



WEB COPY

**BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT**

Reserved on : 12.04.2017

Pronounced on : 04.05.2017

Coram:

**THE HONOURABLE MR.JUSTICE C.V.KARTHIKEYAN**

**A.S. (MD) No. 164 of 2014**

1.Michael Ammal (died)

2.M.Martin

(1<sup>st</sup> Appellant died and 2<sup>nd</sup> Appellant is the  
LRs of the deceased 1<sup>st</sup> Appellant is recorded  
vide order dt:21.03.17

... Appellants/Defendants

-Vs-

1.M.Regina Celine

2.M.Kamseeli

3.L.M.Josephine Mary

... Respondents/Plaintiffs

**Prayer:-** This Appeal Suit has been filed under Section 96 of Civil Procedure Code, praying to allow this appeal by setting aside the Judgment and Decree, dated 07.09.2012 passed in O.S.No.137 of 2009 on the file of the I Additional District and Sessions Judge, PCR, Thiruchirappalli.

For Appellants : Ms.J.Maria RoCelinee

For Respondents : Mr.K.K.Samy

**JUDGMENT**

The defendants in O.S.No.137 of 2009 on the file of the I Additional District and Sessions Judge (PCR), Tiruchirappalli, aggrieved by the judgment and decree dated 07.09.2012 made in the said suit, have filed this appeal.

2. O.S.No.137 of 2009 had been filed by three sisters, namely, M.Regina Celine, M.Kamseeli and L.M.Josephine Mary. They were all daughters of late Michaelsamy and late Kitheri Ammal. Their mother Kitheri Ammal died on 13.10.1978. In 1979, their father Michaelsamy married the first defendant Michael Ammal and through them, the second defendant M.Martin was born. The plaintiffs and the defendants are Roman Catholics and the provisions of Indian Succession Act, 1925, apply to them. It had been stated that the plaintiff's father Michael Samy died on 01.02.1991. They stated that there was a Will, which was acknowledged by the first defendant on 10.03.1991, in front of two witnesses. It is seen

is subject to be di



3. Whether the will dated 10.03.1991 would bind the defendants?

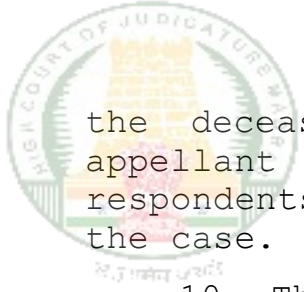
4. Whether a preliminary decree can be passed dividing the suit property into 12 equal parts and allotting nine shares to the plaintiffs, two shares to the first defendant and one share to the second defendant?

5. To what reliefs are the parties entitled to?

7. The parties went to trial. During the trial, the first plaintiff M. Regina Celinee was examined as P.W.1, the third plaintiff M. Josephine Mary was examined as P.W.2. The plaintiffs had marked Ex.A.1 to A.10. Ex.A.1 dated 28.08.2008 is a copy of the advocate notice, Ex.A.2 dated 11.09.2008 is the reply notice, Ex.A.3 dated 27.03.1991 is the legal heirship certificate, Ex.A.7 is the copy of public notice in newspaper, Ex.A.9 dated 10.03.1991 is the consent for the Will, Ex.A.10 dated 10.07.1991 is the title deed of the property in the name of Michael Samy and Kitheri Ammal. On the side of the defendants, the second defendant M. Martin was examined as D.W.1 and Ex.B.1 and Ex.B.2 were marked. Ex.B.1 dated 13.05.1981 is the certified copy of the Will of Michael Samy and Ex.B.2 is the medical certificate dated 07.07.2012.

8. On consideration of the oral and documentary evidence, the learned I Additional District and Sessions Judge, (PCR), Tiruchchirappalli held that the suit property had been purchased from the joint amounts given by both Michael Samy and Kitheri Ammal and with respect to the two Wills, the learned I Additional District and Sessions Judge, (PCR), Tiruchchirappalli held that on 13.05.1981, Michael Samy could not write the Will bequeathing the entire property since Kitheri Ammal had a share in the said property. With respect to the Will dated 10.03.1991, the learned Trial Judge held that the said Will had not been proved in accordance with law. Consequently, the learned Trial Judge rejected both the Wills and finally held that the property was jointly purchased by Michael Samy and Kitheri Ammal and granted the preliminary decree, dividing the property into 12 equal shares and granting the plaintiffs an undivided 9/12<sup>th</sup> share, the first defendant an undivided 2/12<sup>th</sup> share and to the second defendant an undivided 1/12<sup>th</sup> share. The learned Trial Judge further held that since the parties are related to one another, they will have to bear their respective costs. Challenging the said judgment and decree, the defendants namely Michael Ammal, the second wife of Michael Samy and M. Martin, her son have filed the present appeal.

9. During the proceedings of this appeal, Michael Ammal died and a memo in this regard was filed and recorded on 21.03.2017 that the second appellant M. Martin is the legal representative of



the deceased first appellant. The learned counsel for the appellant Ms.J.Maria RoCelinee and the learned counsel for the respondents Mr.K.K.Samy, both took the Court through the facts of the case.

10. The facts of the case are undisputed. Michael Samy and Kitheri Ammal were husband and wife. They had three daughters. The said three daughters are the respondents herein namely M.Regina Celine, M.Kamseeli and L.M.Josephine Mary. They were the plaintiffs in O.S.No.137 of 2009. After the death of Kitheri Ammal, on 13.10.1978, the father of the respondents Michael Samy married the deceased first appellant Michael Ammal and through her the second appellant M.Martin was born. The property stood in the joint names of Michael Samy and Kitheri Ammal. The plaintiffs, who are the respondents herein, sought partition and separate possession. The parties are Roman Catholic Christians. They are governed by the provisions of the Indian Succession Act, 1925.

11. Section 33 of the Indian Succession Act, 1925 reads as follows:

**Where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred. -**  
*Where the intestate has left a widow--*

(a) *if he has also left any lineal descendants, one-third of his property shall belong to his widow, and the remaining two-thirds shall go to his lineal descendants, according to the rules hereinafter contained;*

(b) *save as provided by section 33A, if he has left no lineal descendant, but has left persons who are of kindred to him, one-half of his property shall belong to his widow, and the other half shall go to those who are kindred to him, in the order and according to the rules hereinafter contained;*

(c) *if he has left none who are of kindred to him, the whole of his property shall belong to his widow.*

**33A. Special provision where intestate has left widow and no lineal descendants: -**

(1) *Where the intestate has left a widow but no lineal descendants and the net value of his property does not exceed five thousand rupees, the whole of his property shall belong to the widow.*

(2) *Where the nett value of the property exceeds the sum of five thousand rupees, the widow shall be entitled to five thousand rupees thereof and shall have a charge upon the whole of such property for such sum of five thousand rupees, with interest thereon from the*



date of the death of the intestate at 4 per cent. per annum until payment.

(3) The provision for the widow made by this section shall be in addition and without prejudice to her interest and share in the residue of the estate of such intestate remaining after payment of the said sum of five thousand rupees with interest as aforesaid, and such residue shall be distributed in accordance with the provisions of section 33 as if it were the whole of such intestate's property.

(4) The net value of the property shall be ascertained by deducting from the gross value thereof all debts, and all funeral and administration expenses of the intestate, and all other lawful liabilities and charges to which the property shall be subject.

(5) This section shall not apply --

(a) to the property of--

(i) any Indian Christian,

(ii) any child or grandchild of any male person who is or was at the time of his death an Indian Christian, or

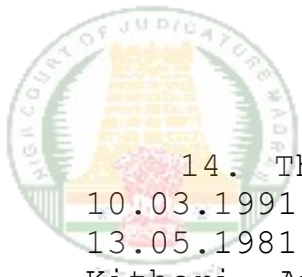
(iii) any person professing the Hindu, Buddhist, Sikh or Jaina religion the succession to whose property is, under section 24 of the Special Marriage Act, 1872 (3 of 1872.)\* regulated by the provisions of this Act;

(b) unless the deceased dies intestate in respect of all his property.

12. Another section of interest is Section 35, which reads as follows:

**35. Rights of widower:-** A husband surviving his wife has the same rights in respect of her property, if she dies intestate, as a widow has in respect of her husband's property, if he dies intestate.

13. In this case, both sides have relied on two different Wills. If either one of the Will is held to be proved in accordance with law, then the property would devolve according to the terms of the said Will. If both the Wills are rejected, then intestate as provided under Sections 33 and 35 of the Indian Succession Act, 1925 will have to be followed.



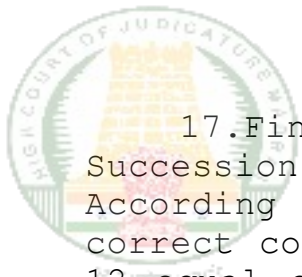
14. The first Will produced by the parties is Ex.A.9 dated 10.03.1991. This Will has superseded the earlier Will dated 13.05.1981 which is Ex.B.1. It had been stated in the plaint that Kitheri Ammal died on 13.10.1978 and Micheal Samy died on 01.02.1991. In Ex.B.1, which is dated 13.05.1981, it had been stated that the property had been purchased by Michael Samy in his name and in the name of the first wife Kitheri Ammal. Thereafter, he had given directions of bequeath as if the entire property belonged to him. This cannot be done since the property also stood in the name of Kitheri Ammal and she had a share in the said property. He cannot execute a Will for the entire property. Moreover, the witnesses to the documents have not been examined before the Court. Registration would not automatically prove execution in a free and voluntary state of mind. The Will has to be proved according to Section 68 of the Indian Evidence Act, 1872 which reads as follows:

**68. Proof of execution of document required by law to be attested:** *If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:*

*Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.*

15. To prove the Will, the witnesses to the document have not been examined. After the death of Kitheri Ammal in 1978, Micheal Samy being a Roman Catholic cannot execute a Will including her independent share of the suit property. Consequently, I hold that the said Will Ex.B.1 has not also been proved in accordance with law and no right or title would flow from the said Will. The other Will produced by the parties is Ex.A.9. It is seen from the plaint that Micheal Samy died on 01.02.1991 and Ex.A.9 is dated 10.03.1991 after the death of Micheal Samy.

16. As a matter of fact, Ex.A.9 is a xerox copy and even though the first appellant Micheal Ammal was alive at the time of trial, she did not enter into the witness box and speak about the said Will. There are two witnesses who have also not been examined. The Will has to be rejected since it has not been proved in accordance with law.



17. Finally, this Court has to go back to the Rules of Succession in accordance with Indian Succession Act, 1925. According to the same, the learned Trial Judge had come to a correct conclusion that the suit property has to be divided into 12 equal shares. Since the respondents herein, are the daughters of Micheal Samy and Kitheri Ammal, they were totally entitled to an undivided 9/12<sup>th</sup> share. Since the first appellant Michael Ammal was the widow of Michael Samy, she was entitled to an undivided 2/12<sup>th</sup> share and second appellant M.Martin was entitled to 1/12<sup>th</sup> share. The ratio has changed during the appeal proceedings since the first appellant died. Once again the shares have to be reworked. The share of Michael Ammal will have to devolve on to the 2<sup>nd</sup> appellant, who is her son. This would mean that the daughters, who are the respondents would get an undivided 9/12<sup>th</sup> share and the second appellant would get an undivided 3/12<sup>th</sup> share. I therefore hold that the Judgment and Decree of the Trial Court has to be interfered with to the limited extent that the second appellant is entitled to an undivided 3/12<sup>th</sup> share in the suit property and the three respondents are jointly entitled to an undivided 9/12<sup>th</sup> share in the suit property.

18. In the result, this appeal suit is partly allowed, holding that the second appellant is entitled to an undivided 3/12<sup>th</sup> share in the suit property and the three respondents are jointly entitled to an undivided 9/12<sup>th</sup> share in the suit property. To that extent, a Preliminary Decree has to be passed by the Trial Court. In view of the relationship among the parties, there will be no order as to costs. The Judgment of the Trial Court in O.S.No.137 of 2009 dated 07.09.2012 is set aside.

Sd/-

Assistant Registrar(CS-I)

/True Copy/

Sub Assistant Registrar

To

The I Additional District and Sessions Judge, (PCR),  
Thiruchirappalli.

+1cc to M/s. K.K.SAMY Advocate in SR. No.55526

+1cc to M/s.J.MARIA ROSELINE Advocate in SR. No.51690

MR/MSA/LS

JS/MR/SAR.1/21.06.2017/7P-4C