

**(2005) 10 MAD CK 0015**

**In the Madras High Court**

**Case No :** C.R.P. (NPD) (MD) No's. 540 and 541 of 2005 and C.M.P. (MD) No's. 2684 and 2685 of 2005

Pushparaj

APPELLANT

Vs

Somalingam Asari and Another

RESPONDENT

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**Date of Decision :** 24-10-2005

**Acts Referred:**

Succession Act, 1925 — Section 213, 57

**Citation :** (2006) 1 MLJ 354 : (2006) 1 RCR(Civil) 556

**Hon'ble Judges :** P.K. Misra, J

**Bench :** Single Bench

**Advocate :** M.V. Venkateshan, for the Appellant; C. Godwin, for the Respondent

**Final Decision :** Dismissed

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## **Judgement**

P.K. Misra, J.—These Civil Revisions are directed against the common order passed by the Executing Court rejecting the applications filed

under Order 11, Rule 99 of the CPC by the present petitioners.

2. The brief facts giving rise to the present Civil Revisions are as follows:

The disputed property originally belonged to one Santhana Marian, the paternal grandfather of the present petitioner. Said Santhana Marian

executed a Will bequeathing the disputed property in favour of his daughter-in-law Maria Soosai Ammal, the mother of the present petitioner. The

said Maria Soosai Ammal had four sons and three daughters, including the petitioner. The Will had not been probated and no letters of

administration had been obtained. On the death of the grandfather in the year 1962, the property devolved upon the father of the petitioner as the

Will in question had not been probated. However, Respondent No. 1 in the

present Civil Revision Petitions, had filed suit for specific performance of the contract against Maria Soosai Ammal, the second respondent in the present Civil Revision Petitions, and obtained a decree. The petitioner claims that since the Will in favour of the present Respondent No. 2 had not been probated, the property did not vest with her, and therefore, the decree for specific performance is not binding on the present petitioner, who claims right on the death of his father on 14.7.2000. The Executing Court has rejected the applications filed under Order 11, Rule 99, on the ground that the requirement to obtain a probate has been done away after the amendment to Section 213 of the Indian Succession Act.

3. The main contention raised by the counsel for the petitioner in the present Revisions is to the effect that the decree against Respondent No. 2 was a nullity as she had not derived any title on the basis of the Will which has not been probated.

4. Section 213 of the Indian Succession Act, before it was amended, is as follows:

213. Right as executor or legatee when established:

(1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This Section shall not apply in the case of Wills made by Muhammadans, and shall only apply--

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jain where such Wills are of the classes specified in Clauses (a) and (b) of Section

57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where

such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where

such Wills are made outside those limits, insofar as they relate to immovable property situated within those limits.

5. As per the aforesaid provision, before seeking to establish a right on the basis of a Will, the Will is required to be probated. The question is

whether in the absence of any probate, the decree recognising any right on the basis of unprobated Will is a nullity.

6. It is not disputed that the decree in question has been affirmed by the High Court in the Second Appeal. The present petitioner is claiming title

through his father Jebastian. Such person was in fact examined as D.W.1 on behalf of his wife, the defendant in the two suits in question, namely

O.S. Nos. 79 of 1982 and 73 of 1983. As D.W.1 he has specifically deposed that he and his wife were living together and even though his wife

was ready and willing to perform her part of the contract, the plaintiff had not completed the contract as he did not have money at that time. In

other words, the person through whom the present petitioner is making claim had not at all raised any claim regarding his own alleged right and all

along assumed that present Respondent No. 2 was the owner on the basis of the Will. Even if the Will was not probated, the title vested with the

legatee immediately on the death of the propounder of the Will. The decree which was passed cannot be said to be a nullity merely because

reliance had been placed upon an unprobated Will. Illegality if any should have been raised during the trial or in the subsequent appeal, but not in

an execution proceeding subsequently. Moreover, in view of the subsequent amendment, there is no embargo as observed by the Executing Court.

Even assuming that any illegality had been committed during the trial, such illegality did not have the effect of making the decree a nullity. In this

connection, the decision of the Supreme Court Ittavira Mathai Vs. Varkey Varkey and Another, , though rendered in a different context, is

relevant.

7. In such view of the matter, the order passed by the Executing Court is legal and proper and there is no scope to interfere with such order in the

present Civil Revision Petitions. Civil Revision Petitions are accordingly dismissed. There would be no order as to costs. Consequently, C.M.P.

Nos. 2684 an 2685 of 2005 are closed.