

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

WEDNESDAY, THE 11TH DAY OF OCTOBER 2017/19TH ASWINA, 1939

WP(C).No. 9715 of 2011 (L)

PETITIONER :

**MRS. PHILOMINA, AGED 61,
W/O. LATE POLAKKAT THOMAS,
POLAKKAT, VIVEKANAND ROAD,
EDAPPALLY NORTH.P.O., KOCHI-682 024.**

BY ADV. SRI.R.ANILKUMAR

RESPONDENT(S):

- 1. GEORGE, S/O.JOSEPH,
POLAKKAT HOUSE, VYMELI ROAD,
AMRITHA AIIMS.P.O, PIN-682 041.**
- 2. STATE OF KERALA,
REP. BY CHIEF SECRETARY,
GOVT. SECRETARIAT, THIRUVANANTHAPURAM-695 004.**
- 3. UNION OF INDIA,
REP. BY SECRETARY, MINISTRY OF LAW & JUSTICE,
CENTRAL SECRETARIAT, NEW DELHI-1.**

**R1 BY ADV. SRI.N.S.MOHAMMED USMAN
R2 BY GOVERNMENT PLEADER SMT. A.C.VIDHYA
R3 BY SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL**

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD
ON 11-10-2017, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:**

sts

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J U D G M E N T

None appears for the petitioner. The Writ Petition hence would stand dismissed for default.

11/10/2017

SD/- K.VINOD CHANDRAN, JUDGE

/TRUE COPY/

P.A.TO JUDGE

sts

SHAJI P. CHALY

W.P.(C) No. 9715 OF 2011

Dated this the 22nd day of May, 2018

JUDGMENT

This writ petition is filed by a widow challenging the constitutional validity of Section 33(b) of the Indian Succession Act; 1925, which read thus: “save as provided by section 33A, if he has left no lineal descendants, but has left persons who are 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 contained thereafter.” Material facts for the disposal of the writ petition are as follows:-

2. The husband of the petitioner expired issueless on 16-08-2010. The deceased husband is having 10 cents of property with a building situated in Survey Number 714/4A

of Edappally North Village, which was purchased as per Sale Deed No. 283 of 1986 of SRO, Edappally. According to the petitioner, the said property was purchased in the name of the husband of the petitioner by selling the gold ornaments gifted during marriage and also with the money advanced by petitioner's parents and her brothers. Petitioner is unemployed, and there is no other source of income for managing the day-to-day affairs. First respondent is the brother of the deceased husband of the petitioner, who is having substantial income. First respondent has filed O.S. No. 170/2011 before the Subordinate Judges Court, Ernakulam, claiming 1/8th share of the property. Evident from Ext.P1 plaint, in which other persons kindred to deceased husband are also made parties along with the petitioner herein.

3. According to the petitioner, the Indian Succession Act, 1925 (hereinafter referred to as 'the Act, 1925') is a Pre-

constitution enactment. Article 372 of the constitution of India does not make a pre-constitutional statutory provision to be constitutional. The constitutionality of the provisions has to be considered on the basis of changed circumstances and Part III of the constitution of India. It is also submitted that the origin of the enactment is the desire of patriarchal social system to keep the wealth and fertility of the widow in same patriarchal line. Due to urbanization and constitutional development, the system has become extinct, and therefore, there is no force at all. It is also submitted that the system prevalent in Biblical era has to be changed and there is nobody to look after the petitioner at her old age. Therefore, the entire property is entitled to be retained by the petitioner. It is also stated that, in accordance with the Hindu law of Succession, the wife can retain property of the husband as full owner. Therefore, according to the petitioner, Section 33 of the Act, 1925, to the extent, it

provides 50 percent of the property to those who are kindred to the husband is clearly arbitrary, and therefore, violative of the provisions of Part III of the Constitution of India.

4. A detailed counter affidavit is filed by the first respondent refuting the allegations and the reliefs sought for by the petitioner. A reply affidavit is also filed by the petitioner reiterating the stand adopted in the writ petition. Today, when the matter is taken up, learned counsel for the first respondent submitted that a preliminary decree in the partition suit was passed, partitioning the property in accordance with the provisions contained under the Act, 1925, and the final decree proceedings are going on. It is also stated that, petitioner has preferred a Regular First Appeal, which is pending consideration before this court.

5. The sole question to be considered is, whether the petitioner is entitled to get any relief as is sought for in the

writ petition. The Indian Succession Act, 1925 has survived the past 92 years. Article 372 of the Constitution of India deals with the continuance in force of existing laws and their adaptation, and Clause 1 states that, “notwithstanding the repeal by this Constitution of the enactments referred to in article 395, but subject to the other provisions of this Constitution, all the laws in force in the territory of India immediately before the commencement of this constitution shall continue in force therein until altered or repealed or amended by a competent legislature or other competent authority.” Adaptation of Laws Order, 1950 dated 26-01-1950 was published in the Gazette, Extraordinary, P 449 as amended by various notifications issued subsequently. Petitioner has no case that any consequences as is contemplated in clause 3 of article 372 are existing. Clause 3 states that, “nothing in Clause (2) shall be deemed - (a) to empower the President to make any adaptation or

modification of any law after the expiration of (3 years) from the commencement of this Constitution; or (b) to prevent any competent Legislature or other competent authority from repealing or amending any law adapted or modified by the President under the said Clause. Explanation I thereto read thus “ the expression 'law in force' in this article shall include a law passed or made by a Legislature or other competent authority in the territory of India before the commencement of this constitution and not previously repealed, notwithstanding that it or parts of it may not be then in operation either at all or in particular area.” As I have pointed out earlier, the Indian Succession Act was enacted by a competent authority within the territory of India before the commencement of the constitution and it was not previously repealed.

6. Therefore, the Act, 1925 is not having any manner of legal impediments *vis-a-vis* article 372 of the Constitution of

India. However, the petitioner has a case that, Section 33(b) of the Act, 1925, provided under Part V is unconstitutional to the extent it provides 50 percent of the property left by deceased to the kindred of the deceased. Part V shall not apply to any intestacy occurring before the first day of January 1866 or to the property of any Hindu, Mohammadian, Budhist, Sikh or Jaina. Sub section (2) reads that “save as provide in Sub section (1) or by any other law for the time being in force, the provisions of this part shall constitute the law of (India) in all cases of intestacy. The term India was substituted by Act 3 of 1951 for the term “states”. Section 33 of the Act, 1925 deals with the situation where intestate has left widow and lineal descendants, or widow and kindred only, or widow and no kindred. Sub sections (a) to (c) read thus:-

- (a) *“if he has also left any lineal descendants, one-thirds 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 descendants, 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. “

Section 33A of the Act, 1925 deals with special provisions where intestate has left widow and no lineal descendants.

Section 34 of the Act, deals with the situation wherein intestate has left no widow and where he has left no kindred, and in that situation, the property shall go to the Government. Section 35 of the Act, deals with the rights of a widower, by which 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. Therefore, in my considered opinion, the provisions of the Indian Succession Act, 1925 have taken care of various situations in respect of succession to properties including the properties of widow and widower,

lineal descendants and any consequences occurring to the death of lineal descendants in accordance with the provisions contained under Part V, right from Sections 29 to 49 of the Act, 1925. On a reading of the provisions, it is categoric and clear that the provisions contained thereunder are competent enough to tackle various situations in respect of the division of the property so far as the widow and widower are concerned. The provisions contained under Section 33 of the Act, 1925 in respect of sharing of the property of a widow is *para materia* with Section 35 of the Act, 1925 where a widower has to undergo the same modality in respect of the property of a wife.

7. Moreover, the title holder of the property has every right to alienate his property in any manner of his choice during his lifetime or leave a Will bequeathing the property to any person of his choice and in complete exclusion of the wife and children. The protection granted to a widow under

Section 33 of the Act, 1925 is to be considered in the light of the rights vested with the title holder to dispose of the property in any manner he wishes. Therefore, viewed in that circumstances, it can be seen that, it is to protect the interest of the widow in case of intestacy on death of the husband, the said provision is introduced in the Act. Likewise, interest of the husband is also protected by virtue of Section 35 of Act, 1925. Construing so, it is discernible, Section 33(a) in respect to the sharing of the property by the widow is a benevolent provision, with the intention of protecting the interests of the widow. Moreover, reading of various provisions of Part V of Act, 1925, it is clear that a balanced approach is made by the legislature in order to protect the interest of the legal heir of the deceased intestate. Moreover, the legislation is made with the intention of protecting the legal distribution of the wealth of a person dying intestate, and to avoid any sort of illegality and maintain peace and

harmony among the family members. The constitutionality of the said provision can again be tested taking into account Section 33(a) of Act, 1925, which stipulates that in the event of the deceased leaving any lineal descendants, widow is entitled to get only one-third of the property, and two-third shall go to the lineal descendants. On an appreciation of the provisions of Part V Chapter I of the Act discussed above, it is explicit, a clear balance is struck among the provisions. Therefore, in my considered opinion, the case put forth by the petitioner that the provisions of section 33 (b) of the Act, 1925 is arbitrary to the extent it stipulates 50 percent of the property of a deceased dying intestate to the kindred of the deceased rendering it unconstitutional, is unsustainable. Moreover, the provisions of the Act, 1925 have withstood the test of time without much amendment.

8. Taking in to account all these aspects, I am of the considered opinion that, petitioner has not made out any

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case justifying interference of this Court under Article 226 of
the Constitution of India.

Therefore, the writ petition will stand dismissed.

**Sd/-
SHAJI P. CHALY
JUDGE**

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29/05/2018

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PA TO JUDGE

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K.P.JYOTHINDRANATH, JUDGE

rk/02.2018