



C.R.P.(MD)No.455 of 2023

BEFORE THE MADURAI BENCH OF MADRAS HIGH COURT

DATED : 02.06.2023

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THE HONOURABLE MR.JUSTICE C.SARAVANAN

C.R.P.(MD)No.455 of 2023

and

C.M.P.(MD)No.2172 of 2023

R.Venkateswaran

.. Petitioner

Versus

T.L.Harikrishnan

.. Respondent

Prayer :- Petition filed under Article 227 Constitution of India, against the fair and decreetal order dated 04.01.2023, passed in I.A.No.5 of 2022 in Probate O.P.No.160 of 2022, on the file of the II Additional District Court, Tiruchirappalli.

For Petitioner : Mr.M.Vallinayagam
Senior Counsel
for Mr.S.Balasubramanian

For Respondent : Ms.Sudharshana Sundar
for Mr.B.Ravi Raja

ORDER

This Civil Revision Petition has been filed against the fair and decreetal order dated 04.01.2023, passed in I.A.No.5 of 2022 in Probate O.P.No.160 of 2022, on the file of the II Additional District Court, Tiruchirappalli.



2. Heard the learned Senior Counsel for the petitioner and the learned counsel for the respondent, the Executor of the Will dated 27.09.2019 allegedly executed by the Testator Late.K.K.S.R.Rajagopalan on 27.09.2019.

3. As per the above said Will, the Testator Late.K.K.S.R.Rajagopalan had bequeathed the rights in favour of his daughter Jeevarathinam for life and thereafter, in favour of his granddaughter *i.e.*, the daughter of Jeevarathinam and the respondent herein.

4. The learned Senior Counsel for the petitioner submits that in Probate O.P.No.160 of 2022, the respondent herein/the Executor of the Will dated 27.09.2019, had given two addresses and that summons in the said O.P. was not served on the petitioner.

5. It is the further case of the petitioner that even if the petitioner had remained *ex parte* in Probate O.P.No.160 of 2022, in the petition filed for appointment of a Curator under Section 192 read with Section 269 of the Indian Succession Act, 1925, he was entitled to a notice, which was not served on him.

6. It is submitted by the learned Senior Counsel appearing for the petitioner that the preamble to the impugned order itself is unusual inasmuch as it states that



the petitioner had been set ex parte in the main petition and that no notice was required to be served on him.

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7.It is submitted that a notice ought to have been served on the petitioner in the petition filed for appointment of a Curator under Section 192 read with Section 269 of the Indian Succession Act, 1925. That apart, it is submitted that an application for appointing a Curator has to be filed within six months from the date of death of the Testator in terms of Section 205 of the Indian Succession Act, 1925. It is submitted that the Testator Late.K.K.S.R.Rajagopalan died on 06.02.2022. Therefore, I.A.No.5 of 2022 was filed on 19.10.2022 for appointing a Curator.

8.That apart, it is submitted that Section 269(2) of the Indian Successions Act, 1925 does not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate.

9.The learned Senior Counsel for the petitioner further submitted that there is exclusion in Section 269(2) of the Indian Succession Act, 1925, as each of the religions have different personal law of succession. That apart, the learned Senior Counsel for the petitioner further submitted that in the case of petition under Part-VII of the Indian Succession Act, 1925, the District Judge has to follow the procedure as contemplated in Section 194 of the Indian Succession Act, 1925.



10.It is submitted that under Section 193 of the Indian Succession Act, 1925, the District Court in the first place has to examine the applicant on oath, and may make such further inquiry, if any, whether there are sufficient grounds for believing that the party in possession has no lawful title and that the applicant or the person on whose behalf he applies is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a suit and that the application is made *bona fide*.

11.It is submitted that before passing order for appointing a Curator under Chapter – VII of the Indian Succession Act, 1925, a notice has to be given to the person, who is in possession of the property, although such a person is respondent in the main O.P. It is further submitted that in case of land, the Judge can delegate to the Collector or to any officer subordinate to the Collector, the powers of a Curator and that every appointment of a Curator in respect of any property shall be duly published. In this case, neither a notice was issued nor a publication was made as it contemplated. It was only after the Curator appointed by the learned II Additional District Judge, Tiruchirappalli, the petitioner came to know about the passing of impugned order. It is submitted that only after the above communication, the petitioner even came to know that Probate O.P.No.160 of 2022 had been filed by the respondent in his capacity as Executor of the Will, purportedly executed by Late.K.K.S.R.Rajagopalan on 27.09.2019.



12. That apart, it is submitted that Late.K.K.S.R.Rajagopalan has also executed a subsequent Will in favour of the petitioner on 15.01.2022 before his death on 06.02.2022 and therefore, even on this count, the question of appointing a Curator cannot be countenanced, as the earlier Will allegedly executed by Late.K.K.S.R.Rajagopalan on 27.09.2019 loses its validity. Hence, Probate O.P.No. 160 of 2022 and I.A.No.5 of 2022 ought to have been dismissed.

13. The learned counsel for the Executor of the Will submitted that a notice in both the Probate O.P. and in I.A. for appointment of Curator was given to the petitioner. However, the petitioner failed to appear. It is submitted that even if the Will dated 27.09.2019 is not ultimately proved in accordance with law, the petitioner at best can have a right for only 1/4th share among other legal heirs of Late.K.K.S.R.Rajagopalan. Therefore, the respondent cannot corner the income from the properties to the exclusion of other legal heirs of Late.K.K.S.R.Rajagopalan.

14. It is submitted that all the properties are now under the control of the petitioner and the petitioner alone is enjoying the benefit to the exclusion of the beneficiary under the Will, dated 27.09.2019 as also the legal heirs. Therefore, even if the application filed for appointment of a Curator is barred under Section 205 of the Indian Succession Act, 1925, the Court can protect the interest of the parties by upholding the order passed by the learned II Additional District Judge,

Tiruchirappalli.



15.The learned counsel for the respondent has drawn the attention of this Court to Paragraph 10 of the decision of the Calcutta High Court in **Atula Bala Dasi and others vs. Nirupama Devi and another** reported in **AIR 1951 Cal 561**, wherein the Calcutta High Court had decided to treat the execution petition as an application for appointment of an Administrator *pendente lite*. Paragraph No.10 of the said decision reads as under:-

"10. In view of the lapse of time as also the particular facts of this case, we do not think that the opposite parties should be directed to make a fresh petition for the appointment of an administrator pendente lite. The order passed by the learned Dist. J. staying proceedings in execution must be set aside, but the petition on which that order was passed will be treated as an application for the appointment of an administrator pendente lite & the court will proceed to deal with the application on the merits, keeping in view the principles indicated above. It will be open to the opposite parties to file an additional petition giving further particulars in support of the prayer for the appointment of an administrator pendente lite if they are so advised. The D. Hs. who are the petitioners before this Court will also be allowed to file objections to the same & be given a hearing."

16.That apart, the learned counsel for the respondent has drawn the attention to Section 247 of the Indian Succession Act, 1925 and submitted that the Court may appoint an administrator of the estate of such deceased person, who shall have all the rights and powers of a general administrator, other than the right of distributing such estate, and every such administrator shall be subject to the immediate control of the Court and shall act under its direction.

17.That apart, the learned counsel for the respondent further submits that the



Curator appointed by the Court vide the impugned order, has done substantial work and therefore, the respondent may be permitted to pay the remuneration to the Curator.

18.The learned counsel for the respondent has drawn the attention of this Court to Paragraph No.6 of the affidavit filed in support of the Civil Miscellaneous Petition to state that the averments contained therein are incorrect, inasmuch as the Testator died on 06.02.2022 and that the Will, which has been executed in favour of the petitioner, according to the petitioner, on 15.01.2023.

19.Per contra, the learned Senior Counsel appearing for the petitioner submits that there is a typographical error in the date mentioned in Paragraph No.6 of the affidavit and the Will is actually dated 15.01.2022.

20.The learned Senior Counsel appearing for the petitioner further submits that Section 247 of the Indian Succession Act, 1925 will apply only under the circumstances, where no Executor is named in the Will. He further submits that in rarest of rare cases, the Administrator may be appointed under Section 247 of the Indian Succession Act, 1925, where the Executor appointed by the Testator fails to discharge the duty or is found lacking in any other aspects.

21.I have considered the arguments advanced by the learned Senior Counsel appearing for the petitioner and the learned counsel for the respondent.



22.The issue in this Civil Revision Petition was the subject matter of Tr.C.M.P. (MD)Nos.164 and 165 of 2023, whereby Probate O.P.No.160 of 2022 has been directed to be transferred and tried along with O.S.No.29 of 2023 filed by one of the daughters of the Testator namely, R.Jeyagowri, to partition the property on 28.04.2023.

23.At the outset, it is to be noticed that invocation of Section 269 of the Indian Succession Act, 1925 was not available to the respondent in view of specific exclusion in Sub-Section 2 of Section 269 of the Indian Succession Act, 1925. Section 269 of the Indian Succession Act, 1925 reads as under:-

"269. When and how District Judge to interfere for protection of property.-

(1) Until probate is granted of the Will of a deceased person, or an administrator of his estate is constituted, the District Judge, within whose jurisdiction any part of the property of the deceased person is situate, is authorised and required to interfere for the protection of such property at the instance of any person claiming to be interested therein, and in all other cases where the Judge considers that the property incurs any risk of loss or damage; and for that purpose, if he thinks fit, to appoint an officer to take and keep possession of the property.

(2) This section shall not apply when the deceased is a Hindu, Muhammadan, Buddhist, Sikh or Jaina or an exempted person, nor shall it apply to any part of the property of an Indian Christian who has died intestate."

24.The admitted position is that Probate O.P.No.160 of 2022 was filed on 02.03.2022 after the death of the Testator Late.K.K.S.R.Rajagopalan on 06.02.2022.



In terms of Section 205 of the Indian Succession Act, 1925, an application for appointment of a Curator has been filed within a period of six months from the date of death of the Proprietor whose property is claimed to be in possession of another person. Thus, the application in I.A.No.5 of 2022 filed on 19.10.2022 was clearly barred under law. Therefore, the impugned order cannot be sustained. That apart, there are some contradictions in the impugned order inasmuch as it states that the petitioner has been set *ex parte*, but he was heard before passing the impugned order.

25.It is the specific case of the petitioner that he was not given notice before passing of the impugned order and that he came to know about the impugned order only after the Curator was appointed by the Court, vide the impugned order, dated 04.01.2023 and it is at that stage, the petitioner came to know that Probate O.P.No. 160 of 2022 was filed by the respondent before the II Additional District Court, Tiruchirappalli.

26.*Prima facie*, Section 247 of the Indian Succession Act, 1925 does not apply when no Executor is appointed in a Will. Here, although two rival Wills are there, genuinity of the respective Wills are required to be tested in the Court. Considering the fact that the Curator appointed has purportedly rendered substantial service, the respondent can file a Memo before the II Additional District Court, Tiruchirappalli, in Probate O.P.No.160 of 2022 giving the particulars for payment of remuneration to



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the Curator so appointed. The respondent shall pay the amount so ordered to be paid to the Curator. This amount shall be later borne equally by all the parties to Probate O.P.No.160 of 2022.

27.But, for the above observations, the order passed by the learned II Additional District Judge, Tiruchirappalli, in I.A.No.5 of 2022 in Probate O.P.No.160 of 2022, dated 04.01.2023, cannot be sustained. It is also open for the respondent to file appropriate application under Order XL of C.P.C. for appointment of a Receiver. The petitioner shall also co-operate in the said proceedings.

28.This Civil Revision Petition stands allowed accordingly. No costs. Consequently, connected Miscellaneous Petition is closed.

NCC : Yes/No
Index : Yes/No
Internet : Yes/No
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02.06.2023

To

The II Additional District Judge,
Tiruchirappalli.



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C.SARAVANAN, J.

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Order made in
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