

**C.P. Paul Vs. Hydro Power Constructions, Kothamangalam and ors.**

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**Court :** Kerala

**Decided On :** Feb-28-1996

**Reported in :** AIR1996Ker324

**Judge :** T.V. Ramakrishnan, J.

**Acts :** [Succession Act, 1925](#) - Sections 276 and 283(1)

**Appeal No. :** C.M.P. Nos. 15800, 32508 and 32958 etc. etc. of 1995

**Appellant :** C.P. Paul

**Respondent :** Hydro Power Constructions, Kothamangalam and ors.

**Advocate for Def. :** Thomas V. Jacob, S. Sreekumar, K.N. Narayana Pillai, George Thomas and Apu C. Paul, Advs.

**Advocate for Pet/Ap. :** M.C. Sen and T.R. Ramachandran Nair, Advs.

**Disposition :** Petitions dismissed

**Judgement :**

ORDER

**T.V. Ramakrishnan, J.**

1. O.P. (Pro.) No. 4550 of 1995 is a petition filed under Section 276 of the Indian Succession Act (for short 'the Act') praying for probate of the Will annexed with the

petition as the last Will of deceased K.P. Poulose. Petitioner is the son of the deceased and has filed the petition in his capacity as the executor named in the Will. In Schedules 1 and II to the petition the petitioner has shown the assets (both movable and immovable) and debts of the deceased with the estimate value thereof.

2. In the O.P. the third respondent, a daughter of the deceased, has filed a detailed counter-affidavit strongly opposing the prayer for the issuance of probate to the petitioner. The third respondent has contended that the Will is a rank fabrication made by the petitioner, respondents 1, 4 and their husbands with whom the petitioner has some understanding in sharing the estate of the deceased. She has disputed the correctness of the details of the assets and liabilities shown in the petition as well as the valuation statement submitted by the petitioner. The petitioner has filed a reply affidavit repudiating the contentions raised in the counter-affidavit.

3. C.M.P. Nos. 15800, 30029 and 32508 of 1995 are petitions filed under Rule 152 of the High Court Rules praying for impleading the petitioners in the C.M.Ps. as additional respondents in the O.P. Petitioners in all the above impleading petitions are persons/ firms alleged to be creditors of the deceased and they have filed the petitions solely in that capacity.

4. The petitioner in C.M.P. No. 15800 of 1995 is claiming that he is entitled to Rs.4,51,370/- on the basis of the cheque alleged to have been issued by the deceased which was returned by the Bank with the endorsement 'party expired'. He has filed the petition stating that his debt has not been included in Schedule II to the O.P. Both the petitioner and the third respondent in the O.P. have filed counter-affidavits raising the contention that as the petitioner in the C.M.P. is only a creditor, he cannot be considered as a person interested in the estate of the deceased and as such the petition is not maintainable. They have prayed for the dismissal of the petition as not maintainable.

5. The petitioner in C.M.P. No. 30029 of 1995 is a firm. The firm is claiming that it is a creditor of the deceased. The firm is disputing the correctness of the amount shown as Item No. 13 in the list of debts. It is only as a creditor the firm has:

contended that it is proper party to be impleaded in the O.P.

6. Petitioners in C.M.P. No. 32508 of 1995 is again a registered partnership firm which the second petitioner is the Managing Partner and the third petitioner is a Partner. It is the case of the petitioners that the deceased was the Managing Partner of the firm having 40% share in the firm at the time of his death. In the petition the petitioners have stated that what is exclusively belonging to the firm is included as assets left by the deceased. Petitioners have contended that they are really persons interested in the estate of the deceased and as such are persons entitled to be heard in the matter and for that purpose they are to be impleaded as additional respondents in the O.P. as necessary or proper parties to the proceedings. It has been asserted that huge amounts are due to the firm from the deceased and the correct details of the assets and liabilities have not been shown in the lists of assets and liabilities annexed to the O.P.

7. In C.M.P. Nos. 30029 and 32508 of 1995, the petitioner in the O.P. has filed a counter-affidavit contending that the petitioners are not liable to be impleaded since the petitioners are only creditors having no interest in the estate of the deceased.

8. C.M.P. No. 15807 of 1995 is a petition filed by the petitioner in C. M .P. No. 15800 of 1995 praying for inclusion of an amount of Rs.4,51,370/- as an item in Schedule 11 annexed to the O.P. for the reasons stated in the affidavit filed in support of C.M.P.No. 15800 of 1995.

9. Caveat O.P. No. 358 of 1995 is a petition filed by the petitioners in C.M.P. No. 32508 of 1995 on 30-5-1995 earlier to the [filing of the above C.M.P. The caveat petition was filed specifically under Section 284(4) of the Act read with Schedule V of the Act. The prayer in the caveat was, not to take any steps in O.P. No. 4550 of 1995 without notice to the petitioners who are the alleged caveators. C.M.P. No. 32598 is a petition filed by the petitioner in the O.P. for discharging the caveat under Rule 28 of the Rules framed under the Indian Succession Act by the High Court (for short 'the Rules').

10. As the main prayer in the petitions is for impleading the petitioners in the probate proceedings and to hear them during the trial of the O.P. and the prayer is being strongly opposed by the petitioner in the O.P., it was submitted that the C.M.Ps. and the caveat Order P. are to be disposed of before commencing the trial in the Order P. Accordingly, I have heard the learned counsel on both sides and is disposing of them by this common order.

11. Whether a creditor who has got a claim against a deceased person, either admitted or disputed, can be considered as a person having any interest in the estate of the deceased and as such liable to be impleaded as a party in the probate proceedings is the common question to be considered in all the petitions.

12. The provisions in Part IX of the Act deal with Probate, Letters of Administration and Administration of assets of deceased. Part IX contains 13 chapters and consists of Sections 217 - 369 (both inclusive) of the Act. Section 222 is to the effect that probate shall be granted only to an executor appointed by the Will either expressly or by necessary implication. Section 276 provides for an application to be filed for the purpose of issue of a probate showing the details mentioned in the said section. Powers of the Court dealing with the application for probate are dealt with in Section 283. Section 283 provides for issue of citations calling upon all persons interested in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration. Section 284 provides for caveats being filed against the grant of probate or letters of administration. Sub-Section (4) of that Section provides that the caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V, Section 300 confers concurrent jurisdiction in the High Court along with the District Judge in the matter of exercise of powers conferred by the Act on the District Judge. Section 263 deals with the revocation or annulment of the grant of probate or letters of administration for just cause. Explanation to the section indicates the circumstances in which 'just cause' shall be deemed to exist.

13. This Court has framed Rules for regulating the procedure to be followed in the matter of filing of applications and trial of the proceedings for the issue of probate under the Act. Rule 6 prescribes form No. 2 as the form in which the application for

probate is to be filed. Paragraph 9 of the form specifically prescribes that names of relatives and their addresses should be given in the application. Rule 22 indicates form No. 8 as the form in which caveat is to be filed. Rule 28 provides for discharge of the caveat on the motion of the petitioner in the probate proceedings. The Rules only require that the petitioner should show the details of the next of kin according to the personal law governing the deceased.

14. About the jurisdiction of the probate Court the Supreme Court has, as early as in 1954 stated thus (Para 2):

'The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court.'

(Ishwardeo Narain Singh v. Kamta Devi, (AIR 1954 SC 280).

As indicated in the decision itself, this is one of the elementary principles of law to be borne in mind while dealing with the probate proceedings especially in a case like the one on hand where locus standi of the petitioners has been challenged by the petitioner in the O.P. If the scope of the jurisdiction of the probate Court is as stated in the above decision, the only question which can legally be decided in the O.P. is whether the Will produced as the last Will of the deceased is genuine one duly executed by the deceased. In John Simon v. George John, AIR 1955 Trav-Co 177, it has been clearly pointed out that 'the grant of a probate or letters of administration is decisive only of the Will and the right of the person to whom the grant is made to represent the estate.' Further this Court has in Thomas P. Jacob v. Varghese, (1987) 1 Ker LT 319: (AIR 1987 Ker 193) made the position clear by stating thus (Para 7 of AIR):

'..... The only function of the Court is to determine whether the Will had been genuinely made by the testator out of his free volition, whether it had been properly executed and attested in accordance with the law, and, whether the testator had the capacity to execute it.'

It is in this background that the question whether a creditor is a person entitled to be impleaded in the probate proceedings or not is to be considered.

15. Learned counsel for the Probate petitioner, Shri M.C. Sen, has pointed out that it is well settled by decisions commencing from *Rahmathullah v. Rama Rau*, (1894) ILR 17 Mad 373, that the fact of being a legatee under the Will or a creditor of the testator does not amount to such an interest which will give locus standi to an applicant to get himself impleaded in the probate proceedings. The reason pointed out is that it is indifferent to him (creditor) whether he shall receive his debt from an executor or an administrator. The above proposition has been consistently referred to with approval in all other subsequent decisions of various other High Courts in India including this Court. (See *M.K. Sowbhagiammal v. Komalangi*, AIR 1928 Mad 803. *In re : Mrs. Elsie Augusta Black*, AIR 1941 Pat 151; *Thillainayagi Ammal v. Saradambal*, AIR 1955 Mad 576 and *Thomas P. Jacob v. Varghese*, (1987) 1 Ker LT 319: (AIR 1987 Ker 193). It is relevant to note that no decision taking a contrary view as regards the mere creditors of the deceased has been pointed out by any of the learned counsel for the petitioners in the impleading petitions and the caveat petition. But in the case of a creditor of an heir who complains that he has been defrauded, decisions have held that he can be considered as a person having necessary interest to object to the grant of probate or letters of administration or seek revocation thereof. In *Varghese's case*, (1987) 1 Ker LT 319 : (AIR 1987 Ker 193), Dr. Justice Kochu Thommen has succinctly traced the development of law on the point and has summed up the law thus (Para 8 of AIR):

'..... like in the case of a purchaser, or an assignee, a creditor too has the locus standi to oppose the grant or to apply for revocation of the probate on the ground of fraud because his interests are adversely affected, when contrary to his expectation, the property which appeared to be in the possession of the heir-at-law is withdrawn by a Will, That is a principle of equity going to the aid of a bona fide purchaser, assignee, creditor and the like to protect him 'against fraud. Equity in this regard protects those who claim under the Will, and not those who claim outside or independently of the Will or adversely to the testator. What is protected is an interest or an estate derived by reason of devolution, or by reason of transfer

from the testator or his heirs.....'

The above principle may not help the petitioners herein as they are only creditors of the deceased and not creditors of the heirs of the deceased.

16. However, it was strongly contended by the learned counsel for the petitioners, Shri T.R. Raman Pillai and Shri Thomas V. Jacob that 'the provision of Section 283 is intended to give the widest publicity to the probate proceedings and to give opportunity to any person having the slightest and even the bare possibility of an interest in the proceedings to challenge the genuineness of the Will and place before the Court all the relevant circumstances before a grant in rem is made in favour of the person claiming probate and as such even a creditor of the deceased who is interested in placing before Court materials to show that the Will annexed to the probate petition is not genuine is to be held as a person entitled to be impleaded as a proper party to the proceedings. It was submitted that there may be cases where it may be to the interest of the creditor to oppose the grant of probate if by obtaining probate by unscrupulous person or a person of no means is allowed to deal with the property and make away with the property of the deceased and thereby defeat the creditor. If a person is likely to suffer by the grant of the probate of a forged Will or an invalid Will he has sufficient interest to enter a caveat or an application to implead himself as a party to the probate proceedings was the submission of the learned counsel for the petitioners. Strong reliance was placed on the relevant observations contained in *Kishen Dai v. Satyendra Nath Dutt*, (1901) ILR 28 Cal 441; *Hanumantha Rao v. Latchamma*, AIR 1926 Mad 1193; *Rammaya Gaorangini v. Betty Mahbert*, AIR 1927 Cal 207; *Sheopati Kuer v. Ramakant Dikshit*, AIR 1947 Pat 434; *Annapurna Kumar v. Subodh Chandra*, AIR 1970 Cal 433 and *G. Jayakumar v. R. Ramarathnam*, AIR 1972 Mad 212.

17. It is true that as regards the real scope of the words 'person claiming to have any interest in the estate of the deceased' used in Section 283(1)(c) of the Act there is a divergence of views. In the above decisions relied upon by the learned counsel for the impleading petitioners a more liberal view has been taken when compared to the view taken in a large number of other decisions such as *M.K. Sowbhagiammal v. Komalangi*, AIR 1928 Mad 803; *Komalangiammal v. Sow-*

bhagimmal, AIR 1931 Mad 37; Janki Saran v. Ramabahadur, AIR 1932 Pat 343, In re: Mrs. Elsie Augusta Black, AIR 1941 Pat 151, Southern Bank v. Kesardeo; AIR 1958 Cal 377; Thillainayagi Ammal v. Saradambal, AIR 1955 Mad 576 and John Simon v. George John, AIR 1955 Trav-Co 177. The tests adopted in the decisions which has taken a liberal view is that laid down by Field, J. in the matter of the petition of Bhobosoondari, (1881) ILR 6 Cal 460, which is to this effect:

'As to the test of what constitutes a sufficient interest to entitle any particular person to be made a party, according to the view which I have already stated, I think it comes to this; that any person has a sufficient interest who can show that he is entitled to maintain a suit in respect of the property over which the probate would have effect under the provisions of Section 242 of the Indian Succession Act.'

The test adopted in the decision taking a contrary view is thus: 'Will the grant of probate to the petitioner displace any right to which the caveator is otherwise entitled? If so, he has an interest; if not he has none.' Venkatasubba Rao, J. in M.K. Sowbhagiammal v. Komalangi, AIR 1928 Mad 803, which decision was confirmed in Komalangi v. Sowbhagiammal, AIR 1931 Mad 37, has indicated the relevant test in this manner.

'. ,..... in every case it must be shown that the caveator, but for the will, would be entitled to a right of which that will deprives him.'

18. Having due regard to the principles laid down and the reasoning contained in the decisions referred to above, I am inclined to accept the test indicated in Komalangi's case, AIR 1928 Mad 803, as the proper test to be applied where the locus standi of a person seeking impleadment or a caveat is disputed by the petitioner in the petition for probate. A mere creditor of a deceased who files a caveat or seeks impleadment cannot be held to be having such interest in the estate of the deceased which will entitle him to be heard in the probate proceedings. The decision of the probate Court may not in any way affect any of his rights. The grant of a probate Will not in any way affect the rights of a creditor. It may not be a matter of concern for a creditor, whether the Will is found to be genuine or not.

19. Even if some of the debts are omitted to be shown or are incorrectly shown or some bogus debts or assets are included in the list of assets and liabilities attached to the petition, a creditor cannot be prejudiced by such inclusion or omission in view of the limited scope of the probate proceedings and the jurisdiction of the probate Court. The fact that on the issue of a probate or letters of administration sometimes, the assets of the deceased can be dealt with by the grantee to the prejudice of the creditors, cannot be a reason for holding that an ordinary creditor is a person having interest in the estate of a deceased and as such a person having a right to be heard in the probate proceedings. The possibility of being affected by the illegal or imprudent actions of the grantee may not constitute a creditor of the deceased, a person having interest in the estate of the deceased and as such a person entitled to be heard in the probate proceedings. Such possibilities may exist even in the case of a grantee under a genuine and undisputed Will. Even a grantee -under a genuine Will can be an unscrupulous person or a person of no means, Only because an executor named in the Will is found to be an unscrupulous person or a person of no means that may not be a reason for denying probate to him if the Will is found to be genuine or admitted. It is relevant to note that even the cases where the liberal view was adopted, were not cases dealing with the right of a mere creditor and in no decision a mere creditor has been held to be a person entitled to be heard in the probate proceedings so far. As such I find no merit in the above contention raised on behalf of the petitioners in the impleading petitions and the caveat filed by one of the creditors.

20, As creditors, the petitioners are entitled to take all appropriate actions before appropriate Courts notwithstanding the pendency of the proceedings for probate. It may not be justifiable to allow the probate proceedings to be used as proceedings to safeguard the interest of a mere creditor who is not having an interest in the estate of the deceased with reference to which the probate or letters of administration is sought for. In this case, the third respondent, one of the daughters of the deceased is hotly contesting the proceedings by raising the contention that the Will annexed to the petition is a fabrication and as such the probate petitioner may have to prove the Will in accordance with law before getting the probate from this Court if the third respondent pursues her contention bona

fide till the end. That is a circumstance which will ensure the genuineness of the entire proceedings which results in an order in rem.

In this view, I would dismiss all the petitions including the caveat O.P. No. 358 of 1995.

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