



BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED: 28.03.2018

CORAM:

THE HONOURABLE DR.JUSTICE S.VIMALA
AND
THE HONOURABLE MRS.JUSTICE T.KRISHNAVALLI

A.S. (MD) No.111 of 2015

1. Athmaram Rao
2. Radhika Madhukar ...Appellants/ 1st and 4th Defendants

-vs-

1. Shanthan Phawar
2. G.Kashthuri Bai ... 1st and 2nd Respondents/Plaintiffs

Uma Kittu Rao (Died)
3. Urmila Kadam ... 3rd Respondent/ 3rd defendant
(**cause title accepted by order dated 12.03.2015**)

Prayer: Appeal Suit filed under Section 96 of the Code of Civil Procedure against the Judgment and Decree in O.S.No.31 of 2008 dated 22.03.2013 on the file of II Additional District and Sessions Judge, Tiruchirappalli.

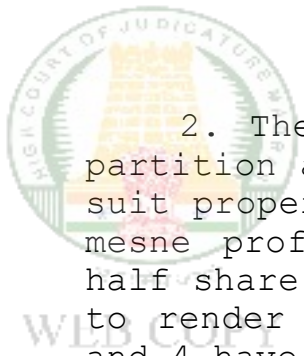
For Appellants : Mrs.N.Krishnaveni, Senior Counsel
For Mr.M.S.Vinodh

For R1 : Mr.T.V.Ramanujam, Senior Counsel
For Mr.Niranjan S.Kumar and Mr.V.Balaji
For R2 : Mr.T.Senthil Kumar
For R3 : Mr.M.Ashok Kumar

Orders Reserved on	20.03.2018
Orders Pronounced on	28.03.2018

J U D G M E N T**Dr.S.VIMALA, J.,**

The appellants are Defendants 1 and 4 before the lower Court. The respondents 1 and 2 are the plaintiffs. The 2nd defendant before the Lower Court was reported dead and the 3rd defendant is the 3rd respondent herein.



2. The respondents 1 and 2 as plaintiffs filed the suit for partition and separate possession of Plaintiffs' half share in the suit property and sought for rendition of accounts apart from past mesne profits. The suit was decreed partitioning of plaintiffs' half share in the suit property with a direction to the defendants to render true accounts. Challenging the same, the defendants 1 and 4 have filed the appeal.

3. The parties are described as per the nomenclature assigned to them in the suit before the Lower Court.

Brief Facts:

4. One T.V.Govindarao had two sons, viz., Athmaram Rao (1st defendant) and Kittu Rao and two daughters, viz., Shanthan Phawar and Kasturi Bai (plaintiffs). The 2nd defendant, Uma Kittu Rao, is the wife of said Kittu Rao and Radhika Madukar and Urmila Kadam are his daughters. Defendants 3 and 4 are the daughters of the deceased Kittu Rao. T.V.Govindarao died in the year 1986 and his wife died in 2002. Kittu Rao died in the year 2005.

4.1. The suit property is the self acquired property of T.V.Govindarao. After the death of Govindarao and after the death of Kittu Rao, the plaintiffs demanded partition. The first defendant relied upon a Will purported to have been executed by the father. The plaintiffs believed that the father would not have executed such an unregistered document and that even if it is so, it would have been divulged to the plaintiffs also and when it is not done, the so called Will could not have been a true document.

4.2. The plaintiffs sent a letter giving their interpretation of the Will. The 2nd defendant did not send any reply. The 1st defendant had given an evasive reply. **The plaintiffs contend that the Will is not legally valid, as it does not dispose of the interest in the property. There is no dedication of suit property in favour of any Trust.**

4.3. The Will creates a perpetual restraint on alienation without any dedication of property to the Trust and therefore, it is hit by rule against perpetuity, is yet another contention raised by the plaintiffs.

4.4. The defendants are in management of the property. The denial of partition right is unjust enrichment.

4.5. The Government acquired a portion of the suit property on its West for the purpose of road expansion and the Government paid compensation. The defendants did not account for the same.

4.6.Hence, the suit for partition and accounts.



5. The 1st defendant contested the suit raising the following grounds:

- I. the Title to the property in favour of T.V.Govindarao, the common ancestor, is admitted.
- II. the execution of the Will dated 02.10.1982 is admitted to be free, voluntary, executed without any coercion or compulsion, though the Will is duly attested, but not registered.
- III. The dispute arose only after the Kalayanamandapam had to be virtually closed down on account of construction of over-bridge and acquisition of part of the property by the Government and the non payment of Rs.5,000/- to each of the plaintiffs, which is payable under the Will.
- IV. The following dispositions have to be made and are being made under the terms and conditions of the Will:

- i) Out of the income from kalyanamandapam,
 - a) Thanneer Panthal had to be operated for two months every year,
 - b) anna thanam had to be done annually on the 3rd Saturday during Puratasi month,
 - c) each of the plaintiff has to be paid Rs.5,000/- each year.

- ii) the remaining income has to be taken by two of the sons, namely, Kittu Rao and Athmaram Rao (D1)

- iii) the property shall not be alienated;

V) The interpretation of the Will would only permit payment of annuity to the plaintiffs; except the grant of annuity during their life time, the plaintiffs have no other right; that Kittu Rao and Athmaram Rao, the 1st defendant alone are entitled to the property, subject to performance of charity;.

6. The following are the issues framed by the Trial Court:

- i) Whether the plaintiffs are entitled to half a share as prayed for?

- ii) Whether the plaintiffs are entitled to past and future profits as prayed for?

- iii) Whether the Will dated 02.10.1982 is valid and genuine?

- iv) To what other relief the plaintiffs are entitled to?

7. The Trial Court, after consideration of the oral and documentary evidence, decreed the suit, granting half a share in the suit property to the plaintiffs. Defendants were directed to



render true account and to pay past mesne profits to be decided in a separate proceeding.

8. Challenging the decree and judgment, the appeal has been filed by the defendants 1 and 4.

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9. The perusal of the issues would go to show that appropriate issues have not been framed. There is no issue regarding the nature of interpretation to be given to the Will. The issue did not even indicate that the consideration was mainly focused on the interpretation of the Will. But, the following are the two issues which have been considered and answered:

(i) ***Whether Ex.B1 / Will bequeaths the income from the property or the property itself to the defendants.***

(ii) ***Whether Ex.B1 / document created any endowment in favour of any temple or religious institution.***

10. Perusal of the judgment would go to show that 1st appellant/1st defendant alone has been examined and the attesor to the Will has not been examined. The legal opinion given by two Advocates are marked as Ex.P2 and Ex.P3, which should not have been done, without examining those Advocates.

11. The Will ought not to have been admitted in evidence without examining the attesor to the Will. In fact, only through the Attestor, the Will ought to have been marked.

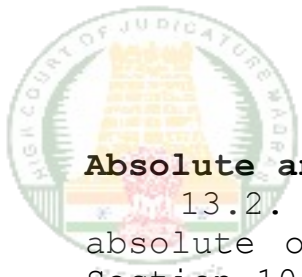
12. The suit property is a marriage hall, about which the recital in the Will holds that nobody should dispose of the marriage hall at any point of time. The relevant recital reads as under:

“அடியில் கண்ட கல்யாணமகாலை யாரும் எந்தகாலத்திலும் எந்த முகாந்திரத்தை கொண்டும் வில்லங்க பராதீனங்கள் செய்ய உரிமை கிடையாது.”

13. Contending that the total restraint on alienation is void and therefore, the property would be available for partition, Section 10 of Transfer of Property Act is relied upon.

Section 10 - condition restraining alienation
- “Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition of limitation is void.

13.1. Section 8 provides that unless different intention is expressed (or implied), a transfer of property passes forthwith to the transferee all the interest which the transferor is then capable of passing in the property and in the legal incidence thereof.

**Absolute and Partial Restriction regarding alienation:**

13.2. The conditions or limitation on alienation may be either absolute or partial. Absolute restraints are declared void under Section 10, however partial restraints may be allowed.

13.3. Whether the restriction amounts to a total or partial restriction depends upon the substance, i.e., the real effect of the condition and not the form of words laying down the condition. **An absolute restraint is one that takes away the power of alienation completely or substantially, whereas, partial restraint is one that imposes some restriction on the power of alienation but the transferee is substantially free to alienate property in various ways.**

13.4. In *Renand v. Tourangeaon*, (1867) LR 2 PC 4, it was held that a condition that transferee shall not transfer the property for a period of twenty years is an absolute restriction and thus void. If it were a condition that transferee shall not transfer the property for a period of 3 years, it would be a partial restraint and thus valid.

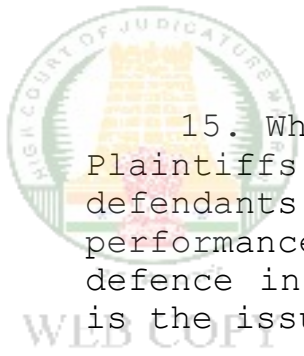
13.5. Section 10 of Transfer of Property Act is based on the general rule of jurisprudence "**alienatio rei prae fertur juri accrescendi**" that is to say that alienation is favoured by law rather than accumulation. This is general economic principle that there should be free circulation and disposition of property. An absolute restraint is repugnant to the nature of the estate and is an exception to the very essence of the grant. This section lays down that where property is transferred subject to a condition absolutely restraining the transferee from parting with his interest in the property, the condition is void.

13.6. In *Rosher v. Rosher*, (1884) 26 Ch D 801, a person A made a gift of house to B with a condition that if B sold during the life-time of A's wife, she should have an option to purchase it for Its. 10,000. The value of the house was Rs. 10,00,000. This was held to be a effect an absolute restraint and void.

When a property is transferred absolutely it must be transferred with all its legal incidents.

13.7. In this case also, there is absolute restraint of alienation of property. Hence, the condition is void.

14. The learned counsel for the appellants submitted that the suit property is a trust property and that therefore, the property cannot be subjected to partition and the plaintiffs have to be non-suited.



15. When the appellants/defendants have taken the defence that Plaintiffs are only entitled to an annuity each and that the defendants alone are entitled to the property, subject to performance of charities, whether they are entitled to take a new defence in the appeal that the suit property is a Trust property, is the issue raised in this appeal.

16. The distinction between trust and trust property has to be considered in order to appreciate the contention that the suit property is a trust property.

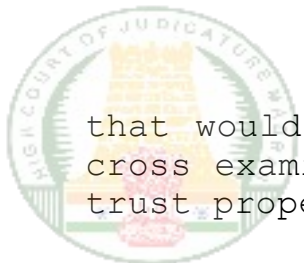
16.1. As per Section 3 of Indian Trust Act 1882, "A Trust is an obligation annexed to the ownership of the property and arising out of a confidence reposed in and accepted by the owner or declared and accepted by him, for the benefit of another, or of another and the owner."

16.2. Trust property refers to assets that have been placed into a fiduciary relationship between a trustor and trustee for a designated beneficiary. Trust property may include any type of asset such as cash, securities, real estate or life insurance policies.

16.3. A trust is called a Private Trust when it is constituted for the benefit of one or more individuals who are, or within a given time may be, definitely ascertained. Private Trusts are governed by the Indian Trusts Act 1882. A Private Trust may be created inter vivos or by will. If a trust is created by will it shall be subject to the provisions of Indian Succession Act, 1925.

16.4. The difference between a public and private trust is essentially in its beneficiaries, A private trust's beneficiaries are a closed group, while a public trust is for the benefit of a larger cross-section having a public purpose. However, there may be trusts which are a blend of both and are known as Public-cum-Private Trusts.

17. The learned counsel for the respondents 1 and 2 would submit that the plea raised that suit property is a trust property, is a new plea raised only in the appeal; that this plea is not raised in the written statement; no such argument before the trial Court; no such grounds raised in the grounds of appeal; that it is contrary to the plea taking in para-19 (xi) of the written statement; the plea taken in the written statement being "In terms of the Will, the plaintiffs are only entitled to an annuity each; Kittu Rao (and after him defendants 2 to 4) and this defendant alone are entitled to the property, subject to performance of the charities" and therefore, such a new plea cannot be entertained in the appeal. This contention is correct as without pleadings if contentions are entertained in the appeal,



that would deprive the valuable right of testing the pleadings by cross examination. Therefore, the new plea that suit property is a trust property cannot be entertained in the stage of appeal.

18. Pointing out the findings of the trial Court that Sections 172 and 173 of the Indian Succession Act, 1925, will not apply to Ex.B1-Will is now accepted and admitted by the appellants in the light of the new plea taken that the property is a trust property. It is contended that this finding is not at all under challenge. The provisions of Sections 172 and 173 of the Indian Succession Act 1925 reads as under:

"Section 172 in The Indian Succession Act, 1925

172. Bequest of interest or produce of fund.—Where the interest or produce of a fund is bequeathed to any person, and the Will affords no indication of an intention that the enjoyment of the bequest should be of limited duration, the principal, as well as the interest, shall belong to the legatee.

Section 173 in The Indian Succession Act, 1925

173. Annuity created by Will payable for life only unless contrary intention appears by Will.—Where an annuity is created by Will, the legatee is entitled to receive it for his life only, unless a contrary intention appears by the Will, notwithstanding that the annuity is directed to be paid out of the property generally, or that a sum of money is bequeathed to be invested in the purchase of it.

18.1. As rightly contended by the learned counsel for the respondents 1 and 2, if the plea of trust property is entertained, then, the applicability of Sections 172 and 173 of Indian Succession Act, will be a question mark.

19. The trial Court also relied upon the decision reported in the case of **Periammal vs. Muthuswamy Udayar**, reported in **1984 L.W.Pg.40** and held that the provisions of Section 172 will not apply to the facts of the case. In the judgment referred to by the Trial Court, it has been held as follows:

"...The case of the plaintiff as set out in the plaint was that the property in question was bequeathed absolutely to Koki alias Thailammal for her life time, and after her death, to Duraswami Udayar with the obligation to perform the charity and therefore, after the death of Duraiswami Udayar, the plaintiff as the widow and heir of Duraiswami Udayar was entitled to the property. Though the learned Subordinate Judge who disposed of the suit in the first instance came to the conclusion that Duraiswami Udayar's right to the trusteeship does not come into existence, so long as the second defendant, namely, Pappammal was alive, the



learned District Judge differed from the learned Subordinate Judge in this connection.....

....Equally, with regard to S.172 of the Indian Succession Act, which merely states that where the interest or produce of a fund is bequeathed to any person, and the Will affords to indication of an intention that the enjoyment of the bequest should be of limited, duration, the principal as well as the interest shall belong to the legatee. I do not have the slightest hesitation in coming to the conclusion that this Section has no application to the terms of the present Will. ***In this Will, it was not even the produce of the A schedule properties that was given to Duraiswami udayar, although Duraiswami Udayar had been authorised to function as the trustee and to take the surplus income after discharging the obligations imposed upon him. To such situation, S.172 of the Indian Succession Act can have no application whatever.***

20. In the case on hand, nobody has been appointed as a trustee. There is no bequeath of the property and when the fund is bequeathed to any person and if the enjoyment is of a limited duration, only then, Section 172 will apply. Therefore, the finding that provision of Section 172 and 173 of the Indian Succession Act can have no application to the facts of this case is upheld.

21. The learned counsel for the appellants, contending that the holistic reading of the Will is essential in order to understand the Will, relied upon the following decisions:

21.1. Contending that the intention of the parties has to be gathered from the Tenor of the document as a whole and it cannot be read out of context in isolation, the decisions reported in the case of **The Chairman And Managing Trustee vs Tmt.C.V.Rajeswari Ammal**, reported in 2013 (4) CTC 586 and **Meera Bai & 8 others vs. Sri Kandaswamy Temple and Sri Muthukumaraswamy Devasthanam**, reported in 2014 (4) CTC 785 are relied upon:

(i) In the decision reported in 2013 (4) CTC 586 **The Chairman And Managing Trustee vs Tmt.C.V.Rajeswari Ammal**, the relevant observation reads as under:

"43.....**The correct method of reading a document** is that the document has to be read as a whole to ascertain the true import. It cannot be compartmentalized, dissected, segregated and then read. It is not permissible to take a passage and read it out of context in isolation. The intention of the parties is to be gathered from the tenor and terms contained in the document as a whole.



(ii) In the decision reported in **2014 (4) CTC 785 (Meera Bai & 8 others vs. Sri Kandaswamy Temple and Sri Muthukumaraswamy Devasthanam)**, the relevant observation reads as under:

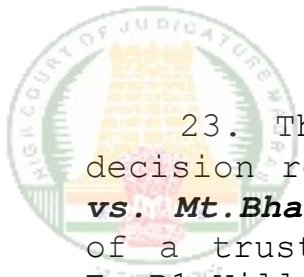
"(ii) It is a cardinal principle that the document must be read as a whole to find out the real intention of the executor. If the document Ex. P1 is read as a whole, I am of the opinion, a Specific Endowment has been created for the performance of any Religious Charity. It is stated in the said document that the settlor was desirous of providing for certain charities and requested the settlor to take charge of the property as owner and Trustee."

In this case, there is no direction to take charge of the property either as a owner or as a trustee. Therefore, these decisions will not apply to the facts of this case.

22. Contending that the clause regarding restraint on alienation has to be interpreted considering the whole tenor of the Will, the decision in the case of **Raj Bajrang Bahadur Singh vs Thakurain Bakhtraj Kuer, reported in AIR 1953 SC 7** is relied upon:

"13. Thus the beneficiaries under the will are Dhuj Singh himself and his-heirs in succession and to each such heir or set of heirs the rights of malik are given but without any power of alienation. On the total, extinction of this line of heirs the properties affected by-the will are to revert to the estate. As it was the intention of the testator that the properties should remain intact till the line of Dhuj Singh was exhausted and each successor was to enjoy and hold the properties without any power of alienation, obviously what the testator wanted was to create a series of life estates one after another, the ultimate reversion being given to the parent estate when there was a complete failure of heirs. To what extent such intention could be, given effect to by law is another matter and that we shall consider presently. **But it can be said without hesitation that it was not the intention of the testator to confer anything but a life estate upon Dhuj Singh in respect of the properties covered by the will. The clause in the will imposing total restraint -on alienation is also a pointer in the same direction....**

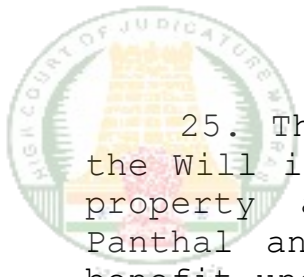
In the above case, it has been held that the total restraint on alienation is a pointer showing that the testator did not intent to confer title upon the beneficiary. In the case on hand also, there is total restraint on alienation. Therefore, this decision will not help the appellants.



23. The learned counsel for the appellants relied upon the decision reported in **AIR 1937 Privy Council 4 (Kayastha Pathshala vs. Mt. Bhagwati Devi and others)**, which relates to interpretation of a trust deed. In this case, the question is whether under Ex.B1-Will the income or the property have been bequeathed. Therefore, this decision also will not help the appellants.

24. Contending that a specific endowment to a Temple, which creates merely a charge on the property, then charge itself can be construed as an endowment, the decision in the case of **M.R. Goda Rao Sahib vs. State of Madras, reported in AIR 1966 SC 653** is relied upon:

"4. There is no dispute that in order that there may be an endowment within the meaning of the Act, the settlor must divest himself of the property endowed. To create an endowment he must give it and if he has given it, he of course has not retained it; he has then divested himself of it. Did the settlors then divest themselves of anything? We think they did. By the instrument the settlors, certainly divested themselves of the right to receive a certain part of the income derived from the properties in question. They deprived themselves of the right to deal with the properties free of charge as absolute owners which they previously were. The instrument was a binding instrument. This indeed is not in dispute. The rights created by it were, therefore, enforceable in law. The charities could compel the payment to them of the amount provided in Schedule B, and, if necessary for that purpose, enforce the charge. This, of course, could not be if the proprietors had retained the right to the amount or remained full owners of the property as before the creation of the charge. It must, therefore, be held that the proprietors had divested themselves of that part of the income of the properties which is mentioned in Schedule B. By providing that their liability to pay the amount would be a charge on the properties, the settlors emphasised that they were divesting themselves of the right to the income and the right to deal with the property as if it was unencumbered. By creating the charge they provided a security for the due performance by them of the liability which they undertook. Further sec. 32 of the Act provides that where a specific endowment to a temple consists merely of a charge on property, the trustees of the temple might require the person in possession of the properties charged to pay the expenses in respect of which the charge was created. This section undoubtedly shows that the Act contemplates a charge as an endowment.



25. The learned counsel for the respondents, contending that the Will is not an endowment, but it created only a charge on the property and the obligations towards performance of Thanner Panthal and Anna Thanam should be carried out by those deriving benefit under the document, relied upon the following decisions:

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25.1. The relevant considerations for deciding whether the recital in a deed providing for performance of charity would amount to endowment making out an outright dedication or only a charge for the expenses specified have been crystallized in the decision reported in *Murugesamuthu Pillai vs. Arumugathammal* (Second Appeal No.1461 of 1964) decided on 08.09.1969. The relevant observation reads as under:

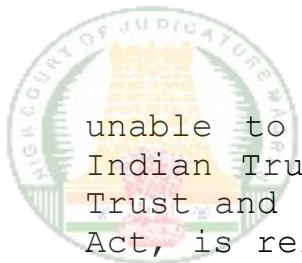
"The relevant considerations are (1) whether the charity is an expanding charity and whether the manager or the trustee who is to conduct the charity is enjoined to spend the entire income upon the charity. (2) Whether the charity would exhaust the entire income or whether there will be a substantial surplus or margin left after meeting all the expenses and (3) the provision as to the ultimate destination of the surplus.

..... Reading all the clauses together it is clear that what the testator has done under his will is only to create a charge over the properties. The result is that the plaintiff is not entitled to question the alienation. The alienees however can take the property only subject to the burden of providing 11/4 kottahs of paddy and Rs. 10 per year which would be a charge upon the property in the hands of the alienee.

.....If reading the document as a whole it is clear that whatever remains, whether substantial or otherwise, after the charities are performed, it is not to form an accretion to the corpus but can be utilised and taken by the manager or the trustee as his own without any liability to render an account and with no obligation to hold it on behalf of the trust the endowment will not be an outright dedication but a charge only is created in favour of the charity for the expenses or dhittam specified in the deed of endowment."

26. The main contention raised by the learned counsel for the respondents is that the defendants admitted that the properties can be owned, subject to performance of charities and that they are entitled to the properties and they would perform the charities.

27. It is contended that even assuming that the property is a Trust property, for the sake of argument, when the charity is



unable to be performed, the provisions of Section 77(c) of the Indian Trust Act would come into play, thereby extinguishing the Trust and in support of the same, Section 77(c) of the India Trust Act, is relied upon, which reads as under:

“77. Trust how extinguished.—A trust is extinguished—

- (a) when its purpose is completely fulfilled; or
- (b) when its purpose becomes unlawful; or
- (c) when the fulfilment of its purpose becomes impossible by destruction of the trust property or otherwise; or
- (d) when the trust, being revocable, is expressly revoked.

28. In this case also, it is stated that there is no income from Kalyanamandabam and therefore, the performance of the terms of Ex.B1 / Will has become impossibility and therefore, the Trust has become extinguished. It is also pointed out that there is no recital in the Will that after the life time of defendants, who should continue the performance.

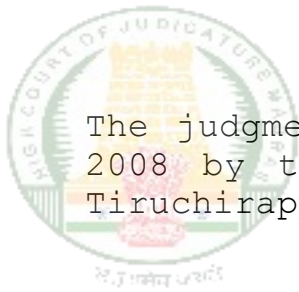
29. From the decisions and from consideration of contents of Ex.B1, it is evident that there is no complete and total dedication of property towards any Trust. In other words, the property is not bequeathed, but only the income from the property has to be utilized for the benefit of public as well as for the private persons, i.e. for performing certain obligations. Therefore, it is only a charge on the property and whomsoever takes the property has to perform the charities. In other words, it is an obligation attached to the property.

30. The test to be applied for the purpose of finding out whether a property itself has been dedicated for a charity or merely a charge has been created over the property for the purpose of performing certain charities has been highlighted in the judgment rendered in **Murugesamuthupillai vs. Arumugathammal** and this decision leads the Court to conclude that Ex.B1 is a document, which has created only a charge over the property for the purpose of performing charities. There is no complete and total dedication of income towards the charity. There is no direction to spend the entire income towards the charity. There will be substantial surplus left out after performing the charity. Therefore, the contention that it is a Trust property, cannot be accepted.

31. Whomsoever are entitled to the property are burdened with an obligation to perform the charities as mentioned in the Will. Subject to this obligation, the property is liable for partition. Therefore, the finding of the trial Court has to be upheld and it is upheld accordingly.

<https://hcservices.mca.gov.in/hcservices>

32. In the result, appeal fails and the appeal is dismissed.



The judgment and decree dated 22.03.2013, passed in O.S.No.31 of 2008 by the learned II Additional District and Sessions Judge, Tiruchirappalli is hereby confirmed.

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Sd/-
Assistant Registrar(CO)

/True Copy/

Sub Assistant Registrar

To:

The II Additional District and Sessions Judge,
Tiruchirappalli.

- + 1 cc TO Mr.V.Balaji , Advocate in SR No. 58844
- + 1 cc TO Mr.M.S.Vinodh , Advocate in SR No. 58719
- + 1 cc TO Mr.T.Senthil Kumar , Advocate in SR No. 59140

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JUDGMENT IN
A.S.(MD) No.111 of 2015
28.03.2018