to consider whether the power of testamentary- disposition should be allowed to be exercised by Hindus without any fetters in favour of their heirs.For Statement of Objects and Reason, please Fort St. George Gazette Supplement, dated 24th November 1896, page 2; for Report of the Select Committee, dated the 8th May 1898; for Processing's in Council, dated the 12th January 1897, page 23;dated the 9th March 1897, page 45; dated the 1st February 1898, page 13; dated the 3rd May 1898, page 34; and dated the 12th July 1898, page 3.Received the assent of the Governor on the 9th July 1898 and of the Governor-General on the 3rd August 1898. The Governor-General's assent to this Act was published in the Fort St. George Gazette, dated the 16th August 1898.An Act to declare the testamentary power of persons governed by the Marumakkatayam or the Aliyasantana law of inheritance, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons.Preamble. - Whereas doubts have arisen regarding the testamentary power of persons governed by the Marumakkatayam or the Aliyasantana law of inheritance; and whereas it is expedient to remove such doubts, and to provide rules for the execution, attestation, revocation and revival of the wills of such persons; It is hereby enacted as follows:-

Part I – Preliminary

1. Short title.

(1)This Act may be called the Malabar Wills Act, 1898.(2)It extends to the whole of the [State of Tamil Nadu] [This expression was substituted for the expression 'Presidency of Madras ' by the Tamil Nadu Adaptation of Laws Order, 1970, which was deemed to have come into force on the 14th January 1969.]; and(3)It shall come into force on such date as the [State Government] [The words 'Provincial Government' were substituted for the words 'local Government' by the Adaptation Order of 1937 and the word 'State' was substituted for 'Provincial' by the Adaptation Order of 1950.] by notification shall appoint in this behalf:[xxx] [The proviso was omitted by section 4 of, and the Third Schedule to, the Tamil Nadu Repealing and Amending Act, 1957 (Tamil Nadu Act XXV of 1957). In so far as this Act applies to the added territories, this proviso was omitted by section 4 of, and the Second Schedule to, the Tamil Nadu (Added Territories) Extension of Laws (No. 2) Act, 1961 (Tamil Nadu Act 39 of 1961).]This Act was extended to the merged State of Pudukkottai by section 3 of, and the First Schedule to, the Tamil Nadu Merged States (Laws) Act, 1949 (Tamil Nadu Act XXXV of 1949).This Act was further extended to the added territories by Madras (Added Territories) Extension of Laws (No. 2) Act, 1961 (Tamil Nadu Act 39 of 1961).See also the Indian Succession Act, 1925 (Central Act XXXIX of 1925)

2. Interpretation clause.

- In this Act, unless there be something repugnant in the subject or context,-(1)"minor" means any person who shall not have completed the age of eighteen years;(2)"will" means any legal declaration of the intentions of the testator with respect to his property which he desires to be carried into effect after his death;(3)"codicil" means an instrument made in relation to a will and explaining, altering or adding to its dispositions. It is considered as forming an additional part of the will.

Part II – Of Wills

3. Persons to whom this part shall apply.

- This part shall apply to persons domiciled in the [State of Tamil Nadu] [This expression was substituted/or the expression 'Presidency of Madras' by the Tamil Nadu Adaptation of Laws Order, 1970, which was deemed to have come into force on the 14th January 1969.] who are governed by the Marumakkatayam or the Aliyasantana law of inheritance.

4. Persons capable of making wills.

- Every person of sound mind and not a minor may by will dispose of property which he could legally alienate by gift inter vivos and shall be deemed to have been always competent so to dispose of such property.Explanation I. - Persons who are deaf or dumb or blind are not thereby incapacitated for making a will, if they are able to know what they do by it.Explanation II. - One who is ordinarily insane may make a will during an interval in which he is of sound mind.Explanation III. - No person can make a will while he is in such a state of mind whether arising from drunkenness or from illness or from any other cause that he does not know what he is doing.

5. Will obtained by fraud, coercion or importunity.

- A will or any part of a will, the making Of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

6. Will may be revoked, or altered.

- A will is liable to be revoked or altered by the maker of it at any time when he is competent to dispose of his property by will.

7. Saving clause.

- Nothing contained in section 4 shall-(a)affect any right established before the commencement of this Act by a final decree of a Court of competent jurisdiction;(b)authorize a testator to deprive any person of any right of maintenance of which, but for section 4, he could not deprive them by will;(c)affect any law of intestate succession or authorize any testator to create in property any

interest, which he could not have created prior to this Act.

Part III – Of The Execution, Attestation, Revocation, Alteration and Revival Of Wills

8. Persons to whom this Part shall apply.

- This Part shall apply to persons governed by the Marumakkatayam or the Aliyasantana law of inheritance, whether they are domiciled in the [State of Tamil Nadu] [This expression was substituted for the expression 'Presidency of Madras ' by the Tamil Nadu Adaptation of Laws Order, 1970, which was deemed to have come into force on the 14th January 1969.] or not.

9. Execution of wills and codicils.

- All wills and codicils made on or after the date of the commencement of this Act within the [State of Tamil Nadu] [This expression was substituted for the expression 'Presidency of Madras' by the Tamil Nadu Adaptation of Laws Order, 1970, which was deemed to have come into force on the 14th January 1969.], and all such wills and codicils made outside the [said State] [These words were substituted for the words 'said Presidency' by paragraph 4 of, and the Schedule to the Tamil Nadu Adaptation of Laws Order, 1970, which was deemed to have come into force on the 14th January 1969.] so far as relate to immovable property situated within the

1st. - The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

2nd. - The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

3rd. - The will shall be attested by two or more witnesses, each of whom must have seen the testator, sign or affix his mark to the will, or have seen some other person sign the will in the presence and by the direction of the testator, or have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses must sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

10. Incorporation of papers by reference.

- If a testator, in a will or codicil duly attested, refers to any other document than actually written, as expressing any part of his intentions, such documents shall be considered as forming a part of the will or codicil in which it is referred to.

11. Witness not disqualified by interest or by being executor.

- No person, by reason of interest in, or of his being an executor of a will, is disqualified as a witness to prove the execution of the will or to prove the validity or invalidity thereof.

12. Revocation of will or codicil.

- No will or codicil, nor any part thereof, shall be revoked otherwise than by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which a will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same.

13. Effect of obliteration, interlineation or alteration in a will.

- No obliteration, interlineation or other alteration made in any will after the execution thereof shall have any effect, except so far as the words or meaning of the will shall have been thereby rendered illegible or indiscernible, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; save that the will, as so altered, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

14. Revival of a will or codicil.

- No will or codicil, nor any part thereof, which shall be in any manner revoked, shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil, which shall be partly revoked and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown by the will or codicil.

15. Execution and revocation of will or codicil by soldiers or mariners.

- No will or codicil made by a soldier employed in an expedition or engaged in actual warfare or by a mariner at sea and no revocation by such person of his will or codicil shall be deemed invalid by

reason only of such will, codicil or revocation not being made in accordance with the provisions of this part.