

(1998) 08 KAR CK 0067

In the Karnataka High Court

Case No : Original Second Appeal No. 1 of 1997

Lt. Col. Richard Charles Menasse (Retired)

APPELLANT

Vs

Mrs. Cheryl Margurite Soggee and Another

RESPONDENT

Date of Decision : 12-08-1998

Acts Referred:

Succession Act, 1925 — Section 118, 2 (h), 24, 263, 99 (c)

Citation : (1998) ILR (Kar) 4134 : (1998) 6 KarLJ 447 : (1999) 1 RCR(Civil) 455

Hon'ble Judges : Y. Bhaskar Rao, J;N.S. Veerabhadraiah, J

Bench : Division Bench

Advocate : Sri V.R. Sridhara, for the Appellant; Sri Leslie D'Silva, for the Respondent

Judgement

N.S. Veerabhadraiah, J.—The appellant being aggrieved of the order of dismissal passed in Prob. C.P. No. 16 of 1990, dated 31-10-1996 by the learned Single Judge has preferred this appeal.

2. The brief facts are as follows;

That a Will and Testament, dated 17-11-1987 was executed by Mrs. Hildred Joyce Faithful w/o Late Mr. Joseph Alexander Faithful bequeathing her immovable property situated at No. 20, Cubbon Road, Bangalore for charitable purpose by appointing her cousin Mrs. Cheryl Margurite Soggee Vs. Lt. Col Richar Charles Menasse, as executors to carry out her last wishes as per the Will. The testatrix Mrs. Hildred Joyce Faithful died on 31-10-1988. Thereafter, the first executrix under the Will namely, Mrs. Certrude June Dalby also died. Consequent to her death, the second executrix Mrs. Cheryl Margurite Soggee filed a petition in Prob. C.P. No. 4 of 1989, for grant of probate. That by an order dated 16-6-1989, this Court granted probate of the said Will in favour of Mrs. Cheryl Margurite Soggee after complying with the procedure laid down by issuing citation etc.

3. The appellant being aggrieved of the grant of probate in Prob. C.P. No. 4 of 1989 filed Prob. C.P. No. 16 of 1990 u/s 263 of the indian Succession Act for

revocation of the probate granted firstly on the ground that he is the real brother of the first executrix Mrs. Certrude June Dalby mentioned in the Will who died subsequently and that he is nearer relative of the deceased testatrix Mrs. Hildred Joyce Faithful wherein she has described Mrs. Certrude June Dalby as her Cousin in the Will. Secondly, on the ground that no citation was issued to him though he is the nephew of the deceased Mrs. Hildred Joyce Faithful and thirdly on the ground that the testator died within 12 months from the date of the execution of the Will and the Will was not deposited within 6 months.

4. The learned Single Judge after hearing the Counsel of both the parties held, that there have no nephew, niece or nearer relative of the deceased testatrix Mrs. Hildred Joyce Faithful and dismissed the petition filed for revocation of the probate granted in favour of the respondent. The appellant being aggrieved of the said order has presented this appeal.

5. Learned Counsel for the appellant contended that the bequeath of the property under the Will and Testament, dated 17-11-1987 executed by the testatrix is not valid in view of the provisions of Section 118 of the Indian Succession Act. He further contended that this appellant is a nephew and therefore, on that ground itself that the probate granted in favour of respondent 1 is liable to be revoked and submitted that the learned Single Judge has not considered and appreciated the provisions of Section 118 of the Indian Succession Act. It is further contended that in the Will, it is clearly mentioned that the first executrix Mrs. Certrude June Dalby is the cousin of the testatrix wherein this appellant is the real brother of Mrs. Certrude June Dalby and even otherwise that he becomes a nearer relative within the definition of Section 118 of the Indian Succession Act. Therefore, the testatrix Mrs. Hildred Joyce Faithful did not have power to bequeath the property to religious and charitable use. Accordingly, he prayed to set aside the impugned order by allowing this appeal.

6. On behalf of the respondents, it is contended that the appellant is neither a nephew nor a nearer relative within the definition of Section 118 of the Indian Succession Act and therefore, the appellant has no locus standi to seek for revocation of the probate granted and justified the orders passed by the learned Single Judge and prayed for dismissal of the appeal.

7. In the light of the contentions raised, the important questions that arise for determination are:

1. Whether the appellant has any locus standi to question the Will and Testament, dated 17-11-1987 executed by Mrs. Hildred Joyce Faithful?

2. If so, whether the probate granted has to be revoked?

3. What orders?

8. It is not in dispute that Mrs. Hildred Joyce Faithful executed her last Will and Testament dated 17-11-1987 in respect of the property situated at Cubbon Road, Bangalore by appointing her cousin Mrs. Certrude June Dalby and Mrs. Cheryl

Margurite Soggee. It is also an admitted fact that the appellant Lt. Col. Richard Charles Menasse is the brother of Mrs. Gertrude June Dalby. As per the above contentions, it is clear that Lt. Col. Richard Charles Menasse and Mrs. Gertrude June Dalby are brother and sister and are the cousins of the testatrix Mrs. Hildred Joyce Faithful. The question first that has to be adjudicated is whether this appellant Lt. Col. Richard Charles Menasse is a nephew or a nearer relative of the testatrix. It is only in case if the appellant were to come within the meaning of Section 118 of the Indian Succession Act, then it is open for him to challenge the Will and Testament executed on the ground that the testatrix did not have power to execute the Will when her nephew or a nearer relative is alive. Section 118 of the Indian Succession Act reads as under:

"118. Bequest to religious or charitable uses.--No man having a nephew or niece or any nearer relative shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than twelve months before his death and deposited within six months from its execution in some place provided by law for the safe custody of the Wills of living persons".

By a reading of the provision of Section 118, it is clear firstly that a person shall have no power to bequeath any property to religious or charitable use if he has a nephew or a niece or any nearer relative. Secondly, the will ought to have been executed not less than twelve months before his or her death. Thirdly, such a Will has to be deposited within six months from the date of the execution of the Will. Thus it is manifest that at the time of the execution of the Will, there should not be a living nephew or a niece or a nearer relative. Then only, the "Will" will be valid.

9. Section 2(h) of the Indian Succession Act, reads as under:

" "Will" means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death".

It makes clear, that Will is an instrument which a person makes dispossession of his property to take effect after his death.

10. It is after the death of the testatrix the second executrix Mrs. Cheryl Margurite Soggee applied for grant of probate in Prob. C.P. No. 4 of 1989 and the probate was granted by an order dated 16-6-1989.

11. It is only a nephew, a niece or a nearer relative who could challenge the Will and Testament as void as per Section 118 of the Indian Succession Act.

12. Section 99(c) of the Indian Succession Act, reads as under:

"The words "nephews" and "nieces" apply only to children of brothers or sisters".

It is clearly defined that it is only the children of brothers or sisters of the testator who would come within the meaning of nephew or niece and therefore, it is clear in the case on hand that the appellant does not come within the definition of Section 99(c) of the Act and therefore, the appellant cannot be said

that he is a nephew.

13. Section 24 of the Act, reads as under:

"Kindred or consanguinity: Kindred or consanguinity is the connection or relation of persons descended from the same stock or common ancestor".

This makes clear that nearer relations means the persons who are descended from the same ancestors and it denotes only to legitimate relationship. By this also, it cannot be said that the appellant is a nearer relative.

14. The learned Single Judge considering the relevant provisions of Sections 118 and 24 of the Indian Succession Act has rightly held that the appellant is neither a nephew nor a near relative. The learned Single Judge has also held that the appellant has not questioned the genuineness and the validity of the Will and further observed that the first executrix under the Will is Mrs. Certrude June Dalby, who is none else than his sister and therefore, the execution of the Will by the testatrix was well within his knowledge and thereby issuing citation to him did not arise. The learned Single Judge had also considered the relevant provisions of law and various decisions of other High Courts and held that the appellant has no right to question the Will as he does not come within the meaning of Section 118 of the Indian Succession Act.

15. We have gone through the orders passed by the learned Single Judge.

16. In view of the fact that the appellant is neither a nephew nor a near relative, we hold that he has no locus standi to question the Will executed. When once the appellant has no locus standi to question the Will, he has also no legal right to appeal to seek relief of revocation of the Will in respect of the property bequeathed.

17. For the foregoing reasons, we do not find any merit in the appeal and we hold that the appellant has no locus standi to question the Will. Accordingly, the appeal is dismissed.

18. In view of the circumstances, the parties shall bear their own costs.