

(1935) 10 MAD CK 0061
In the Madras High Court

Fatma Kani Ammal

APPELLANT

Vs

Shaikh Dawood and Others

RESPONDENT

Date of Decision : 30-10-1935

Acts Referred:

Citation : AIR 1936 Mad 197 : 160 Ind. Cas. 733 : (1936) 43 LW 75

Hon'ble Judges : Menon, J

Bench : Division Bench

Judgement

Menon, J.—Plaintiff 1 is the appellant. This second appeal arises out of a suit for partition of the properties left by one Haji Muhammad

Esuff, husband of plaintiff 1. Defendant 2 is a sister of the deceased Haji Muhammad Esuff and defendant 1 is the husband of defendant 2.

Defendant 3 is the son of plaintiff 1.

2. Haji Muhammad Esuff went to Singapore about four years before the date of the plaint and died there on 18th July 1928. The case of plaintiff 1

is that she is entitled to 1/8th share and her son, defendant 3, to the remaining 7/8ths share in the plaint properties which belonged to her husband.

Defendants 1 and 2 contended that Haji Muhammad Esuff left a will under which he bequeathed the plaint properties to defendant 2; they also

raised the plea that the suit was bad for non-joinder of another widow of Haji Muhammad Esuff and the children by her at Singapore. Both the

lower Courts upheld the contentions of the defendants that the will alleged to have been executed by Haji Muhammad Esuff is true, valid and

binding on plaintiff 1 and that the suit for partition was bad on account of the nonjoinder of the widow and children of Haji Muhammad Esuff at

Singapore.

3. In arriving at the finding about the genuineness and validity of the will, the probate that was granted by the Supreme Court of Singapore in respect of that will namely Ex. 1, was also taken into consideration by both the lower Courts. It is now alleged by the appellant that that probate was revoked by the Supreme Court, and an application has been filed to admit the subsequent judgment and order of the Supreme Court, Singapore, in evidence. The judgment is admitted in evidence and marked as Ex. D, and the order as Ex. D-I. The contention now raised by the appellant is that, as the probate originally granted in respect of the will, has been now revoked, it must be held that Haji Muhammad Esuff never executed a will at all, but died intestate. The effect of that contention is that Ex. D should be treated as a judgment in rem, as a consequence of which it has to be held that Haji Muhammad Esuff died intestate and that there was no will left by him in respect of his properties. But it is specifically stated in Ex. D:

It follows therefore that the probate must be revoked and although the matter is not strictly before me for decision, it is to my mind clear that the testator revoked the will of May 25th by attempting to execute a later will and that as this attempt failed, he died intestate.

4. It is clear from these observations that the question whether Haji Muhammad Esuff died intestate did not at all arise for decision and that the observation that he must be deemed to have died intestate is purely obiter. It cannot therefore be held that this judgment is a judgment in rem having the effect contended for by the appellant. Further, as observed by Lord Cranworth in *Whicker v. Hume* (1859) 7 HLC 124 "A probate is conclusive evidence that the instrument proved was testamentary according to the law of this country. But it proves nothing else". It follows that the revocation of the probate by the Supreme Court of Singapore proves no more than that the instrument before it was not testamentary according to the law of the Straits Settlements. We are therefore unable to uphold the contention of the appellant. The law generally is that every question with regard to devolution of Immovable properties in consequence of death is governed by the *lex situs*. The rights of the parties therefore to the properties in British India left by the deceased Haji Muhammad Esuff are governed by the law in force in British India. The question then is

whether according to the law in force here the will alleged to have been left by him is valid. Both the lower Courts have found on the evidence in favour of the genuineness of the will and also its validity. This is a finding of fact and there is no reason shown to disturb it. If the will as held by the lower Courts is genuine and valid, it follows that the plaintiff's suit for partition is not maintainable and that the defendants' contention was rightly upheld.

5. It is also in evidence that there were other parties interested in the properties of Haji Muhammad Esuff by reason of the provisions in the will. As they have not been made parties to the suit, the lower Courts were right in holding that the suit is bad for non-joinder of parties also. The second appeal therefore fails and is dismissed with costs.