

(1981) 09 KL CK 0013

In the High Court Of Kerala

Case No : C.R.P. No's. 2181 and 2185 of 1978

Philip Raymond and Another

APPELLANT

Vs

Kumara Pillai Demadaran Nair and Another

RESPONDENT

Date of Decision : 17-09-1981

Acts Referred:

Succession Act, 1925 — Section 213, 214(1)

Citation : AIR 1982 Ker 136 : (1982) 1 ILR (Ker) 114

Hon'ble Judges : P. Subramonian Poti, Acting C.J.; George Vadakkal, J

Bench : Division Bench

Advocate : P.F. Thomas, for the Appellant; C.K.S. Panicker, P.G.P. Panicker, P.N. Poti, V. Bhaskara Menon, K.S. Radhakrishnan and K.S. Balakrishnan, for the Respondent

Final Decision : Dismissed

Judgement

Subramonian Poti, Ag. C.J.

1. The same question arises in both these revisions. These were referred by one of us to a Division Bench because the dictum in Antony v. P. K. Rockey Memorial Trust ILR (1980) Ker 721 was doubted. The question for decision is simple. The decree holder in both these cases died. He had executed a will under which assets due to him were claimed by a Trust. The Managing Trustee of the Trust sought to execute the decree on the death of the decree-holder. The question was whether such execution can be permitted without taking out a probate of the will. In both these cases the learned Munsiff held that without such probate, execution cannot be permitted, That is challenged in these revisions.

2. On the death of the decree-holder it is the legal representative who could execute the decree. If the decree-holder dies intestate his heirs at law inherit his assets and they are entitled to continue the execution as legal representative of the deceased decree-holder. If, on the other hand, he dies testate, those who obtain the right of the decree under the will would be entitled to execute it as his

representatives. In the case before us, it is the Managing Trustee who has come up with a claim for execution. The Managing Trustee seeks execution because according to him the Trust is entitled to such execution. It is on its behalf he is seeking execution. The trust is entitled to such execution only because of the terms of the Will. That will has not been probated. Section 213 of the Indian Succession Act obliges an executor or legatee who seeks to establish his right as such executor or legatee to obtain a probate of the Will under which the right is claimed or letters of administration of the Will or a copy of an authenticated copy of the Will executed. Section 214 of the Indian Succession Act prohibits a court from passing a decree against the debtor of a deceased person for payment of his debt to a person claiming under succession or to proceed upon an application of a person claiming to be so entitled to execute a decree except on production by the person so claiming of a probate or letters of administration or such other document as is enumerated in Clauses (i) to (v) of Sub-section (1) of Section 214 of the Act.

3. Reference has been made to the Division Bench because of the view of a learned Judge of this Court in *Antony v. P. K. Rockey Memorial Trust* ILR (1980) Ker 721. It is seen that the Trust with which the learned Judge was concerned in that case and that into which we are concerned in these cases is identical. The learned Judge rightly referred to the 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*, and noticed that Section 213 creates a bar to the establishment of any right under Will by an executor or a legatee unless probate or letters of administration of the Will have been obtained. Having said so, the learned Judge went on to consider the facts before him. Referring to the terms of the Will the learned Judge noticed that a Trust can be created under a Will. The terms of the Will define how the Trust is to be administered and the business managed in future. The petition has been filed by the Managing Trustee in terms of the Will to proceed with the execution. Having noticed these facts the learned Judge observed : "No claim is sought to be established in the case as a legatee or executor." In the light of that observation, the learned Judge took the view that no probate was necessary. With great respect to the learned Judge, we notice that the essential point lost sight of was that the Trust was created under the terms of the Will. If the Trust obtained the assets of the deceased under the Will even though the terms of the Will enabled the Managing Trustee to manage, the Managing Trustee may have to implead himself so as to take out execution. He was doing so on behalf of the Trust and could do so only on behalf of the Trust. Therefore if he is depending upon the terms of the Will for his right as Managing Trustee of the Trust, to execute the decree probate of the Will was called for. We therefore find no way to agree with the decision of the learned Judge.

The result is that the view expressed by the court below in both these cases is correct and calls for no interference. The C. R. Ps. are dismissed. No costs.