

(2013) 12 AP CK 0111
In the Andhra Pradesh High Court
Case No : L.P.A. No. 192 of 2001

Anantharaju Venkata Seshamma

APPELLANT

Vs

Rajupalem Seshavataram (died) and Others

RESPONDENT

Date of Decision : 16-12-2013

Acts Referred:

Citation : (2014) 4 ALD 316

Hon'ble Judges : M.S.K. Jaiswal, J; L. Narasimha Reddy, J

Bench : Division Bench

Advocate : V.L.N.G.K. Murthy, for the Appellant; K.A. Narasimham for Respondents 2 and 4, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy, J.—This appeal is filed by the sole plaintiff in O.S. No. 3 of 1977 on the file of the Subordinate Judge, Chirala. The suit was filed for the relief of partition and separate possession in respect of items 1, 2 and 3 of plaint A-schedule properties, against the defendants. The plaintiff presented the suit as an indigent person, and after due enquiry, the trial Court accorded permission. The trial Court passed a preliminary decree, through its judgment, dated 30.06.1989. Aggrieved by that, defendant No. 3, his sons - defendants 7, 8 and 9 preferred A.S. No. 1994 of 1989. A learned Single Judge of this Court allowed the appeal, through his judgment, dated 27.03.2000, and has set aside the preliminary decree passed by the trial Court. Hence, this L.P.A. For the sake of convenience, the parties herein are referred to as arrayed in the suit.

2. Sri Koniki Subba Rayudu and his wife Ranganayakamma had three sons, viz., Seshagiri Rao, Adiseshayya and Sheshavataram (defendant No. 3) and two daughters, by name, Rajamma and Laxmamma. Ranganayakamma had a sister, by name Seethamma. Seethamma is said to have gifted item No. 3 of suit schedule in favour of Ranganayakamma, through a deed of settlement, dated 09.09.1926. Ranganayakamma, in turn, executed a deed of settlement, dated 11.04.1931 (Ex. A. 1), creating life interest in favour of her daughter -

Laxmamma and the vested remainder in equal shares in favour of her two sons ? Adiseshayya and Sheshavataram. Here itself, it is necessary to mention that Sheshavataram was given in adoption to one Sri Rajupalepu Anjaneyulu and Seethamma. Seshagiri Rao died issueless. The plaintiff is the daughter of Adiseshayya, through his first wife, who is said to have died at the tender age of the plaintiff. The 1st defendant is the second wife of Adiseshayya and defendant No. 2 is her daughter. Adiseshayya was the absolute owner of items 1 and 2 of the suit schedule properties. He executed a deed of settlement, dated 07.04.1945 (Ex. A. 2), creating life interest in respect of both the items in favour of his sister - Laxmamma and retaining vested remainder in himself. It so happened that Adiseshayya died in the year 1952, whereas Laxmamma was alive till 1976.

3. Claiming that herself and defendants 1, 2 and 3 became entitled to the respective shares on account of the death of Laxmamma and by operation of succession on account of the death of Adiseshayya, the plaintiff filed the suit claiming half share in items 1 and 2 and one-fourth share in item 3 of the suit schedule.

4. The contest to the suit was mainly by defendant No. 3. He did not dispute various dispositions pleaded by the plaintiff. However, it is stated that his brother - Adiseshayya i.e. father of the plaintiff executed a Will, dated 26.04.1951 (Ex. B. 5) bequeathing all his movable and immovable properties in his favour, and that the suit filed by the plaintiff is without any basis. He has also stated that the 1st defendant i.e. second wife of Adiseshayya filed O.S. No. 88 of 1953 against him, for the relief of possession of certain properties, and in his defence, he relied upon Ex. B. 5. A compromise decree (Ex. B. 26) on 31.08.1951 is said to have been passed therein and that the burden to perform the marriage and to otherwise maintain the plaintiff was placed upon Defendant No. 1.

5. The trial Court disbelieved Ex. B. 5, and passed a preliminary decree. On appeal, learned Single Judge, however, reversed that finding and held that Ex. B. 5 is proved, since it was acted upon O.S. No. 88 of 1953. Certain other reasons were also furnished.

6. Sri V.L.N.G.K. Murthy, learned counsel for the plaintiff, submits that the view taken by the learned Single Judge, accepting Ex. B. 5 cannot be sustained in law. He contends that at no point of time, any person connected with Ex. B. 5 was examined, and the mere fact that a mention was made to it, in Ex. B. 26 i.e. compromise decree in O.S. No. 88 of 1953, to which the plaintiff herein is not a party, does not lead to any conclusion that the Will can be taken as proved. He submits that there are any number of suspicious circumstances surrounding the Will. He contends that by the time Adiseshayya breathed his last, he had the plaintiff, who was aged 7 or 8 years; the 1st defendant, his second wife, aged about 18 to 19 years; 2nd defendant, an infant through defendant No. 1, and that no prudent person in the place of Adiseshayya would have thought of bequeathing all his properties, in favour of a brother, that too, who was given in

adoption, pushing the family comprising of a widow and two minor children, to penury. He submits that the learned Single Judge was mostly impressed by the fact that long time gap intervened between the date of death of Adiseshayya and filing of the suit, and the same is immaterial, since the plaintiff had to wait, till the person in whom the life interest is created, is no more. It is also pleaded that the principles of law applied by the learned Single Judge are not at all relevant for the purpose of this case.

7. Sri K.A. Narasimham, learned counsel for the 3rd defendant, on the other hand, submits that the suit was almost speculative in nature filed long after the things have settled in favour of various individuals. He contends that in case the plaintiff was interested in claiming succession through her father, she ought to have done that soon after she attained the age of majority, whereas the suit was filed at a time when she became 33 years old. He further submits that notwithstanding the fact that the plaintiff is not a party to O.S. No. 88 of 1953, the arrangement made in the compromise decree therein i.e. Ex. B. 26, cannot be ignored, particularly when the 1st defendant was placed under the obligation to take care of the plaintiff. Another contention of the learned counsel is that Ex. B. 5, being an old document of more than 30 years, an element of acceptability needs to be attached to it. He further submits that the succession to the properties or estate of Adiseshayya opened on his death, and the mere fact that the person in whom the life interest is created died at a later point of time, does not make any difference, in the context of limitation.

8. On the basis of the pleadings before it, the trial Court framed the following issues for its consideration:

1. Whether the Will set up by 3rd defendant is true and binding upon the plaintiff?
2. Whether the judgment and decree in O.S. No. 88 of 1953 on the file of the Subordinate Judge, Bapatla are binding upon the plaintiff?
3. Whether the suit is barred by time?
4. Whether the plaintiff is entitled to a share in plaint schedule properties and if so to what share?
5. Whether the defendants 4 to 6 can be evicted from the plaint schedule properties in the event of plaintiff getting a share in the property?
9. On behalf of the plaintiff, P.Ws. 1 to 5 were examined and Exs. A. 1 to A. 9 were filed. On behalf of the defendants, L.Ws. 1 and 2 were examined and Exs. B. 1 to B. 35 were filed. In addition to that, the Court has already taken on record Exs. C. 1 and Exs. X. 1 to X. 29.
10. On the preliminary decree having been passed by the trial Court, A.S. No. 1994 of 1989 was filed before this Court. The learned Single Judge framed the following points for consideration:

i) When the succession opens viz., on the death of Adiseshaiah in the year 1952

(the vested/remainder holder) or on the death of Lakshmamma, the life estate holder on 18.04.1976;

ii) As to whether the compromise decree in O.S. No. 88 of 1953 is binding on the plaintiff; and

iii) Whether the Ex. B. 5 Will deed executed by Adiseshaiah dated 26.04.1951 is true and valid?

11. On the first point, the learned Single Judge took the view that the opening of the succession either on the death of the person in whom vested remainder is created or the one in whom the life interest is created, does not make any difference and the concerned parties can work out their remedies at any point of time. As regards point Nos. 2 and 3, which relate to Ex. B. 5, are concerned, no specific finding as to proof thereof was recorded, but the relief was granted on the premise that the Will (Ex. B. 5) can be taken as proved. The points that arise for consideration in this L.P.A. are:

a) Whether Ex. B. 5 can be said to have been proved?

b) Whether the rights of the plaintiff are in any way adversely affected on account of the filing of the suit at the stage at which it was filed?

POINT NO. 1:

12. The relationship of the parties and the dispositions of different items of property made by the concerned parties have already been mentioned. The 3rd defendant also did not dispute the genuinity of Exs. A. 1 and A. 2 and other documents, through which the arrangements within the family came to be made. However, his total answer to the claim of the plaintiff is through Ex. B. 5, a Will, said to have been executed by Adiseshayya, the father of the plaintiff and defendant No. 2 and husband of defendant No. 1.

13. It is too well established that the beneficiary under a Will must not only prove its execution, but also must explain the suspicious circumstances, if any, in relation to the Will. It is only on being successful on both the counts, that the legatee can reap the benefits under the Will. Taking the second aspect first; the guiding factor in this behalf is that the Court would take into account, the conduct of a prudent person, on the part of the executant. Into this very phenomenon, get included the factors, such as the exclusion of the natural legal heirs, the conferment of undue benefit on a person, who is otherwise well off, the condition to which the legal heirs are likely to be exposed, on account of the bequest, made by the testator.

14. The mother of the plaintiff died, within few months or years after her birth. Therefore, her father ? Adiseshayya married the 1st defendant, who was hardly 16 or 17 years at the time of her marriage. The 2nd defendant was born out of the wedlock. By the time Adiseshayya died, the plaintiff was a girl of tender age of 7 to 8 years, his second wife - Defendant No. 1 was aged 18 years and

defendant No. 2, - his daughter, through her, was an infant of hardly 1 year. In addition to that, Laxmamma, the widowed sister of Adishesayya, was living with him. His death would result in four women, becoming without any male help. Therefore, any prudent person in his place, would not think of bequeathing his property to the total exclusion of the said two widows and two unmarried daughters of tender age. Assuming that the testator was a man of philanthropic nature, the bequest can be expected towards an institution of social service, but not to a brother, who not only got the property in the original family, but also in the adoptive family. These suspicious circumstances were not at all explained at any point of time by defendant No. 3. He failed to convince the Court, as to extraordinary circumstances that prompted his brother to make him super rich, even while making the natural legal descendants, that too, women, as destitutes. This is a rare case in which, the Will, even if proved, cannot be acted upon, since several suspicious circumstances remain unexplained.

15. So far as the proof is concerned, not a single person was examined in this behalf. Section 68 of the Evidence Act, 1872 (for short "the Act") mandates that any document, which is required to be attested in law, can be proved only by examining at least one of the attestors. It was not pleaded by defendant No. 3, the attesor of Ex. B. 5 was not alive, by the time the occasion to prove it, has arisen. His stock plea was that it is a holographic Will written by the attesor himself. The requirement under law, regarding proof of Will is very clear. There is nothing in law, including Section 68 of the Evidence Act, which makes any difference between the Wills that are holographs, on the one hand, and those, which are scribed by third parties, on the other hand.

16. The holographic document at the most may obviate the necessity of examining a scribe, if the signatory thereof vouches for it. The reason is that it is the signatory, who has played the role of scribe also. In the context of Wills, however, the occasion or possibility to examine the signatory does not exist. The Will gets its life alive only from the grave of its executant. Obviously for that reason, the lawmakers have insisted that a Will must be attested and the proof thereof shall be through a separate mechanism.

17. Section 68 of the Act mandates that at least one of the two attestors of the Will must be examined. Even where such attestors were not alive, any person who is acquainted with the writing or signature of such person can be examined as a witness. The 1st defendant did not take any steps, in this regard.

18. The matter needs to be examined from another angle. Assuming that a person has scribed a Will in his own hand and signed it, the testament cannot be enforced, after his death, unless it was attested by at least two persons. Even if a person, who is contesting the Will, does not dispute the fact that it was in the handwriting of the testator and it was written and signed by the testator, he can successfully oppose the disposition made thereunder, if it is demonstrated that the Will was not attested. Failure to take steps that are stipulated u/s 68 of the Act would leave the Will in the state of an unattested document. From this point

of view also, Ex. B. 5 cannot be said to have been proved.

19. Excessive reliance was placed by the learned Single Judge upon the fact that Ex. B. 5 was referred to with approval in the compromise decree in Ex. B. 26. Admittedly, the plaintiff was not a party to that suit. Added to that, no finding was recorded about Ex. B. 5 in Ex. B. 26 on the touchstone of Section 68 of the Act. Viewed from any angle, Ex. B. 5 was not proved. The point is, accordingly, answered.

POINT NO. 2:

20. This point, in a way touches the controversy as to limitation. In a suit for partition, the question of limitation becomes irrelevant. The 1st defendant, however, projected a plea that the claim of the plaintiff is on the basis of succession and unless the suit is filed within three years from the date, on which the succession opened, it is barred by limitation. The trial Court has rightly repelled that contention. In A.S. No. 1994 of 1989, an attempt was made to apply the principle laid down by the Supreme Court in *Daya Singh (Dead) through Lrs. and Another Vs. Dhan Kaur*, That was a case, in which the controversy was as to the date, with reference to which, the law of succession must be applied. Their Lordships took the view that where a limited owner succeeds to an estate, the succession to that must be decided, on the basis that the lawful owner died on the day, on which the limited owner died, and the law, which was in force at that time, must be applied. In the instant case, the devolution is not through natural succession. It was an arrangement under Exs. A. 1 and A. 2 ordained by the owner. His sister, Laxmamma, was conferred with the rights of life estate and vested remainder was to remain in him. It so happened that he pre-deceased his sister, Laxmamma. Unless the limited estate that was conferred upon Laxmamma terminated, it would not have been competent for anyone to claim the property, during the lifetime of Laxmamma. The suit was filed shortly after the death of Laxmamma. Therefore, the point is answered in favour of the plaintiff.

21. In the result, the Letters Patent Appeal is allowed and the judgment of the learned Single Judge in A.S. No. 1994 of 1989 is set aside. The preliminary decree passed by the trial Court is upheld. There shall be no order as to costs. The Miscellaneous Petitions, if any, pending in the appeal shall stand disposed of.