(1994) 03 KL CK 0049

High Court Of Kerala

Case No: O.S. No.1 of 1984

Pappoo, V.J.		APPELLANT
	Vs	
K.J. Kuruvilla and Others		RESPONDENT

Date of Decision: March 18, 1994

Acts Referred:

- Evidence Act, 1872 - Section 67, 68
- Succession Act, 1925 - Section 100, 101, 102, 103, 104

Hon'ble Judges: K.Sreedharan, J

Bench: Single Bench

Advocate: George Varghese Kannanthanam, for the Appellant; T.V. Ananthan and P. Parameswaran for Defendent 1, S.V.S. Iyer, for Defendant 2, C.K.S. Panicker and K.S. Radhakrishna, for Defendant 4, P. Sukumaran Nair Thottathil, B. Radhakrishnan and G. Unnithan for Defendant 6, Abraham Vakanal, for Defendant 8, Roy Thomas, for Defendant 9 and T.R. Raman Pillai T.M. Abdul Azeez and T.R. Ramachandran Nair for Defendant 10, for the Respondent

Judgement

K.Sreedharan, J.

One Mr. Mathew J. Kollamparambil had executed two Wills on 16th November 1972 and 16th November 1978. As per the Will of 1972, Sri A.A. Joseph, Advocate, Kottayam was appointed Executor. Under the Will of 1978, Sri V.J. Pappoo was appointed the Executor. Sri Mathew J, Kollamparambil died on 18th April, 1979. Thereupon the Executors under the above-mentioned Will approached this Court for getting probate issued with the respective Wills attached to it. Executor under the Will dated 16th November 1972 moved this Court by filing O.P. 1327 of 1980 and the Executor under the Will of 1978 filed O.P. 1874 of 1979 for identical relief. Respondents in these Original Petitions questioned the genuineness of the Will and consequently the matters became contentious. Thereupon O.P. 1874 of 1979 was converted as O.S. 1 of 1984. O.P. 1327 of 1980 has been renumbered as O.S. 2 of 1984. As per the rules framed under the Indian Succession Act, 1925 where two or

more applications for probate relating to the same estate are filed, the Court shall order those applications to be consolidated and heard as if there were only one proceeding. One of the applications has to be chosen for the said purpose and the parties to the remaining applications are to be joined as Respondents therein. In view of the said provision, by order dated 7th February 1994, the Original Petitions, which were converted as suits, were consolidated as O.S. 1 .of 1984 and is treated as the suit under Rule 29 of the Rules of the Indian Succession Act, framed by the High Court. Plaintiff in O.S. 2 of 1984 was impleaded as additional Defendant in O.S. 1. of 1984. All the parties to that suit were also impleaded as additional Defendants in O.S. 1 of 1984.

2. The material averments made by the Plaintiff in O.S. 1 of 1984 in the plaint as it now stands amended, which was filed as O.P. 1874 of 1979, areas follows: Mathew J. Kollamparambil died at Lissie Hospital, Ernakulam on 18th April 1979. The writing annexed is the certified copy of his last Will and testament. It was duly executed at Ernakulam on 16th November 1978. Petitioner (Plaintiff) is the Executor in the said Will. Testator had executed Anr. Will dated 16th November 1972, the certified copy of which is also annexed. By his Will dated 16th November 1978, he revoked the previous Will dated 16th November 1972. The revocation of the earlier Will was a dependent relative revocation so far as the religious and charitable bequests in the former Will are concerned while all the other provisions of the former Will stand revoked by the last Will dated 16th November 1978. By virtue of the application of the doctrine of dependent relative revocation, the religious and charitable bequests in the former Will will take effect. For the purpose of application of the doctrine of dependent relative revocation, it is necessary that probate is granted with the Will dated 16th November 1972 also annexed. The former Will dated 16th November 1972 was duly executed at Ernakulam. Sri A.A. Joseph (Petitioner in O.P. 1327 of 1980, which was numbered as O.S. 2 of 1984) was the Executor named in the said Will and his appointment as Executor was revoked as per the last Will dated 16th November 1978. To the best of his knowledge, Annexure A, B (i), B (ii), B (iii) and B (iv) are the properties and credits which the deceased possessed of or was entitled to at the time of his death. Annexure B contains the items which he is entitled to deduct. Deceased left Defendants 1 and 2 as his surviving next-of-kin under the. Travancore Christian Succession Act. The testator has immovable property in the State of Karnataka also. Item No. 27 in Annexure A is situated within the jurisdiction of the District Court, Bangalore. Petitioner is not in a position to assess the value of the properties of the testator. Wills dated 16th November 1972 and 16th November 1978 were duly executed. Petitioner is the Executor named in the last Will. Hence it is prayed that probate may be granted to the Petitioner having effect throughout Kerala and Karnataka with the Will dated 16th, November 1978 and also the Will dated 16th November 1972 annexed, Will dated 16th November 1972 being annexed only in so far as the religious and charitable bequests therein are concerned.

3. The Executor named in the Will dated 16th November 1972, namely Sri A.A. Joseph, who is the additional 24th Defendant in O.S. 1 of 1984, raised the following contentions in O.P. 1327 of 1980, which was subsequently numbered as O.S. 2 of 1984.-Mathew J. Kollamparambil died on 18th April 1979. The writing annexed to the petition is the Registration copy of the last Will and testament executed by him. The original of it is in deposit in the office of the Sub Registrar, Ernakulam. It was written in the testator''s own handwriting and was duly attested. Petitioner is the Executor in that Will. The assets left behind by the deceased are set forth in Schedule-I to the petition. Schedule-II contains items which are to be deducted. The assets left behind are valued at Rs. 8,05,000. Defendants 1, 2, 10 and 29 are the next-of-kin of the deceased under the Travancore Christian Succession Act. Application has been made by the Petitioner in O.P. 1874/1979 (O.S. 1. of 1984) for probate of a Will alleged to have been executed by the deceased. The genuineness and validity of that Will is contested by the legal heirs of the deceased. Petitioner denies its genuineness and validity. That Will is a fabrication, brought into existence without the deceased knowing its contents. The said Will dated 16th November 1978 is no bar for issuing a probate to the Petitioner with the Will dated 16th November 1972 annexed thereto. On these basis, it is prayed that a probate be issued with Will dated 16th November 1972 annexed to it.

4. Second Defendant filed a detailed counter affidavit in O.P. 1874 of 1979. The contentions raised therein can be summarised as follows.- Mathew J. Kollamparambil was his father''s brother. First Defendant is the son of Anr. brother. First and second Defendants are the only surviving legal heirs of the deceased. The Will produced by the Plaintiff (the Will dated 16th November 1978) is not a genuine document. It is a false document brought into existence by the Plaintiff with the help of his personal friends who had figured as attestors, with the sole object of acquiring for his benefit the major portion of the assets left behind by the testator. The Plaintiff is riot a near relative of the deceased. He is the grandson of the maternal uncle of the deceased. For more than two years preceding his death, the testator was suffering from serious ailments, like diabetes, heart trouble and host of other ailments for which he was hospitalised on several occasions. He was stricken with paralysis in 1976 and by about that time, he also lost his eye sight. By the time he reached 75 years of age, he became completely invalid. He was unable to read or write. He was incapable of making any disposition of his assets by writing a Will in that respect. By 16th November 1978 Mathew J. Kollamparambil had actually become physically and mentally incapacitated to make any disposition of his properties. That Will was not executed by the testator. He had lost the power of speech long prior to 16th November 1978. His life was sustained only by drugs administered in the Lissie Hospital. During the period of one year preceding his death, he was really incapable of exercising any free will of his mind or of doing any act of volition by himself. Considerable poritons of his assets are seen allotted to his servants. This is a clear manipulation by the Plaintiff and his associates. The legatees

under the Will dated 16th November 1978 are his driver, driver''s sister, driver''s sister''s husband and the driver''s brother. The dispositions in favour of strangers far exceed in value compared to those made in favour of his natural and legal heirs. Sizable portion of the assets of the deceased is seen allotted for charitable purposies of a vague and indefinable nature. The bequest so made for the alleged charitable purposes is void and illegal in view of the provisions contained in Section 118 of the Indian Succession Act. If the testator wanted to make a bequest for charitable purposes, he would have normally made such a bequest in more explicit and clear terms. In any view of the matter, no probate can be granted in respect of the assets which have been bequested for the alleged charitable purposes, which are vague and indefinite. Defendants 1 and 2 are the only natural heirs of the deceased. They are entitled to his entire assets. The application for probate has only to be dismissed.

5. In O.S. 2 of 1984 (Probate O.P. 1327/1980), second Defendant has filed Anr. written statement. The contentions raised therein are to the following effect.- Defendant puts the Plaintiff to proof of the fact that the original of Annexure A (Will dated 16th November 1972) is the last Will and testament of Mathew J. Kollamparambil and that it is executed duly and lawfully in accordance with law. Petitioner is put to strict proof of the genuineness, validity, legality and enforceability of that Will as well as its due execution. To the knowledge, of this Defendant, deceased had executed a codicil also. Will dated 16th November 1972 contains casual references to religious and charitable purposes. The provisions in that regard in the Will are vague and indefinite. They are incapable of Enforcement. Reference made in the said Will cannot be deemed to be a disposition or bequest in favour of or for the benefit of a religious or charitable endowment or trust. So much so that portion of the Will dated 16th November 1972, referring to religious and charitable purposes, is to be ignored. Legal and factual requirements to constitute a bequest in favour of or of a charitable and religious nature are absent.

6. The other contesting, Defendants have, to a large extent, supported the contentions raised by the second Defendant.

7. On the basis of the pleadings in the case, following issues were raised for trial:

1. Is the Will dated 16th November 1978 true, genuine and valid.

2. Is the Will dated 16th November 1972 true, valid ''and genuine.

3. Does the bequest for charitable and religious purposes fail because of the death of the testator within one year of the execution of the Will u/s 118 of the Indian Succession Act.

4. Is the Petitioner entitled to invoke the principle of dependent relative revocation with regard to items set apart for charities and religious purposes.

5. Does the Will take effect as regards items 17 in A schedule in the petition.

6. Does the bequest for charities and religious purposes fail because of vagueness and uncertainty.

7. Can the Petitioner claim probate for properties covered by the Will dated 16th November 1972 as a different person is appointed as executor for the same and as he has applied for probate in O.P. No. 1327 of 1980.

8. Are all items of properties of deceased Mathew included in the probate application.

9. Is the suit bad for non-joinder of necessary parties.

10. Reliefs and costs.

8. On the side of the Plaintiff, P.Ws. 1 to 3 were examined. P.W. 1 is an attestor to the Will dated 16th November 1972. P.W. 2 is the Plaintiff in. O.S. 1 of 1984 and P.W. 3 is an attestor to the Will dated 16th November 1978. The Wills dated 16th November 1972 and 16th November 1978 were marked as Exhibits A-1 and A-2 respectively. On the side of the Defendants, D.W. 1 was examined. He was the second attestor to the Will dated 16th November 1972, which is marked as Exhibit A-1.

9. Issue No. 1.- Exhibit A-2 is the Will dated 16th November 1978. In order to prove the due execution of a Will, statutory provisions contained in Sections 67 and 68 of the Evidence Act and Section 63 of the Indian Succession Act have to be complied with. u/s 67 of the Evidence Act, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting. Section 68 of that Act deals, with proof of execution of a document required, by law to be attested. It states that such a document shall not be used as evidence until one attesting witness alt least has been called for the purpose of proving its execution. These provisions of the Evidence Act prescribe the requirements and the nature of proof which must be satisfied by the party who relies on that document. For a Will to be accepted in evidence, special proof regarding the attestation as required by Section 63 of the Indian Succession Act has also to be adduced. As held by Their Lordships of the Supreme Court in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, :

As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

10. In Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, after an exhaustive survey of all the decisions on the point, Their Lordships enumerated the following propositions regarding the nature and standard of evidence required to prove a Will:

1. Stated generally, a Will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters.

As in the case of proof of other documents, so in the case of proof of Wills, one cannot insist on proof with mathematical certainty.

2. Since Section 63 of the Succession Act requires a Will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

3. Unlike other documents, the Will speaks from the death of the testator and therefore the maker of the Will is never available for deposing as to the circumstances in which the Will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last Will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the Will.

4. Cases in which the execution of the Will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the Will under which he receives a substantial benefit and such other, circumstances raise suspicion about the execution of the Will. That suspicion cannot be removed by the mere assertion of the propounder that the Will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the Will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the Will excite the suspicion of the Court, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.

5. It is in connection with Wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is called upon to decide a solemn question and by reason of suspicious circumstances the Court has to be satisfied fully that the Will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion, etc., in regard to the execution of the Will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances, "surrounding the execution of the Will may raise a doubt as to whether the testator was acting of his own free Will. And then it

is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

11. In order to prove the due execution of the Will, P.W. 3, one of the attesting witnesses, has been examined in this case. This witness is a Medical Practitioner, who was intimately connected with the testator for long number of years. According to him, himself and the other attesting witness to the document, namely Devadasan Nair, saw the testator affixing his signature in all pages of Exhibit A-2 Will and that the testator also witnessed the attestors affixing their signatures. He would say that he was there in the house of the testator durrng the whole period taken for writing the Will. When he reached the house of the testator, there were three Ors. ; two being document writers and the third one from the Registrar''s office. He gave an explanation for the shaky signature of the testator in the various pages of the Will as the result of the testator haying hemi parasis, i.e. slight shivering of the hand. It was on account of that shivering of the hand, the document writer got the testator''s finger print also affixed in all the pages of Exhibit A-2 Will. This witness was subjected to lengthy and searching cross-examination by counsel appearing for the various Defendants. In cross-examination, he said that he was acquainted with the testator from 1966 onwards. It may be anterior to 1966 even. It was at the request of the testator he went to the testator''s house to attest the document Exhibit A-2, since his connection with the testator was much deeper. When he was asked whether the document was completely written up prior to his arrival in the testator''s house, he gave the reply that it was not written earlier and that it was written in his presence. After it was written by the scribe Kochukesava Menon, testator affixed his signature and thumb impression in the presence of the attesting witnesses and thereupon the attesting witnesses affixed their signatures. To the question whether there was any correction in the document Exhibit A-2, he gave the reply that in writing the manu script several discussions took place between the testator and the scribe and corrections were effected. Learned Counsel representing the 10th Defendant then asked: "After the document was read over what was the'' first thing that took place?". The answer was: "Mathew J. Kollamparambil signed all the pages of Ext. A-2". To the question as to at whose instance thumb impression of the testator was taken, the witness replied that since the signature was not coming out rightly, the scribe asked the testator to affix his thumb impression as well. Learned Counsel then put the question- "After preparing the original I put it to you that it was signed without any correction. Am I correct?", to which the witness gave the reply in the affirmative. He categorically stated that the testator signed first, affixed his thumb impression and thereafter himself and the other attestor signed as attestors. He further stated that he wrote his name and signed Exhibit A-2 with his own pen. He wrote his name and signed it in the space set apart for him to write his name and sign the same. To the question whether Exhibit A-2 was prepared in signed papers by somebody, the witness replied that the testator made the Will in the presence of attestors and that he signed the same. Regarding the mental

faculties of the testator, this witness would say that he was cent per cent sure that testator had all mental faculties. When cross-examined by the second Defendant, this witness asserted that he saw all the persons signing the document personally. To the question whether anybody held the thumb of the testator when he affixed the thumb impression, he replied that the document writer helped the testator in affixing the thumb impression.

12. On going through the testimony of P.W. 3, I do not find any ground to disbelieve him. He was not only a personal friend of the testator, but also a Medical Practitioner helping him. Their acquaintence started prior to 1966. No suggestion was put forward by any counsel representing the Defendants in cross-examination as to whether he had any personal interest to help the propounder of the Will in proving the same. The absence of such a suggestion even will go to establish the trust-worthy nature of the evidence given by this witness. He categorically stated that himself and the other attesting witness saw the testator signing Exhibit A-2 and affixing his thumb impression therein. He also stated that himself and the other attesting witness signed Exhibit A-2 as attestors in the presence of the testator. This evidence of P.W. 3 shows that Exhibit A-2 Will was properly executed strictly in compliance with the requirements of Section 63 of the Indian Succession Act.

13. Learned Counsel representing the 24th Defendant (Plaintiff in O.S. 2 of 1984) raised a contention that on account of certain, suspicious circumstances surrounded the execution of the document Exhibit A-2, Exhibit A-2 cannot be taken as a genuine and valid document. I shall deal with these circumstances to see whether they are circumstances suspicious enough to invalidate Ext. A-2.

14. Any and every circumstance cannot be taken as suspicious circumstances. A circumstance would be suspicious only when it is not normal or is not normally expected in a normal situation or is not expected of a normal person vide Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, . The fact that learned Counsel representing the Defendants termed some circumstances as suspicious, will not by itself make those circumstances suspicious. In a case where the propounder let in evidence to prove the due execution of the Will, the burden shifts on to the Defendants to substantiate their case that the execution of the Will is shrouded in suspicious circumstances. When the propounder of the Will has discharged his initial onus, the caveator-the person opposing the issue of the probate, should prove the suspicious circumstances. In the instant case, no evidence, either oral or documentary, was let in by the contesting Defendants in this regard.

15. In Exhibit A-1 Will dated 16th November 1972, it was stated that the testator can take it back or execute a codicil. If is also stated therein that the receipt obtained from the Registrar''s office on deposit of that document is entrusted with the Executor. For executing Exhibit A-2, the testator did not get back Exhibit A-1 from the Registrar''s office. Nor did he take back the receipt from the Executor appointed

under the first Will. These are suspicious circumstances, according to counsel, casting doubt on the execution of Exhibit A-2. The fact that earlier Will was deposited with the Registrar''s office and its receipt entrusted with the Executor appointed therein is not a bar for the execution of a new Will. By the execution of the subsequent Will, depending on the intention of the testator, the earlier one Will stand revoked. No provision of law requires the testator to get back the Will which was deposited with the Sub Registrar for him to execute Anr. Will on a later date. So, the fact that testator did not get back Exhibit A-1 from the Registrar''s office prior to the execution of Exhibit A-2 cannot in any way go to invalidate Exhibit A-2.

16. According to the learned Counsel representing the Defendants in Exhibit A-2 the testator asserts that he is thereby cancelling all the previous Wills. When there was infact only Exhibit A-1, the said statement will not hold good. Further in Exhibit A-1 there are clear recitals in relation to all the properties of the testator. Details of all properties are not given in Exhibit A-2. The space in between last line of each page of Exhibit A-2 and the signature of the testator therein differs and so, according, to counsel, the document must be taken to have been written on signed papers. I find it difficult to consider these grounds as suspicious circumstances to upset Exhibit A-2 Will. According to Defendants, the name of P.W. 3 was not written by the scribe while the other attestor''s name was written by the scribe. This is Anr. suspicious circumstance which tells upon the validity of Exhibit A-2. I can''t agree with the argument either. The other attestor is a person who was with the scribe. So, his name was written by the scribe, while space was left for P.W. 3 to wrote his name and signature. In that space, P.W. 3 wrote his name and signed as attestor. There is no infirmity in this procedure.

17. Another circumstance which was highlighted by the learned Counsel representing the Defendants is that the appointment of the Executor in Exhibit A-1 Will was specific, while that in Exhibit A-2 is vague. The Executor under Exhibit A-1 was a stranger to the testator. Even in Exhibit A-1, the Executor was directed to take instructions from Mr. Pappoo, who has been appointed Executor in the second Will. This Mr. Pappoo, the Plaintiff in O.S. 1 of 1984, was a person having the confidence of the testator. The testator was keeping a locker in the bank in the joint names of himself and this Mr. Pappoo. So, the appointment of 24th Defendant as Executor in Exhibit A-1 Will had to be made with specific authorities. Such a requirement was not felt when the testator appointed Sri Pappooo. So, the testator had not gone into the minute details of the authorities of the Executor. This has not in any way gone to put Exhibit A-2 in any suspicious circumstance.

18. Lengthy arguments were advanced by counsel appearing for the Defendants on the basis of so-called interpolation in page 5 of Exhibit A-2. Towards the bottom of that page, certain lines are written without the spacing seen in the earlier part. So, according to counsel, the bottom portion of page 5 was written at a later time, even without the knowledge of the testator. It may, according to counsel, even go to

show that the Will was written, or atleast page 5 was written, in signed paper. I find it difficult to accept any of these contentions. It is true that there is difference in the spacing of the lines at the bottom of page 5. But it is quite evident that it was written by the same hand and in the same ink. P.W. 3 has categorically stated that all persons affixed their signatures only after getting Exhibit A-2 completely written up. May be the bottom portion of page 5 was written up immediately before the testator affixed his signature. But since the testator, as per the evidence now before Court, signed after the whole of Exhibit A-2 was written up, I do not find my way to invalidate Exhibit A-2 Will on this ground. This is more so because immediately after the execution of Exhibit A-2 it was deposited with the Registrar. Endorsement to this effect made by the Registrar is seen on the cover of Exhibit A-2. Consequently, I do not find any merit in the above argument advanced by the learned Counsel.

19. In Exhibit A-1 properties belonging to the testator Where rubber was planted were described as rubber estates. But those properties were described as rubber plantation in Exhibit A-2. This difference in the description of the properties, according to counsel, must also be taken as a suspicious circumstance. I do not find any logic in this argument. Exhibit A-1 is a holograph Will, while Exhibit A-2 was one written by a seasoned document writer. Further, I can''t find any noticeable difference between rubber estate and rubber plantation. So, I overrule this contention.

20. The difference in signature of the testator is Anr. circumstance highlighted by counsel representing the Defendants. The difference in the signature has been properly explained by P.W. 3, who is a Medical Practitioner. According to him, the testator was having hemi parasis and so his hands were slightly shivering. Consequently there happened to be difference in the signatures seen in Exhibits A-1 and A-2. On account of this shaky hand, the scribe got the thumb impression of the testator also affixed in all the pages of Exhibit A-2. Immediately after the execution of the document Exhibit A-2, it was deposited with the Registrar in a sealed cover. Testator had affixed his signature and thumb impression on the cover. The thumb impression in that cover was taken by the officer attached to the Registrar''s office. On a closer scrutiny of that thumb impression with those seen in the various pages of Exhibit A-2, I am clear in my mind that all these thumb impressions are of the same person. So, I am of the view that the testator, who affixed the thumb impression on the cover containing Exhibit A-2, himself affiled his thumb impression on all the pages of Exhibit A-2.

21. From the evidence of P.W. 3, it is crystal clear that the testator was aware of the effect of Exhibit A-2 document when he executed the same. Because of the shaky hand, the signature was not similar to those seen in Exhibit A-1. So, he had to affix his thumb impression. The scribe helped the testator in affixing the thumb impression. According to him, he was cent per cent sure that the testator had all mental faculties when he executed the document Exhibit A-2. The requirement of

law is that the testator must be shown to have known what he was doing, with regard to the contents and the executipn of the Will. It is not the requirement of law that he should enjoy perfect health. What was needed is that the testator must be having such a State of mind that he knew what he was doing. In the case of the execution of a Will, the requirement is a sound mind. A sound state of health is different from sound state of mind, which alone is legally required to validate the Will. In the instant case, testator was having a sound mind, eventhough he was not having perfect bodily health.

22. The propounder of the Will, namely Plaintiff in O.S. 1 of 1984, was examined in this case. He had not taken part in the execution of the Will Exhibit A-2. Even though he was subjected to very lengthy cross-examination, he was not questioned about his involvement in getting Exhibit A-2 executed. As stated earlier, P.W. 2 was a person in whom the testator was having absolute confidence. Even the Executor appointed under Exhibit A-1 Will of 1972 was to consult P.W. 2 before taking any major decision. Such a person has now been appointed Executor.

23. From the above discussion, I come to the conclusion that Exhibit A-2 Will dated 16th November 1978 is true, genuine and valid Will executed by deceased, Mathew J. Kollamparambil. Issue found accordingly.

24. Issue No. 2.- This relates to the validity and genuineness of the earlier Will dated 16th November 1972. The fact that testator executed Exhibit A-1 Will dated 16th November 1972 is not in serious dispute. P.W. 1 and D.W. 1 are the two attestors to that Will. Their evidence is trust wrothy. Consequently, I hold that testator had infact executed Exhibit A-1 Will. Issue found accordingly.

25. Issue No. 3.- Mathew J. Kollamparambil, the testator, executed Exhibit A-2 Will on 16th November 1978. On the same day, he deposited that document in the Office of the Registrar. He passed away on 18th April 1979. As per Section 118 of the Indian Succession Act, no man having a nephew or niece or any near relative shall have power to bequeath any property to religious or charitable uses, except by a Will executed not less than twelve months before his death and deposited within six months from its execution in some place provided by law for the safe custody of the Will of living person. Since Exhibit A-2 Will was deposited with the Registrar, within six months prior to the date of death of the testator, the bequest to religious or charitable purpose under that Will should fail. So, by virtue of the provision, contained in Section 118 of the Indian Succession Act, bequest for charitable and religious purposes made in Exhibit A-2 Will should fail. The issue is found accordingly.

26. Issue No. 5.- It is settled law that a Court of probate is only concerned with the question as to whether the document put forward as the last Will of the deceased person was duly executed and attested. The Court is also to see whether at the time of the execution of that document whether the testator had sound disposing mind.

The probate Court is not to embark on the question relating to disputed questions of title and possession. If authorities for this proposition are required, reference can be had to Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others, and Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, . In the first decision, their Lordships observed:

The Courts of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the Probate Court. It is surprising how this elementary principle of law was overlooked by both the Courts below.

In the second decision, Their Lordships, after quoting the above passage from the first decision, observed:

Therefore, the only issue in a probate proceedings relates to the genuineness and due execution of the Will and the Court itself is under duty to determine it and preserve the original Will in its custody. The Succession Act is a self-contained code in so far as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate Court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate Court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the Will annexed establishes conclusively as to the appointment of the executor and the valid execution of the Will. Thus it does no more than establish the factum of the Will and the legal character of the executor. Probate Court does not decide any question of title or of the''existence of the property itself.

(emphasis added)

In view of these decisions of the Supreme Court, this probate Court is not to go into the question as to whether the Will has effect on item No. 17 in A schedule to the plaint. Issue found accordingly.

27. Issue No. 6.- In the light of the decisions referred to earlier, namely Ishwardeo Narain Singh Vs. Sm. Kamta Devi and Others, and Chiranjilal Shrilal Goenka (Deceased) through Lrs. Vs. Jasjit Singh and Others, , this Court is not to embark on an examination as to whether the bequest for charities and religious purposes fail because of vagueness and uncertainty. But, lengthy arguments were, advanced by counsel representing the Defendants for nearly five days. So, I will refer to this aspect to some extent.

28. By Exhibit A-1, properties were set apart for religious and charitable purposes. Provisions in this regard are seen at pages 4, 9 and 11 of that document. For a

proper understanding of those provisions, I translate them As under:

Page 4:

I decide that all movable and immovable properties belonging to me excepting the properties herein below specifically stated would be utilised for the most suitable religious and charitable purposes.

Page 9:

My Bangalore building and property and Kalpaka Bungalow in Ferumannur and property shall be used for the conduct of any most suitable public institution of a religious and charitable nature in the name of Kallemparambil Mathew Memorial. If it is found to be impracticable, they may be sold for very good price and proceeds actually received shall be utilised for conduct of institutions in the said name. The naming is not at all intended for my fame; but it is intended to be a model and inspiration for Ors. .

Page 11:

Every year, on my death anniversary dates, one Pattu Khurbana (high mass) and Oppease (requiem) is to be conducted in Thalayola-parambu Church and one Rasa (high solemn mass) and Oppease (requiem) is to be conducted in Thevara Komentha Church. Furthermore, firstly for the benefit of my soul and for all those deceased members of my family and secondly for my brother-in-liaw Mampilly Mathai Poulo and for deceased Augusthy the faithful servant of my sister every year 1,000 Otta Khurbana (low mass) is to be rendered immediately on payment of stipend. It has to be done for 10 years from the date of my death. With the sanction of the diocesean office, I have reserved a separate place on the immediate southern side of the tomb of my sister Annamma in Thalayolaparambu Church, for my burial on payment in advance of Rs. 1,000 to the Church and a tomb is to be constructed there and my burial done there and suitable headstone is to be installed.

Coming to Exhibit A-1, the provision made therein for charity is as follows:

All my remaining properties are to be used for different types of charitable purposes; for conducting of mass for the salvation of my soul and for giving food and clothing to the poor people for penance of my sins.

I hereby appoint Shri Pappu, S/o Madathara Mundadan Kochavuseph, Nayarambalam Kara, Njarakkal Village who is the son of the brother of my mother as the executor with the responsibility and power to carry into execution the written directions given by me. Agreeing as stipulated above I have signed in this before the witnesses and the witnesses have signed in this before me. If due to any reason the above said Kochavuseph Pappu is unable to perform the above matters, Shri Vattathara Mundadan Kochuvarkey has also been appointed as Executor and trustee for performing the above said matters. The Executor and trustee will have

power to collect the amounts due to me and to pay off the amounts to be paid by me.

The argument advanced by Counsel is that the above provision mentioned in the Will regarding bequest to charity are vague. As stated earlier, bequest to charity under Exhibit A-2 has failed because of the provision contained in Section 118 of the Indian Succession Act. Therefore, the validity or otherwise of that bequest need not be adverted to. Bequest under Exhibit A-1, according to me, is not at all vague. Bequest to charity is valid, as could be seen from the decision in In Re Caus Lindeboom v. Camille 1934 1 Ch. 162. To the same effect is the decision in C. Saldanha v. D''Souza AIR 1956 Mad 412. As observed by Lord Simonds in Peter Cosquieri v. Magdalena Formento AIR 1949 P.C. 46 all proper efforts should be made to give to the provisions of the Will an effective and consistent meaning. In construing the language of the Will, Court is entitled to put itself into the "testator''s arm-chair and is bound to bear in mind all circumstances which the testator would have taken into consideration while making the disposition. The true intention of the testator has to be gathered from the reading of the whole Will. The effort of the Court must be to give effect to the expression made by the testator and not to make it inoperative. To the extent, it is legially possible, the Court should adopt that construction which will give effect to each and every disposition.Every intention contained in the Will should, as far as possible, be given effect to. In the instant case eventhough the religious and charitable purposes are mentioned in general terms, the Executor is given the power and option to choose the religious and charitable purposes to which the funds are to be utilised. He has conferred on the Executor the power of selection of the various charities. The law allows the testator to direct a fund to be distributed among such charities as the trustee may, in his discretion, decide. This position is accepted by the Privy Council in AIR 1937 8 (Privy Council) . Lord Macmillan speaking for the Council observed:

The privilege of controlling by Will the disposition of property after death is subject to the condition that such disposition must be made in favour of ascertained or ascertainable persons or objects. A testator is not permitted to delegate to Ors. the disposition of his property, subject to this: that he may confer upon his trustees a power of selection and apportionment among a definitely prescribed class of beneficiaries. In the case of charitable objects, the law, by reason of the favour in which charity is held, has accepted such objects as constituting a sufficiently ascertained class notwithstanding its wide extent, and permits a testator to direct a fund to be distributed among such charities and in such proportions as his trustees may in their discretion decide. But in all other cases the requirement of definite precision is enforced m the definition of the individuals or classes to be benefited.

In the instant case, the testator has clearly expressed his intention as to for what all purposes the funds are to be utilised. But, he gave freedom to the Executor to select those purposes. In other words, the testator gave freedom and power to the

Executor to utilise the funds for charity, types of charities having been fully set out by the testator himself. Such a procedure adopted by the testator is perfectly sustainable. The power given to the Executor in the Will is general. When the power so given is general, according to me, there can be no question of testator''s direction being defective for uncertainty. Learned Counsel representing the Defendants then brought to my notice various decisions of the English Courts in support of their contention that the provision contained in the Will executed by the testator regarding charity are vague and hence hit by Section 89 of the Indian Succession Act. Those decisions of the English Courts were not in probate proceedings. Further, the principles relating to charity in England cannot be pressed into service in a proceedings under the Indian Succession Act. Probate proceedings in India are controlled by the provisions contained in the Succession Act. In understanding those provisions, decisions of the English Courts are not of much help. This position was explained by the Privy Council in Mt. Ramanandi Kuer v. Mt. Kalawati Kuer AIR 1928 P.C. 2 in the following words:

It has often been pointed out by this Board that where there is a positive enactment of the Indian Legislature the proper course is to examine the language of that statute and to ascertain its proper meaning uninfluenced by any consideration derived from the previous state of the law or of the English law upon which it may be founded.

This observation of the Privy Council has been quoted with approval by the Supreme Court in Hind Overseas Private Limited Vs. Raghunath Prasad Jhunjhunwalla and Another, . Under the Indian Succession Act, specific provisions have been made for testamentary disposition. In giving effect to those provisions, the ecclesiastical origin of jurisdiction of the Courts in England has been completely discarded. Therefore, the decisions of the English Courts referred to are not of much relevance. Consequently, I hold that the bequest for charities and religious purposes as seen in Exhibit A-1 Will is not to fail because of vagueness and uncertainty.

29. An argument was advanced by the learned Counsel representing the Defendants that bequest to charity must fail u/s 89 of the Indian Succession Act. Section 89 states that a Will or bequest not expressive of any definite intention is void for uncertainty. Section 89 comes in Chapter VI of the Succession Act, which deals with ''Construction of Wills'', consisting of Sections 74 - 111. So, we have to see whether while construing this Will one can find out the intention of the testater. If the Will contains provisions, expressive of any definite intention, then that Will will not become void because of uncertainty. Section 89 applies only to those cases where a Will is so indefinite that it is not possible to give any definite intention to it at all. If the testator indicates what he intends to bequeath and that indication is sufficient to identify the property bequeathed, there cannot be any difficulty because the testator himself has made the selection of the properties. So also if the testator indicates the purposes for which the properties are bequeathed, then that bequest

cannot also fail for vagueness. In the instant case, in the Wills Exibits A-1 and A-2 executed by the testator, he has clearly expressed his intention to bequeath properties for religious and charitable purposes. In Exhibit A-1, all the items are specifically mentioned. While executing Exhibit A-2, he made certain specific legacies. All the other properties not covered by those legacies were set apart for charity. So, a reading of the Wills will not give room for any doubt regarding the properties set apart for charities and intention of the testator to bequeath them for charitable purposes. So, I have no hesitation in holding that the bequest to charity made by the testator is one expressive of definite intention. Issue found accordingly.

30. Issues 4 and 7.- These issues relate to the principle of dependent relative revocation. As stated earlier, the bequest to charity under Exhibit A-2 failed on account of the provisions contained in Section 118 of the Evidence Act. Therefore, the question to be looked into is whether bequest to charity under Exhibit A-1 will revive?

31. The principle of dependent relative revocation has been dealt with by Halsbury in Volume 50 of Fourth Edition in these terms:

The revocation of a Will may be relative to Anr. disposition which has already been made or is intended to be made, and is so dependent on it that revocation is not intended unless that other disposition takes effect. Such a revopation is known as a ''dependent relative revocation and, if from any cause the other disposition fails to take effect, the Will remains operative as it was before the revocation. The doctrine also applies where the purported revocation is based on an assumption of fact which is false, the mistaken belief in that fact being the reason for the revocation.

Theobald on Wills, Fourteenth Edition has explained it at page 81 in the following terms:

If a testator by Will or codicil gives property to X, and by a later Will or codicil gives the same poperty to Y, is the gift to X revoked if the gift to Y fails? If in the later Will or codicil the testator has shown an intention to revoke the gift to X in any event, the gift to X is revoked; but if the testator has shown an intention to revoke the gift to X conditionally on the gift to Y taking effect, the gift to X is not revoked if the gift to Y fails. The presence of express words of revocation in the later Will or codicil is not decisive.

Jarman on Wills, Eighth Edition at page 165 states the principle as:

Where the act of destruction is connected with the making of Anr. Will, so as fairly to raise the inference that the testator meart the revocation of the old to depend upon, the efficacy of the new disposition. intended to be substituted, such Will be the legal effect of the transaction; and therefore, if the Will intended to be substituted is inoperative from defect of attestation, or any other cause, the revocation fails also and the original Will remains in force. The doctrine, which has been described as

somewhat overloaded with unnecessary polysullables, applies whenever the intention to revoke a Will is conditional only and the condition is not fulfilled, and the doctrine may apply although the later Will is partially effective.

32. In Exhibit A-2 Will dated 16th November 1978, testator stated that he revokes the earlier Wills. That specific statement regarding the revocation is not decisive and is not having much consequence. This position has been accepted by a Full Bench of the Travancore-Cochin High Court in Thresia v. C. Lonappm Mathew 1956 KLT 469 and by a Division Bench of this Court in Antony v. Mathew 1961 KLT 500. This principle was reiterated in David Tharakan v. Lilly Jacob 1992 (2)K.L.T. 426.

33. In Exhibit A-1 Will of 1972, the testator gave a small extent of his properties to named legatees. The entire balance was set apart for religious and charitable purposes. While executing the last Will of 1978, extensive items have been given to named legatees. Residue was set apart for charities. As found earlier, the bequest to charity under the Will of 1978 failed as a result of the provision contained in Section 118 of the Indian Succession Act. In such a situation, the duty of the Court is, if it is in any way possible, to give effect to the manifest intentions of the testator. The Court is not to favour intestacy. As stated by Langton, J. in In the Estate of Brown (1942)2 All. E.R. 176, the Court in doing so is restrained from any efforts to make a new Will for the testator where he has not made it by himself. But the Court can give effect to what appear to be the clear intention and to admit to probate such document as Will give effect to those intentions.

34. The testator intended to give properties for religious and charitable purposes. That intention is reiterated in the last Will as well. The bequest to charity under the last Will failed only because of Section 118 of the Succession Act. Consequent on that if the revocatory clause in Ext. A-2 is given its full effect, it will defeat the intention of the testator. A probate Court is not to resort to an interpretation which will patently go to defeat the testator''s wishes. For giving effect to the testator''s intention, the Court has necessarily to fall back on the terms of Ext. A-1, so far as it relates to charity.The mere fact that the whole of the property set apart in Ext. A-1 Will is not available as per Ext. A-2 is no reason for saying that the revocatory clause must be given effect to. The revocatory clause, according to me, must, in the above circumstance, be held to be conditional. Viewed in this light, according to me, I will have to give effect to the second Will in relation to specific bequests to various legatees and at the same time give effect to his intention to bequest the remaining properties to charities by admitting the earlier Will in that regard also to probate. This course alone will do justice to the testator''s wishes. I hold that the testator put in revocatory clause into the second Will conditionally and that since gift to charity failed on account of Section 118, that part of 1972 Will regarding charity should also be admitted to probate. This is more so when the testator had in unmistakable terms expressed his intention to bequeath his properties for religious and charitable purposes. Issues 4 and 7are thus found in favour of the Plaintiff.

35. Issue No. 8.- No paity to this suit has raised a contention that all the items of properties owned by the testator are not included in this proceedings. Therefore, no finding on this issue is called for.

36. Issue No. 9.- It is the common case that all necessary parties have been made parties to this suit. No one has raised a contention that all parties are not before Court. Issue No. 9 is found in favour of the Plaintiff.

37. Issue No. 10.- "In view of the findings entered by me on issues 1 to 9, I grant a probate to the Plaintiff in O.S. 1 of 1984 with copies of Exts. A-1 and A-2 attached to it, with the clauses relating to revocation and charities omitted from Ext. A-2 and clauses relating to specific legacies and appointment of Executor omitted from Exhibit A-1" (vide order dated 24th March 1994). This I do so because these two Wills with these deletions represent the real and final wishes of the testator. The appointment of Plaintiff in O.S. 1 of 1984 as the sole Executor will stand.

The costs incurred by the Plaintiff in O.S. 1 of 1984 will come out of the estate.

Suit is decreed in the above terms.