Rossy Lazar and Others Vs Jose P. John and Others

Court: High Court Of Kerala

Date of Decision: Dec. 13, 1989

Acts Referred: Succession Act, 1925 â€" Section 276

Hon'ble Judges: Thulasidas, J; Radhakrishna Menon, J

Bench: Division Bench

Advocate: P.K. Balasubramonian and Jayakumar, for the Appellant; A.P. Chandrasekharan, for the Respondent

Judgement

Radhakrishna Menon, J.
The Petitioners in O.P. 181 of 1982 before the Additional District Judge, Trichur are the Appellants. This

application u/s 276 of the Indian Succession Act, 1925, for short The Succession Act, for letters of administration with the Will annexed, stands

dismissed by the order under challenge.

2. The genuineness of Ext. A-1, the Will executed by one Thandamma in favour of her brother"s son Lasar who was the husband of the first

Appellant and the father of the other Appellants, was under challenge in O.S. 84 of 1956 before the Additional Subordinate Judge of Trichur. That

was a suit instituted by two of the heirs of Thandamma (Lasar was the first Defendant in the said suit) for a declaration that Ext. A-1 Will was not

validly executed and also for a permanent induction restraining Lasar from dealing with the properties covered by the Will. The Subordinate Judge

after considering the various aspects of the issue, held as follows:

...The circumstances I have narrated show that the deceased has not a disposing mind on the date of Ext. D-1 (Ext. A-1 here) and that Ext. D-1

did not express the frue will of the deceased. In any view of the matter the circumstances narrated by me excite the suspicion of the Court as to the

genuineness of the Will. It is not removed by the evidence adduced in this case and so the Will cannot be accepted as that of a free and capable

testatorÃ¯Â¿Â½. I therefore find on this issue for the Plaintiff that the deceased Thanda was not possessed of a sound mind and disposing capacity in

executing the Will propounded by the 1st Defendant. I also find that the Will is invalid for the above reasons.

The appeal, A.S. 791 of 1959 filed by the first Defendant Lasar challenging the above finding was dismissed by this Court by judgment dated 7th

January 1964. Relevant portion therefrom is extracted hereunder:

Therefore, I am not satisfied that the evidence of D.W. 3 alone is sufficient to dispel the suspicion arising out of the circumstances surrounding the

execution of the Will. The result is the decision of the lower Court is confirmed and the appeal is dismissed with costs of the Plaintiff-Respondent.

The declaration discernible from the judgment aforesaid that Ext. A-1 Will is not genuine and hence not valid has become final. It could thus be

inferred from the above observation that Thandamma had not executed any Will. In other words she had died intestate.

3. It is in this background the question now raised before us namely, whether the judgment in O.S. 84 of 1956 would operate as res judicata and

consequently would disentitle the Appellants who are the legal representatives of Lasar, from obtaining the letters of administration. It is a well

established principal that the decision of a civil Court regarding the genuineness or otherwise of a Will under no circumstances operate as res

judicata in probate proceedings taken out in probate Court. A reference in this connection to judicial pronouncements Chinnasami and Anr. v.

Hariharabadra and Anr. ILR 16 Mad. 380, Jerbanoo Rustomji Garda Vs. Pootlamai Manecksha Mehta, and the latest ruling of this Court in A.S.

470 of 1973 Joseph v. Aleyamma 1978 K.L.T.S.N. 60 Case 139, is profitable. On going through these decisions it can however be seen that the

judgments of the civil Courts which were pressed into service to sustain the plea of res judicata, had not become final. To put it differently the

judgments of the civil Courts, relied on to sustain the plea of res judicata in these rulings, were under challenge in appeals. In other words it was

during the pendency of the appeals, the probate proceedings were being prosecuted in such cases as observed by Chagla, C.J., in Jerbanoo

Rustomji Garda Vs. Pootlamai Manecksha Mehta, , the decision as to the proof of the Will given by civil Court will not operate as res judicata in

probate proceedings taken out in the Probate Court. The said principle in our view cannot be extended to a case where the judgment of the civil

Court declaring that no genuine Will had been executed, has become final and consequently no Will was available to be appended with the petition

u/s 276 of the Succession Act. In such cases the document purported to be the Will does not exist in the eye of law on account of the declaration

of the Court of competent jurisdiction that the Will is not genuine.

4. Applying this principle to the facts of the case we are of the view that the petition for letters of administration is liable to be dismissed. In this

view of the matter the finding of the Court below that the proceeding is barred by res judicata is not sustainable.

The appeal for the reasons stated above is dismissed. No costs.