

**Kunjunjamma and ors. Vs. Rosamma**

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**Court :** Kerala

**Decided On :** Mar-24-2009

**Reported in :** 2009(1)KLJ865

**Judge :** P.R. Raman and; P.S. Gopinathan, JJ.

**Acts :** Indian Succession Act - Sections 71, 211, 217, 222, 273, 283(1), 373, 383 and 387; Code of Civil Procedure (CPC) - Sections 10

**Appeal No. :** A.S. No. 52 of 1999(C)

**Appellant :** Kunjunjamma and ors.

**Respondent :** Rosamma

**Advocate for Def. :** T. Krishnan Unni, Sr. Adv.,; R. Rajesh Kormath,; M.R. Mi

**Advocate for Pet/Ap. :** V. Chitambaresh, Sr. Adv. and; Tom Jose, Adv.

**Judgement :**

**P.R. Raman, J.**

1. The appeal Suit, A.S. No. 52 of 1999, arises out of the judgment and decree of Subordinate judge's Court, Pala, in O.S. No. 227 of 1994, a suit for declaration, recovery of possession, mesne profits and injunction. The respondent herein as plaintiff instituted the suit. As per the plaint averments, the second defendant

Kunjuamma was the wife of the first defendant, George Joseph. Defendants 3 to 5 were their children. First defendant was the brother of the plaintiff. In short, the defendants were the plaintiff's brother, his wife and children. The plaintiff's schedule properties belong to the plaintiff. According to the plaintiff, originally the property belonged to the father of the plaintiff and first defendant, namely, Ouseph son of Ouseph. The plaintiff's schedule property was included in E Schedule in the Will executed by the said Ouseph in June 1979. Ouseph died on 30-8-1991. On 25-1-1991, Item No. I of the plaintiff's schedule property was sold to the plaintiff for a consideration of Rs. 31,000/= through the Mukthiyar holder of Ouseph by document No. 159/91. As per the recitals in the Will, the remaining property of the deceased Ouseph would devolve on his Wife Aley, if she is alive after his death and also that she had every right to sell or mortgage the properties. Only after her death, the property will devolve on the legal heirs. Thus, after the death of Ouseph; the property would devolve on his wife, who was the mother of the plaintiff and the first defendant. While so, on the basis of the right of Aley over Item No. II, she sold that property to the plaintiff for a consideration of Rs. 67,000/- on 11-5-1992, and thus, the plaintiff had got absolute right over Item No. II. Thus, both on Item Nos. I and II of the plaintiff's schedule property, the plaintiff has got absolute right, as per the two separate documents, stated above. Besides the plaintiff and the first defendant, Ouseph and Aley had another son by name, Joseph, who died earlier leaving his children, Annakkutty, Thresiamma, Mariakutty, Aleykutty and Claramma. There was a building situated in Item No.2 of the plaintiff's schedule property, constructed by Ouseph, 60 years back and periodical repairs and maintenance were done by him. The first defendant, his family and mother Aley were residing in that building, during the life time of Ouseph. Cultivations were done by Ouseph. Few years prior to his death, the relationship between him and the first defendant became strained, and Ouseph and his wife Aley left the house, because of the cruelty meted out to them by the first defendant, and were staying in a Poor Home for the Aged at Bangalore. Five Acres of property and 9 1/4 cents of property along with a two storied building and 9 1/4 cents of property along with a two storied building was given to the first defendant by Ouseph. Aley has given 2 1/2 acres of land in the name of the second defendant. The defendants were residing in Item No. II of the building, on

the permission granted by Ouseph during his life time, but had no independent right over the same. After the sale of the property in favour of the plaintiff, they had no right and they became mere licenceesi As the plaintiff had no intention to permit them to stay there, the licence was cancelled and the same was duly intimated. The plaintiff, being the absolute owner of the property, is entitled to get recovery of possession from the defendants. Earlier, claiming right over the plaint schedule property, first defendant filed an Indigenous Application, I.A. No. 996/1992, before the Vacation Court, which was transferred to Munsiff Court, pala and re-numbered as O.S. No. 310/1992 against the plaintiff and her husband. The Will executed by Ouseph was produced in L.A.O.P No. 151 of 1992 before the District Court, Kottayam, for getting letters of administration. Hence, the suit.

2. The defendants filed a written statement. As per the Will executed by Quseph in 1979 the plaintiff will not get any right over the plaint schedule properties. It was stated that Letters of administration O.P. has not been disposed of, and pending consideration (then) before the District Court, Kottayam. As per the power of attorney produced by the plaintiff, it has been noticed that the Will has already been cancelled, and hence, any document created on the basis of the Will is unenforceable. It was also stated that the document produced by the plaintiff was not properly executed; that it was a forged document; that the plaintiff had no right over the plaint schedule properties; that the entire plaint schedule properties belong to the first defendant and the same is under his enjoyment and possession; that the plaintiff had been given sufficient ornaments and share at the time of marriage; that the plaintiff's sister was also given due share and other sister are Nuns; that the elder brother was also given due share by the father; that the plaintiff's mother had no right to sell Item No. II of the plaint schedule properties, which was not included in the Will; that the mother had only a life-estate over the plaint schedule properties and that the first defendant was looking after the parents. It was also stated that the building Situated in the property was demolished and extended by Spending more than Rupees One Lakh. The registration of the house was in the name of the first defendant and that he was paying the property tax. As per the Will, the entire property was allotted to the first defendant. The sisters of the first defendant exerted undue influence over the parents who were in their old age. The first defendant and her husband took the

parents to an Orphanage at Bangalore and allowed them to stay there. Their father, Ouseph, died subsequently on 10-8-1990, and the first defendant did the funeral functions. It was after taking the father to Bangalore that a power of attorney was created, but it has not come into effect and the father was not in a position to execute the same. Even if it was admitted that the power of attorney was executed, it was only for maintaining the property, and the power of attorney holder has no right to sell the property. Subsequently, the sale deed executed based on the power of attorney had not come into effect. The first defendant was enjoying the property with a hostile animus to the knowledge of others, and therefore, the right, if any, of the plaintiff was lost by adverse possession and limitation.

3. The first defendant died during the pendency of the suit and defendants 2 to 5 were recorded as legal representatives of the defendant. They sought to amend the written statement raising a contention that as per the power of attorney, Ouseph had no intention to act upon the Will executed by him. Therefore, it must be deemed to have been cancelled and the plaintiff has no right over the plaintiff schedule items.

4. Based on the pleadings, necessary issues were raised by the court below for trial. The evidence consists of the oral testimony of PWs. 1 to 4, DWs. 1 and 2 and the documents Ext. A1 to A12, B1 to B21 and third party exhibits, Ext X1.

5. During the pendency of the suit, the letters of administration O.P. pending before the District Court, Kottayam, was disposed of, granting letters of administration to the petitioner thereunder, who is the plaintiff in the present suit. The other legal representatives of Ouseph are the respondents thereunder. The court below made extensive reference to the order in the letters of administration, and practically accepted the same, however without independently considering each of the issues in the suit. As per the Will, the properties were divided into two plots and were allotted to the son and daughter respectively. There was however a provision that, if Aley, the wife of Ouseph, is alive, she will be competent to deal with the property in any manner she likes. According to the plaintiff, as per the recital in the Will, Aley, the wife of Ouseph, executed document No. 903 dated 11-

5-1992, Ext. A3, in favour of the plaintiff, which is the document of sale for a consideration of Rs. 67,000/-. Further during the life time of Ouseph, he executed a power of attorney in favour a third party, who in turn executed the sale deed with respect to Item No II of the plaint schedule properties in favour of the plaintiff and thus the plaintiff obtained Item No. I also as per the document No. 159/91, Ext. A1, produced in the case. The Mukthiyar holder is one Mathai, and Ext. A1 was executed by him for and on behalf of ouseph, for a consideration of Rs. 31,000/-. Ext. A2 was the power of attorney executed by Ouseph in favour of Mathai, delegating his power to sell the property to any intending purchaser. The court below, held that in view of Ext. A2 power of attorney executed in favour of Mathai by the testator Ouseph, an intention was created to cancel the earlier Will executed by Ouseph in 1979. Though the Will as such not been cancelled, the property sold to the plaintiff by the power of attorney was included as an item in the Will. The mode of revocation on a Will as per Section 71 of Indian Succession Act, though not strictly been adhered to, there was an intention in Ext. A2, to revoke the Will, as was expressed. Subsequently, acting upon the Will, letters of administration O.P. was decided by the District Court, and Ext. A9 was the order passed by that Court. That is a judgment in rem which was binding on all. Therefore, the Will was not revoked. Going by the Will, the mother of the plaintiff executed the sale deed in favour of the plaintiff, selling Item No.2 for a consideration of Rs. 67,000/- as per the Ext.A3 document. In view of the provisions contained in the Will, enabling Aley, the wife of Ouseph, to deal with the property during her life time, in any manner she likes, Ext. A3 document was executed. As per the terms of the Will, aley, the wife of Ouseph, the testator, is competent to deal with the property in any manner she likes. Hence, Ext. A4 was a letter written by the father expressing his intention to execute the settlement deed in favour of the plaintiff for 11/2 acres of property or in the alternative for a direction to pay Rs. 1 1/2 lakhs to the plaintiff. Ext.A5 was another letter in which Ouseph had denied the contention in the written statement that the defendants were looking after his and he was leading a peaceful life in their house. The court below drew an inference, based on the above letters as to the circumstances which lead to the father of the plaintiff to change his mind and allot the property to the plaintiff. These letters were marked subject to proof. But the testator was not

examined. PW.2, who was the mother of the plaintiff, Aley, explained the circumstances under the which the power of attorney was executed. As per the Will, she had absolute right over the property and after her death, the properties would devolve on Joy. Ouseph and Aley were residing in an Orphanage at Bangalore. It was also stated that he had intention to pay an amount of Rs. 11/2 lakhs to the plaintiff, and that it was his decision to execute the power of attorney. Since the amount was not paid, Ext. A1 was executed in favour of the plaintiff. As per Ext.A3, one acre of property along with a residential building was sold to the plaintiff by PW.2. The power of attorney holder was examined as PW.3. He deposed that Ext.A1 was executed after receiving consideration PW4 is one Joseph, uncle of the plaintiff and he was an attesting witness in Ext. A3 document.

6. DW. 1 is the wife of the first defendant. During the pendency of the suit, the first defendant died. According to her, the first defendant spent huge amount for repair and maintenance of the house, and that after 1979, the property was in the absolute possession of the first defendant. Initially, it was a permissive possession, but later it became hostile possession and therefore, they were entitled to get the property on the basis of the adverse possession and limitation. However, the court below thought that this contention was not sustainable, since, if at all, the first defendant has got possession, it was in 1979 and the suit has been filed in 1994. During the life time of the father, the first defendant would not get any right over the same. Exts. B1 to B21 are produced to prove possession and towards the defacto exercise of the claim over the property. According to the court below that the first defendant was in possession of the plaint schedule properties was beyond dispute and the suit itself was one for recovery of possession. But the first defendant was in the property with his father and therefore documents produced will in no way advance the first defendant. The allegation of undue influence said to have exerted by the plaintiff was unsupported by any evidence. The allegation raised by the defendants, the burden of whom to prove the same, has thus failed to discharge the burden. Father dies only in 1991 and the suit was filed in 1994. Therefore, the plea of adverse possession was out of question. The averments of the defendant that the first defendant has spent huge amount for renovation of the suit property is unsupported by any evidence. DW.2 was examined to prove a complaint said to have filed by Joseph with respect to a

transaction of the property, which was irrelevant for deciding the real dispute in the case. The question in this case was whether the document executed in favour of the plaintiff was one under any vitiating circumstances. The court below held that there was no evidence to prove that the documents were executed under vitiating circumstances. Since the letters of administration has obtained to the plaintiff based on the original Will dated 1979, the plaintiff has got ownership right as per Ext. A3 and the plaintiff was entitled to get recovery of possession of Item No. II of plaint schedule property and she was also entitled for a declaration as prayed for. The mesne profits, however, were denied, in the absence of any evidence. The injunction sought for was also refused since there was no evidence to show that any act of waste was committed by the defendants.

7. Aggrieved by the judgment and decree of the court below, the defendants 2 to 5, who are the legal representatives of the first defendant had preferred this appeal, as also a cross appeal by the plaintiff.

8. On a careful perusal of the judgment under appeal, it is evident that the court below decided the case following the judgment in the letters of administration O.P. by the District Court, which in rum interpreted the various provisions in the Will to arrive at its conclusion. It did not independently consider the effect of the Will after Ext. A2 power of attorney and the subsequent transfers made by the power of attorney holder. It did not also interpret the terms of the Will as to whether Aley had only a life estate or had any right of dispossession to deal with the property in any manner she likes, so as to validity execute any document in favour of the plaintiff over one of the items of the property mentioned in the plaint schedule. According to the court below, letters of administration being a right in rem, it preferred to follow the same while deciding the issues which arose for consideration in the suit.

9. The main contention advanced by the appellant is that the Court below should not have swayed away by the observations made by the District Court in the letters of administration O.P., as the District Court while granting the letters of administration, had only limited jurisdiction in considering the validity of the Will. There is no dispute on the validity of the Will now between the parties. However,

how the property vested with the legatees and the manner thereof, whether Aley, the wife of testator, had Only a life estate or an absolute right in terms of the Will, are not matters coming within the jurisdiction of that Court. As such, the court below ought to have independently considered this issue after affording an opportunity of being heard to the petitioner, and after calling for the Original Will produced in the letters of administration O.P. The respondents, on the other hand, would support the judgment contending that all the incidental question arising for consideration in the letters of administration O.P are squarely within the competence and jurisdiction of the District Court and so the decision on those issues regarding the interpretation of the Will is well within its competence. Both sides placed reliance on various decisions, in support of their contentions.

10. We heard learned Senior Counsel, Sri, Chitambaresh, appearing on behalf of the appellant, as also the learned Senior Counsel, Sri. T. Krishnan Unni, appearing on behalf of the respondents. We have also perused the judgment of the court below and the evidence oil record.

11. Incidentally it may be mentioned that M.F. A. No. 1276 of 1997 is filled against the order passed in the letters of administration O.P. by the District Court, on the finding on certain issues, which are contended to be beyond the scope of jurisdiction of a Probate Court. Therefore, once we decide A.S. No. 52 of 1999, regarding the jurisdiction of the Probate Court, to decide such questions and interpreting the terms of the Will, it will virtually dispose of both the matters which are now before us.

12. A copy of the Will is not even produced in the suit. Ext. A9 is the judgment rendered in the letters of Administration O.P. The Court below did not consider independently the terms of the Will as to whether Aley, the wife of the testator, had only life estate or whether she has got an absolute right over the property, during her life time and how the shares are allotted to the parties, and in general, the effect of the Will and the right suffering therefrom. But as already noticed, the court below was of the view that being a decision in rem, it binds on all and the further finding that Will has not been revoked and it is based on the Will that the mother of the plaintiff has executed, etc, are only interference drawn from the finding based

on the judgment of the letters of administration O.P. Hence, if we find that the Probate Court has only limited jurisdiction and can decide only the validity or otherwise of the Will, but interpretation of the terms of the Will is beyond its scope, then, normally, the matter will have to go back, unless we find that on the available evidence, this Court could finally decide all the issues. But the learned Senior Counsel appearing for the appellant would contend that in case his contentions are accepted by this Court, then necessarily, since he had not been given an opportunity of being heard in the matter regarding the manner in which interpretation should be placed on the Will and to adduce evidence thereof. It will amount to denial of an effective opportunity of being heard in the matter. It is also contended that since the trial court did not consider the matter on merits independently it is only appropriate that the matter be considered at the first instance by the trial court. According to him, it is not a case where the parties let in evidence and the decision was rendered thereafter. Any way, we will consider these aspects of the matter after we enter a finding on the main issue regarding the jurisdiction of the Probate Court and its powers as to the interpretation of a Will.

13. Rosamma, the wife of Mathew, who is the plaintiff in O.S. No. 227 of 1994, is the petitioner in the letters of Administration O.P filed before the District Court as I.A. O.P. No. 151 of 1992. That the letters of Administration was granted in favour of the plaintiff, as per order dated 12-2-1997, Ext.49 produced in the case. Ext. A1 marked in that L. A.O.P is the Will executed by the deceased Ouseph son of Ouseph, who died on 30-8-1991. The contest was on the ground that the petitioner had no locus standi, in so far as she is not a beneficiary under the will, the sale deed, Ext. A2, produced in that proceeding, with respect of the portion of the property executed by her mother, who is the beneficiary in the Will is invalid, as she executed the same without obtaining any letters of Administration. Reference was also made to the suit, O.S. No. 370/1992, filed before the Munsiff Court, Pala, for an injunction against the petitioner; and the plea of adverse possession was also raised. The District Court, however, found that the aspect of adverse possession is beyond the scope of L. A.O.P Proceedings. As a matter of fact, before the judgment-passed in the letters of Administration O.P., maintainability question was decided as a preliminary point earlier, which was the subject of an

appeal before this Court, by judgment dated, 27-1-1997, held that the observation made by the District Judge in paragraph 5 of the order passed in the earlier proceedings, deciding the maintainability question will not have any persuasive effect and directed the District Court to dispose of the matter, untrammelled by toy such observation. It may be noticed that the observation, relating to the competence of the wife of the testator to deal with the property in any manner she likes and that only after her death, the legatees would be entitled to whatever that is left by her, was contended as a finding prejudicially affecting the right of the appellant. The District Court, in Ext. A9 judgment, found that the petition is maintainable and also upheld the validity of the Will over which there is no dispute between the parties. But it also went on to hold that Ext.A2, sale deed, produced in the case, showed that the beneficiaries named in Ext. A1 Will, namely, Aley, who is the wife of the testator, has conveyed the right over one acre of land forming part of the bequeathed property in her favour in 1992. But while answering the maintainability question, it held that it is not necessary that the legatee alone could prefer any letters of Administration O.P and any person interested in the distribution of the estate would normally be competent to file such a petition for issuance of letters of administration. No serious contentions are raised with regard to those findings, before us.

14. As per Ext. A1 Will, the properties were divided into two plots and allotted to the son and daughter respectively. There was a provision in the Will that in case Aley, the wife of testator, is alive, she will be competent to deal with the property in any manner she likes, and only after her life time, the legatees would take the remainder. A finding was made by the District Court in letters of administration O.P. that 'in view of the said provision, the conveyance in respect of one acre of land, in favour of the petitioner, provided by Ext. A2, cannot be assailed and for that reason its non-inclusion in the present petition is not fatal'. This finding is, however, seriously challenged by the appellants-defendants inter alia contending that it is beyond the scope and jurisdiction of the Probate Court.

15. In *Krishna Kumar Birla v. Rajendra Singh Lodha and Ors.* : (2008)4SCC300 , the Apex Court held that the jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the Will. A question of title arising

under the Act cannot be gone into the probate proceedings, Construction of a Will relating to the right, title and interest of any other person is beyond the domain of the Probate Court. (See paragraph 57 of that judgment). Reference was made to Kanwarjit Singh Dhillon v. Hardy Singh Dhillon 2007 (1) SCC 357 and also Chiranjilal Shrilal Goenka v. Jasjit Singh : [1993]2SCR454 , in which it was observed that the Probate Court does not decide any question of title or of the existence of the property itself. In Basanti Devi v. Ravi Prakash ram Prasad : AIR 2008 SC295 , it was held that the Probate Court, indisputably, exercises a limited jurisdiction and it is not concerned with the question of title. No doubt, in paragraph 100 of the very same judgment, the Apex Court observed that 'the judgment rendered in a probate proceeding is a judgment in rem. But, its application is limited. A judgment rendered in a probate proceeding would not be determinative of the question of title. (emphasis supplied)

16. In Joginder Pal v. Indian Red Cross Society and Ors. : AIR 2000 SC3279 , the Apex Court held that 'merely because issues were raised and evidence was led, it does not mean that the findings given thereunder are final and operate as res judicata. Even in summary proceedings issues can be raised or evidence can be led. The proceedings remain summary even though the court may, in its discretion, permit leading of evidence and raising of issues. So, in a subsequent suit the crucial issues must be decided afresh, untrammelled or influenced by any finding made in the proceedings for grant of succession certificate'. (emphasis given), part X of the Indian Succession Act deals with succession certificates. Sections 373, 383(e) and 387 are relevant. Section 373 deals with the procedure of application and it says that if the District Judge is satisfied that there is a ground for entertaining the application, he shall fix a day for the hearing thereof and cause notice of the application and of the day fixed for the hearing, and upon the day fixed, or as soon thereafter as may be practicable, shall proceed to decide in a summary manner the right to the certificate. Section 383 deals with revocation of certificate, which provides that a decree or order made by a competent court in a suit or other proceeding with respect to effects comprising debts or securities specified in the certificate renders it proper that the certificate should be revoked. It also provides for revocation of certificate on the ground that the decree or order by a competent court finds that such certificate should be revoked. Section 387 deals

with effect of decisions under the Act and liability of holder of certificate thereunder, which specifically states that no decision under this Part upon any question of right between any parties shall be held to bar the trial of the same question in any suit or in any other proceeding between the same parties, and nothing in this Part shall be constructed to affect the liability of any person who may receive the whole or any part of any debt or security, or any interest or dividend on any security to account therefor to the person lawfully entitled thereto. This makes it clear that the decision in this part on any question of right between the parties cannot be held to bar the trial of the same question in any suit or any other proceeding between the same parties. Thus Section 387 makes it clear that proceedings for grant of succession certificate are summary in nature. Thus, the adjudication of any question under Part X does not bar the same question being realised between the same parties in a subsequent suit or proceedings.

17. In the above case, there was a Will executed in favour of Indian Red Cross Society in 1985. Yet another Will was executed in June 1987, by which the earlier Will was cancelled and bequeathed all the property to the appellant thereunder. The testator died in April, 1988. In an application for succession certificate in respect of the movable assets of the said deceased, the claim was made as beneficiaries under the Will of 1985, that is the first Will. The appellant knowing about the same got himself impleaded and filed a petition for probate of the Will later executed in 1987. On this, the contesting respondent applied for stay of the petition under Section 10 of the Code of Civil Procedure, on the ground that the parties and the issues in the probate petition and the succession certificate were the same. The Probate petition was accordingly stayed. The issue raised was whether the Will was validly executed. Ultimately, the succession certificate was granted based on the Will dated 12-6-1987 and the probate petition was withdrawn. Later, the respondent filed a suit for declaration that they were the lawful owner and in possession of the assets of the deceased testator, based on the Will dated 2-4-1985. The appellant filed an application that the plaintiff did not make out any case. The trial court rejected the plaintiff's case. The appeal, however, therefrom was allowed and the case was remanded. The Second Appeal was dismissed, against which Special Leave was preferred before the Apex Court. The main contention was that there was a full fledged trial earlier in the succession

certificate matter, and the question arose as to whether the grant of succession certificate was summary in nature. It was in that context the observations were made after referring to relevant provision made in Part-X of Indian Succession Act. But the grant of Probate and grant of letters of administration of assets of the deceased comes under Part IX of the Indian Succession Act, and in the absence of any specific provision as in the case of issuance of a succession certificate under Part-X, it cannot be said that the grant of Probate or letters of administration is summary in nature. On the other hand, as regards the validity of the Will is concerned, it affixes no doubt that the only competent forum which has exclusive jurisdiction to decide the validity of the Will in a Probate proceedings or while granting letters of administration is final and conclusive, and is also a judgment in rem with regard thereto. Therefore, the above position of facts has to be distinctly understood and cannot have any relevance to decide the jurisdiction of a Probate Court. Though succession certificate as also the grant of Probate may be by the same forum, viz., the District Court, the procedure to be adopted and the conclusiveness it reaches while dealing with the two are separate. While granting a succession certificate, as held by the Apex Court, being a summary in nature, it will not operate as res judicata in subsequent proceedings. But that cannot be the case in relation to the grant of Probate or letters of administration and the decision regarding the validity of the same, while such adjudication is made. In this connection, we need only refer to the decision of the Apex Court.

18. Chiranjilal Shrilal Goeoka v. Jasjit Singh and Ors. : [1993]2SCR454 , was a case relating to the grant of Probate after referring to Section 211, 217, 222 and other relevant provisions of Indian Succession Act, and it was held by the Apex Court that the Probate Court does not decide any question of title or the existence of the property itself. But it was held that the grant of Probate is final subject to appeal, if any, or revocation if made in terms of the provisions of the Succession Act. It is a judgment in rem, conclusive and binds not only the parties but also the entire world.

19. In Ishwardeo Narain Singh v. Smt. Kamtra Devi : AIR 1954 SC280 , while dealing with the jurisdiction of the Probate Court under Section 222 of the Indian Succession Act, it was held by the Apex Court that the Probate court is only

concerned with the question as to whether the document put forward as the last Will and testament of the 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. The dismissal of application of Probate on the ground that dispossession in favour of a party is void for uncertainty can on no principle be supported. It was held that whether a particular bequest is good or bad is not within the purview of the Probate Court, and it even expressed its surprise as to how this elementary principle of law was overlooked by both the courts below.

20. In *M.S. Premanand v. Mr. Purushotam and Ors.* , it was held that in a suit for grant of letters of administration, the Court in the proceedings is not entitled to go into the question of title to the properties bequeathed. Of course, there was a decision rendered on concession. However, it is seen from paragraph 2 of the above judgment, that the contention raised was that the Court cannot go into the question of title to the properties bequeathed under the Will, and it was for him to grant letters of administration, even if there is already a suit involved regarding the said question. This preposition of law was however accepted by the other side.

21. In the decision reported in *Delhi Development Authority v. Vijaya C. Gurushaney and Anr.* : AIR 2003 SC3669 , in paragraph 8, the Supreme Court reiterated the position that 'it is settled law that a testamentary court, while granting probate or letters of administration does not even consider particularly in uncontested matters, the motive behind execution of a testamentary instrument. A testamentary court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will. It is settled law that the grant of a probate or letters of administration does not confer title to property. They merely enable administration of the estate of the deceased. Thus, it is always open to a person to dispute title even though probate or letters of administration have been granted'.

22. A Division Bench of this Court, in *Kuruvila v. Sosamma* 2000 (2) KLT 399 held that the Probate Court had no jurisdiction to ascertain whether the testator had the

title to property or not. It was alien to the Probate Court to enquire about the title of the testator in respect of the properties covered by the Will.

23. In *Kiran Singh v. Chaman Paswan* : [1955]1SCR117 , it was ruled by the Honourable Supreme Court that it is a fundamental principle well established that a decree passed by a court without jurisdiction is a nullity, and that its invalidity could be set up whenever and wherever it is sought to be enforced or relied upon, even at the stage of execution and even in collateral proceedings. A defect of jurisdiction strikes at the very authority of the court to pass any decree, and such a defect cannot be cured even by consent of parties.

24. In *Kunhikannan v. Damodaran Nambeesan and Ors.* 1992 (2) KLJ 625, it was ruled out that merely because the defendant has no title to the property, from that alone, it cannot automatically follow that the plaintiff has got title over the property. The plaintiff also cannot maintain his case by merely showing that the defendant does not have title. Therefore, in a suit for recovery of possession, the burden is on the part of the plaintiff to establish the same. It is true, in the course of appreciation of evidence, the Court is entitled to consider the rival title set up by the defendants. Failure of the defendants to establish the same would not enable the plaintiff to a decree.

25. The learned Counsel appearing for the respondent-plaintiff contended that the applicant seeks to execute the property assigned by the deceased from the operation of the Will and her interest is as of a daughter. In the counter statement, both the execution of the property and the right of the applicant to maintain the application were disputed. Thus, the appellants herein, has invited the Court for a decision on the right of the applicant on letters of administration O.P. and sought to exclude the property assigned by the testator. It was decided on a preliminary point on 3-10-1986 and it was thereafter that the Division Bench decided its judgment dated 27-1-1997, in M.F.A. No. 115 of 1997. As per Section 273 of the Indian Succession Act, Probate or letters of administration shall have effect over all the property and estate, movable and immovable, of the deceased, throughout the State, in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding

property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all persons delivering up such property to the person to whom such probate or letters of administration have been granted, provided, the letters of administration is granted by a High Court or by a District Court having jurisdiction, shall, unless otherwise directed by the grant, have like effect through other States. It is, therefore, contended that Section 273 gives a conclusiveness in the matter of Probate or letters of administration granted.

26. The learned Counsel appearing for the respondent - plaintiff also relied on a decision of this Court reported in *Elsy v. Raju* : 2006(4)KLT890 , wherein, it was held that Probate Court is not a court of probity and that court is not expected to ask whether the testator bequeathed his property as the court thinks he ought to have done. If the propounder proves the bona fides of the transaction recorded in the testamentary instrument and there are no circumstances suggesting suspicion, there is no legal impediment in granting probate. It is not the province of the probate court in its testamentary jurisdiction to go into the questions of title. The Probate Court cannot also enter into the question as to whether the testator's property was joint or separate.

27. It was further contended by the respondent that when it is held that it cannot go into the question of title, it refers to the title of the 'testator'. In other words, whether the testator had any right over the property bequeathed under the Will is beyond the jurisdiction of the Probate Court and not whether any person as legatee obtained any right under the Will. In *Thomas P. Jacob v. Varghese* 1987 (1) KLT 319, a Division Bench of this Court held that Caveator claiming interest in the property on the basis of adverse possession, whether he had right to notice under Section 283(1)(c) of the Indian Succession Act and negatived the contention by saying that he has no such right to be heard by a Probate Court. It was observed that in proceedings for probate or letters of administration, the court does not enter on the question of title to the property which the testator by his Will proposed to leave. The only function of the Court is to determine whether the Will had been genuinely made by the testator out of his free volition.',

28. In *Bhaskar Waman Joshi v. Shrinarayan Rambilas Agarwal* : [1960]2SCR117 , the question as to whether the transaction as phrased in the document is ostensibly a sale with a right of repurchase in the vendor, in relation to the exercise of which time was not decisive. The question in each case is one of determination of the real character of the transaction to be ascertained from the provision of the deed viewed in the light of surrounding circumstances. Therefore, if the words are plain and unambiguous, they must in the light of the evidence of surrounding circumstances be given their true legal effect. If there is ambiguity in the language employed, the intention may be ascertained from the contents of the deed with such extrinsic evidence as may be law be permitted to be adduced to show in what manner the language of the deed was related to existing facts. Oral evidence of intention is not admissible in interpreting the covenants of the deed but evidence to explain or even to contradict the recitals as distinguished from the terms of the documents may of course be given. Evidence of contemporaneous conduct is always admissible as a surrounding circumstance; but evidence as to subsequent conduct of the parties is inadmissible.

29. Therefore, it is contended that an opportunity to adduce evidence to the extent, as indicated above, has to be afforded before finally interpreting the document is made.

30. On a consideration of the various case laws, as discussed above, there cannot be two opinion that unlike in the matter of grant of succession certificate covered by Part-X of the Indian Succession Act, the jurisdiction of a Probate Court or letters of administration under Chapter - IX cannot be said to be summary in nature. On the other hand, the validity or otherwise of a Will executed, on which the exclusive jurisdiction vests with the Probate Court and it is conclusive and binding, and in that sense, it is a judgment in rem. But the right under the Will, based on interpretation of the various terms contained in the Will, are matters on which the Probate Court has no jurisdiction. It is not only the title of the testator, but also whether a legatee had only life estate or absolute right over any item of property bequeathed, depending upon the construction of the terms contained in the Will, is not a matter falling within the exclusive jurisdiction of a Probate Court. The conclusiveness of Probate Court is only with relation to the validity of the Will.

In this case, both sides have no dispute regarding the validity of the Will, but as to whether a particular Clause contained in the Will by which the absolute right is vested, on the death of testator in favour of his wife, she has a life estate to be enjoyed with the ultimate beneficiary in favour of the son, are therefore matters in the realm of interpretation of the terms of the Will, which cannot be said to be in the exclusive jurisdiction of the Probate Court. It is true that the maintainability of letters of administration O.P. was decided by the Probate Court and incidentally it has to touch upon the right of the applicant under the Will. But as held by the Apex Court, it is not even necessary to maintain an application for obtaining letters of administration that he should be a legatee under a Will. Any party who may be interested in the bequest and even an executor for that matter can obtain a letters of administration. At any rate, that will not be conclusive or binding on the court which adjudicates the right of the parties. It is contented by the learned Counsel for the respondent that it is not necessary to remand the matter for interpreting the Will and to enter a finding and the Appellate Court is also equally competent to go into such questions. We have no doubt in our mind that in appropriate cases where no further evidence is to be adduced, the Appellate Court can decide the issue, based on the materials available on record. But the learned Counsel appearing for the appellants pointed out that they had no opportunity to adduce evidence on the surrounding circumstances under which the Will was executed, for the limited purpose of showing as to whether there is any ambiguity in any Clause of the Will and whether the said ambiguity could be clarified by any such evidence, the matter has to go back. In this case, the trial court did not even independently consider any of the question as to whether the wife of the testator had absolute estate or life estate and it was fade away by the observations contained in the letters of administration O.P. and the subsequent findings are all based on the finding rendered by the District Court in letters of administration O.P. In the view we have taken, the jurisdiction of the Probate Court to interpret the Will or the terms contained thereunder, is beyond its jurisdiction, in which event, such finding can only to be ignored and after calling for the Will from the other court, in the letters of administration proceedings, the trial court has to arrive at an independent conclusion, after hearing the parties.

31. In the result, we allow A.S. No. 52 of 1999, setting aside the impugned judgment of the court below, and remand the case for fresh disposal, in accordance with law. Both the parties shall appear before the court below on 1-6-2009. The Court below, shall dispose of the matter expeditiously, at any rate, within a period of six months.

32. Since, we have already allowed the appeal, A.S. No. 52 of 1999, a separate finding on the said regarding the jurisdiction of the District Court in the letters of administration O.P. has necessarily to be rendered, and the limited question raised in M.F.A. No. 1276 of 1997 is only with regard to such finding, which is already dealt with in A.S. No. 52 of 1999, the M.F.A. No. 1276 of 1997 is disposed of holding that the finding regarding the interpretation of the Will and the right of the parties there under, is without jurisdiction.

Since the matter is remitted to the court below, and the judgment and decree is set aside, the court below will consider the question afresh, including the question of mesne profits. The cross appeal is thus allowed for the purpose of reconsideration of the issue regarding the mesne profits.