

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE P.R.RAMACHANDRA MENON

&

THE HONOURABLE MR.JUSTICE K.HARILAL

MONDAY, THE 9TH DAY OF NOVEMBER 2015/18TH KARTHIKA, 1937

MFA(PROBATE) No. 73 of 2015

(AGAINST THE ORDER IN I.A.NO.1348/2010 IN OP (PROBATE)
NO.118/1992 DATED 19/1/2015 ON THE FILES OF THE
ADDITIONAL DISTRICT COURT-I, THIRUVANANTHAPURAM.

APPELLANT/PETITIONER/COUNTER PETITIONER:

SARASAMMA AGED 83 YEARS
D/O.NANU, 'GOPA SARASS', DALAVAPURAM,
MUDIYAKODE DESOM, CHERUNNIYOOR VILLAGE

BY ADV. SRI.G.SREEKUMAR (CHELUR)

RESPONDENT/COUNTER PETITIONER/PETITIONER:

GOVINDARAJA BEN,
S/O.BALAN, SREELANKAPURI, MUDIYAKODE DESOM,
CHERUNNIYOOR VILLAGE-695 001.

THIS MISC. FIRST APPEAL (PROBATE) HAVING BEEN
FINALLY HEARD ON 13-10-2015, THE COURT ON 09-11-2015
DELIVERED THE FOLLOWING:

**P.R. RAMACHANDRA MENON &
K. HARILAL, JJ.**

M.F.A. (Probate) No. 73 of 2015

Dated this the 9th day of November, 2015

JUDGMENT

Harilal, J.

The appellant is the petitioner in I.A. No.1348/2010 in O.P. (Probate) No.118/1992 on the files of the Additional District Court-I, Thiruvananthapuram. The respondent is the petitioner in the above O.P. (Probate). The above application was filed by the appellant under Sec.263 of the Indian Succession Act (for short 'the Act') seeking revocation of the probate granted to the respondent under Sec.217 of the Act in the above O.P. (Probate). The parties are referred to as in the impugned order.

2. The appellant is a sibling of the testator by name Sri. Nanu Sahadevan, who has executed a Will on 19/3/1991 in favour of the respondent herein and the respondent is a nephew of the testator also. The testator died on 26/12/1991 at Singapore. The property scheduled to the Will is the only asset which he left at the time of his death. The contention raised in the above I.A. is that the Will alleged to have been executed by her brother Nanu Sahadevan, the then citizen of Singapore is concocted, forged and fake and the grant of probate is based on such a fraudulent Will. On the date of alleged execution of the Will, her brother Nanu Sahadevan was under treatment in her house. The civil suit as O.S. No.104/1990 and O.S.No.164/1992 were instituted by her against her siblings before the Civil Court, Attingal; but none of the parties to those litigations were impleaded in the O.P. (Probate) and an order granting probate is fraudulently and falsely secured in favour of the respondent in exclusion of the close

relatives. Therefore, the grant of probate is liable to be revoked in exercise of the jurisdiction and power under Sec.263 of the Act.

3. To substantiate the claim, the appellant was examined as P.W.1. The respondents produced and marked Exts.R1 to R3. After evaluating the evidence on record, the court below dismissed the I.A. and passed the impugned order mainly on a finding that the prayer in the above petition is barred by limitation, res judicata and bereft of bona fides and lacking merits. The legality and propriety of the findings whereby the court below dismissed the petition is under challenge in this appeal.

4. Heard the learned counsel for the appellant in extenso.

5. The learned counsel for the appellant advanced arguments contending that the court below failed to appreciate the facts, evidence and law in its correct perspective. It is contended that the court below went wrong by finding that the

application is barred by limitation and res judicata. The sum and substance of the argument is that the court below ought to have found that the alleged Will stated to have executed by the brother of the appellant is a concocted and fabricated document and based on the same, no probate ought to have been granted in favour of the respondent.

6. The point to be considered in this appeal is, whether the appellant has succeeded in proving any of the just causes explained under Clauses (a) to (e) of Sec.263 of the Act?

7. Going by the impugned judgment, it is seen that the court below has considered the question of limitation as a preliminary issue. Admittedly, the grant of probate was ordered on 15/6/1994 under Sec.217 of the Act. After considering the evidence on record, the court below observed that grant of probate was ordered after taking full-fledged evidence in the above O.P. (Probate). All movables and immovables and cash balance left by the

testator after his death were bequeathed in favour of the legatee, who is the respondent herein as per the Will. Though the grant of probate was ordered on 15/6/1994, this application for revocation of probate is filed in year 2010 only. It is true that the appellant was not made a party in the above O.P. (Probate). But, both the appellant and the respondent were parties in the civil suits, O.S. No.164/1992 and O.S. No.166/1992 filed by the appellant and got dismissed, which is evidenced by Ext.R2. After considering Ext.R2, the court below specifically observed that in all the suits referred above, the respondent herein has duly contended and propounded the disputed Will executed in his favour by the testator Sri. Nanu Sahadevan and his possession of the entire assets of the deceased eventual to his death on 26/12/1991. The court below specifically found that the appellant was very much aware of the Will executed by the deceased and the probate obtained by the legatee in O.P.

(Probate) No.118/1992, from the written statement filed by him on 23/8/1997 in O.S.No.104/1990 instituted by the appellant, As rightly held by the court below, obviously, the appellant was aware of the grant of probate to the respondent, at least, from 1997 onwards. But, the present application is filed in the year 2010 only i.e., after 13 years. Thus, the court below is justified in finding that the relief sought for in the application is barred by limitation.

8. Similarly, the appellant filed the above suits for declaration of right over the property bequeathed by the testator under the disputed Will for which the grant of probate was ordered by the court below. Both the appellant and the respondent were parties in the above suits and the subject matter in this application and the above referred suits are one and the same. The right to title of the subject matter is the matter in issue involved in both the suits and the present application. If that be so, the court below is justified in finding that the prayer in the application

is barred by res judicata also. The appellant miserably failed to prove any of the just causes explained under Clauses (a) to (e) of Sec.263 of the Act.

9. There is no illegality or impropriety in any of the findings and we do not find any kind of perversity in the appreciation of evidence from which those findings have arrived at. Thus, this appeal is bereft of bona fides and lacking merit.

Hence this appeal is dismissed accordingly.

Sd/-

(P.R. RAMACHANDRA MENON, JUDGE)

Sd/-

(K. HARILAL, JUDGE)

Nan/

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P.S. to Judge