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A.S.No.596 of 2



THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 07.11.2023

CORAM:

THE HONOURABLE MR.JUSTICE R.SUBRAMANIAN
AND
THE HONOURABLE MR.JUSTICE N.SENTHILKUMAR

A.S.No.596 of 2019
and
C.M.P.No.18161 of 2019

1.Agnes @ Karpaga Devi

2.Minor Amala Jenifer

(2nd Appellant is represented by her mother and
1st appellant, Agnes @ Karpaga Devi)

...Appellants

Vs.

Pauline @ Pauline Iruthaya Mary

...Respondent

Prayer: First Appeal filed under Section 96 of C.P.C., 1908, against the judgment and decree dated 05.07.2019 made in O.S.No.20 of 2013 on the file of the District Judge, Nagapattinam.

For Appellants : Mr.C.Munusamy

For Respondent : Sole respondent - Served - No appearance
Ms.B.S.Mitra Neshaa - Amicus



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J U D G M E N T

(Judgment of the Court was made by R.SUBRAMANIAN, J.)

This appeal is at the instance of the defendants in O.S.No.20 of 2013. The suit in O.S.No.20 of 2013 was launched by the respondent herein, seeking 1/3rd share in the suit properties. The plaintiff would claim that the suit properties belonged to her son, Moses, who died intestate on 08.11.2012.

2. While admitting the title of Moses, the defendants resisted the suit, contending that the plaintiff is not entitled to share in the properties.

3. Upon consideration of the pleadings, the Trial Court framed the following issues in the suit:-

- i) Whether the suit is properly valid.*
- ii) Whether the proper Court fee has been paid.*
- iii) Whether the plaintiff is entitled to partition.*
- iv) To what other relief the plaintiff is entitled to.*

An additional issue was framed relating to legitimacy of the 2nd defendant, which reads as follows:-



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v) *Whether the 2nd defendant, being a illegitimate child is entitled to share in the suit properties as heir of Moses.*

4.The Trial Court, on the evidence available on record, concluded that the plaintiff would be entitled to a share. The Trial Court also took into consideration the admission by the 1st defendant that she got married the said Moses on 13.08.2003 before a Notary Public, subsequently, another marriage was solemnized in the Church on 26.01.2004, after she had converted to Christianity and she was five months into pregnancy on the date of the marriage, held that the 2nd defendant is not a legitimate child as she was conceived even before a valid marriage between the deceased, Moses and the 1st defendant. On the said finding, the learned Trial Judge concluded that the plaintiff, being the mother of Moses and the 1st defendant, being a widow would be entitled to equal share in the properties. A preliminary decree followed suit. Aggrieved, the defendants have come up with this appeal.

5.Mr.C.Munusamy, learned counsel for the appearing appellants contended that the Trial Court has over looked the fact that the parties were



Christians governed by the Indian Succession Act and in view of Sections 33 and 33-A of the Indian Succession Act, mother of an intestate will not be entitled to any share in the property, when he leaves behind a widow or a lineal descendant.

6.Contending that the 1st defendant being a widow and the 2nd defendant being a lineal descendant, they alone would be entitled to a share and therefore, the Trial Court was not right in granting decree for partition at the instance of the mother, who will be a heir only if the situation contemplated under Section 43 to 46 of the Indian Succession Act arises.

7.Since the respondent mother was not represented by a counsel and considering the importance of the question of law, we had requested Ms.B.S.Mitra Neshaa, learned counsel to assist us and appointed her as Amicus Curiae. The learned Amicus has placed a brief note before us detailing the position of law under the Indian Succession Act. Sections 33 and 33-A deal with succession to the estate where the intestate has left a widow and a lineal descendant or a widow and kindred or the widow only.



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8.As per the rules under Section 33 & 33-A where the Christian dies intestate leaving behind a widow and lineal descendants 1/3rd of the property would go to the widow and remaining 2/3rd will go to the lineal descendants. If an intestate dies leaving behind a widow and a kindred 1/3rd of the property will be taken by the widow and the remaining will go to the kindred. If there is neither lineal descendants nor kindred, the entire property will go to the widow. Section 33-A provides for certain rules regarding succession and we do not see any situation where provisions of 33-A would apply in this case.

9.Section 43 of the Indian Succession Act deals with Distribution of Assets when there are no lineal descendants and a widow. Section 42 makes the father a heir and Section 43 provides that if the father is not alive on the date of the death of the intestate, his mother and brothers and sisters would be heirs. The provisions of Sections 41 to 45 of the Indian Succession Act would apply only when the heirs mentioned in Section 33 namely, the widow and lineal descendants are not available.



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10. In the case on hand, there is no question of the mother of the intestate getting a share as a heir of the intestate. Therefore, the entire judgment of the learned District Judge is flawed as the learned Judge had overlooked the fact that it is Indian Succession that would apply to the parties, and under the said act, a mother of an intestate does not become the heir unless there is a failure on other heirs namely, widow, the lineal descendant, kindred or father.

11. It will be useful to refer to the judgment of this Court in ***Rashmi Pithavadian Vs. Edith Pithavadian*** reported in ***2021 SCC Online Mad 5468*** wherein, the Hon'ble Mr. Justice V. Parthiban considered the similar question and has concluded that since a mother is not a heir, she cannot maintain a suit for declaration that the settlement deed executed by her deceased son in favour of his daughter is invalid. The learned Judge after adverting to the provisions concluded that the mother has no right over the property and hence, she has no cause of action to question the settlement deed. Even in the absence of the settlement deed or the Will, the property would go to the only daughter as a lineal descendant.



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12. In view of the above position of law, we are unable to sustain the judgment and decree of the Trial Court. This Appeal is therefore, **allowed**, the judgment of the Trial Court is set aside and all the findings therein relating to legitimacy or otherwise of the 2nd defendant will also stand eschewed. The suit in O.S.No.20 of 2013 will stand dismissed. We make no order as to costs, in view of the fact that the respondent has not chosen to enter appearance in this appeal.

13. We place on record our sincere gratitude and appreciation to Ms.B.S.Mitra Neshaa for the valuable assistance rendered to enable us to clear the air in respect succession in case of Christian who leaves behind a widow, kindred and mother.

(R.S.M.,J.) (N.S.,J.)
07.11.2023

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Internet: Yes

Index: Yes

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Neutral Citation : Yes



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R.SUBRAMANIAN, J.
and
N.SENTHILKUMAR, J.

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To:-

The District Court,
Nagapattinam.

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