Madras High Court
Damodara Moothan vs Ammu Amma And Ors. on 19 July, 1943
Equivalent citations: (1943) 2 MLJ 332
Author: Horwill
JUDGMENT Horwill, J.

1. The question that arises in this appeal is with regard to the construction of a will which has been marked as Ex. A. It was held by the District Munsiff of Palghat, who tried the suit, that according to the will one Kunjammal, the sixth defendant and mother of the plaintiff, had an absolute interest and that therefore the plaintiff had no cause of action. He therefore dismissed the suit. In appeal, the learned Subordinate Judge construed the will as conferring upon the sixth defendant and her children the plaintiff and the seventh defendant, joint rights in the property after the death of their mother, the widow of the testator. He therefore allowed the appeal and remanded the suit for fresh disposal, because the disposal of the suit then depended upon the result of certain inquiries as to the binding nature of the alienations and other matters.

2. After the testator had expressed his regret that he had no male issue and had only a young daughter often years of age, he said that " the aforesaid Kunjammal (6th defendant), born to me by my wife Paru, becomes entitled to all my properties and the proceeds thereof." He then goes on to say that he would manage the property for the remainder of his life, that he and his wife during their lifetime should enjoy the property, and that after they were both dead their property..." should be enjoyed by the daughter Kunjammal and the issues that might be born to her." Mr. Krishna Variar, who appears for the appellant, first contends that this document is not a will at all, but is merely a settlement conferring upon his wife rights even during his lifetime; and he relies on the words, "It is settled, however, that till the end of my life and that of my wife, we ourselves should keep in possession and enjoy the properties in any manner we like." The document is, however, described as a will; and I do not think that the testator meant anything more than that his daughter should not come into possession of the property as long as his widow was alive. The reference to enjoyment by himself and his wife was a reference to a natural state of affairs, wherein the wife, equally with the husband, enjoys the income from the husband's property. This recital was intended to emphasise the fact that after the death of one of them the other should continue to enjoy the property.

3. Another preliminary argument of Mr. Krishna Variar is that under Section 113 of the Indian Succession Act, a bequest to the children of Kunjammal would be void; but I see no reason why it should be. Section 113 of the Indian Succession Act, and the corresponding Section 13 of the Transfer of Property Act, make void a bequest or a transfer to a person unborn at the time of the bequest or transfer if the interest does not comprise the whole of the remaining interest in the testator or transferor. I see no reason why a reference to a prior bequest or a prior transfer excludes the idea of more than one prior bequest or transfer. The illustrations given in the text beneath these sections do not indicate that when there are two or more prior life interests the bequest or transfer would be void even if it comprised the whole of the interest of the testator.

4. An incidental question which might under certain circumstances have had some importance was whether the widow had merely a life estate as known to English law or a widow's estate, which is the

common form of enjoyment by a woman under Hindu law. The District Munsiff was of opinion that it must be presumed that the widow was intended to have a woman's estate. The Subordinate Judge does not discuss that question; and presumably left it open for future consideration after the District Munsiff had considered the various issues of fact that arose in the suit.

5. The question is whether Kunjammal obtained the property absolutely, the reference to her issues being merely a customary form for the conferring of an absolute estate, or whether it was meant that the issue should at once have some indefeasible interest in the property. Section 97 of the Succession Act says that " Where property is bequeathed to a person, and words are added which describe a class of persons but do not denote them as direct objects of a distinct and independent gift, such person is entitled to the whole interest of the testator therein, unless a contrary intention appears by the will." This section does not apply directly to wills by Hindus; but it lays down a general principle of interpretation of wills which could equally be applied to a will by a Hindu, though if the clear intention of the testator appeared otherwise the section should not be applied. Pandrang Row, J., in Viswanadhan v. Anjaneyalu A.I.R. 1935 Mad. 865 relied on by the learned Subordinate Judge, holds that the general principles laid down in the Succession Act should ordinarily be applied to Hindu wills. The use of the words such as " santhathi "--as used here--is a common way of expressing the intention of a testator that the property should be enjoyed absolutely by the person to whom the property is bequeathed. This much is conceded by the learned Subordinate Judge by reference to a number of cases in which that word has been held to imply succession or heirship; but he relies on two cases which he considers point to a different interpretation; One is a case by a single Judge of the Bombay High Court in Krishnadoss v. Dwarkadas A.I.R. 1936 Bom. 459 who said that in construing Hindu wills it is not improper to take into consideration what are known to be ordinary notions and wishes of Hindus with respect to the devolution of property. That is very true. But in the case that he was considering there was a bequest to a person and his sons and daughter. The conventional expression was not there used. There is no mention of Tulsidas and his children or his issue in a general way but specifically to his sons and daughter, in the singular. It seemed in that case that the testator had in mind not a general class of persons but specific sons and a specific daughter that were living at the time when he drew up the will and that he intended that they equally and jointly with their father Tulsidas should enjoy the property. The learned Subordinate Judge also refers to a decision of the Privy Council in Madhavarao Ganpatrao v. Balabhai Raghunath (1927) 54 M.L.J. 245 : L.R. 55 I.A. 74 : I.L.R. 52 Bom. 176 (P.C.) but the question we are considering did not arise there at all. Perhaps the learned Judge quoted that case more for an observation of Lord Buckmaster contained therein that the technical meaning given to words in English law should there be disregarded; but it cannot be considered as an authority for ignoring the principle found in Section 97 of the Succession Act. It is perhaps correct to say, as the learned Judge has, that the use of the words "santhanam" and " santhanamgal' has not the same rigidity as the words "and his issues" in English and does not exclude the possibility that the testator intended to benefit them as individuals. An earlier part of the will confirms the view that one would take from a strict interpretation of Section 97; because the testator there said that as he had no male child and only a minor female child named Kunjammal and that it appeared that his wife was incapable of further child bearing, " Therefore the aforesaid Kunjammal, born to me by my wife Paru, becomes entitled to all my properties and proceeds thereof." He seems therefore not to be considering the possibility of enjoyment of the property by

anybody but his daughter Kunjammal. I think, therefore, that the learned District Munsiff was right in holding that after the life interest of the widow there was an absolute right to Kunjammal.

6. Even if Ex. A be so interpreted as to give an interest to the children of Kunjammal, it could be only after her lifetime. I cannot interpret the will in the way that the learned Subordinate Judge has, as a joint gift to Kunjammal and such children as might be alive when she came to enjoy the property. In the Bombay case Krishnadoss v. Dwarkadoss A.I.R. 1936 Mad. 459 quoted by the learned Judge it is obvious that the sons and a daughter were living at the time when the will was drawn up and that that was one of the reasons why the learned Judge construed the will as one in favour of all of them jointly. If the bequest in this case was not to Kunjammal absolutely, then there could be little doubt that she was to enjoy for her life and her children after her. As Kunjammal is still alive, the plaintiff would have no cause of action to sue for a share of the property. She would be entitled to ask for a declaration that the alienations were not binding on her; but I do not think, in the circumstances of this case, whatever the facts might prove to be, that that declaration should be granted.

7. In any view of the matter, therefore, the suit must fail. The appeal is allowed with costs throughout and the order of the lower appellate Court set aside.