1950 *Present* : **Nagalingam J. and Swan J.**

KUMARAJEEVA, Appellant, *and* SUSANA FERNANDO *et al.*, Respondents

S. C. 23—D. C. (Inty.) Negombo, 3,493

Will—Probate—Right of executor is paramount.

The Court cannot refuse to grant the probate of a will to a person appointed executor on the ground of refusal by the executor to include certain disputed moneys as forming part of the estate.

APPEAL from an order of the District Court, Negombo.

N. E. Weerasooria, K.C., with *C. V. Ranawake*, for the petitioner appellant.

H. V. Perera, K.C., with *E. G. Wikramanayake, K.C.*, and *Vernon Wijetunge*, for the 3rd respondent.

Cur. adv. vult.

December 11, 1950. NAGALINGAM J.—

This is an appeal from an order of the learned District Judge of Negombo granting letters of administration with the will annexed to the 3rd respondent in preference to the claim of the petitioner who is the executor named in the will.

That the Court has the power to pass over an executor for good reason is a proposition that must necessarily flow from the Divisional Bench judgment of this Court in *Setukavalar v. Alvapillai* [1] by reason of the interpretation placed by the Court on the words " shall be preferred to all others " which were held to vest impliedly such a power in the Court. The case itself was one where the Court was invited to express its opinion

[1] *(1934) 36 N. L. R. 281.*

as to whether the claim of a widow or widower should be passed over in favour of another person. That was a case of intestacy, and it is the Court that appoints the administrator in such a case. The duty, therefore, is cast upon the Court to satisfy itself that the person it proposes to appoint as administrator of the estate of a deceased person is one who is fit and proper to carry out and discharge those duties faithfully and in accordance with the trust imposed by the office. Under those circumstances, that a Court has a large discretion and large powers to investigate the suitability of a claimant for letters of administration cannot be doubted, but in the case of a testacy and where the testator expressly appoints an executor to carry out his wishes embodied in his last will, a Court cannot be said to have any large discretion or broad powers to examine minutely the credentials of such an appointee.

A testator's right to dispose of his property in any way that he may think proper or to appoint any man with any history to the office of an executor cannot be questioned by a Court. The only case that I can think of where an executor may be passed over by Court in favour of another person is where the executor appointed becomes *non compos mentis* and incapable of taking upon himself the very office of executor. An utterly unworthy man is one who in the opinion of the majority of people or of mankind in general is regarded as such. But so far as the family of that utterly unworthy man may be concerned, he may be the best person to protect the rights and their interests, so that if a testator chooses to appoint one who by ordinary standards is unworthy of trust, such an appointment would not necessarily invoke the disapprobation of Court to the extent of denying to him the right conferred on him by the testator, who is the sole and exclusive authority to appoint an executor to carry out his testament. I would emphatically say that the Court has no right to ignore or supersede the appointment made by a testator. That would be to substitute for the testator's mind the mind of the Court—a course totally indefensible.

In this case, the appellant sought to have the will admitted to probate; he claimed probate as the executor named therein. He is a man of maturity, a man possessed of wealth, and is the eldest son-in-law of the deceased ; and he has been described by a witness called by the contesting respondent as one who is quite capable of managing the estate and who would honestly administer the estate. He no doubt is not a beneficiary under the will. The three beneficiaries are the three children of the deceased who are the three respondents, the first of whom is the wife of the appellant, the third of whom is also a daughter and the youngest of the respondents, while the 2nd respondent is a son. The 1st and 2nd respondents do not oppose the application of the petitioner for grant of probate, while it is the 3rd respondent who opposes it.

The ground of opposition to the grant of probate is that two mortgage bonds standing in the name of the 1st respondent had not been included by the petitioner among the assets of the deceased in the schedule to the petition. It is said by the contesting respondent that those are bonds held by the 1st respondent in trust for the estate as the moneys lent thereon belonged to the deceased and were lent by the deceased himself

though the bonds were taken in the name of the 1st respondent by him. There is a vague suggestion that the bonds were so taken by him in the name of the 1st respondent to evade a payment of income-tax. The petitioner denies that the two bonds referred to form part of the estate and assert that those bonds are truly the property of his wife and that the moneys invested thereon were the moneys of his wife though lent out by the deceased. The ground of opposition, therefore, has no reference whatsoever to the fitness of the appellant to administer the estate but rather relates to a dispute as to whether certain moneys should be treated as forming part of the estate or not. The learned Judge himself has quite properly expressed the view that this dispute " is a matter for adjudication by a competent Court " but he has unwittingly misdirected himself when he observes that the petitioner is disentitled to be appointed executor as the petitioner " has made up his mind not to make any effort to recover moneys due on bonds the beneficial interest in which is alleged was with the deceased " ; for this observation proceeds on the assumption even before an adjudication by a competent Court has taken place, that the beneficial interest in the bonds was in fact in the deceased.

It is the function of an executor to collect all the assets of the estate and it is for him to decide what are and what are not the assets, particularly where property is claimed either by an heir or a third party as not forming part of the estate. Should an executor decide wrongfully and unlawfully to recover assets of the estate, he would be liable to the heirs as he would be guilty of *devastavit*. It is also the duty of an executor not to fritter away an estate in unprofitable litigation on the mere allegation of an heir that certain property in the possession of a third party, whether he be an heir or a stranger to the estate, is property that forms part of the assets. Such an allegation is not so conclusive as to make it incumbent upon an executor to pursue the recovery without interposing his will. The law permits him to exercise his own judgment, and where he exercises that judgment wrongly and the Court is satisfied that not merely did he exercise that judgment wrongly but that he acted *mala fide* and in collusion with the third party in not collecting those assets, he would be liable to make good the value of such property whether in fact he recovers it or not.

The whole of the inquiry before the learned District Judge was with regard to the question whether the two bonds did form part of the estate of the deceased or not. This is a question that can properly be raised by an heir by challenging the correctness of the inventory filed by the executor or even at a later stage of the proceedings by other proceedings: *Nagahawatte v. Wettasinghe* [1]. But to make this question the sole pivot for a determination as to the fitness or otherwise of the executor to carry out the confidence reposed in him by the testator is a proceeding entirely unwarranted in law.

I do not wish to express any opinion as regards the sufficiency or otherwise of the evidence led in this case, nor as regards the legal principles that should be considered to reach the conclusion whether the bonds referred to in fact form part of the estate or not, as this question may

[1] *(1921) 23 N. L. R. 70.*

yet have to be adjudicated upon. It is, however, sufficient to say that the difference of opinion between the executor and an heir as to whether a particular property should or should not form part of the assets of an estate cannot form the foundation for an order refusing the claim of an executor to be appointed such. In fact Counsel have not been able to cite a single case where the appointment by a testator of an executor has been refused to be recognised by Court. Williams, in his well-known treatise [1], states the law in very emphatic terms :—

> " The Court cannot refuse to grant the probate of a will to a person appointed executor on account of his poverty or insolvency. "

He does not refer to any circumstance such as the refusal of an executor to include disputed assets as ever having formed a ground upon which to reject the claim of an executor. He however, cites cases where the Court of Chancery has controlled the actions of an executor who has become insolvent or bankrupt by appointing a receiver. The proposition therefore, seems to be clear that the right of an executor to be granted probate of the will is paramount. I do not therefore think that the claim of the executor in the circumstances of this case should not have been upheld.

I set aside the order of the District Judge and direct the issue of probate to the executor. The appellant will be entitled to the costs of appeal and of the proceedings had in the lower Court.

SWAN J.—I agree.

Appeal allowed.