

Rohini Vs. All Concerned

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Court : Andhra Pradesh

Decided On : Dec-31-1999

Reported in : 2000(2)ALD288; 2000(2)ALT218

Judge : Elipe Dharma Rao, J.

Acts : [Indian Succession Act, 1925](#) - Sections 2, 57, 59, 61, 63, 68, 213(1 and 2) and 276; Indian Succession (Amendment) Act, 1962

Appeal No. : AAO No. 1511 of 1992

Appellant : Rohini

Respondent : All Concerned

Advocate for Def. : Mr. K. Mohan, Adv.

Advocate for Pet/Ap. : Mr. I.S. Seshavataram, Adv.

Judgement :

ORDER

1. This civil miscellaneous appeal was filed by Smt Rohini wife of late R.S. Shankarnarayanan (hereinafter referred as the deceased), who was the petitioner in OP No.1236 of 1990 on the file of the Additional Chief Judge, City Civil Court, Hyderabad (Temporary) being aggrieved by the order dated 15-3-1991 dismissing the OP, which was filed under Section 276 of the [Indian Succession Act, 1925](#) (for

short the Act) to grant probate of the will dated 26-9-1989 executed by the deceased.

2. The brief facts of the case are that the petitioner-appellant is one of the two wives of the deceased, who was working as Manager, Bank of Baroda at Coonoor, Nilgiris District in Tamil Nadu and died on 16-1-1990. During his life time he acquired certain movable and immovable properties, which bequeathed in favour of the appellant and his four sons in the presence of two witnesses, while he was in sound condition of health and good state of mind, by way of will aforementioned. He bequeathed the flat Bearing No.43, second floor, situated at Somajiguda, Hyderabad for life in favour of the appellant without right to alienate and after her life time absolutely in favour of his four sons, i.e., two sons of his first wife by name, R.S. Ganesh and R.S. Kumar and two sons of the appellant herein by name Kiran Babu and Arun Babu. Provident Fund, Gratuity and other service benefits which may amount to Rs.80,000/- were bequeathed in favour of the appellant and she is also entitled to a sum of Rs.25,000/- from the Bank of Baroda Staff Co-operative Credit Society, Hyderabad, after adjustment of loan and death benefits of the deceased. The value of the above said flat is Rs.1,25,000/- and the service benefits from the Bank of Baroda after adjustment of loan amount, is Rs.80,000/- and the amount from Bank of Baroda Staff Co-operative Credit Society, Hyderabad inclusive of death of death benefits amounts to Rs.25,000/-. Therefore, she filed the OP to grant probate of the will dated 26-9-1989 executed by the deceased.

3. None were made as respondents to the petition. A paper publication was issued in Deccan Chronicle, an English Daily, calling for objections, if any, to allow the petition, but no objections were received. The petitioner-appellant herself was examined as PW1 and marked Ex.P1.

4. PW1 the appellant deposed that her husband died on 16-1-1990 at Coonoor in Tamilnadu while working as Manager, Bank of Baroda, Coonoor Branch and she was staying with him, that his two children R.S. Ganesh and R.S. Kumar were bom through his first wife and the two children Kiran Babu and Arm Babu, born to him through her, were staying with her, that her deceased husband executed a will

in September, 1989 before his death and it is Ex.P1. As per Ex.P1 she is entitled for the service benefits of her deceased husband from Bank of Baroda and the deceased bequeathed the flat Bearing No.43, Shanti Shikara Apartments, Hyderabad in her favour, which is worth one lakh and that she was given only life interest in the said flat and all the four children of her husband are entitled to the said property after her life time and she is also entitled to all the service benefits of the deceased from Bank of Baroda. Therefore, she prayed to grant a probate of the will.

5. The learned Judge, after considering the facts and circumstances of the case observed that for grant of probate to the will executed by a testator, the appellant should prove the execution of the said will to the satisfaction of the Court. It further observed that Section 63 of the Act requires proof of three things mentioned in sub-clauses (A), (B) and (C) thereof, before it can be said that a will has been validly executed, firstly, the testator has to sign or affix his marks to the will or it has got to be signed by some persons in his presence and by his direction, secondly that the signature or mark of the attester or the signature of the person signing for him has to appear at a place from which it would appear that by that mark or signature the document was intended to have effect as a will and thirdly, the will has to be attested by two or more witnesses and each of the witness must have seen the testator signing or affixing his marks to the will or must have seen some other person signing the will in the presence and by the direction of the testator or must have received from the testator a personal acknowledgment of his signature or mark of the signature of such other person and each of the witnesses has to sign the will in the presence of the testator. Though no particular form is necessary to be a valid attestation, yet it should be attested by two witnesses. The learned Judge further went on discussing the provisions of Sections 63, 59, 61 and Section 68 of the Act and ultimately held that the appellant did not chose to examine any of the attesting witnesses to the will, Ex.P1, said to have been executed by the deceased. It is no doubt true that the will Ex.P1 is attested by two witnesses, but none were examined to prove the execution of the will, which is an unregistered one. The appellant, as PW1 did not speak about the mental and bodily condition of the testator at the time of execution of this will deed. The learned Judge further observed that the appellant did not specifically say that the

testator executed the will out of his own free will without fraud or coercion, and she did not chose to produce the certificate of death of the deceased and also that Ex.PI was executed in her presence. She also did not specifically state that the will was executed in the presence of two witnesses and they saw the testator signing the will deed and therefore, it can not be said that the execution of the will Ex.PI by the deceased is proved and therefore no probate can be granted in favour of the appellant in respect of the said will and dismissed the petition.

Against that order, the present miscellaneous appeal was filed.

6. It is submitted by the learned Counsel for the appellant that the petition was filed for grant of probate of Ex.P1 will, but the learned Judge without granting such probate, went on scrutinising its correctness, which is beyond the scope of the petition and therefore, the order impugned is liable to be set aside. It is further contended that under Section 213 of the Act, execution of the wills, grant of probate therefore, legal obligation of the legatee to obtain probate and the Court competent to grant probate etc., are governed by the provisions of the Act. Section 2(h) of the Act defines 'will' as '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.' He also contended that Section 59 of the Act provides that 'every person of sound mind not being a minor, may dispose of his property by will.'

7. Section 213 which prescribes procedure for establishment of right as executor or legatee under a will, reads as under:

213: Right as Executor or Legatee When Established :--(1) No right as executor or legatee can be established in any Court of justice, unless 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 classes, specified in clause (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, where such Wills are made within the local limits of the ordinary 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 situate within those limits.'

8. A plain reading of sub-section (1) of Section 213 would definitely indicate that it prohibits any executor or legatee under a will from establishing his or her right under the will in any Court of justice without obtaining a probate of the Will or letters of administration. But, it is clear from subsection (2) of Section 23 that Section 213 shall not at all apply to the Wills made by Muhammadans and shall apply only to the 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 of the Act, which reads as under:

57, Application of Certain Provisions or Part To a Class of Wills Made By Hindus, etc :--The provisions of this part which are set out in Schedule III shall, subject to the restrictions and modifications specified therein, apply.....

(a) to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of September, 1870, within the territories which at the said date were subject to the Lieutenant Governor of Bengal, or within the local limits of the ordinary original civil jurisdiction of the High Courts of judicature at Madras and Bombay; and

(b) to all such Wills and codicils made outside those territories and limits sofar as relates to immovable property situate within those territories or limits; and

(c)

9. Therefore, it is clear that the prohibition contained in sub-section (1) of Section 213 applies to Wills by Hindus on or after the first day of September, 1870 within the territories which at the said date were subject to the jurisdiction of the

Lieutenant Governor of Bengal or within the local limits of the ordinary Original Civil Jurisdiction of the High Courts of Judicature of Madras and Bombay. In view of the sub-section (2) of Section 213 although the will is executed by Hindu, it will be governed by clauses (a) and (b) and the prohibition contained in sub-section (1) of Section 213 does not apply.

10. The prohibition contained in subsection (1) of Section 213 docs not apply to the Will executed by Hindus residing in the State of Andhra Pradesh in respect of the properties situate in the territories of Andhra Pradesh High Court but apply to will executed by a person not residing within the territory of Andhra Pradesh but subjected to the Lieutenant Governor of Bengal or within the local limits of the Ordinary Civil Jurisdiction of the High Courts of Judicature at Madras and Bombay. In such circumstances the legatee cannot establish his right to the property without obtaining probate or letters of administration.

11. As discussed above, sub-section (2) of Section 213 excludes Wills executed by persons residing in the State of Andhra Pradesh in respect of properties situated in Andhra Pradesh from the prohibition contained in Section 213(1) of the Act. Hence, even without obtaining probate or letters of administration the legatees are entitled to establish their right to the properties.

12. Therefore, applying the above principle to the facts and circumstance of the case the properties are situated within the jurisdiction of the Andhra Pradesh High Court and the will was executed in Hyderabad. Therefore, the prohibition contained in sub-section (1) of Section 213 of the Act does not apply. The learned Judge, without adverting to the relevant provisions of the Act, went on the premise to decide the issue of execution of the will and its validity. Once the petitioner has filed the petition for grant of probate, the learned Judge should have taken into consideration the facts and circumstances stated in the petition, whether or not the probate or letters of administration has to be granted by the Court.

13. If once the will is executed in respect of immoveable property situated within the jurisdiction of the Andhra Pradesh High Court, the question of granting probate does not arise inasmuch as there is no need to grant executed is entitled to enjoy the immovable properties bequeathed in favour of such person.

14. Therefore, in my considered view the order passed by the learned Judge in dismissing the petition is contrary to the provisions of Section 213 of the Act, hence, set aside, further in view of the principle laid down by the Division Bench of this Court in A.S. Murthy v. D.V.S.S. Murthy, 1979 (2) ALT 347, while implementing Section 213 of the Act. Therefore, the appeal is allowed holding that the will was executed by the deceased, a Hindu, in Andhra Pradesh, in respect of the immovable and movable properties situated within the jurisdiction of the Andhra Pradesh High Court and the legatee-appellant and her four sons are entitled to enjoy the properties bequeathed in her favour by her late husband without obtaining probate or letter of administration from a competent civil Court. The civil miscellaneous appeal is allowed. No costs.

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