Clarence Pais & Ors vs Union Of India on 22 February, 2001

Equivalent citations: AIR 2001 SUPREME COURT 1151, 2001 (4) SCC 325, 2001 AIR SCW 890, (2001) 3 JT 82 (SC), 2001 (1) UJ (SC) 567, 2001 UJ(SC) 1 567, 2001 (3) JT 82, 2001 (2) BLJR 1177, 2001 (2) SCALE 184, (2001) 1 MARRILJ 485, 2001 (1) LRI 753, 2001 (3) SRJ 463, 2001 (2) ALL CJ 1137, 2001 ALL CJ 2 1137, 2001 BLJR 2 1177, 2001 (1) MARR LJ 485, (2001) ILR (KANT) (2) 5051, (2001) 1 ANDH LT 712, (2001) 1 KER LJ 936, (2001) 3 MAD LJ 43, (2001) 1 SCJ 465, (2001) 2 RECCIVR 184, (2001) REVDEC 272, (2001) 2 RAJ LW 177, (2001) 2 ANDHLD 87, (2001) 2 SUPREME 127, (2001) 2 SCALE 184, (2001) WLC(SC)CVL 233, (2001) 43 ALL LR 249, (2001) 2 BLJ 45, (2001) 2 CIVLJ 260, (2001) 1 KER LT 860

Bench: S. Rajendra Babu, R.C. Lahoti

CASE NO.:
Writ Petition (civil) 137 of 1997
Writ Petition (civil) 674 of 1998

PETITIONER:
CLARENCE PAIS & ORS.

Vs.

RESPONDENT:
UNION OF INDIA

DATE OF JUDGMENT: 22/02/2001

BENCH:
S. Rajendra Babu & R.C. Lahoti

JUDGMENT:

J U D G M E N TL...I...T.....T.....T.....T.....T.....T.....T..J RAJENDRA BABU, J. :

These two writ petitions have been filed challenging the validity of Section 213 of the Indian Succession Act, 1925 (hereinafter referred to as the Act] as unconstitutional and to restrain the Union of India from enforcing the provisions thereof against the Indian Christians.

In Writ Petition (C) No. 137 of 1997, petitioner No. 1 is an Indian Christian and a citizen of India. He has been in the legal profession for about 48 years, and on account of experience gained in having appeared in many probate cases and had occasions to obtain probate of his fathers Will, his experience has made him decide to file this writ petition. Petitioner No.2 is a Catholic Association of Dakshina Kannada, Karnataka. It is submitted that the effect of taking out probate of a Will is to establish the genuineness or validity of the Will and the grant of probate is not a condition precedent to the vesting of the estate in the executor in light of the provisions of Section 211 of the Act. Section 211 of the Act provides for vesting of the property in the executor or administrator, as the case may be, of a deceased person in his legal representative for all purposes. However, when the deceased is a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi nothing contained in the Act shall vest in an executor or administrator any property of the deceased person, which would otherwise have passed by survivorship to some other person. Section 213(1) requires that no right as executor or legatee under a Will can be established in a Court of Justice without obtaining probate or letters of administration of the Will under which such right is sought to be established. Section 57 of the Act makes it clear that the provisions of that part which are set out in Schedule III subject to the restrictions and modifications specified therein, shall apply to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina after the first September, 1870 who are originally residents in the jurisdiction of the High Courts of Judicature at Madras and Bombay or subject to the jurisdiction of Lieutenant Governor of Bengal and to all such Wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits and to all Wills and codicils made by any Hindu, Buddhist, Sikh or Jaina on or after the first day of January, 1927 to which those provisions are not applied by clause (a) and (b), provided that marriage shall not revoke any such Will or codicils. In view of the aforesaid provisions, there is compulsory requirement of probating a Will to establish such a right by virtue of the provisions of Section 213 which is made applicable and is restricted to Indian Christians and certain other categories of persons professing Hindu and other faiths. The contention of the petitioner is that there is no rational or discernible basis for making the requirement of probate necessary for only a limited section of Indian citizens such as Indian Christians excluding other sections. The Indian Succession Act, 1925 repealing the Indian Succession Act, 1865 was enacted by Parliament with a view to consolidate the law applicable to intestate and testamentary succession in India and, as a consequence no intentional change in the law was made at that stage. While no distinction is made with respect to establishing a right to property of a person dying intestate belonging to different communities and professing different faiths, Christians alone are subjected to this requirement.

In Writ Petition (C) No. 674 of 1998 petitioner is an Indian Christian who belongs to Roman Catholic community residing in the State of Kerala. The petitioner was the sole beneficiary of a registered Will dated 15.12.1986 executed by his aunt Mrs. Lissa Jos Arakal owner of a flat No. 5, Ashiana Apartment, Pitam Pura, Delhi. She was a

Christian and she remained unmarried till her death. Out of love and affection towards the petitioner she executed a Will on 15.12.1986 bequeathing her entire rights in respect of the said flat in favour of the petitioner. She died on 9.8.1991 at Lourdes Hospital, Kochi. The petitioner received a letter in August 1993 from the Secretary of M/s Loyola Co- operative Housing Society, Ashiana Apartments, Road No. 41, Pitam Pura, Delhi stating that the committee of the Society had decided not to hand over the flat to him without any court direction. The petitioner also informed the Society not to transfer the said flat to any one else other than himself. However, he received a reply from the Society stating that Mr. Barley Arakal is the nominee of the testatrix as per their record and as such since there is a dispute regarding the property the status quo will be maintained until further orders. It is stated that the petitioner is not in a position to establish his legal right over the property in question or to obtain any relief from the court on account of the fact that he is a Christian who is bound by the restriction provided under Section 213 of the Act and since Section 213 of the Act comes in the way of exercising his right, the petitioner is challenging the validity of the said provision for identical reasons as set forth in the connected writ petition. It is also brought to our notice in these proceedings that in view of the harsh procedure contemplated in the provisions under challenge the Kerala Legislature has enacted an amendment known as Indian Succession (Kerala Amendment) Act, 1986 dated 14.3.1997 by which sub-section (2) of Section 213 of the Act has been amended to the effect that after the word Muhammadans the words or Indian Christians shall be inserted. It is thus evident from this provision that it would apply to the State of Kerala in respect of the property held by the deceased but it is not clear whether the amendment would apply to the property of a testator who belongs to the State of Kerala in respect of the property situated outside the State of Kerala, as in the present case. The petitioner points out the anomaly arising in the law. Thus a Christian residing in the State of Kerala owning property therein if dies after making a Will, the legatee thereto need not to obtain a probate in terms of Section 213 of the Indian Succession Act before establishing their right, while those residing in other parts of the country are required to do so. The anomaly pointed out by the petitioner is that the Will is made in respect of a property situate in some part of the country other than Kerala.

The defence taken by the Government of India is that the members of the Christian community are not put to any discrimination and they are compelled to obtain probate or letters of administration of the Wills only by way of rule of evidence and procedure and it is intended to provide for a right of means of establishing the genuineness of a Will conclusively. So far as marriage and divorce, infants and minors, adoption, wills, intestacy and succession, joint family and partition and all matter in respect of which parties in judicial proceedings were immediately before the commencement of the Constitution subject to their personal law, it is open to the State Legislatures to undertake any legislation of the nature of Section 213 of the Act. The State Governments bring in changes in personal law from time to time as per the social conditions prevailing in the particular States. Therefore, the amendment made in the State of Kerala would not discriminate the persons residing in other parts of the country. The contention is that the classification has achieved social acceptance

as is evident from the fact that it has been in existence in the statute book for a quite long time and it is not established that how such classification in the statute suffers in any manner from discrimination, and the provisions being procedural in nature are intra vires to the Constitution. It is further submitted that the Central Government has been consistently following a policy of non-interference in the personal laws of the minority communities unless the necessary initiative for amendments or repeal from a majority or sizable cross- section of the community arises.

On several representations having been made in this regard by the Christian community in India amendment was sought to be introduced by way of a Bill to amend Section 213 of the Act to bring Christians at par with other communities who are not required to obtain probate. The grievance of the petitioners in these cases, it is stated, is well brought out in the Statement of Objects and Reasons dated May 13, 1942 in respect of proposed amendment of Section 213 which reads as under:-

> Prior to 1901, Indian Christians laboured under a serious grievance, namely, that they were compelled to obtain probate of wills and letters of administration with liability to pay death duties on the death of every owner of property under the Indian Succession Act X of 1865, while Hindus and Muslims were exempt from the provisions of the Act. They have since been partially relieved by being placed practically on the same footing as their non-Christian countrymen in cases of intestacy under the Indian Christian Estates Administration Act VII of 1901; but where the deceased has left a will, they are still bound to obtain probate and pay probate duty as required by section 213 of the Indian Succession Act XXXIX of 1925, a section which does not apply to will of Hindu, Buddhists, Sikhs or Jains except where such wills are of the class specified in clauses (a) and (b) of section 57 and to all wills of Muhammadans.
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> The necessity of making wills has been imposed upon Indian Christians by the provisions of the Indian Succession Act as to intestate succession being made applicable to them, which are far in advance of their usages and are derived from English law. It is felt as a serious hardship that in such circumstances Indian Christians should be compelled to obtain probate and should be made liable to pay death duties while their non-Christian countrymen to whom wills are a luxury are exempt. From this injustice they should be relieved by placing Indian Christians on the same footing as Hindus and Muhammadans in Sections 213 and 370 of the Act.
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> Sections 57 and 213 of the Act provide as follows :
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> 57. Application of certain provisions of Part to a class of wills made by Hindus, etc. The provisions of this Part which are set out in Schedule III shall, subject to the restricts and modifications specified therein, apply
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> (a) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of September, 1870, within the territories which at the said date were

subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary original civil jurisdiction of the High Courts of Judicature at Madras and Bombay; and

(b) to all such wills and codicils made outside those territories and limits so far as relates to immovable property situate within those territories or limits; and

(c) to all wills and codicils made by any Hindu, Buddhist, Sikh or Jaina, on or after the first day of January, 1927, to which those provision:

Provided that marriage shall not revoke any such will or codicil.

Section 213. Right as executor or legatee when established. (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the will under which the right is claimed, or has granted letters of administration with the will or with a copy of a authenticated copy of the will annexed.

(2) This section shall not apply in the case of the wills made by Muhammadans, and shall only apply-

(i) in the case of wills made by any Hindu, Buddhist, Sikh or Jaina where such wills are of the classes specified in clauses (a) and (b) of section 57; and

(ii) in the case of wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962, where such wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay and where such wills are made outside those limits, in so far as they relate to immovable property situate within those limits.

Hindu Wills Act, 1870 is the forerunner of Section 57 of the Act. This Section without the proviso together with Schedule III except Article (5) is Section 2 of Hindu Wills Act, 1870 as amended by Section 154 of the Probate and Administration Act, 1881. The proviso is proviso to Section 3 of the Hindu Wills Act. Thus, the scheme of the said enactment is retained in Section 57 of the Act.

The scope of Section 213(1) of the Act is that it prohibits recognition of rights as an executor or legatee under a will without production of a probate and sets down a rule of evidence and forms really a part of procedural requirement of the law of forum. Section 213(2) of the Act indicates that its applicability is limited to cases of persons mentioned therein. Certain aspects will have to be borne in mind to understand the exact scope of this section. The bar that is imposed by this section is only in respect of the establishment of the right as an executor or legatee and not in respect of the establishment of the right in any other capacity. The section does not prohibit the will being looked into for purposes other than those mentioned in the section. The bar to the establishment of the right is only for its establishment in a court of justice and not its being referred to in other

proceedings before administrative or other Tribunal. The section is a bar to everyone claiming under a will, whether as plaintiff or defendant, if no probate or Letters of Administration is granted. The effect of Section 213(2) of the Act is that the requirement of probate or other representation mentioned in sub-section (1) for the purpose of establishing the right as an executor or legatee in a court is made inapplicable in case of a will made by Muhammadans and in the case of wills coming under Section 57(c) of the Act. Section 57(c) of the Act applies to all wills and codicils made by any Hindu, Buddhist, Sikh or Jain, on or after the first day of January, 1927 which does not relate to immovable property situate within the territory formerly subject to the Lieutenant-Governor of Bengal or within the local limits of the ordinary civil jurisdiction of the High Courts of Judicature at Madras and Bombay, or in respect of property within those territories. No probate is necessary in the case of wills by Muhammadans. Now by the Indian Succession [Amendment] Act, 1962, the section has been made applicable to wills made by Parsi dying after the commencement of the 1962 Act. A combined reading of Sections 213 and 57 of the Act would show that where the parties to the will are Hindus or the properties in dispute are not in territories falling under Section 57(a) and (b), sub-section (2) of Section 213 of the Act applies and sub-section (1) has no application. As a consequence, a probate will not be required to be obtained by a Hindu in respect of a will made outside those territories or regarding the immovable properties situate outside those territories. The result is that the contention put forth on behalf of the Petitioners that Section 213(1) of the Act is applicable only to Christians and not to any other religion is not correct.

We have shown above that it is applicable to Parsis after the amendment of the Act in 1962 and to Hindus who reside within the territories which on 1.9.1870 were subject to the Lt. Governor of Bengal or to areas covered by original jurisdiction of the High Courts of Bombay and Madras and to all wills made outside those territories and limits so far as they relate to immovable property situate within those territories and limits. If that is so, it cannot be said that the section is exclusively applicable only to Christians and, therefore, it is discriminatory. The whole foundation of the case is thus lost. The differences are not based on any religion but for historical reasons that in British Empire in India, probate was required to prove the right of a legatee or an executor but not in Part B or C States. That position has continued even after the Constitution has come into force. Historical reasons may justify differential treatment of separate geographical regions provided it bears a reason and just relation to the matter in respect of which differential treatment is accorded. Uniformity in law has to be achieved, but that is a long drawn process. Undoubtedly, the States and Union should be alive to this problem. Only on the basis that some differences arise in one or other States in regard to testamentary succession, the law does not become discriminatory so as to be invalid. Such differences are bound to arise in a federal set up.

The learned counsel for the Petitioners relied on the decisions in B.Venkataramana vs. State of Madras & Anr., AIR 1951 SC 229, Sheokaransingh vs. Daulatram, AIR 1955 Raj. 201, State of Rajasthan & Ors. vs. Thakur Pratap Singh, AIR 1960 SC 1208, Mrs.Hem Nolini Judah vs. Mrs. Isolyne Sarojbashini Bose, 1962 Supp.(3) SCR 294, Mary Sonia Zachariah vs. Union of India, 1995(1) KLT 644, Ahmedabad Women Action Group (AWAG) & Ors. vs. Union of India, 1997 (3) SCC 573 and Preman vs. Union of India, 1998(2) KLT 1004. However, in the light of the above conclusion, it is unnecessary to refer to those decisions though some of them may have bearing in analysing and understanding the scope of the provisions which are made applicable exclusively to

Christians as it happened in the case of Section 118 of the Act or in the case of the Indian Divorce Act. Therefore, we have not adverted to any one of these provisions. If Christians alone had been discriminated against by treating them as a separate class, we think the argument could have been understood and merited consideration.

In that view of the matter, we do not think there is any merit in these petitions and the same stand dismissed@@ JJJJJJJJJJJJJJJJJJJJJJJJJJJ accordingly. No costs.@@ JJJJJJJJJJJJJJJJJJJJJJ S. RAJENDRA BABU R.C. LAHOTI February 22, 2001.