
(1974) 07 MAD CK 0010
In the Madras High Court
Case No : Appeal No. 288 of 1970

Soundararaja Peter and Others APPELLANT
Vs
Florance Chellaih and Others RESPONDENT

Date of Decision : 15-07-1974

Acts Referred:

Succession Act, 1925 — Section 232, 234, 235

Citation : AIR 1975 Mad 194 : (1978) 87 LW 848 : (1974) 87 LW 848 : (1975) 2 MLJ 164

Hon'ble Judges : V. Ramaswami, J;Ramanujam, J

Bench : Division Bench

Advocate : P.S. Nagaswami Iyer and R. Srinivasan, for the Appellant; V.P. Raman and N. Srivatsamani, for the Respondent

Judgement

Ramanujam, J.—Defendants 2 and 3 in O. S. No. 2 of 1967 on the file of the Court of the District Judge, Madurai, are the appellants in this

appeal arising out of a suit filed u/s 217 read with Section 222 of the Indian Succession Act by one of the daughters of one Mrs. Natchatram Peter

Issac for grant of a probate of the last will and testament of the said Mrs. Natchatram Peter Issac. The plaintiff and defendants 4 to 6 are the

daughters and defendants 1 to 3 are the sons of the said Mrs. Natchatram Peter Issac. The father Mr. Peter Issac, died in 1941 and the mother

died on 20-8-1960. The father had earlier left a will bequeathing one third of his properties to his wife Mrs. Natchatram Peter Issac. According to

the plaintiff, her mother left a will dated 26-8-1958 whereunder all the properties which belonged to her have been bequeathed to all her

daughters, the plaintiff and defendants 4 to 6. The grant of either probate or Letters of Administration with the Will annexed is sought for in the suit

in relation to the said Will.

2. The suit has been resisted by defendants 1 to 3. They denied the genuineness of the Will. According to them, their mother was 80 years old and

for a few years prior to her death on 20-8-1960 she had paralytic stroke and was completely bedridden and she was not in a sound and disposing

state of mind. It is their case that taking advantage of the helpless position of their mother the plaintiff with the connivance of the 5th defendant with

whom the mother was living, had brought about the said Will fraudulently, Defendants 4 to 6 remained ex parte.

3. On the defence raised by defendants 1 to 3, the main question that came up for consideration before the court below was whether the testatrix

executed the Will when she was in a sound and disposing state of mind and whether the Will is true and genuine.

4. The plaintiff has examined P. W. 2, the scribe and P. W. 4, an attesor, to prove that the Will was duly executed by the testatrix. She also

examined, P. W. 3, an Advocate of the Madurai Bar who prepared the draft for the Will. Ex. A-2 in the case. The Trial Court, mainly on the basis

of the evidence of these three witnesses, held that the Will had been duly executed by the mother of the plaintiff: as regards the question as to

whether she was of a sound and disposing state of mind at the time of the execution of the Will, the court below found that she has been attending

to certain proceedings and also was operating bank accounts. It also relied on other evidence in the case indicating that the mother of the plaintiff

was in a position to attend to her own affairs and that she could not have been bedridden at or about the time of the execution of the Will Ex. A-1

dated 26-8-1958 as alleged by the contesting defendants. It specifically considered the defence case that the testatrix suffered a paralytic stroke

two years before her death and ever since then she has been confined to bed and that her physical and mental condition was so weak that she

could not attend to her own affairs in the light of the evidence adduced by them. The evidence in this regard adduced by the contesting defendants

consists of the evidence of D. Ws. 1 to 3. D. W. 1 is that 1st defendant and is the eldest son. He deposed that his mother had a paralytic attack

two years ago and from then onwards she was bedridden. He admitted that she was being attended by one Dr. Manickavasagam. But the said

doctor has not been examined to speak to the truth and the nature of the paralytic attack and about the physical condition of the lady after the alleged attack. D. Ws. 2 and 3 are strangers who have spoken to the fact that the lady was suffering from paralysis and was not moving about. But in the absence of direct evidence from the doctor as to the nature of the disease, the lower court was not inclined to accept the evidence of these witnesses when they say that the lady was not in a position to move about and was not in such a mental state as to execute the Will in question. It therefore proceeded to hold that the Will is true and genuine and that the testatrix was of sound and disposing state of mind at the time of the execution of the will. In that view it decreed the suit granting Probate in favour of the plaintiff on her satisfying certain formalities.

5. In this appeal the appellants not only challenge the decision of the Court below on merits, but also challenge the grant of Probate on legal grounds. It is the contention of Mr. Parasaran, learned counsel for the appellants, that the grant of Probate in this case is not legal and that probate can be granted only in favour of an Executor when one is appointed by the Will. It is pointed out by the learned counsel that in the Will no Executor has been appointed either expressly or by necessary implication and therefore the issue of probate in respect of this Will is out of question. We are inclined to agree with the learned counsel on this part of the case. It is not in dispute that in the Will no Executor has been appointed either expressly or by necessary implication. Therefore, a Probate cannot be issued u/s 232 of the Indian Succession Act as has been done in this case. But as already pointed out, the plaintiff has asked for an alternative relief of Letters of Administration with the Will annexed. The question is whether the plaintiff will be entitled to the Letters of Administration, if on merits, the Will is held to be true and genuine and the testatrix is found to be of sound and disposing state of mind at the time of the execution of the Will. According to the learned Counsel for the appellants, even Letters of Administration cannot be granted in respect of the Will in question. Reference was made to Sections 232 and 235.

6. Section 232 applies to a case where the testator has not appointed an executor. The section states that where an executor has not been appointed under a Will or the executor appointed is incapable of or has refused to act or has died before the testator or before proving the will, an

universal or residuary legatee may be admitted to prove the will, and letters of administration with the will annexed may be granted to him of the estate. Section 235 provides that letters of administration with the will annexed shall not be granted to any legatee other than an universal or a residuary legatee, until a citation has been issued and published in the manner prescribed by the provisions of that Act. Mr. Parasaran contends that though letters of administration could be granted u/s 232 to an universal or a residuary legatee, the plaintiff not being an universal or a residuary legatee, is not entitled to the letters of administration under the said provision. It is also further pointed out that no citation having been issued or published in the manner prescribed by the Indian Succession Act, no letters of administration could be issued to the plaintiff even if she is treated as an universal or a residuary legatee in view of the prohibition contained in Section 235. It is true that the plaintiff is not an universal or a residuary legatee under the terms of the will Ex. A-1. She is one of the four legatees under the terms of the will Ex. A-1 and all the properties covered by the will have been bequeathed to them and there is no residue to be administered. We do not understand the provisions in Section 232 as enabling only a residuary or an universal legatee to prove the Will and claim letters of administration. Section 234 specifically provides that any legatee having a beneficial interest may also prove the will and seek a tellers of administration. The plaintiff being a legatee under the will and there being no universal or residuary legatee, the provisions of Section 234 will come into play. The plaintiff is therefore entitled to prove the will and get letters of administration in relation to that will.

7. The only further question is whether she can get letters of administration without the citation and the publication in the manner contemplated by Section 235. Section 235 specifically refers to the case of an universal or a residuary legatee applying for letters of administration and prohibits the grant of letters of administration unless citation has been issued and published in the manner prescribed. On the face of it Section 235 does not apply to a case where a legatee applies for letters of administration Apart from this, when all the legatees are before the Court and there being no other person having beneficial interest under the Will, no citation or publication appears to be necessary having regard to the object of such a

citation and publication. Admittedly in this case all the legatees mentioned in the will in question are before court and they are the plaintiff and

defendants 4 to 6. Defendants 4 to 6 have not raised any objection for the grant of either probate or letters of administration to the plaintiff and

they in fact sail together. It is only defendants 1 to 3 who get no beneficial interest under the Will who are questioning the grant of probate or letters

of administration. Therefore Section 235 does not stand in the way of the grant of letters of administration in favour of the plaintiff in the

circumstances of this case.

8. The court below decreed the suit granting probate in favour of the plaintiff on her satisfying the required formalities. As already stated the grant

of probate in this case cannot be legally sustained and the plaintiff can only be granted letters of administration with the will annexed. Presumably

this legal point was not addressed before the court below and no one appears to have questioned the propriety of the court below granting the

probate. We have to therefore hold that if the plaintiff establishes the truth and genuineness of the will and the testamentary capacity of the testatrix

then the plaintiff will be entitled to letters of administration with the will annexed and not to a probate as held by the court below, x x x x x.

Hence we agree with the court below that the will is true and genuine and that it was executed by the testatrix while she was in a sound and

disposing state of mind.

9-10. The learned counsel for the appellants lastly points out a mistake that has crept in the drafting of the decree. The suit has been decreed with

costs of the plaintiff. That means, the plaintiff will be entitled to her costs in the suit. But the decree in the suit has been drafted in such a way that a

liability has been cast on defendants 1 to 3 as regards the probate duty payable by the plaintiff in respect of the will in question. This is entirely

wrong. Defendants 1 to 3 can in no event be liable for the probate duty, which the plaintiff is liable to pay. We, therefore, direct the deletion of that

portion of the decree which makes the defendants 1 to 3 liable for the probate duty. The appeal is dismissed except for the above modification in

the decree. There will be no order as to costs.