A JOHN VALLAMATTOM AND ANR.

v.

UNION OF INDIA

JULY 21, 2003

B [V.N. KHARE, CJ., S.B. SINHA AND DR. AR. LAKSHMANAN, JJ.]

Constitution of India, 1950; Articles 13, 14, 15, 25, 26, 51 and 372/ Indian Succession Act, 1925; Section 118:

C *Testamentary disposition of property by Christians—Restriction to bequest property to religious or charitable uses—Constitutionality of—Held: Though restrictions prevent testator from making ill considered death-bed bequest under religious influence but restrictions are arbitrary/unreasonable as it restricts only the Christians in bequeathing property for charitable* D *purposes—Bequeathing of property for charitable/religious purpose only if the testator has a wife but having no nephew/niece or the testator survives for 12 months after execution of the Will—Interpretive changes of the statute effected by passage of time—Such restrictions are unreasonable/arbitrary/ discriminatory—Hence, violative of Article 14 of the Constitution of India—Charitable Uses Act, 1935—Mortmain and Charitable Uses Act, 1858—* E *Charities Act, 1960—Indian Succession Act, 1865.*

Words and Phrases:

'Testamentary disposition of property', 'bequest', 'death-bed disposition', 'philanthropic act', 'suspect legislation'—Meaning of.

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Petitioners are members of the Christian community aggrieved by the discriminatory treatment meted out to them in India under the Indian Succession Act. They were prevented from bequeathing property for religious and charitable purposes under Section 118 of the Act. Hence the present Writ Petition.

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It was contended for the petitioners that the impugned provision was violative of Articles 14 and 15 of the Constitution of India as it discriminates against a Christian *vis-a-vis* non-Christian, against testamentary disposition by a Christian *vis-a-vis* non-testamentary disposition,

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against religious and charitable use of property *vis-a-vis* all other uses including not so desirable purposes, a Christian who has a nephew, niece or nearest relative *vis-a-vis* Christian who has no relative at all against a Christian who dies within twelve months of execution of the will of which he has no control; that since the impugned provision owes its origin to the Statute of Mortmain which was repealed in England, it could not be retained in the Indian Statute Book particularly when it does not conform to the provisions contained in Part III of the Constitution of India; that since petitioners are citizens of India, they have right to effectuate their wishes according to their discretion with freedom to choose legatee under the will for the purpose of bequest; that the impugned provision is violative of Article 1 of the Vienna Declaration in the World Conference on Human Rights; and that contribution for religious and charitable purpose is an essential and integral part of Christian Religious Faith; and that the impugned provision violates Articles 25 and 26 of the Constitution of India.

On behalf of the respondent, it was submitted that since the Indian Succession Act - a pre-Constitution enactment having regard to Article 372 of the Constitution, continues to be in force within the territory of India; that the Indian Parliament is not bound by the legislative changes in any foreign country; that since Indian Christians form a separate class distinct from other communities in India, they could not be treated equally; and that the secular matters like succession/marriage could not be brought within the guarantee enshrined under Articles 25, 26 and 27 of the Constitution of India.

Allowing the Petition, the Court

HELD: *Per Khare,* CJ: 1.1. The history of Section 118 of the Indian Succession Act can be traced to an ancient British statute known as Charitable Uses Act, 1735. The Act was repealed by Mortmain and Charitable Uses Act, 1888. The statute of Mortmain created severe restrictions on assurance of land for charitable purposes, it provided exemption in respect of assurance of land of any quantity for a public park, museum, universities, colleges or to any local authority. While borrowing the restrictive clauses for Mortmain Statute at the time of enacting Section 118 of the Act, the Indian Legislature omitted to include the exemptions in favour of the various charitable uses as provided in the Mortmain and Charitable Uses Act. The consequence is that as per the impugned provision the testamentary disposition of property in relation to all forms of religious

A and charitable purposes is subject to the same restriction as contained in Section 118 of the Indian Succession Act. [647-B-C, H; 648-A-B]

1.2. Clause 1 of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are B inconsistent with the provisions of Part III of the Constitution, shall, to the extent of such inconsistency, be void. Keeping in view the fact that the Indian Succession Act is a pre-Constitution enactment, the question as regards its constitutionality will have to be judged as being law in force at the commencement of the Constitution of India. By reason of clause 1 C of Article 13 of the Constitution of India, in the event, it be held that the provision is unconstitutional the same having regard to the prospective nature would be void only with effect from the commencement of the Constitution. Article 372 of the Constitution of India per force does not make a pre-constitution statutory provision to be constitutional. It merely makes a provision for the applicability and enforceability of pre-D constitution laws subject to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities. [651-B-D]

Keshvan Madhava Menon v. *The State of Bombay,* [1951] SCR 228, relied on.

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1.3. The underlying principle contained in Section 118 of the Act indisputably was to prevent persons from making ill-considered death-bed bequest under religious influence. It is beyond any cavil of doubt that the restrictions imposed thereby have a great impact on a person who desires F to dispose of his property in a particular manner which would take effect upon or after his death. The concept of ownership of a person over a property or a right although is a varying one includes right to dispose of his property by way of will. The Indian Succession Act confers such a right upon all persons irrespective of caste, creed or religion he belongs to. Section 118 of the Act imposes a restriction only on the Indian Christians. The said G restriction is not applicable to the citizens belonging to other religions including Parsis. [651-G-H; 652-A, C]

1.4. An Indian Christian in terms of the impugned provision is forbidden from making any bequest excepting in the manner provided for therein. Such bequest is prohibited only in the event the testator has a nephew or a niece or H any nearer relative. Indisputably, a wife of a testator, in terms of definition as

contained in Section 28 read with the First Schedule of the Act would not be a near relative, although an adopted son would be. It is difficult to appreciate as to why a testator would, although, be entitled to bequeath his property by way of charitable and religious disposition if he has a wife but he would be precluded from doing so in the event he has a nephew or a niece. [652-D-F] A

1.5. A charitable disposition of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to the mankind has specifically been acknowledged not only in different religious texts but also in different statutes. The Indian Succession Act does not define as to what would be a charitable disposition, but the transfers to which it refers are the same as those described in Section 92 CPC as trusts created for public purposes of a charitable or religious nature. It is really baffling that no protection has been given to the near relatives against death-bed gifts for non-religious or charitable purpose. Furthermore, there is no restrictive provision with regard to gift intervivos. It is really strange as to how a statute may permit death-bed gifts to any other person for any purpose whatsoever including illegal or immoral purposes but restriction has been imposed on testamentary disposition for religious or charitable uses. [652-F-H; 653-A-B] B C D

1.6. Assuming that the purpose of Section 118 of the Act is to prevent bequest of property under religious influence, there is no justification in restricting testamentary disposition of property for charitable purpose. As the charitable purposes are philanthropic and since a person's freedom to dispose of property for such purposes has nothing to do with religious influence, the impugned provision treating bequests for both religious and charitable purposes is discriminatory and violative of Article 14 of the Constitution. [653-E-F] E F

1.7. There is no rationale behind limiting the survival of the testator to a period of twelve months in order to give effect to his wishes. There is also no rationale in the classification between a testator, who survives beyond twelve months, and a testator, who does not survive beyond the same period, in declaring the will of the former as void and that of the latter as valid. Besides, the period of duration of life of a testator has no relation with the purpose of will, there is no reason behind fixing twelve months period. Testators constitute a homogeneous class and they cannot be divided arbitrarily on the basis of duration of their survival which is unrelated to the purpose of executing a will. Hence, the period of twelve months has no nexus with the object of G H

A performing a philanthropic act. Thus, the impugned provision is violative of Article 14 of the Constitution. [653-G-H; 654-A]

1.8. Once it is held that the underlying purpose for enacting the provision was merely to thwart influence exercised by people professing religion resulting in death-bed disposition, having regard to the fact that B such a contingency has adequately been taken care of in terms of Section 51 of the Act, the purport and object of the Act must be held to be non-existent. It may be true that the Indian parliament is not bound to take note of and amend its statutory enactments keeping in view the amendments made in England. But there cannot be any doubt whatsoever that while interpreting a C restrictive statute, one may consider not only the past history of the concerned legislation but the manner in which the same has been dealt with by the legislature of its origin. A right of transfer of land indisputably is incidental to the right of ownership and must be construed strictly. The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretive changes of the statute effected by passage of time. Hence Section 118 of the D Act being unreasonable is arbitrary and discriminatory and, therefore, violative of Article 14 of the Constitution. [654-C-E, F]

M/s. DLF Qutab Enclave Complex Educational Charitable Trust v. *State of Haryana and Ors.*, [2003] 2 SCALE 145 and *Kapila Hingorani* v. *State of Bihar*, [2003] 4 SCALE 712, relied on.

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2. It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing as on 26th January, 1950, but while doing so the Court is not precluded from taking into consideration the F subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation. In view of the matter even if a provision was not unconstitutional on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered G unconstitutional. The world has witnessed a sea-change. This Court, therefore, while considering the constitutionality of Section 118 of the Act, is entitled to take those facts also into consideration. Though a restriction to make testamentary disposition of the property to some extent is prevalent under the Mohammedan law but therein the purpose is to protect the near relation which cannot be said to be the sole purpose underlying Section 118 of the H

Act. [655-F; 656-B-E] A

Clarence Pais and Ors. v. *Union of India,* JT (2001) 3 SC 82, referred to.

3.1. In the instant case, this Court is not concerned with the right of a person to freedom of conscience but is only concerned with a question B as to whether by reason of Section 118 of the Act the right of Christians to profess, practise and propagate religion is violated. Article 25 provides freedom of 'profession' meaning thereby the right of the believer to state his creed in public and freedom of practice meaning his right to give it expression in forms of private and public worships. Disposition of property C for religious and charitable purpose is recommended in all the religions but the same cannot be said to be an integral part of it. Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion. Article 25 of the Constitution of India would not have any application and so Article 26 may also not have any application in the instant case. [657-C-E, G; 658-A] D

Stainislaus Rev. v. *State of M.P.,* AIR (1975) MP 163, relied on.

3.2. The two provisions viz. Articles 25 and 44 of the Constitution of India show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt E that marriage, succession and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation. [658-C-E]

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Smt. Sarla Mudgal, President, Kalyani and Ors. v. *Union of India and Ors,.* [1995] 3 SCC 635, relied on.

Per Sinha, J. (Supplementing):

1.1. Message of charity and compassion is to be found in all religions G without any exception. Only because charity and compassion are preached in every religion, the same by itself would not be a part of the 'religious practice' within the meaning of Article 25 of the Constitution of India. Thus the Religion of Christianity encouraging the Christians to practise charities to attain spiritual salvation is of not much relevance for this purpose. H

A Renouncement of world by a person following any religion is necessarily not the essential practice of the religion which is meant for commonness. Such preachings for renouncement from the world have no co-relation with the tenets of Article 25 of the Constitution of India. [658-H; 659-A, B, G]

Lily Thomas and Ors. v. *Union of India and Ors.*, [2000] 6 SCC 224, B referred to.

English Dictionary by Collins, referred to.

1.2. The impugned provision was enacted to prevent person from making ill-considered death bequest under religious influence. The object behind the C said legislation was to protect a section of illiterate or semi-literate persons who used to blindly follow the preachers of the religion. Such a purpose has lost all its significance with the passage of time and, therefore, has to be declared *ultra vires* Article 14 of the Constitution of India. [659-H; 660-A]

D *Per Dr. AR. Lakshmanan, J. (Supplementing):*

1.1. The harsh and rigorous procedure envisaged under Section 118 of the Indian Succession Act in relation to testamentary disposition of property for religious and charitable use does not apply to members of Hindu, Mohammadan, Buddhist, Sikh or Jain Community by virtue of Section 58 of E the Act. At the same time, since no exemption is granted by the State Government to the members of the Christian community under Section 3 of the Act, Christians cannot bequest property for religious or charitable use unless fresh will is executed on the expiry of every 12 months, if the testator does not suffer from the misfortune of death within the statutory period of 12 months. There is no justification in retaining the impugned provision in the F statute book, which is arbitrary and violative of Article 14 of the Constitution, since the Mortmain Statutes were repealed by the Charities Act, and by that the very basis and foundation of the impugned provision has become non-existent. The impugned provisions are also violative of Articles 25 and 26 of the Constitution inasmuch as it is an essential and integral part of Christian G religious faith to give property for religious and charitable purposes. The impugned provision defeats object of the will and is harsh, unjust and arbitrary. [661-B-F]

1.2. The classification between testators who belong to Christian community and those belonging to other religions is extremely unreasonable. H All the testators who bequeath property for religious and charitable purpose

belong to the same category irrespective of their religious identity and so the impugned provision, which discriminates between the members of one community as against another, amounts to violation of Article 14 of the Constitution. There is no rationale behind limiting the survival of testator to a period of 12 months in order to give effect to his wishes. There is no rationale in the classification between a testator who survives beyond 12 months and a testator who does not survive beyond the same period in declaring the will of the former as void and that of the latter as valid. There is no logic behind fixing 12 months' period, and the testators who constitute a homogenous class cannot be decided arbitrarily on the basis of the duration of their survival which is unrelated to the purpose of executing a will. Since fixation of such a period has no nexus with the object of performing a philanthropic act, the impugned provision is liable to be declared void as violative of Article 14 of the Constitution. [661-H; 662-A-C]

1.3. The first part of Article 14 of the Constitution of India is a declaration of equality of civil rights for all purposes within the territory of India and basic principles of republicanism and there will be no discrimination. The guarantee of equal protection embraces the entire realm of 'State action'. It would extend not only when an individual is discriminated against in the matter of exercise of his right or in the matter of imposing liabilities upon him, but also in the matter of granting privileges etc. In all these cases, the principle is the same, namely, that there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same. All persons of similar circumstances shall be treated alike both in privileges and liabilities imposed. The classification should not be arbitrary; it should be reasonable and it must be based on qualities and characteristics and not any other who are left out, and those qualities or characteristics must have reasonable relation to the object of the legislation. [662-D-F]

D.S. Nakara v. *Union of India,* [1983] 1 SCC 305, relied on.

1.4. The contribution for religious and charitable purposes is a philanthropic act intended to serve humanity at large and is also recognized as a religious obligation. Therefore, bequeathing property for religious and charitable purposes cannot be controlled or restricted by the Legislature as it would offend the fundamental rights of the testator under Articles 25 and 26 of the Constitution. Hence, the impugned provision is arbitrary and unconstitutional. It is also violative of Article 26 of the Constitution inasmuch as it is an essential and integral part of Christian religious faith to give

A **property for religious and charitable purposes. Every Christian shall have the right to establish and maintain institutions for religious and charitable purposes, manage its own affairs, own and acquire movable and immovable properties and to administer such property in accordance with law. [663-D-E]**

1.5. There cannot be any unusual burden on Christian testators alone
B **when all other testators making similar bequests for similar charities and similar religious purposes are not subjected to such procedure. Therefore, Section 118 of the Act is anomalous, discriminatory and violative of Articles 14, 15, 25 and 26 of the Constitution and should be struck down. [663-G]**

1.6. A substantive restriction is imposed based on uncertain events over
C **which the testator has no control. Thus, Section 118 of the Act regarding religious and charitable bequests of all testators who are similar should be subjected to the same procedure. It is pertinent to notice that the judgment of the Kerala High Court was not appealed against by the Union of India, in the case of *Preman* v. *Union of India**. However, even then the Parliament did not**
D **remove the discrimination. Under such circumstances, this Court, in exercise of its jurisdiction and to remedy violation of fundamental rights, is bound to declare the impugned provision as invalid and being violative of Articles 14, 15, 25 and 26 of the Constitution. Hence Section 118 of the Act is unconstitutional and is liable to be struck down as unconstitutional.**

[664-E; 665-C-D]

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Preman* v. *Union of India,* **(1998) 2 KLT 1004, approved.

CIVIL ORIGINAL JURISDICTION : Writ Petition (C) No. 242 of 1997.

(Under Article 32 of the Constitution of India).

F Romy Chacko and Ms. V. Mohana for the Petitioners

P.P. Malhotra, Ms. Anjani Aiyagari, S.N. Terdol and B.K. Prasad for the Respondent.

The Judgment of the Court was delivered by

G **V.N. KHARE, CJ.** In this petition under Article 32 of the Constitution of India we are concerned with the constitutionality of the provisions of Section 118 of the Indian Succession Act, 1925 (hereinafter referred to as 'the Act').

Petitioner No. 1 is an Indian citizen and is a Christian Priest belonging
H to the religious denomination of Roman Catholics. The second petitioner is

also a member of the Christian community. The petitioners are aggrieved by the discriminatory treatment meted out to the members of the Christian community under the Act by which they were practically prevented from bequeathing property for religious and charitable purposes and that has led them to file this writ petition. A

The history of Section 118 of the Act can be traced to an ancient British statute of 1735 known as 'Charitable Uses Act, 1735' [hereinafter referred to as "1735 Act"]. 1735 Act provided that gift by Will after 24th June, 1736 of land for charitable purposes were void as a general rule. 1735 Act was repealed by Mortmain and Charitable Uses Act, 1888. Part I of Mortmain and Charitable Uses Act, 1888 prohibited assurance of land to charitable corporations by providing that land shall not be assured to or for the benefit of or acquired by or on behalf of any corporation in Mortmain otherwise than under Royal Licence or statutory authority was provided for and if so assured shall be forfeited to the Queen. As per the Mortmain statute the expression "assurance" included gift, conveyance, appointment, lease, transfer, settlement, mortgage, charge encumbrance, devise, bequest and every other instrument by deed, will or other instrument. The said statute also provided that the land may be assured by Will to or for the benefit of any charitable but unless the recipient charity was authorized to retain land by the court or the Charity Commissioner, the land must, notwithstanding any contrary direction contained in the Will, be sold within one year from the testator's death or such extended period as may be determined. If the land is not sold within the appointed period, the land will vest in the official Trustee of charity lands and Charity Commissioner was required to take steps to enforce the sale. The further restriction provided that every assurance of immoveable property for any charitable use is void unless it is executed within a period of twelve months before two witnesses and enrolled in Chancery within six months before the death. The said Act was enacted with a view to prevent persons from making ill- considered death-bed bequests under religious influence. Amending Act 1891, further provided that the land may be assured by Will to or for the benefit of any charitable use; but in such case it was required to be sold, as a rule, within one year from the testator's death. B C D E F G

Even though the statute of Mortmain created severe restrictions on assurance of land for charitable purposes, it provided exemption in respect of assurance of land of any quantity for a public park, museum, universities, colleges or to any local authority, assurance by Will not exceeding 20 acres for a public park or two acres for a museum, etc. In this respect it is relevant H

A to mention that while borrowing the restrictive clauses for Mortmain Statute at the time of enacting Section 118 of Indian Succession Act, the Indian Legislature omitted to include the exemptions in favour of the various charitable uses as provided in the Mortmain and Charitable Uses Act, 1888. The consequence is that as per the impugned provision the testamentary disposition of property in relation to all forms of religious and charitable purposes is B subject to the same restriction as contained in Section 118 of the Act.

Ultimately, on account of the harshness and unreasonableness of Mortmain Statutes, the same were repealed by the British Parliament by an Act known as Charities Act, 1960. The consequential provision of repeal is C provided hereunder:

> "No right or title to any property shall be defeated or impugned and no assurance or disposition of property shall be treated as void or voidable, by virtue of any of the enactment relating to mortmain on 29th July, 1960 the possession was in accordance with that right or D title or with assurance or disposition and no step has been taken to assert a claim by virtue of any such enactment."

The Indian Succession Act, 1925 was enacted in the year 1925, by reason whereof, the Indian Succession Act, 1865 was repealed. Section 3 of the Act confers power on the State Government to exempt any race, sect or E tribe residing therein from the purview of Sections 5 to 49, 58 to 191 and 212. Testamentary succession has been dealt with in Part VI of the Act. Section 58 provides that the provisions of Part VI would not apply to the testamentary succession to the property of any Mohammedan, Hindu, Buddhist, Sikh or Jain. Section 59 provides that every person of sound mind not being a minor may dispose of his property by Will. Chapter VII of the Act deals F with void bequests.

Section 118 is contained in the said chapter which reads as follows :

> "Sec. 118. Bequest to religious or charitable uses - No man having a nephew or niece or any nearer relative shall have power to bequeath G any property to religious or charitable uses, except by a will executed not less than twelve months before his death, and deposited within six months from its execution in some place provided by law for the safe custody of the will of living persons."

The said provision, thus, postulates that a person having a nephew or H

niece or any nearer relative cannot bequeath his property for religious or charitable use unless : (i) the will is executed not less than twelve months before the death of testator; (ii) it is deposited within six months from its execution in some place provided by law for the safe custody thereof; and (iii) it remains in such deposit till the death of the testator.

The section plainly means that to the extent to which the bequest is for religious or charitable uses, the application of this section is attracted despite the fact that the bequest may be for only a part of the property or some interest in the property.

The question as to who are the near relations for the purpose of Section 118 is to be determined according to the Table of Consanguinity, as per Section 28 read with Schedule I of the Act. The term 'any nearer relative' includes father, mother, son, daughter, grandfather, grandmother, grandson, granddaughter, brother or sister. The word 'relative' means legitimate relative and has no application to any relationship by marriage. It includes adopted son also. So a Christian testator having a nephew or niece or nearer relatives must execute the Will at least 12 months before his death, and deposit it within six months, otherwise the bequest for religious or charitable use would be void.

It is urged that having regard to the fact that the impugned provision owes its origin to the statute of Mortmain which is repealed in England cannot be any reasonable justification for retaining the same in the Indian statute books particularly in view of the fact that upon coming into force the Constitution of India, the pre-constitution statute could remain valid only if the same conforms to the provisions contained in Part III thereof.

Further according to the petitioners the said provision is violative of Articles 14 and 15 of the Constitution of India inasmuch as it :

(a) discriminates against a Christian *vis-a-vis* non-Christians;

(b) discriminates against testamentary disposition by a Christian *vis-a-vis* non-testamentary disposition;

(c) discriminates against religious and charitable use of property *vis-a-vis* all other uses including not so desirable purposes;

(d) discriminates against a Christian who has a nephew, niece or nearest relative *vis-a-vis* Christian who has no relative at all; and

A (e) discriminates against a Christian who dies within twelve months of execution of the Will of which he has no control.

It was submitted that a citizen of India is also entitled to live with basic human dignity and, thus, has a right to effectuate his wishes according to his own discretion by having a freedom to choose his legatee under the Will as B well as the purpose of bequest.

It was also submitted that the said provision is violative of Article 1 of the Vienna Declaration on the Right to Development adopted by the World Conference on Human Rights of 1993 and Article 18 of the United Nations Covenant on Civil and Political Rights 1966.

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The petitioners have further raised a plea that it is an essential and integral part of Christian Religious Faith to contribute for religious and charitable purpose as has been prescribed in the Canon Law of the Code of Canons of the Eastern Churches and the teachings of the Holy Bible, the impugned provision violates Articles 25 and 26 of the Constitution of India.

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The contention of the respondent, however, is that the Indian Succession Act, 1925 being a pre-constitution enactment having regard to Article 372 of the Constitution of India, continues to be in force within the territory of India. The respondent would not deny or dispute the legislative history of the E said provision but contends that the Indian Parliament is not bound by any legislative changes or development in this behalf in England or any other foreign country. Further, contention of the respondent appears to be that the Indian Christians form a separate and distinct class and in that view of the matter they cannot be treated on equal footing to Muslims or Hindus in the matter of bequeathing property for religious or charitable purposes. The F respondent contends that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25, 26 and 27 of the Constitution of India.

Before proceeding further I may notice that a Division Bench of the Kerala High Court in *Preman* v. *Union of India,* (1998) 2 KLT 1004 held the G said provision to be unconstitutional. A special leave petition filed there against by a private party was, however, dismissed by a Bench of which I myself as I then was, a party stating :-

"Permission to file SLP is granted.

H Delay condoned.

We find that the Special Leave Petitions are at premature stage. Whatever grievance the petitioner may have, may be agitated in the hierarchy of proceedings in petitioner's appeal. The Special Leave Petitions are dismissed." A

It is neither in doubt nor in dispute that clause 1 of Article 13 of the Constitution of India in no uncertain terms states that all laws in force in the territory of India immediately before the commencement of the Constitution, in so far as they are inconsistent with the provisions of Part III there, shall, to the extent of such inconsistency, be void. Keeping in view the fact that the Act is a pre-constitution enactment, the question as regards its constitutionality will, therefore, have to be judged as being law in force at the commencement of the Constitution of India [See *Keshavan Madhava Menon* v. *The State of Bombay,* [1951] SCR 228. By reason of clause 1 of Article 13 of the Constitution of India, in the event, it be held that the provision is unconstitutional the same having regard to the prospective nature would be void only with effect from the commencement of the Constitution. Article 372 of the Constitution of India per force does not make a pre-constitution statutory provision to be constitutional. It merely makes a provision for the applicability and enforceability of pre-constitution laws subject of course to the provisions of the Constitution and until they are altered, repealed or amended by a competent legislature or other competent authorities. B C D

The equality clause enshrined in Article 14 of the Constitution of India is of wide import. It guarantees equality before the law or the equal protection of the laws within the territory of India. The restriction imposed by reason of a statute, however, can be upheld in the event it be held that the person to whom the same applies, forms a separate and distinct class and such classification is a reasonable one based on intelligible differentia having nexus with the object sought to be achieved. E F

The underlying principle contained in Section 118 of the Act indisputably was to prevent persons from making ill-considered death-bed bequest under religious influence. It is beyond any cavil of doubt that the restrictions imposed thereby have a great impact on a person who desires to dispose of his property in a particular manner which would take effect upon or after his death. G

The concept of ownership of a person over a property or a right although is a varying one includes right to dispose of his property by Will. H

A The Indian Succession Act confers such a right upon all persons irrespective of caste, creed or religion he belongs to. Section 59 of the Act provides that every person of sound mind and who is not a minor is entitled to dispose of his property by Will. Thus all persons who have sufficient discretion and free will are capable of disposing of their property by Will. Section 51 provides that a Will, the making of which is caused by fraud or B coercion or by such opportunity which takes away the free agency of the testator is void. Section 63 deals with execution of unprivileged Wills providing that the Will shall be signed by the testator and it shall be attested by two or more witnesses each of whom should have seen the testator sign or affix his mark to the Will.

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Section 118 of the Act imposes a restriction only on the Indian Christians. The said restriction is not applicable to the citizens belonging to other religions including Parsis. The short question, therefore, which arises for consideration is as to whether the said restriction imposed by Section 118 of the Act is a reasonable one.

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The right to own or dispose of a property mainly arises either by operation of law or by reason of some act or event. An Indian Christian in terms of the impugned provision is forbidden from making any bequest excepting in the manner provided for therein. Such bequest is prohibited only in the event the testator has a nephew or a niece or any nearer relative. E Indisputably, a wife of a testator, in terms of definition as contained in Section 28 read with the First Schedule of the Act would not be a near relative, although an adopted son would be. It is difficult to appreciate as to why a testator would, although, be entitled to bequeath his property by way of charitable and religious disposition if he has a wife but he would be F precluded from doing so in the event he has a nephew or a niece.

Furthermore, a charitable disposition of property for the benefit of the public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to the mankind has specifically been acknowledged not only in different religious texts but also in different statutes. G Section 18 of the Transfer of Property Act, 1882 states that restrictions in Sections 14, 16 and 17 shall not apply in the case of a transfer of property for the benefit of public in the advancement of religion, knowledge, commerce, health, safety, or any other object beneficial to mankind. The Indian Succession Act does not define as to what would be a charitable disposition, but the transfers to which it refers are the same as those described in Section 92 of H

the Code of Civil Procedure, 1908, as trusts created for a public purposes of a charitable or religious nature. The illustration appended to the impugned provision gives a list of bequests for religious or charitable uses which is of wide import. It is really baffling that no protection has been given to the near relatives against death-bed gifts for non-religious or charitable purpose. Furthermore, there is no restrictive provision with regard to gift intervivos. It is really strange as to how a statute may permit death-bed gifts to any other person for any purpose whatsoever including illegal or immoral purposes but restriction has been imposed on testamentary disposition for religious or charitable uses.

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It may be seen that as per Section 118 of the Act bequest of property for religious and charitable use fails if for any reason the testator suffers from the misfortune of death within twelve months of execution of Will or if it is not deposited in the place provided by law within 6 months. Since as per the impugned provision the testator who lives beyond the statutory period of twelve months is not able to execute his wishes in relation to his property, the impugned provision defeats the object of the Will. In this view of the matter, such a provision is unreasonable and arbitrary.

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The matter may be examined from another angle. Assuming that the purpose of Section 118 of the Act is to prevent bequest of property under religious influence, there is no justification in restricting testamentary disposition of property for charitable purpose. Charitable purpose includes relief to poor, education, medical relief, advancement of objects of public utility, etc. As the aforesaid charitable purposes are philanthropic and since a person's freedom to dispose of property for such purposes has nothing to do with religious influence, the impugned provision treating bequests for both religious and charitable purposes is discriminatory and violative of Article 14 of the Constitution. Further, it may be seen that there is no rationale behind limiting the survival of the testator to a period of twelve months in order to give effect to his wishes. There is also no rationale in the classification between a testator, who survives beyond twelve months, and a testator, who does not survive beyond the same period, in declaring the will of the former as void and that of the latter as valid. Apart from the fact that the period or duration of life of a testator has no relation with the purpose of Will, there appears to be no reason behind fixing twelve months' period. Testators constitute a homogeneous class and they cannot be divided arbitrarily on the basis of duration of their survival which is unrelated to the purpose of executing a Will. In that view of the matter, the period of twelve months has no nexus

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A with the object of performing a philanthropic act. Thus, the impugned provision is violative of Article 14 of the Constitution.

The provision relating to making of testamentary disposition by the citizens of India *vis-a-vis* those professing the religion of Christian must be judged on the touch-stone of Article 14 of the Constitution of India. It is true B that they form a class by themselves but ex facie I do not find any justifiable reason to hold that the classification made is either based on intelligible differentia or the same has any nexus with the object sought to be achieved. In fact, the respondent have failed to show that there exists any such object. Once it is held that the underlying purpose for enacting the said provision C was merely to thwart influence exercised by people professing religion resulting in death-bed disposition, having regard to the fact that such a contingency has adequately been taken care of in terms of Section 51 of the Act, the purport and object of the Act must be held to be non-existent. It may be true that the Indian Parliament is not bound to take note of and amend its statutory enactments keeping in view the amendments made in England. But D there cannot be any doubt whatsoever that while interpreting a restrictive statute, one may consider not only the past history of the concerned legislation but the manner in which the same has been dealt with by the legislature of its origin. A right of transfer of land indisputably is incidental to the right of ownership and must be construed strictly. [See *M/s. DLF Qutab Enclave* E *Complex Educational Charitable Trust* v. *State of Haryana and Ors.*, (2003) 2 SCALE 145]. The constitutionality of a provision, it is trite, will have to be judged keeping in view the interpretive changes of the statute effected by passage of time. [See *Kapila Hingorani* v. *State of Bihar*, (2003) 4 SCALE 712.

F For the aforesaid reasons, I find that Section 118 of the Act being unreasonable is arbitrary and discriminatory and, therefore, violative of Article 14 of the Constitution.

Furthermore, India being a signatory to the Declaration on the Right to Development adopted by the World Conference on Human Rights and Article G 18 of the United Nations Covenant on Civil and Political Rights, 1966, the impugned provision may be judged on the basis thereof. Article 1 of the aforementioned declaration reads thus :-

> "The right to development is an inalienable human right by virtue of which every human person and all people are entitled to participate H in, contribute to, and enjoy economic, social, cultural and political

development, in which all human rights and fundamental freedom can be fully realized. A

The human right to development also implies the full realization of the right of people to self determination, which includes subject to the relevant provisions of both International Covenants on Human Rights, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources." B

Article 18 of the United Nations Covenant on Civil and Political Rights 1966 provides as follows :

"Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief or belief in worship, observance, practice and teaching. C

Freedom to manifest ones own religion or beliefs may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health, or morals or the fundamental rights and freedom of others." D

The impugned provision must, therefore, also be judged having regard to the aforementioned treaties and covenants. [See *Kapila Hingorani* (supra) at para 47]. E

It is trite that having regard to Article 13(1) of the Constitution, the constitutionality of the impugned legislation is required to be considered on the basis of laws existing on 26th January 1950, but while doing so the court is not precluded from taking into consideration the subsequent events which have taken place thereafter. It is further trite that the law although may be constitutional when enacted but with passage of time the same may be held to be unconstitutional in view of the changed situation. F

Justice Cardoze said : G

"The law has its epochs of ebb and flow, the flood tides are on us. The old order may change yielding place to new; but the transition is never an easy process". Albert Campus stated :

"The wheel turns, history changes". Stability and change are the two H

A sides of the same law-coin. In their pure form they are antagonistic poles; without stability the law becomes not a chart of conduct, but a gare of chance: with only stability the law is as the still waters in which there is only stagnation and death."

In any view of the matter even if a provision was not unconstitutional B on the day on which it was enacted or the Constitution came into force, by reason of facts emerging out thereafter, the same may be rendered unconstitutional. The world has witnessed a sea-change. The right of equality of women *vis-a-vis* their male counterpart is accepted worldwide. It will be immoral to discriminate a woman on the ground of sex. It is forbidden both C in our domestic law as also international law. Even right of women to derive interest in a property by way of inheritance, gift or bequeath is statutorily accepted by reason of Hindu Succession Act, 1956 and other enactments. This Court, therefore, while considering constitutionality of Section 118 of the Indian Succession Act, is entitled to take those facts also into consideration.

D I, however, am not oblivious of the fact that a restriction to make testamentary disposition of the property to some extent is prevalent under the Mohammedan law but therein the purpose is to protect the near relation which cannot be said to be the sole purpose underlying Section 118 of the Act.

E I may notice that the a Division Bench of this Court in *Clarence Pais and Ors.* v. *Union of India,* JT (2001) 3 SC 82 while considering the constitutionality of the provisions of Section 213 of the Indian Succession Act did not consider the applicability of various decisions cited before it including *Preman* (supra) on the ground that the said provision applies to F Christians as also non-Christians stating:

> ".....However, in the light of the above conclusion, it is unnecessary to refer to those decisions though some of them may have bearing in analyzing and understanding the scope of the provisions which are made applicable exclusively to Christians as it happened in the case G of Section 118 of the Act or in the case of the Indian Divorce Act. Therefore, we have not adverted to any one of these provisions. If Christians alone had been discriminated against by treating them as a separate class, we think the argument could have been understood and merited consideration."

H So far as the second argument of learned counsel for the petitioner is

concerned, it is suffice to say that Article 15 of the Constitution of India may not have any application in the instant case as the discrimination forbidden thereby is only such discrimination as is based, inter alia, on the ground that a person belongs to a particular religion. The said right conferred by clause 1 of Article 15 being only on a 'citizen', the same is an individual right by way of a guarantee which may not be subjected to discrimination in the matter of rights, privileges and immunities pertaining to him as a citizen. In other words, the right conferred by Article 15 is personal. A statute, which restricts a right of a class of citizens in the matter of testamentary disposition who may belong to a particular religion, would, therefore, not attract the wrath of clause 1 of Article 15 of the Constitution of India.

Coming to the last argument raised by the petitioners' counsel it may be stated that in the instant case, this Court is not concerned with the right of a person to freedom of conscience but is only concerned with a question as to whether by reason of Section 118 of the Indian Succession Act the right of Christians to profess, practise and propagate religion is violated. Article 25 is subject to the other provisions contained in Part III of the Constitution of India. What was thought of by the Constitution makers while conferring right to profess, practise and propagate religion was that freedom of conscience be supplemented by freedom of unhampered expression of spiritual conviction. Article 25 provides freedom of 'profession' meaning thereby the right of the believer to state his creed in public and freedom of practice meaning his right to give it expression in forms of private and public worships [See *Stainislaus Rev.* v. *State of M.P.*, AIR (1975) MP 163. A disposition towards making gift for charitable or religious purpose may be a pious act of a person but the same cannot be said to be an integral part of any religion. It is not the case of the petitioners that the religion of Christianity commands gift for charitable or religious purpose compulsory or the same is regarded as such by the community following Christianity. The petitioner has not been able to place any material to show that disposition of property for religious and charitable purposes is an integral part of Christian religious faith.

Disposition of property for religious and charitable purpose is recommended in all the religions but the same cannot be said to be an integral part of it. If a person professing Christian religion does not show any inclination of disposition towards charitable or religious purposes, he does not cease to be a Christian. Even certain practices adopted by the persons professing a particular religion may not have anything to do with the religion itself.

A Article 25 merely protects the freedom to practise rituals and ceremonies etc. which are only the integral parts of the religion. Article 25 of the Constitution of India will, therefore, not have any application in the instant case.

For the self-same reasons, Article 26 may also not have any application
B in the instant case.

Before I part with the case, I would like to state that Article 44 provides that the State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India. The aforesaid provision is based on the
C premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions viz. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law. It is no matter of doubt that marriage, succession
D and the like matters of a secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution.

Any legislation which brings succession and the like matters of secular character within the ambit of Articles 25 and 26 is a suspect legislation. Although it is doubtful whether the American doctrine of suspect legislation
E is followed in this country. In *Smt. Sarla Mudgal, President, Kalyani and Ors.* v. *Union of India and Ors.*, [1995] 3 SCC 635, it was held that marriage, succession and like matters of secular character cannot be brought within the guarantee enshrined under Articles 25 and 26 of the Constitution. It is a matter of regret that Article 44 of the Constitution has not been given effect
F to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies.

For the reasons aforementioned, this writ petition is allowed and Section 118 of the Indian Succession Act is declared unconstitutional being violative
G of Article 14 of the Constitution of India. The parties shall, however, pay and bear their own costs.

S.B. SINHA, J. While agreeing with the opinion of My Lord, the Chief Justice of India, I would like to add only a few words. Message of charity and compassion is to be found in all religions without any exception. Only
H because charity and compassion are preached in every religion, the same by

itself would not be a part of the 'religious practice' within the meaning of Article 25 of the Constitution of India. A

Thus, the Religion of Christianity encouraging the Christians to practise charities to attain spiritual salvation is of not much relevance for this purpose. Such preachings are also found in Bhagavat Geeta and Upanishad. B

In Collins English Dictionary, 'Christian' is defined as a person who believes in and follows Jesus Christ.

Similarly, we may notice that this Court in Lily *Thomas and Ors.* v. *Union of India and Ors.*, [2000] 6 SCC 224 in relation to the religion of Islam observed thus : C

> "The word "Islam" means "peace and submission". In its religious connotation it is understood as "submission to the will of God"; according to Fyzee (outlines of Mohammedan Law, 2nd Edn.), in its secular sense, the establishment of peace. The word "Muslim" in Arabic is the active principle of Islam, which means acceptance of faith, the noun of which is Islam." D

The petitioners have quoted a passage purported to be from Chapter 19 of Gospel according to Luke. The Holy Bible published by Gideons does not contain the said passage. E

Assuming that the said preachings have found place in the Holy Bible, the same ex facie would go to show that what was being preached is renouncement.

Even if the said passage is taken to be correct, the same appears to be a person who had followed namely : Do not commit adultery; do not commit murder; do not steal; do not accuse anyone falsely; respect your father and your mother. That was an advice to a person. F

Renouncement of world by a person following any religion is necessarily not the essential practice of the religion which is meant for commonness. Gandhiji also said renouncement and enjoy. G

Such preachings for renouncement from the world have no co-relation with the tenets of Article 25 of the Constitution of India.

The impugned provision was enacted to prevent persons from making H

A ill-considered death bequest under religious influence. The object behind the said legislation was, therefore, to protect a section of illiterate or semi-literate persons who used to blindly follow the preachers of the religion. Such a purpose has lost all significance with the passage of time and, therefore, has to be declared *ultra vires* Article 14 of the Constitution of India.

B **DR. AR. LAKSHMANAN, J.** I have the benefit of going though the detailed and elaborate judgment prepared by My Lord Hon'ble the Chief Justice of India. I am respectfully in agreement with the same. However, I would like to add few more paragraphs as to how the Christians are aggrieved by the discriminatory treatment meted out to members of Christian community C under the Indian Succession Act, 1925 (hereinafter referred to as "the Act") by which they are practically prevented from bequeathing property for religious and charitable purposes. The impugned provision has already been extracted in the judgment prepared by Hon'ble the Chief Justice of India. As per the impugned provision, a person having a nephew or niece or nearer relative cannot bequeath any property for religious or charitable use unless (1) the D Will is executed not less than 12 months before the death of the testator, (2) it is deposited within six months from the date of execution in some place provided by law and (3) it remain in deposit till the death of the testator. The harsh and rigorous procedure envisaged under Section 118 of the Act in relation to testamentary disposition of property for religious and charitable E use does not apply to members of Hindu. Mohammadan, Buddhist Sikh or Jain Community by virtue of Section 58 of the Act . At the same time, since no exemption is granted by the State Government to the members of the Christian community under Section 3 of the Act, Christian cannot bequest property for religious or charitable use unless fresh will is executed on the expiry of every 12 months, if the testator does not suffer from the misfortune F of death within the statutory period of 12 months.

There is no restriction on Muhammadan on bequeathing property for religious or charitable purposes. A Muhammadan can validly bequeath one third of his net assets, when there are heirs. The only restriction as regards the legator is that he should be of sound mind and he should not be a minor. G As regards the legatee, it is stated that if the legatee causes the death of the legator, the Will becomes void and ineffective. Under Mohammedan Law, a Will can be lawfully made in favour of an individual, an institution, a non Muslim, a minor and an insane. As regards the subject-matter any property can form the subject of a Will, and both corpus and usufructs can be H bequeathed.

In the case of Hindus, the founding of a temple or a charitable institution is considered as an act of religious duty and has all the aspects of Dharma. A

In my opinion, there is no justification in retaining the impugned provision in the stature book, which is arbitrary and violative of Article 14 of the Constitution, since the mortmain statutes were repealed by the Charities Act, 1960 and by that the very basis and foundation of the impugned provision B has become non-existent. The impugned provision is also violative of Articles 25 and 26 of the Constitution in as much as it is an essential and integral part of Christian religious faith to give property for religious and charitable purpose. The teachings from the Holy Book of Bible also encourage Christian to practice charities to attain spiritual salvation. Whenever fundamental right to C freedom of conscience and to profess, practice and to propagate religion is invoked, the petitioners, contend that the act complained of as offending the fundamental right must be examined to dishonour whether such act is to protect order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity D which may be associated with religious practice or to provide for social welfare and reform. It is the duty and function of the Court so to do.

As per Section 118 of the Act, bequest of property for religious and charitable use fails, if, for any reason, the testator does not suffer from the misfortune of death within 12 months of execution of the Will or if it is not E deposited in the place provided by law within 6 months, and that since as per the impugned provision a testator who lives beyond the statutory period of 12 months is not able to effectuate his wishes in relation to his property, the impugned provision defeats object of the Will and is harsh, unjust and arbitrary. In order to survive the challenge under Article 14 of the Constitution, F it must be established that the classification arising out of the impugned provision is reasonable and that it has a nexus with the object sought to be achieved, and since in the instant case, the classification between bequests for religious and charitable use and bequests for other purposes is unreasonable and since it has no nexus with the object sought to be achieved, the impugned provision is hit by Article 14 of the Constitution. The impugned G provision is also attacked as discriminatory and violative of Articles 14 and 15 of the Constitution inasmuch as the restriction on bequest for religious and charitable purpose is confined to Christians alone and not to members of other communities. In my opinion, the classification between testators who belong to Christian community and those belonging to other religion is H

A extremely unreasonable. All the testators who bequeath property for religious and charitable purpose belong to the same category irrespective of their religious identity and so the impugned provision, which discriminates between the members of one community as against another, amounts to violation of Article 14 of the Constitution. There is no rationale behind limiting the survival of testator to a period of 12 months in order to give effects to his B wishes. There is no rationale in the classification between a testator who survives beyond 12 months and a testator who does not survive beyond the same period in declaring the will of the former as void and that of latter is valid. There is no logic behind fixing 12 months period, and the testators who constitute a homogenous class cannot be decided arbitrarily on the basis of C the duration of their survival which is unrelated to the purpose of executing a will. Since fixation of such a period has no nexus with the object of performing a philanthropic act, the impugned provision is attacked as liable to be declared void as violative of Article 14 of the Constitution.

Article 14 of the Constitution states that the State shall not deny to any D person equality before the law or the equal protection of the laws within the territory of India. The first part of Article 14 of the Constitution of India is a declaration of equality of civil rights for all purposes within the territory of India and basic principles of republicanism and there will be no discrimination. The guarantee of equal protection embraces the entire realm of 'State action' E . It would extend not only when an individual is discriminated against in the matter of exercise of his right or in the matter of imposing liabilities upon him, but also in the matter of granting privileges etc. In all these cases, the principle is the same, namely, that there should be no discrimination between one person and another if as regards the subject-matter of the legislation their position is the same. In my view, all persons of similar circumstances shall be F treated alike both in privileges and liabilities imposed. The classification should not be arbitrary; it should be reasonable and it must be based on qualities and characteristics and not any other who are left out, and those qualities or characteristics must have reasonable relations to the object of the legislation.

G In the case of *D.S. Nakara* v. *Union of India,* [1983] 1 SSC 305, this Court has observed thus:

> "Thus the fundamental principle is that Article 14 forbids class legislation but permits reasonable classification for the purpose of legislation which classification must satisfy the twin tests of

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classification being founded on an intelligible diferentia which distinguishes persons or things that the grouped together from those that are left out of the group and that differntia must have a rational nexus to the object sought to be achieved by the statute in question". A

It has been also observed in the above judgment that in the very nature of things, the society being composed of unequals a welfare State will have to strive by both executive and legislative action to help the less fortunate in the society to ameliorate their condition so that the social and economic unequality in the society may be bridged and in the absence of doctrine of classification such legislation is likely to flounder on the bed rock of equality enshrined in Article 14 of the Constitution. B C

Article 25 of the Constitution deals with freedom of conscience and the right freely to profess, practice and propagate religion. The contribution for religious and charitable purposes is a philanthropic act intended to serve huminity at large and is also recognised as a religious obligation. Therefore, bequeathing property for religious and charitable purposes cannot be controlled or restricted by the Legislature as it would offend the fundamental rights of the testator under Articles 25 and 26 of the Constitution and therefore the impugned provision is arbitrary and unconstitutional. It is also violative of Article 26 of the Constitution inasmuch as it is an essential and integral part of Christian religious faith to give property for religious and charitable purposes. Every Christian shall have the right to establish and maintain institutions for religious and charitable purposes, manage its own affairs, own and acquire movable and immovable properties and to administer such property in accordance with law. D E

In my opinion, whether in an enactment religious bequests by a Christian is discriminatory and violative of Articles 14 and 15 of the Constitution must be determined as per the rule of procedure laid down by Section 118 of the Act, which comes within the purview of Articles 14 and 15 of the constitution, and it is therefore, necessary that all testators who are similarly situated should be subjected to the same rule of procedure. There cannot be any unusual burden on Christian testators alone when all other testators making similar bequests for similar charities and similar religious purposes are not subjected to such procedure. Therefore, in my opinion Section 118 of the Act is anamolous discriminatory and violative of Articles 14, 15, 25 and 26 of the Constitution and should be struck down. F G

The Indian Succession Act though is claimed to be a universal law of H

A testamentary disposition, but in effect, crucial sections apply only to Christian. There is no acceptable answer from the other side as to why Section 118 of the Act is made applicable to Christians alone and not to others.

The Indian succession Act came into effect on 30th September, 1925. As per Section 4, Part II of the Act shall not apply if the deceased was a B Hindu, Muhammadan, Buddhist, Sikh or Jaina. Section 20 of Part III of the Act is not applicable to any marriage contracted before the first day of January, 1866; and is not applicable and is deemed never to have applied to any marriage, one or both of the parties to which professed at the time of marriage the Hindu, Muhammadan, Buddhist, Sikh or Jaina religion. As per section 23 C of Part IV of the act, that part shall not apply to any Will made or intestacy occurring before the first day of January, 1866 or to intestate or testamentary succession to the property of any Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi. Likewise as per Section 29 of Part V of the Act that part shall not apply to any intestacy occurring before the first day of January, 1866 or to D the property of any Hindu, Muhammadan, Buddhist, Sikh, or Jaina. By Act 51 of 1991, Parsis were also excluded from the application of Section 118 of the Act. Thus, it is seen that the procedure has been made applicable to Christians alone. There is also no acceptable answer from the respondent as to why it regulates only religious and charitable bequests and that too, bequests of Christians alone. The whole case, in my view, is based upon E undue, harsh and special burden on Christian testators alone. A substantive restriction is imposed based on uncertain events over which the testator has no control. I, therefore, have no hesitation to hold that Section 118 of the Act regarding religious and charitable bequests of all testators who are similar should be subjected to the same procedure. As the law stands today, a Christian cannot make a bequest for religious or charitable purposes without F satisfying the conditions and procedures prescribed by Section 118 of the Act. Such a burden, procedural burden and substantive law burden, is not falling upon Hindu, Muhammadan, Jain or Parsi testators.

The very same question was raised before the Kerala High Court. The G Division Bench of Kerala High Court in the case of *Preman* v. *Union of India* reported in 1998(2) KLT 1004 to which I was a party, declared thus:

(a) discriminates against a Christian *vis-a-vis* non Christian;

(b) discriminates against testamentary disposition by a Christian *vis-a-vis* non-testamentary disposition;

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(c) discriminates against religious and charitable use of property *vis-a-vis* all other uses including not so desirable purposes. A

(d) discriminates against the Christian who has a nephew, niece, or nearest relative *vis-a-vis* a Christian who has no relative at all; and

(e) discriminates a Christian who dies within 12 months of execution of the Will, of which he has no control. B

It is pertinent to notice that the judgment of the Kerala High Court was not appealed against by the respondent therein, namely, the Union of India. Even after the judgment of the Kerala High Court dated 16.10.1998, the Parliament did not remove the C discrimination. Under such circumstances, this Court, in my opinion, in exercise of its jurisdiction and to remedy violation of fundamental rights, are bound to declare the impugned provision as invalid and being violative of Articles 14, 15, 25, and 26 of the Constitution. For the foregoing reason, I am respectfully in D agreement with My Lord Hon'ble the Chief Justice of India that Section 118 of the Act is unconstitutional and is liable to be struck down as unconstitutional.

In the result, the writ petition is allowed.

S.K.S. Petition allowed. E