
(1975) 07 AP CK 0010
In the Andhra Pradesh High Court
Case No : Appeal No. 268 of 1972

Bandara Veeramma and Others	Vs	APPELLANT
Chirtravuri Ramakrishna Sarma and Others		RESPONDENT

Date of Decision : 18-07-1975

Acts Referred:

Evidence Act, 1872 — Section 70, 71
Succession Act, 1925 — Section 63

Citation : AIR 1976 AP 370 : (1976) 1 AnWR 281

Hon'ble Judges : Ramachandra Raju, J;Raghuvir, J

Bench : Division Bench

Advocate : T. Anantababu, E. Raja Rao and M.S.K. Sastri, for the Appellant; J.V. Surya Narayana and T. Seshagiri Rao, for the Respondent

Judgement

Raghuvir, J.—This appeal is by defendants 1 and 4 to 7 against the judgment in O.S. No. 32 of 1967 on the file of the Court of the II Additional District Judge, Rajamundry.

2. The suit was laid for partition of plaint "A" and "B" schedule properties described as the estate of late Chirravuri Pedda Venkanna, a resident of village Sitanagaram, Taluk Rajamundry. The plaintiff claimed two-thirds of "A" and "B" Schedule properties amongst themselves in six equal shares, one each for them, and for future profits. After the death of Ch. Pedda Venkanna, the plaintiffs alleged, the estate devolved on and became vested, under the Hindu Succession Act, in his paternal uncle's son Chinna Venkanna, who also died on 7-3-1965. Plaintiffs 1 and 2 are Chinna Venkanna's sons, 3 to 5 are his daughters and the 6th plaintiff is his widow.

3. There are about 40 defendants impleaded in the a suit and among them are also impleaded tenants in occupation of some of the scheduled properties.

4. In view of the short point that falls for decision in this appeal, the details of these properties and as to how against each of the defendants, the claim is made

against the specified properties need not be death with in detail. It is sufficient to mention that except items 1, 8, 9 and 10 of the plaint "A" Schedule, the contesting defendants as forming part of the estate of late Pedda Venkanna. In the course of the trial, it was conceded by the defendants that items 8 and 9 were also the properties of late Pedda Venkanna. Items 1 and 10 of "A" Schedule were held by the trial Court as not the property of the deceased Pedda Venkanna. There is no appeal filed by the parties against the finding. Therefore, nothing further need be stated about the properties of those two schedules. In this appeal, the plaintiffs alone figure as respondents.

5. The plaintiffs alleged that Ch. Pedda Venkanna died intestate but defendants 1 and 4 to 7 contended that he executed a will on 4-12-1961, which, in the suit, stands marked as Ex. B-2. The validity of Ex. B-2 as a will was vehemently contested by the plaintiffs. The only issue which is debated before us and the only question to be decided is whether Ex. B-2 is valid as a will and, to be precise, whether or not it is properly attested. The 1st defendant is the mistress of late Pedda Venkanna. She in her written statement, and defendant 4, 5, 16 and 7 by separate written statements, resisted the suit for partition as mentioned earlier on the ground that Pedda Venkanna executed the will. Ex. B-2 on 4th December, 1961, and defendants, 1, 4, 5, 6, 8, 9, 10, 12 and 13 to 19 are the legatees under that will.

6. In the lower court, the validity and also the factum of subscription of Venkanna to the deed, Ex. B-2 were contested by the parties. In view of the finding given by the lower court, and due to preponderance of evidences disclosing that it was late Pedda Venkanna who executed the deed Ex. B-2 on 4th December, 1961 in a sound state of mind, the counsel for the appellants mainly addressed arguments covering the evidence touching attestation and the legality of Ex. B-2.

7. The trial court framed the following four points for determination :

"(1) Whether the will Ex. B-2 is in the hand of the testator late Chirravuri Pedda Venkanna and bears his signature?

(2) Whether the same was executed by the testator in a sound and disposing state of mind?

(3) Whether the dispositions made in the said will are unnatural and were not result of the testator's free will and mind? And

(4) Whether the said will was duly attested?"

and found that Ex. B-2 was written and signed by the testator Chirravuri Pedda Venkanna. In regard to the second point, it held that the testator executed this will in a sound disposing state of mind, and observed the recitals of the will do not appear to be incoherent in the product of an unsound mind". In regard to point No. 3, the Court opined that it is highly impossible that the 1st defendant wielded any influence over the late testator in pressuring him to execute the said

will, Ex. B-2, though the lower court found that the 1st defendant's status in the house of the testator was akin to "that of a married wife of the testator". Taking the overall circumstances into consideration, the disposition made in the will are held as natural and that the bequests therein the result of the testator's free will and mind. Thus on all the three points the lower court came to the conclusion that Ex. B-2 was executed by the testator. Adverting to the 4th point, the learned Judge held "..... the said will Ex. B-2 although it was written and signed by the said testator, while in a sound and disposing state of mind, is yet, invalid due to want of proper attestation as required by law."

8. Apart from the above questions, there also is one more question which is argued before us by Shri Anantababu, the counsel for the appellants, and that relates to issue No. 4

9. Issue No. 4 is as follows : "Are the plaintiffs estopped from claiming the suit properties by their conduct or by the conduct of Chinna Venkanna, in not claiming the property?"

10. The trial court held that by conduct or otherwise late Chinna Venkanna or his successors in interest are not estopped from pleading the will. No other circumstances are mentioned except reiterating the argument as in the trial court, on the same set of facts before us to dislodge the finding of the lower court. Thus, we affirm the finding of the lower court on this aspect of the matter.

11. Whether or not Ex. B-2 is properly attested is the only question now to be decided. It is necessary to recapitulate few facts pertaining to Ex. B-2. It is dated 4th December, 1961. That it is a holograph will of Pedda Venkanna, is not disputed now. It is written on 12 sheets setting out dispositions in 8 schedules. In the last page, the testator in his hand took care to write that there are 29 lines on that page and in the last lines, he has written that the document is witnessed by the Sun and Moon. The main dispositions contained in the will cover agricultural lands. Soon after the death (3-12-1961) of the testator, on 4th December 1961 the 1st defendant presented Ex. B-2 for registration before the Sub-Registrar at Rajamundry. The Sub Registrar issued notice to all concerned and issued notice to Chinna Venkanna, who filed his Caveat Ex. A-2 on the 1st March, 1966. The long delay in filing the Caveat is explained as Chinna Venkanna experienced some difficulty in obtaining a copy of the will Ex. B-2, and, therefore, there was delay in filing the Caveat. However, it is stated he was given a true copy, ex. A-4 Chinna Venkanna, it appears, died on 7th March, 1965. On 3rd August, 1965 the plaintiffs issued the suit notice Ex. B-13 to the defendant. This notice was replied by the 1st defendant on 7th September, 1965 under Ex. B-14.

12. On 12th March, 1966, the Sub Registrar issued notice Ex. B-12 to the 1st defendant to make the necessary deposits for taking further steps for the registration and reminded the 1st defendant on 21-4-1966, 21-7-1966 and on 20th September, 1966, but the defendant on 7-1-67 under Ex. A-3, withdrew Ex.

B-2 from the forum of the Sub Registrar on the plea that she does not have the necessary funds to pursue the matter. Thus Ex. B-2 remained unregistered.

13. The main dispositions in the will are the landed property of about 80 acres and 10 cents out of which 24 acres and 60 cents are bequeathed in favour of the 1st defendant. All these lands are situate in Sitanagram, a village in Rajamundry Taluk.

14. The defendants examined two witnesses, D.W. 1 Maddipati Suranna and D.W. 2 Vadlamuri Venkata Raju, as attestators of the will. The 1st defendant is examined as D.W. 3. The evidence of these witnesses was read before us and it was the subject-matter of a close scrutiny by the counsel for both the parties. The counsel for appellants referring to the evidence of D.Ws. 1 and 2 argued that Ex. B-2 is properly attested and one if it is accepted that Ex. B-2 is attested by these two witnesses, the counsel submitted that the suit has to be dismissed.

15. We have already mentioned that the will is a holograph will and on a reading of Ex. B-2, we are satisfied (the counsel for the parties in fairness to state do not dispute the same) that it is Pedda Venkanna who, in his hand wrote all the 12 pages including the 6 schedules. From a reading of the will, Shri Anantababu, counsel for the appellants argued not without any justification, that Pedda Venkanna appears to be a clever person. It is stated that he was well versed in writing documents, as he was a document-writer and was aware of the cobwebs of litigation in courts. Such a person, it is asserted, when wrote Ex. B-2 must have obtained the signatures of D.Ws. 1 and 2 as attestators, and their evidence should be accepted as proof of attestation, notwithstanding the flamboyant recitals in the will that the Sun and Moon are the attestors to the will. Before us in this appeal, as in the lower court much criticism was focused by the respondents against the status of D.Ws.1 and 2 and their character and other related factors to show that the evidence of D.Ws. 1 and 2 is absolutely unreliable. At this juncture, we may state that D.W. 2 was declared hostile and was cross-examined by the 1st defendant. Therefore, in this background, we consider the evidence of these two witnesses.

16. D.W. 1 originally is a resident of Purshotampalli of West Godavari District and about 40 years back he moved to Rapaka as his mother belonged to that village. He owns 18 acres of land. At the time of his deposition he was a resident of Rapaka, which is a hamlet of Raghudevapuram. Rapaka and Sitanagram, the village of the testator, are adjacent villages. He deposed that the testator lived in the garden house outside the village Sitanagram. He had known the testator and was on visiting terms with him. On 4th December, 1961 when he visited him at the instance of the deceased, he signed Ex. B-2. He identified his signature of the other attestator. In the cross-examination he stated that he used to borrow tobacco during barns from the deceased. Therefore, in that connection, on that day he visited the testator. About the health of the deceased he deposed that he was healthy but had minor ailments though he was moving freely. He admitted that he had no documents to show that he had borrowed the barns from the

deceased.

17. It is suggested to him in the cross-examination which suggestion the witness admitted that one Edupuganti Suryarao is his Guru. The 1st defendant and her son one Appanna, by document Ex. A-19 dated 18-1-1962, purported to have alienated 3 acres and odd for consideration. The consideration under Ex. A-19 it is recited as having been paid earlier to the registration of the deed. The land in Ex. A-19 is situate abutting the road at Sitanagaram near Rapaka adjacent to the Ashram site where Suryarao the Guru, resided. These facts are admitted.

18. On 20th January, 1972, his chief examination was recorded. He was recalled on 28th January and cross-examination. His further cross-examination was continued on 29th of January Ex. A-19 is admitted by the 1st defendant as D.W. 2 to have been registered on the afternoon of 20th of January, 1972. D.W.3 deposes "On that day the said I. Suryarao did not come to Sub Registrar. That sale consideration was Rs. 1,000. I do not know how many days prior to the registration of the original Ex. A-19 was executed. I cannot say whether the recitals in Ex. A-19 regarding payment of consideration are true or false." If the sale consideration has been paid by the vendee, Suryarao, earlier to the date as recited in Ex. A-19 then there was no occasion for Suryarao to pay Rs. 1,000 on that date to defendant No. 1. It was suggested that the witness put his signature on Ex. B-12 after the death of the testator and is a reward for his deposition his Guru was given the land gratis. This suggestion was confronted to the witness. She stated "it is not true and I executed original of Ex. A-19 in favour of I. Suryarao, without taking any consideration in keeping with the understanding that D.W. 1 should depose in my favour." On the basis of the admission, we hold that this criticism against the evidence of this witness is not wholly unjustified.

19. The next witness, D.W. 2, is a resident of Rajapalem. He deposes that in an earlier suit, O.S. No. 96/66, filed against Chinna Venkanna and others, he had deposed about the execution of the will by the testator and in that deposition he admitted his attestation. In the chief examination, when he is shown Ex. B-2 he says this Ex. B-2 is not the original will. He stated that Pedda Venkanna was in sound state of mind when executed the will which is not Ex. B-2. Referring to his earlier deposition in O.S. No. 96/66, he deposed that Ex. B-2 was not shown to him. He admitted that he signed at the request of the deceased as an attestor to the will. He does not know the contents of the will. he did not read it as there was no occasion for him to read Ex. B-2. He had known the testator for 15 years even before the execution of the deed. His earlier statements, Exs. B-3 to B-8, he admitted. Exs. B-3 to B-8 which are portions marked in C.C. of Deposition of D.W. 2 dated 6-2-1967, in so far as they are material, read as follows :---

"I know Chirravuri Pedda Venkanna. I know his executing a will. I signed in that will as attestator. He wrote it in his own hand, I saw him signing the will.

Maddipati Suranna, a Kaman gentleman, is the other attestator of the will. Both of us saw the executor signing the will.

He was in a sound and disposing state of mind. It was executed in 1961 December. Ex. B-5 is the certified copy of the will executed by Pedda Venkanna and attested by me "..... I distinctly remember I signed beneath the heading "INDUKU SAKSHULU" I remember under the will he gave some properties to a trust and he gave some properties to Bandaru people."

20. After he has been declared hostile in the cross-examination by the 1st defendant, it was suggested that P. Venkat Rao, I. Suryarao, v. Reddy and the 2nd plaintiff took him away to Raghudevapuram on 21-1-1972 and thereafter he was won over. It is suggested that P. Venkat Rao of Raghudevapuram in financing the present litigation of the plaintiff and at his instance he was resiling from his earlier deposition.

21. From the fact that Ex. B-2 was denied as not the original by this witness, read with other irreconcilable statement that the witness made about the execution of the will, it was argued by the respondent that the attestation of the will by this witness is not proved.

22. Section 63(c) of the Indian Succession Act requires that the will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark or of the signature of such other person and each of the witnesses shall sign, the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary. Sections 70 and 71 of the Evidence Act lay down the mode in which attestation is to be proved. As per the provisions of those two sections, if the attesting witness denies or does not recollect the execution of the document, its execution may be provided by other evidence. The object of incorporating the necessity of attestation by two witnesses is to prevent fraud. In *Re-Vere-Wardale (Deceased), Vere-Wardale v. Johnson*, (1949) 2 All ER 250 Willmer, J., speaking about the mode of attestation, held : "I have always understood that no particular form of words is required for the attestation clause---indeed the Wills Act, 1837, Section 9 says so." In that case, the attesting witnesses had stated that they had signed the will before it has been signed by the testator. An attempt was made to show by other evidence that they had signed the will after the signature of the testator. An argument was advanced that recourse to other evidence except that of the attestators was not permissible. Adverting to this argument, Willmer, J., stated :

"It appears to me that the object of the Legislature in imposing the strict formalities required by the Wills Act, 1837, Section 9 was the prevention of fraud, and, therefore, that my duty here is to do all that I am to see that no fraud is perpetrated, and, if I am to exclude further evidence, (other than attestators) it seems to me that such a ruling can only increase the possibility of the perpetration of fraud. In all the circumstances it appears to me that it would

be wrong and not in accordance with authority to exclude such further evidence with regard to the attestation of this will as may be available. I, therefore, decline to rule that it is not competent for the propounders of this will to adduce further evidence, and they are at liberty to do so."

23. Therefore, in the event of an attestor being declared hostile, it is permissible for the propounder of the will to cross-examine such an attesting witness and it is also legitimate for such a propounder to rely upon other evidence to show that the will has been properly executed. Therefore, we do not find any lacuna in cross-examination, the witness after the witness having been declared hostile, and this circumstance, by itself is not sufficient to reject the evidence of the attestor. We are of further opinion that it would be permissible for the propounder to adduce other evidence apart from the evidence of attestators in proof of the execution and attestation of the will. Therefore, the mere resilience of D.W. 2 from his earlier deposition, does not shut out the propounder to prove attestation by recourse to other evidence and it is legitimate in this connection to look into his evidence in O.S. No.96 of 1966 and also the other evidence like the deposition of D.W. 3 (of 1st defendant) in this regard. The fact that the witness had given earlier statement that he had attested the will of the deceased and that he denies ex. B-2 is not the will he had attested the will of the deceased and that he denies Ex. B-2 is not the will in original and taking the other circumstances into consideration, we find, the evidence of this witness is not at all inspiring and absolutely unreliable. Having considered the evidence of D.Ws. 1 and 2, we are in agreement with the view taken by the lower court that their evidence is untrustworthy and we affirm the finding that no reliance can be placed on their evidence in proof of attestation of Ex. B-2. We have stated earlier that at one place he stated that the witnesses are the Sun and Moon. The places where the signatures of D.Ws. 1 and 2 are found are placed in continuation of these lines. As the testator had stated that there are only 29 lines on that page, the attempt was made by affixture of their signature to appear that these two witnesses attested the will. Even by a look at the document, we are satisfied that the signatures of D.Ws. 1 and 2 on Ex. B-2 are interpolations. Thus, we agree with finding and decision of the lower court that the will Ex. B-2 suffers from lack of attestation as required u/s 63(c) of the Indian Succession Act and the Ex. B-2 is not a valid will for that reason. We dismiss this appeal with costs.

24. Appeal dismissed.