

Elsy Vs. Raju

Elsy Vs. Raju

SooperKanoon Citation : sooperkanoon.com/729374

Court : Kerala

Decided On : Oct-20-2006

Reported in : 2006(4)KLT890

Judge : V. Ramkumar, J.

Acts : [Indian Succession Act, 1925](#) - Sections 63, 222, 237, 238, 239, 266, 268, 275, 276, 280, 281, 283, 284, 285 and 295; [Kerala Court Fees and Suits Valuation Act, 1959](#) - Sections 55 and 56 - Schedule I and 2, Article 1, 4, 6 and 11; Indian Succession Rules (Kerala), 1968 - Rule 6, 17, 22 and 26

Appeal No. : A.S. No. 370 of 1994

Appellant : Elsy

Respondent : Raju

Advocate for Def. : S.K. Brahamanandan,; G.S. Prabu, S.B. Premachandra Prabhu, and Bepin Vijayan, Adv.

Advocate for Pet/Ap. : K.N. Sivasankaran, Adv.

Disposition : Appeal dismissed

Judgement :

V. Ramkumar, J.

1. Defendant Nos. 2, 3, 5 and 7 in O.S. No. 15/86 on the file of the first Addl. District Court, Ernakulam are the appellants in this appeal. The proceedings before the court below originated as probate O.P. 61/1986 filed by invoking the testamentary and intestate jurisdiction of the District Judge under Sections 266 and 268 of the [Indian Succession Act, 1925](#) (hereinafter referred to as 'the Act' for short). The first respondent V.K. Raju was the petitioner in the above probate O.P.

2. The case of the petitioner in the lower court can be summarised as follows:

Late E.A.Thomas, S/o. Augustine, was permanently residing in Amaravathy, Fort Kochi. He died on 7-1-1980 at building No. X/602, Amaravathy, Cochin. The said Thomas had duly executed from the aforesaid house his last will and testament on 9-2-1985 produced along with the O.P. The petitioner is the executor named in the will. The petitioner has truly set forth in Schedule No. I all the properties and credits which the deceased possessed or was entitled to get at the time of his death. The petitioner has also truly set forth in Schedule No. II the items which by law are allowed to be deducted. Respondents 1 to 10 are the widow and children of deceased Thomas and they are his legal heirs as per the Cochin Christian Succession Act. No application has been made to any District Court or to High Court for probate or letters of administration of the will with or without the will annexed. The petitioner prays that a probate may be granted to him having effect throughout the State of Kerala in respect of the properties mentioned in the O.P.

3. Upon the filing of the above O.P. the court below issued notice to the respondents and also ordered publication of the same in the Gazette and Malayala Manorama daily. The court below had also called for the valuation statement from the District Collector.

4. The respondents to the original petition were the following:

i) Benny Thomas (widow of late E.A. Thomas)

ii) Elsy

iii) Sandhyavu @ Kunhappan

- iv) Philomina
- v) Francis
- vi) E.T. Treasa
- vi) Sebastian @ Peter
- vii) E.T. Antony
- ix) E.T. Augustine
- x) E.T. Jqsey

The 1st respondent above is the widow and the other respondents to the O.P. are the sons and daughters of late Thomas.

5. Upon receipt of notice in the above Original Petition respondents 1 and 10 above filed a joint statement to the effect that they have absolutely no objection to the grant of probate to the will executed by late E.A Thomas. Respondents 2 to 5 and 7 above filed separate affidavits to the effect that late Thomas had not executed any will during his lifetime and that the will set up by the petitioner was a concocted document prepared in collusion with the 9th respondent. Respondents 2 to 5 above had also filed a joint objection to the grant of probate.

6. In view of the contest by the respondents other than respondents 1, 4, 6, 8, 9 and 10 to the probate O.P., the O.P. was converted into a regular suit and re-numbered as O.S. No. 15/1986. Thereafter the appellants herein namely, defendants 2, 3, 5 and 7 alone objected to the grant of probate by filing a written statement. The 4th respondent to the O.P. withdrew her contest and filed a statement to the effect that she has no objection to the grant of probate.

7. In the joint written statement filed by defendants 2, 3, 5 and 7 they contended inter alia as follows:

E.A.Thomas, father of defendants 2 to 9 and husband of the first defendant had never executed any will during his lifetime nor had he appointed any executor.

Deceased Thomas was residing in the property along with all the defendants. The house wherein he was residing with the members of his family belonged to him. Deceased Thomas always wanted all his assets to be enjoyed by all his legal heirs. He was not keeping well for some time before his death. At that time he did not have the requisite capacity to decide matters independently. It appears that a loan was availed in his name from the bank by the 9th defendant and at that time the father might have signed some papers without knowing his liability under the aforesaid transaction. Deceased Thomas did not have any capacity to express his intention to create a will or appoint an executor for the said purpose. It was not at all necessary for Thomas to make a will. After the death of Thomas, the plaintiff who is a close friend of the 9th defendant Augustine had colluded with Augustine for fraudulently creating such a will without the knowledge of Thomas. This was with the intention of cheating the other legal heirs of Thomas. The idea behind the execution of such a will was to obtain the house exclusively in favour of the 9th defendant Augustine. The plaintiff was supporting the 9th defendant to perpetrate the illegality. The plaintiff who is an ex-employee of the Corporation of Cochin had by exercising his influence got the assessment of the building transferred in the name of the 9th defendant. The will is a concocted document and the witnesses thereunder are only supporters of the plaintiff and the 9th defendant. Deceased Thomas had independent means to purchase buildings in his own name and to effect necessary repairs to the same. He had no connection whatsoever with the plaintiff. There was no possibility or occasion for late Thomas to discuss any matter relating to his properties with the plaintiff. Deceased Thomas who was not at all educated was influenced by the 9th defendant with the assistance and connivance of the plaintiff with a view to claim exclusive right over the property left behind by Thomas. The funeral expenses of deceased Thomas was not met by the 9th defendant alone but was met by all the children of Thomas. The amount shown as funeral expenses is an exaggerated figure. The value of the property shown in the schedule is not Rs. 25,000/-. The house alone will fetch a minimum of Rs. 2,00,000/-. The will in question is a concocted one and is a product of collusion. The suit which is not maintainable in law may be dismissed with costs.

8. The court below framed 5 issues for trial. On the side of the plaintiff three witnesses were examined as P.Ws 1 to 3 and Exts. A1 to A4 were marked. On the

side of the contesting defendants. 2 witnesses were examined as DWs. 1 and 2 and four documents were marked as Exts. B1 to B4. Exts. XI series were got summoned for the purpose of perusing the admitted signatures of deceased Thomas.

9. The learned District Judge, after trial, as per judgment and decree dated 6-12-1993 repelled the defence contentions and granted probate of Ext. A2 will as prayed for. It is the said judgment and decree which are assailed in this appeal by defendants 2, 3, 5 and 7.

10. Heard both sides.

11. The learned Counsel appearing for the appellants made the following submissions in support of the appeal:

P.W. 1 the plaintiff was a revenue inspector in the Corporation of Cochin and he retired as a superintendent. Even though P.W.I and the 9th defendant (examined as P.W.3) would depose that they are not friends. P.W.3 had admitted that the witnesses to Ext.A2 are the very same persons who figured as witnesses to an earlier agreement for sale on the basis of which P.W.3 had filed a suit. Similarly, it is the niece of P.W.I who was admittedly the scribe of both Ext.A2 will as well as the earlier agreement for sale. Neither P.W.I nor his niece is professionally qualified to prepare documents of this nature. But a reading of Ext.A2 will show that it is the product of professional draftsmanship. While P.W. I claimed to be a family friend of deceased Thomas, P.W.3 the sole legatee under Ext.A2 will has confessed that there was absolutely no need for his father to collaborate with P.W.I. P.W.I has admitted that there was no particular reason as to why the document was not registered. The following are the suspicious circumstances which militate against late Thomas executing the alleged will:

a) The signatures in Ext.A2 are not that of E.A. Thomas.

b) Ext.A2 is an unregistered instrument.

c) There was no need for Thomas to appoint an executor when there was only one item of property to be dealt with under the document.

- d) In Ext. A2 the plaintiff who is the executor himself has signed as an attesor.
- e) The widow and all other children (except the 9th defendant) of the testator have been disinherited under Ext. A2.
- f) P.W.1 the plaintiff has admitted that almost all the children of Thomas are jobless.
- g) Ext A2 contains details of the devolution of title. Such recitals could not have been incorporated in Ext. A2 without inspecting the anterior title deeds which were in the. Mattanchery Sarvajenic Co-operative Bank.
- h) P.W. 1 has deposed that many of the information for the preparation of Ext. A2 were supplied by the 9th defendant, the sole legatee and not by the testator.
- i) On the date of Ext.A2 while two of the daughters of the testator were married, 6th defendant who was the youngest one was unmarried. Still no provision is made for her in Ext. A2.
- j) O.S. 8/1984 was a suit filed by the 9th defendant legatee for specific performance of an agreement for sale executed by third a party in his favour. The attestors to that agreement are the very same attestors to Ext.A2 as well. Similarly, the scribe to that agreement for sale and the scribe of Ext. A2 is the very same person namely the niece of P.W. 1.
- k) Neither P.W. 1 nor his niece are document writers nor are they conversant with the preparation of documents. But a reading of Ext.A2 will indicate that it is prepared by a professional document writer.
- 1) This is a case in which the propounder of the will has taken an active part in the preparation of the document and he has figured as the sole legatee to the exclusion of the widow and the remaining eight children of E.A. Thomas.

The circumstances indicated above suggest that the propounder has created sufficient suspicion in the mind of the court necessitating him to satisfy the conscience of the court. Vide Smt. Sawant Kaur v. Smt. Amrit Kaur and Ors. AIR 1977 SC 74.

12. I am afraid that I cannot agree with the above submissions. Among the widow and nine children of Thomas only four of the children have opposed the grant of probate. All others including the widow have not disputed the will. Defendants 1, 4 and 10 even filed statements admitting the will and expressing their consent to the grant. Except denying in their written statement the execution of the will or the ground of testamentary capacity, the contesting defendants had no case that the signature in Ext.A2 is not that of late Thomas. Their main contention has been that the will was manufactured by the plaintiff who is a close friend of the sole beneficiary namely the 9th defendant.

13. The 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. Questions as to whether the testator was a Mahomedan or a Christian or his relationship with the parties to the proceedings his disposing power over the subject matter of the will etc. are ordinarily irrelevant in probate proceedings. (See *Abdul Rashid v. Minnaul Hasan* AIR 1938 Nagpur 173. It is not the province of the probate court in its testamentary jurisdiction to go into the questions of title. (Vide *Ishwerdeo Narain Singh v. Smt. Kamta Devi and Ors.* AIR 1954 SC 280, *Chiranjilal Shrilal Goenka v. Jasjit Singh and Ors.* (1993) 2 SCC 507, *Pappoo v. Kuruvila* 1994 (2) KLT 278, *Varghese v. Oommen* 1994 (2) KLT 620, *Thomas P. Jacob v. Varghese* 1987 (1) KLT 319, *I.M. Madhavi v. Sree Ramavarma* 1969 KLT 806, *Ghulam Quadir v. Special Tribunal and Ors.* (2002) 1 SCC 33, *Kuruvila v. Sosamma* 2000 (2) KLT 399 and *C.P. Poulouse and Ors. v. C.P. Paul and Ors.* 1996 (1) KLJ 472. The Probate Court cannot also enter into the question as to whether the testator's property was joint or separate. (See *Vithaldas Govindram Gandhi v. Vadilal* AIR 1936 Bombay 191. While considering a Muslim will, the probate court cannot go into the question as to whether the bequests under the will are valid under the Muslim law. (*Dhanu Ali Mia v. Sobhan Ali* AIR 1978 Cal. 399. The probate gives no efficacy to the provisions of the will. It merely proves the contents of the will. In other words, the scope of enquiry of the probate court is to see whether the testator signed the will fully understanding the dispositions thereunder and that the will was the last will

duly executed by a testator who had the requisite testamentary capacity.

14. There is nothing in law which requires the registration of a will (Ishwardeo v. Kamta AIR 1954 SC 280. Even a registered will is required to be proved like any other will {Karunabai v. Rameshoddas AIR 1992 A.P. 270. When the testamentary capacity of the testator is proved by the evidence of competent and disinterested witnesses, the fact that the testator was in such a state of health which might have affected his memory is not sufficient to discard the will (Surya Narayan Muni v. Saramma 52 Calcutta Weekly Notes 35 (PC) and Venkatachala v. B.N. Thimma Jamma AIR 1959 SC 443. While in the case of an executor appointed under the will, he gets the authority to represent the estate from the will itself, in the case of an administrator he gets such authority under orders of the Court in a proceedings for the grant of letters of administration. (Kamamma v. Somasekharappa AIR 1963 Mysore 136. Probate can be granted only to an executor appointed under the will. (See Section 222 of the Indian Succession Act).

15. P.W.I has proved due attestation of Ext.A2 will in the manner required by Section 63 of the Act. Apart from the executor appointed under Ext.A2 will P.W.I was also one of the attesting witnesses. The other attesting witness to Ext. A27 as evidenced by Ext. A3 death certificate, had died before the trial of the suit. In Ext. A2, the attesting witnesses before affixing their signatures as attesting witnesses have endorsed that they had seen the testator Thomas affixing his signatures in Ext.A2. Giving allowance to the natural variations in the signatures, the signatures in Ext.A2 bear striking resemblance to his admitted signatures in Exts.A4 and XI series.

16. The evidence in the case is to the effect that the 9th defendant who is the eldest son of late Thomas had put up an automobile workshop of his own some time in the year 1970-1971 at a time when he was aged only 20 years. It must be remembered that the family of Thomas was a large family with 11 members all living in the same house. The only avocation of late Thomas was a petty business in the form of a bunk shop put up in front of his house. He himself was a kudikidappukaran. There was an old house in the property. As evidenced by Ext.A4 dated 7-10-1977 Thomas had put up the present construction in the place

of the old house. In Ext.A2 Thomas has mentioned that it was with the funds of the 9th defendant legatee that he constructed the house. There were boundary fence on three sides of the property which has an extent of 6 1/4 cents. To replace the fence with brick wall late Thomas and 9th defendant had availed of a loan from Mattancherry Sarvajenic Co-operative Bank by deposit of title deeds. Ext. X1 series evidence the above transaction. 9th defendant examined as P.W.3 has deposed before court that it was he who had repaid the above loan. In Ext.A2 late Thomas has mentioned about the above loan transaction as also another loan transaction. Besides the above loan, 9th defendant had expended a further amount of Rs. 3550/- from his own resources for the construction of the house. Thomas was not on good terms with the 3rd defendant namely, Sandhyavoo @ Kunhappan who had married without his consent and had moved out of the family house. When the 3rd defendant made an attempt to enter forcibly into the family house late Thomas had filed a suit for injunction against him as O.S. 621/84 before the Muusiff's Court, Cochin. Exts. B1 and B2 evidence the above litigation. In Ext.A2. Thomas has authorised the 9th defendant to prosecute the above suit further.

17. When examined before Court P.W.I has deposed that he was keeping custody of the original will since the children of Thomas would not obey Thomas. His evidence further shows that his acquaintance with Thomas started from 1951 onwards. P.W.I was employed in the Corporation of Cochin. Two of the brothers of late Thomas were also employed in the Corporation of Cochin. P.W. 1's evidence further shows that he used to be consulted for all matters concerning that family. This shows that he was virtually a family friend of Thomas. P.W.I has denied the suggestion put to him that he was a friend of the 9th defendant legatee.

18. With regard to testamentary capacity of late Thomas also there is enough evidence to hold that he was hail and hearty when he executed Exl.A2 will. Merely because he died of heart attack one year after the execution of the will, it cannot be presumed that he was not in a sound disposing state of mind at the time of executing the will. The evidence of P.W.I goes to show that late Thomas and his youngest son the 10th defendant had come to the house of P.W.I and requested him to prepare a will and accordingly P.W. 1's niece had prepared the will. The

10th defendant has supported the grant. The evidence of P.W.I further shows that Thomas had insisted that P.W.I and the other attesting witness should figure as the witnesses to the will. Even going by the testimony of the 5th defendant examined as DW2 it is clear that deceased Thomas was a strong-willed character who was firm and resolute in his determination and a man of determination. To quote his own words in chief examination

That is precisely what the father did by bequeathing the plaintiff schedule property to his eldest son in whom he reposed complete confidence. He was also indebted to his eldest son Augustine. D.W.2 confessed that the plaintiff was present for his marriage as one of the invitees. If so, P.W.I was not a stranger to that family. D.W.2 has also admitted that his father was not a person who blindly obeyed his eldest son. This shows that his father was a man of independent disposition. This also shows that late Thomas could not be expected to be a puppet in the hands of his eldest son notwithstanding the fact that he was greatly indebted to the eldest son. Merely because the will in question is an unregistered will and that there is an uneven distribution of property under the will, that cannot be treated as a suspicious circumstance. (Vide *Sundaresa Pai v. Sumangala T. Pai* 2002 (1) KLT 32 SC. In *Ramabai Padmakar Patil v. Rukminibai Vishnu Vekhande and Ors.* AIR 2003 SC 3109 the apex court upheld the will in spite of the fact that the entire property of the testator was given to his widow to the exclusion of all his daughters. The non-examination of the scribe was also held to be of no consequence.

19. The trial judge who had the unique advantage of seeing the witnesses and assessing their credibility has chosen to believe P.Ws 1 and 3 in preference to D.Ws 1 and 2. In the absence of any infirmity in the appreciation of the evidence by the trial Court, this Court also does not find any ground to differ from the conclusions reached by the court below. Ext.A2 is accordingly held to be the last will and testament duly executed by late Thomas bequeathing the plaintiff schedule property in favour of his eldest son Augustine and that the said Thomas had the requisite testamentary capacity while executing the said will.

20. Incidentally, this Court has been coming across various procedural infirmities committed by the courts exercising testamentary and intestate jurisdiction. An

application for probate or for letters of administration is to be filed under Section 276 of the Act. Probate is to be granted only if an executor is appointed under the will. Otherwise, the request should be one for the grant of letters of administration. Section 276 of the Act reads as follows:

276. Petition for probate -

(1) Application for probate or for letters of administration, with the Will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will or, in the cases mentioned in Sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating -

a) the time of the testator's death.

b) that the writing annexed is his last Will and testament

c) that it was duly executed

d) the amount of assets which are likely to come to the petitioner's hands, and

e) when the application is for probate, that the petitioner is the executor named in the Will. 2 In addition to these particulars, the petition shall further state, -

a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge, and

b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate

The High Court of Kerala has made Rules under the Indian Succession Act. The said Rules were published in the Kerala Gazette No. 30 dated 28-7-1970 and are contained in Appendix XII of the Civil rules of Practice (Kerala). As per Rule 6 of the said Rules an application for probate should be in Form No. 2 which reads as follows:

FORM No. 2

(Rule 6)

Application for probate

In the Court of....

Testamentary and Intestate jurisdiction

Petition for probate of the will of...Petitioner

SHEWETH

1. That the above named....(a) died at...on or about the...day of...
2. That the said deceased at the time of his death left (b) property within the Town of...and in the State of Kerala.
3. That the writing hereunto annexed and marked...in his last Will and testament.
4. That the same was duly executed at (c) ... the...day of....
5. That the petitioner is the executor (d) named (e) the said Will.
6. That the petitioner has also truly set forth in the Schedule No. 1 hereto all the property and credits which the deceased died possessed of or entitled to at the time of his death which have or likely to come to his hands.
7. That the petitioner has also truly set forth in Schedule No. II (f) all the items that by law he is allowed to deduct.

8. That the said assets exclusive of what the deceased may have been possessed of or entitled to as a trustee for another and not beneficially or with power to confer a beneficial interest and also exclusive of the items mentioned in the said Schedule No. II, but inclusive of all rents, interest and dividends and increased value since the date of his death are under the value of Rupees....

9 That the said deceased left him surviving as his only next-of-kin according to (g)...law.

10. That no application has been made to any District Court (h) or to any other High Court for probate of any Will of the said deceased or letters of administration with or without the Will annexed to his property and credits.

The petitioner prays that probate may be granted to him having effect....(i)....

I...the petitioner...above named to solemnly declare that what is stated in paragraphs...is true to my knowledge and that what is stated in the remaining paragraphs is true to the best of my information and belief and I believe the same to be true.

Date: Signature of the Petitioner

Section 280 of the Act inter alia says that the petition for probate shall be subscribed by the petitioner and his pleader and shall also be verified by the petitioner in the manner indicated therein. Section 281 of the Act gives the form in which the petition for probate is to be verified by at least one witness. Section 275 of the Act declares that an application for probate if made and verified in the manner provided under the Act shall be conclusive for the purpose of authorizing the grant of probate and the said Section further states that no grant of probate shall be impeached by reason only that the testator had no fixed place of abode or no property within the district at the time of his death. Section 268 of the Act provides that proceedings before the District Judge shall by and large, be regulated by the Code of Civil Procedure. Section 283 of the Act reads as follows:

Powers of District Judge --

(1) In all cases the District Judge or District Delegate may, if he thinks proper, -

a) examine the petitioner in person, upon oath;

b) require further evidence of the due execution of the Will or the right of the petitioner to the letters of administration, as the case may be;

c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.

(2) The citation shall be fixed up in some conspicuous part of the court-house, and also the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.

(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation

Thus, by virtue of Clause (c) of Sub-section (1) of Section 283, citations are to be issued to all persons claiming to have an interest in the estate of the deceased. The form of such citations is prescribed under Form No. 5 of the Kerala Rules as shown below:

FORM No. 5

(Rule 17)

Notice of Citation for Personal Service

In the Court of...

Testamentary and Intestate Jurisdiction....

Petition for...deceased.

Petitioner's

To

Take notice that the above petition for the grant of...shall be heard on the...day of...19...at...You may appear on the date of hearing to show cause why...should not be granted.

And also take notice, that in default of your so appearing and showing cause, the Court will proceed to grant...your absence notwithstanding.

Dated this...day of...19...

Signature...

Designation...

Any person who has received citations and who is desirous of objecting to the grant of probate has to enter a caveat with the District Judge in view of Section 284 of the Act which reads as follows:

284. Caveats against grant of probate or administration. --

(1) Caveats against the grant of probate or administration may be lodged with a District Judge or a District Delegate.

(2) Immediately on any caveat being lodged with any District Delegate, he shall send copy thereof to the District Judge.

(3) Immediately on a caveat being entered with the District Judge, a copy thereof shall be given to the District Delegate, if any, within whose jurisdiction it is alleged the deceased had fixed place of abode at the time of his death, and to any other Judge or District Delegate to whom it may appear to the District Judge expedient to transmit the same.

(4) Form of caveat - The caveat shall be made as nearly as circumstances admit in the form set forth in Schedule V.

Schedule V of the Act prescribes the Form of Caveat to be lodged by a person opposing the grant. The said Form Reads as follows:

SCHEDULE V

(See Section 284(4))

FORM OF CAVEAT

Let anything be done in the matter of the estate of A. B., late of...deceased, who died on the day ...at...without notice to C.D. of...

Section 285 of the Act says that after the entry of caveat no proceedings should be taken on the petition without notice to the Caveator. Rule 22 of the Kerala Rules is also to the same effect and Form No. 8 appended to the Rules is the form of notice of caveat prescribed by the Rules. The procedure in contentious cases is indicated in Section 295 of the Act which reads as follows:

295. Procedure in contentious cases.-- In any case before the District Judge in which there is contention, the proceedings shall take, as nearly as may be. the form of a regular suit, according to the provisions of the Code of Civil Procedure, 1908 (5 of 1908) in which the petitioner for probate or letters of administration, as the case may be, shall be the plaintiff, and the person who has appeared to oppose the grant shall be defendant.

Rule 26 of the Kerala Rules is the corresponding Rule which reads as follows:

Conversion of application into suit - Upon the affidavit in support of the caveat being filed, notice whereof shall simultaneously be given by the caveator or to the petitioner. The proceedings shall be ordered by the Court to be numbered as a suit in which the petitioner for probate or Letters of Administration shall be the plaintiff and the caveator shall be the defendant, the petition for probate or Letters of Administration being registered as and deemed as a plaint filed against the caveator, and the affidavit filed by the caveator being treated as his written

statement in the suit. The procedure in such suit shall, as nearly as may be, be according to the provisions of the Code.

Thus, after the conversion of the Original Petition into a regular suit the petitioner/petitioners who filed the probate O.P. will stand relegated to the position of plaintiff and the caveators who oppose the grant will stand relegated to the position of defendants in the regular suit. In *Mrs. Kamala Bui Nelson v. Vedraj* ILR 1981 (2) Kerala 1, it has been held that even a person who has not filed a caveat may later appear and object to the grant of probate or letters of administration and make the proceedings contentious.

21. In the present case instead of issuing citations what the court below did was to issue notice. Similarly, consequent on the contest by four out of the ten respondents those four respondents alone should have been shown as the defendants to the suit. Instead, all the respondents to the probate O.P. were arrayed as the defendants in the suit.

22. Instances are not infrequent when the relevant provisions of the [Kerala Court Fees and Suits Valuation Act, 1959](#) ('Kerala Court Fees Act') for short are not adhered to while entertaining and converting such Original Petitions. The relevant provisions of the Kerala Court Fees Act are extracted hereinbelow for the sake of District Courts and District Delegates dealing with such Original Petitions.

If the L.A.O.P. or Probate O.P. is uncontested.

1. Petition Fee Rs. 25/-- (See Schedule II Article 11(k)(II)(2) of Kerala Court Fees Act)
2. Court Fee: 1 % of the total valuation upto rupees 10 million -(See Sections 55 and 56 and Schedule 1 Article 6(1) of Kerala Court Fees Act.

If the L.A.O.P. or Probate O.P. is contested

By virtue of Rule 26 of the Indian Succession Rules (Kerala) 1968, the O.P. is to be deemed to be a suit.

1) Petition Fee: Rs. 5/-- (See Schedule II Article 11(k)(II)(2) of Kerala Court Fees Act)

2) Court Fee: One half of the scale of fee prescribed under Schedule I Article 1 on the market value, less the fee already paid on the Original Petition. - (See proviso to Schedule II Article 11(k)(II)(2) of the Kerala Court Fees Act).

In Pappoo v. Kuruvila 1982 KLT 255 it has been held that the proviso to Article 11(k) of Schedule II of the Kerala Court Fees Act applies to both clauses (i) and (ii) thereof.

Rate of court fees under Schedule I Article 1 of the Kerala Court Fees Act

First Rs. 100/-...Rs.4/-

Next Rs. 100/-upto Rs. 15,000/-...Rs.4/-foreveryRs.100/-exceedingRs.2100/-

From Rs. 15,000/- to Rs. 50,000/-...Rs.8/-foreveryRs.100/-exceedingRs. 15,000/-

From Rs. 50,000/- to Rs. 10lakhs...Rs. 10/-for every Rs. 100/-exceedingRs. 50,000/-

If the valuation in a suit is Rs. 100000/- then the C.F. for the suit will be Rs. 8,400/-
One half of it would be Rs. 4,200/-

23. In Kurian v. Ayyappan 1982 KLT 434 F.B. it has been held that since an appeal can arise only in a contentious proceeding, the fee prescribed under Schedule I Article 4 for an appeal is the fee payable for a contentious original proceeding as provided under the proviso to Schedule II Article 11(k)(ii).

25. Thus, after bestowing my anxious consideration to the entire facts and circumstances of the case, I do not find any good ground to interfere with the conclusions reached by the trial Judge.

In the result, this Appeal is dismissed. However, having regard to the facts and circumstances of the case, the parties shall bear their respective costs.

