
(2000) 01 KL CK 0036
In the High Court Of Kerala
Case No : M.F.A. No. 384 of 1994

C.C. Kuruvila alias Raju and Others

APPELLANT

Vs

Sosamma and Others

RESPONDENT

Date of Decision : 27-01-2000

Acts Referred:

Succession Act, 1925 — Section 278, 64

Citation : AIR 2000 Ker 241 : (2000) 2 ILR (Ker) 251 : (2000) 3 RCR(Civil) 215

Hon'ble Judges : R. Rajendra Babu, J;K.K. Usha, J

Bench : Division Bench

Advocate : V.N. Achutha Kurup, for the Appellant; M.S. Radhakrishnan Nair, for the Respondent

Final Decision : Allowed

Judgement

Rajendra Babu, J.—This appeal is at the instance of the petitioners in O.P. (L.A.) No. 122/92 before the District Court, Kottayam. The petitioners filed O.P. u/s 278 of the Indian Succession Act for grant of Letters of Administration in respect of a Will executed by their deceased -- father, Thomas. The above O.P. was dismissed by the District Court and aggrieved by the above order, the petitioners have come up in appeal.

2. Thomas, husband of the 1st respondent and father of the appellants and respondents 2 to 4 executed Ext. A-1 Will on 6-9-89 and got it registered in the Sub-Registrar's Office, Kottayam as document No. 661/89. The testator (Thomas) died on 27-9-90. The appellants filed the O.P. for the issue of Letters of Administration. Even though the respondents received notice, they did not contest the matter. The Will was attested by two attestors. One of the attesting witness was examined as P.W. 1 and the 2nd appellant was examined as P.W. 2. A life interest over the property was reserved with the 1st respondent as per Will. After considering the evidence, the Court below found that the testator had the testamentary capacity and was in a sound disposing state of mind and the Will had been duly executed and attested by two at testers. But the Court below

dismissed the O.P. holding that the testator obtained the property as per a Will executed by his father Kuruvilla on 27-4-63 and the above Will was not probated and accordingly the petitioners were found not entitled to probate or the issue of Letters of Administration of the Will executed by deceased -- Thomas. The above order is challenged by the appellant.

3. The learned counsel for the appellants argued that the Court below had gone wrong in dismissing the O.P, as the Probate Court was not having the jurisdiction to ascertain whether the testator had the title to the property or not. It was further argued that the Probate Court need consider only whether the testator had the testamentary capacity and it was duly executed in accordance with Section 64 of the Indian Succession Act and it was not for the Court to decide whether the testator had title to the property or not. It was in evidence that the Will executed by Kuruvilla in favour of his son Thomas was not probated or Letters of Administration had been obtained in respect of the above Will. The Court below placing reliance on a decision of the Supreme Court in *Mrs. Hem Nolini Judah (since deceased) and after her Legal Representative Mr. Marlean Wilkinson Vs. Isolyne Sarojbhashini Bose and Others*, held that petitioners were not entitled to Letters of Administration In respect of the Will executed by Thomas and accordingly the O.P. was dismissed. The scope and jurisdiction of a Probate Court had been considered by the Supreme Court as well as by this Court in a series of decisions. In *C. P. Poulose v. C. P. Paul* (1996) 1 KLJ 472, this Court held :

"The Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad Is not within the purview of the Probate Court."

In *Ittyanath Madathil Madhavi Vs. Sree Rama Varma*, , this Court held :

". . . a testamentary Court dealing with the question of issuing a grant of probate is concerned to see whether the Will is duly executed as required by law by a testator of sound and disposing state of mind. In case of grant of Letters of Administration the Court has to see that the person properly entitled to represent the estate of the deceased according to the Succession Act has come to Court and is given the grant. It is not part of the duty of the testamentary Judge to consider the question of title to property."

The same approach was made by this Court in *Pappoo v. Kuruvilla* (1994) 2 KLT 278. Therein Sreedharan, J. as he then was held :

"A Court of probate is only concerned with the question as to whether the document put forward as the last Will of the deceased person was duly executed and attested. The Court is also to see whether at the time of the execution of that document whether the testator had sound disposing mind. The Probate Court is not to embark on the question relating to disputed questions of title and

possession."

The same view was taken by this Court in *C. P. Poullose v. C. P. Paul* (1996) 1 KLJ 472.

4. The learned District Judge was relying on a decision of the Supreme Court in *Mrs. Hem Nolini Judah* (since deceased) and after her Legal Representative *Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others*, . That was a case where the Supreme Court was considering Section 213 of the Indian Succession Act. Section 213 stipulates that no right as executor or legatee can be established in any Court on the basis of a Will unless the Will had been probated or Letters of Administration issued by a competent Court. For establishing a right under the Will, it has to be probated or Letters of Administration has to be obtained from a competent Court. When once the Will is probated or Letters of Administration has been obtained, then the Court has to take into consideration of any right obtained on the basis of a Will. The right or title of the testator has to be considered when the right obtained on the basis of the Will is considered after It is probated. Section 213 of the Indian Succession Act is not at all attracted in the case in hand and hence the decisions relied on by the Court below has no relevance in this case. The present O.P. was filed for the issue of Letters of Administration on the basis of a Will executed by Thomas and when it had been proved that the testator had the testamentary capacity and was in a sound disposing state of mind and the Will had been attested properly by two attestors, then the Probate Court was bound to issue Letters of Administration as prayed for. It was alien to the Probate Court to enquire about the title of the testator in respect of the properties covered by the Will. The Court below had gone wrong in dismissing the petition placing reliance on a decision in *Mrs. Hem Nolini Judah* (since deceased) and after her Legal Representative *Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others*, . As the testamentary capacity of the testator and the due execution of the Will had been established, the O.P. should have been allowed by the Probate Court. The Court ought to have Issued Letters of Administration as prayed for and as such this appeal has only to be allowed and the order of the Court below to be set aside.

In the result this appeal is allowed. The order in O.P. (L.A.) 122/92 before the District Court, Kottayam is set aside and the above O.P. shall stand allowed. Letters of Administration as prayed for In O.P. (L.A.) 122/92 shall be issued.