

P.D. Rajan and Others

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Court : Chennai

Decided On : Oct-25-1995

Reported in : AIR1996Mad318

Judge : Govardhan, J.

Acts : [Succession Act, 1925](#) - Sections 263 and 283; [Code of Civil Procedure \(CPC\), 1908](#) - Order 39, Rule 1

Appeal No. : O.P. No. 516 of 1994, Original Applns. Nos. 282 and 283 of 1995 and Applns. Nos. 1600, 2363 and 2364

Appellant : P.D. Rajan and Others

Judgement :

ORDER

1. A. No. 1600/1995 and O.A. Nos. 282/1995 and 283/1995. The averments in the affidavit in all the three applications are similar and it is as follows: The deponent is a third party. He was born in Kerala in 1958. One Koshy and his wife were neighbours of the applicant. They have brought him to Madras and was bringing him up as their foster son. Koshy died on 4-2-1979. He had purchased the schedule mentioned property on 16-6-1953. His wife had executed a sale deed in respect of the first floor of the said property and it is the subject matter of this petition. The petitioner had a joint account with Mariam Koshy in Canara Bank, Kelly. The petitioner was residing in the same house. In the Voters' list as well as

in the Ration Card, his name is in the said premises. He is now employed in M.R.F. as a driver. After the death of Mr. Koshy, one Alexander and his wife who are related to Koshy, came to Miidras and they were permitted to be in the premises by Mr. Dr. Mariam Koshy. Mariam Koshy had executed a Will in favour of Alexander on 16-8-1988. But, subsequently, she had cancelled the same and executed a cancellation deed also. She had informed the petitioner that she does not want Alexander to get any benefit under the Will and she does not want to execute any other document. It appears that the respondents have suppressed the execution of the cancellation document dated 24-8-1991 and obtained the probate in O.P. No. 516/1994 on 2-12-1994. The present application viz., A. 1600/1995 is to revoke the said probate. O.A. No. 282/1995 is for injunction restraining the respondents from alienating and demolishing the petition-mentioned property in pursuance of the probate. O.A. No. 283/1995 is for injunction restraining the respondents from interfering with the possession of the property by the petitioner.

2. When these applications were moved, interim injunction was granted in O.A. Nos. 282/1995 and 283/1995 and notice returnable by 12-4-1995 was ordered.

3. In A. No. 1600/1995, also notice has been ordered.

4. Aggrieved over the said order of interim injunction, the respondents have filed A. Nos. 2363 and 2364/1995 to vacate the injunction granted in O.A. No. 282/1995 and 283/1995.

5. The counter in O.A. No. 1600/1995 and the averments in A. Nos. 2363 and 2364/1995 are same and it is as follows : The deponent is the second respondent. It is false to state that V. K. Koshy and his wife were neighbours of the petitioner in Kerala. It is also false to state that they brought him to Madras in the year 1971 and treated him as their foster son. They were in Delhi for more than 20 years before they came and settled at Madras. The mother of the petitioner was a maid servant in Dr. (Mrs.) Mariam Koshy's father-in-law's house at Kerala. The petitioner was brought to Madras only as a paid servant to work in the house of Mr. Koshy. There is no other relationship between them. After the death of Koshy in the year 1979, the petitioner has joined the service of M.R.F. Company as driver. He used to visit Dr. (Mrs.) Mariam Koshy during her life-time since he had a

soft corner for one Krishna Leka who was working as a maid servant in the house of Mrs. Mariam Koshy. He used to benefit himself by seeking the help of Dr. (Mrs.) Mariam Koshy. The allegation that he was having a joint account with Mrs. Mariam Koshy is not correct. The residence of the petitioner in the house belonging to Mariam Koshy does not give him any right over the said property. The registered will executed by Dr. (Mrs.) Mariam Koshy was attested by Mr. Eapen Varghese a practising advocate. The allegation that Mrs. Mariam Koshy had cancelled the will by a document of the year 1991 is not true. Mr. Alexander and his family members have been residing in the ground floor premises of the petition-mentioned property for more than nine years. Mr. Alexander is in lawful possession and enjoyment of the said property. The petitioner had never been in possession of the said property. Alexander and his wife were related to Dr. (Mrs.) Mariam Koshy. He has been paying the Corporation tax, M.E.S. Bills, and Telephone Bills etc., and has effected repairs at a cost of more than Rs. 15,000/-. The allegation that Mariam Koshy had cancelled the Will is not true. If there is any document, it should have been a forged one. The petitioner had no interest in the ground floor premises and he cannot claim any right. Mere possession of the title deeds may not confer any legal rights to the petitioner. The allegation that the respondents have suppressed the cancellation deed is not correct. As per the Registered Will, the property should not be transferred or sold to anyone and should be kept with Meenathethil Puthenpurayil family of Kerala. The allegation that they are trying to alienate the property is not correct. The property is now in the possession of Alexander the beneficiary. Even if the O.P., is converted into T.O.S., the petitioner will be added only as a defendant and he is not entitled to injunction against the respondents. The petitioner has not made out a case for injunction. Injunction granted therefore should be vacated. There is no necessity for the respondents who are residing at Kerala to interfere with the possession of the property at Madras by anyone. Hence O. A. Nos. 282/1996 and 283/1996 and application No. 1600/ 1995 are liable to be dismissed.

6. The learned counsel appearing for the petitioners in A. Nos. 2363 and 2364/1995 has argued that the applicant in A. No. 1600/1995 does not claim any right under the Will or under the alleged cancellation document and he claims only as a foster son of Dr. Koshy and the application filed by him for revoking the

probate issued in favour of the respondents is liable to be dismissed since he is not a competent person to file such an application and he is not entitled for any citation in the application for probate. The learned counsel appearing for the applicant in A. No. 1600/ 1995 would argue that it is no doubt true that the applicant was not related to the testator by blood, but, the respondents have filed the O.P., suppressing the execution of a cancellation document under which the testator had cancelled the Will executed by her under which Alexander claims to be the beneficiary of the Will and that the order granting probate should be set aside on the ground that the petitioners in the O.P., have not taken citation to the applicants and they have filed the said O.P. suppressing the fact that a cancellation document was executed by the testator in 1991 and it has been attested by none other than Mr. Eapen Varghese who has earlier attested the Will executed by Mrs. Koshy. As far as the case of the applicant in A. No. 1600/1995 is concerned, he would contend the testator viz., Mrs. Koshy who had executed a Will on 16-10-1988, had executed a document cancelling the same on 24-8-1991 and this document was also attested by the very same advocate Mr. Eapen Varghese and in view of the fact that the petitioner in the O.P., had suppressed a material fact to the Court in which he is seeking probate, the probate issued should be revoked. As per Section 263 of the Indian Succession Act, the grant of probate or letters of administration may be revoked or annulled for just cause. As per Explanation (B) where the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case, it can be considered as a just cause for revoking the probate granted. If really Dr. (Mrs.) Mariam Koshy had executed a cancellation document on 24-8-1991, certainly the probate granted can be revoked provided the application for revocation has been filed by a person who has some interest in the estate. Mr. Eapen Varghese has filed an affidavit on 9-3-1995 in which, he has sworn that he was present on 24-8-1991 when Dr. Mariam Koshy had set and subscribed her name at the foot of the testamentary paper in English language and character herein to annexed and marked with the letter 'A' and declare the same as and for her last Will and testament. In other words, the affidavit of Mr. Eapen Varghese is to the effect that on 24-8-1991, he was present in the house of Dr. Mariam Koshy when she executed the document. It is not stated specifically that it is the document under

which she had cancelled the Will dated 16-8-1988. This affidavit of Mr. Eapen Varghese prima facie does not establish that Mariam Koshy had executed the cancellation document on 24-8-1991.

7. We have to see whether this affidavit of Mr. Eapen Varghese is sufficient to revoke the Will, assuming that he has sworn the affidavit to the effect that he had attested the cancellation document executed by Dr. (Mrs.)-Mariam Koshy on 24-8-1991. Even as per the affidavit of the applicant, in A. No. 1600/ 1995, the probate is said to have been granted on 2-12-1994. Before granting a probate, in order to prove the Will in common form, attestors' affidavits are to be filed. If really, the Will had been cancelled on 24-8-1991, it is highly improbable that Mr. Eapen Varghese would have given an affidavit swearing to the execution of the Will by Dr. Mariam Koshy in the Probate proceedings which ended on 2-12-1994. Therefore, we cannot brush aside the contention of the respondent that if any cancellation document had been executed, it should have been a forged document. The genuineness of the cancellation deed itself is doubtful in view of the affidavit of Mr. Eapen Varghese dated 9th March, 1995 and in view of the fact that the probate proceedings ended on 2-12-1994. Therefore, much reliance cannot be placed on the affidavit of Mr. Eapen Varghese filed by the petitioner in support of Application No. 1600/1995.

8. Assuming the cancellation document is a genuine one, if we consider the case of the petitioner also, we have to come to the conclusion that the probate granted cannot be cancelled. Even though Section 263 of the Indian Succession Act provides for revoking the Probate, if it is established that material facts have been suppressed by the petitioner who has filed an application for that purpose, it must also be shown that such an application should have been filed by a person who is having an interest in the testator's estate at least in a very slight manner. The applicant in A. No. 1600/1995 does not claim to be a blood relation of Dr. Koshy. He does not claim to be a beneficiary under the Will. He only claims to be a neighbour of Dr. Koshy in Kerala and claims that he has been brought up by Dr. Koshy and her husband. Bringing up a boy belonging to their native place, even if true, cannot confer any right to the boy in the estate of persons who have brought up the boy. It is held in the decision reported in *Sadananda Pyne v. Harinam Sha*,

AIR 1950 Cal 79 as follows:

'In order to have the locus standi to apply for revocation of probate, a person must have an interest in the estate of the deceased, supposing he had died intestate.'

In the decision reported in Ramyad Mahton v. Ram Bhaju, : AIR1932 Pat89 , it is held as follows :

'What was intended by the Legislature was that citations should be served upon all persons who have an interest in the estate, in other words, all persons who have a locus standi to be heard on the question of grant of probate.

Where an objection to the petition for granting the letters of administration claims that he was living joint in property which the testator left by Will, he has no locus standi to object to the granting of the letters of administration even where citations have been served on him.'

In the present case, the applicant claims to have lived jointly with Dr. Koshy. He is not a person who has any interest in the property of Dr. Koshy, He is not a person having any locus standi to apply for revocation, Therefore, even assuming that Dr. (Mrs.) Koshy had executed a cancellation of the Will executed by her earlier, it is not open for the applicant in A.No. 1600/1995, to apply for the revocation of the same, since he has no locus standi to file such an application. It is more so, when the applicant had no possible chance of succeeding the testator's estate and on that ground itself, this application for revocation should be held as not maintainable.

9. The next question that arises for consideration is whether the injunction granted in the two applications have to be vacated or not. When once it is held that the application for revocation of the probate cannot be filed by the applicant in these two applications, it goes without saying that he is not entitled to an order of injunction also. Further, a proceeding for Probate of a Will, or for Letters of Administration, is not a suit in which there is dispute in respect of an immovable property. Therefore, there is no question of invoking the provision of Order 39, Rule 1 of the Code of Civil Procedure. It has been held in the decision reported in

Namagiri Ammal v. T. Subba Rao, ILR (1948) Mad 494 : AIR 1949 Mad 45 that in probate proceedings, there is no property in dispute and application for injunction, is therefore, not sustainable. In the decision reported in Premji Ratansey Shah v. Union of India, (1994) 2 MLW 735 the Supreme Court has held that there cannot be an injunction in favour of a trespasser or a person who is in unlawful possession against the owner. We have already seen that a person in joint possession of a deceased person cannot claim any interest over the property in question. Therefore, even assuming that the applicant is in possession of the property in question, his possession can only be considered as that of a trespasser or as that of an unauthorised possession. As per the provisions of the Will, the beneficiary is entitled to be in the possession of the property in question. The petitioner is found to be a person not entitled to seek revocation of the Will, under which the beneficiaries are in possession. Therefore, any injunction granted in favour of the applicant in O.A. Nos. 282 and 283/1995 cannot be continued and it has to be vacated.

10. The learned counsel appearing for the applicant in A. No. 1600/1995 has argued that the application may be converted into T.O. S. and the right, title and interest of the parties can be decided in the said proceeding. Conversion of O.P. filed for letters of administration or probate, can be ordered only if the person who objects to the grant of letters of administration or probate has a right or claims a right in the estate of the deceased. In other words, there should be some relationship for the person who claims the revocation and the property of the testator. In our case, the applicant is neither a beneficiary nor a person having any right over the estate of the deceased. Therefore, his objection for the grant of letters of administration or probate or his prayer for revocation of the probate cannot be entertained as a bona fide and legal one. Therefore, the request made by learned counsel appearing for the applicant to convert the O.P., into T.O.S., with a direction to the parties to the proceedings to agitate their rights in it, cannot be complied with. Considering all these aspects, I am of opinion that the application for revoking the probate viz., A. No. 1600/1995 and the applications for injunction viz., O. A. Nos. 282/1995 and 283/1995 are to be dismissed allowing the Application Nos. 2363 and 2364/1995.

11. In the result, A. Nos. 1600/1995 and O. A. Nos. 282 and 283/1995 are dismissed. A. Nos. 2363 and 2364/1995 are allowed.

12. Order accordingly.

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