

(1960) 12 AP CK 0013
In the Andhra Pradesh High Court
Case No : Appeal No. 544 of 1957

Chilamakuri Chinna Pullappa	Vs	APPELLANT
Guruka Chinna Bayanna and Others		RESPONDENT

Date of Decision : 14-12-1960

Acts Referred:

Succession Act, 1925 — Section 104, 119, 63

Citation : AIR 1962 AP 54

Hon'ble Judges : Seshachalapati, J; Satyanarayana Raju, J

Bench : Division Bench

Advocate : D. Narasaraju, General and C. Kondaiah, for the Appellant; I. Balaiah and B. Venkatarao, for the Respondent

Judgement

Satyanarayana Raju, J.

(1) This is an appeal from the judgement and decree of the Court of the Subordinate Judge, Anantapur, in Original Suit No. 58 of 1955.

(2) The facts material for appreciating the question debated before us are not in dispute. The plaint schedule properties belonged to one Toomula Hanumappa, resident of Kottalapalli in the Anantapur District. His wife was Viyyamma. He had a son and a daughter. His son, Peddayya died shortly after his marriage. Hanumappa executed a will on 19th December, 1941. He died on 22nd July, 1942. His widow Viyyamma, died on 22nd February, 1954. Peddakka, the daughter of Hanumappa, who was married to the 1st defendant predeceased her mother on 8th July 1945. Defendants 1 and 2 are brother and are the sister's sons of Hanumappa. Plaintiff is the son of another sister of Hanumappa. He instituted the suit on 17th November, 1955 for a declaration of his title to a 1/3rd share out of the properties comprised in the estate of Hanumappa and for partition and separate possession of one such share.

(3) The genuineness of the will was not seriously disputed by the plaintiff. It could not have been otherwise because the will was registered and the testator lived

for seven months after its execution. It was, however, contented by the plaintiff that the will in question duly executed and also that the estate created by the testator in favour of his daughter was contingent on her surviving her mother, and that as the daughter predeceased her mother, there was a lapse and the estate should devolve on the reversioners as on intestacy. Both these contentions were negated by the lower court, with the result that the suit was dismissed. Against the decision of the trial court, the plaintiff has preferred this appeal.

(4) Two questions arise for decision in this appeal:

1. Whether the formalities required by law for the execution of a valid will were complied with?
2. Whether, on a true construction of the terms of the will, the testator conferred on his daughter an estate contingent on her surviving her mother?

(5) Under Sec. 63 of the Indian Succession Act, the first condition requisite to render valid any testamentary disposition is that such disposition should be "in writing" though no particular form is required. The next condition prescribed for the validity of a will is that it should be duly signed by the testator. The third statutory requisition is that it should be attested by at least two witnesses.

(6) The will, Ex. B. 3, was executed by Hanumappa on 19th December, 1941. After the usual preliminary and disposing of clauses, the will concluded with the name of the testator written by the scribe. The testator was admittedly illiterate. His thumb impression was not affixed at the foot of the document. Two witnesses, Chennareddi and Chinnapareddi, attested the will. The scribe of the document there after subscribed his signature. On the day of its execution, the will was presented by the testator in the Office of the Sub-Registrar Gooty. In token of his having admitted the execution of the will, the testator put his thumb impression before the Sub-Registrar. He was there identified by the two attesting witnesses, and the Sub-Registrar then admitted the document for registration.

(7) The evidence as to the execution of the will is that the testator held the pen and the scribe wrote his name at the foot of the document. The first and third conditions of a valid testament disposition have undoubtedly been satisfied in this case. It is, however, argued that the second condition prescribed for the validity of a will, viz., that it should be signed, has not been complied with by reason of the testator's mark not having been affixed at the foot of the document.

(8) According to S. 63 of the Indian Succession Act, the testator must sign or affix his mark to the will, or it must be signed by some other person in his presence and by his direction. The further requirement under this section is that "the signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will."

(9) It is contended by the learned Advocate General, on behalf of the appellant,

that the writing of the name of the testator by the scribe would not constitute due execution within the purview of Sec. 63 of the Succession Act. In support of this contention he relied upon the decision in *Radhakrishna v. Subraya Mudaliar* ILR Mad 550 : AIR 1917 Mad 900. In that case, with a view to execute a will the testatrix who was a marks woman touched the pen and gave it to another who affixed to the will a mark and wrote against it the name of the testatrix and added beneath it his own name as the person who affixed the mark. It was there held by the Division Bench, consisting of Wallis, C.J. and Phillips, J., that the will was invalid as not complying with the provisions of Sec., 50 of the Indian Succession Act (X of 1865) (which is in terms identical with S. 63 of the present Act), and that considered as a signed will, as it might be, it was equally invalid as the signature of the testatrix was put by another and there were not two other attestors besides the one so signing. At page 556 (of ILR Mad): (at p. 901 of AIR), we find the following passage:

"If the signature, as distinct from the mark of the testatrix, is taken to have been affixed by Doraiswami Aiyanger in her presence and by her direction, the will fails for want of due attestation....."

The learned Judges were willing to hold that what was done might amount to a signature by some other person in her presence and by her direction within the meaning of the section, and if attested by two witnesses other than the signatory would be sufficient. On the language of Sec. 50 it was held that the person who signed by the direction of the testatrix could not be one of the two attesting witnesses required by the section. The conclusion reached by the learned Judges in that case is no authority for the position that when some other person signs for the testator by writing out the testator's name in his presence and by his direction it would not amount to due execution within the purview of S. 63(a) of the Succession Act.

(10) In *Dasureddi Vs. M. Venkatasubbammal*, the question for consideration was whether a will executed in the following circumstances could be deemed to be in conformity with Sec. 63 of the Succession Act. Rangamma an illiterate woman executed a will. It was in the handwriting of P.W. 2. The execution of the will, which also was in the handwriting of the scribe consisted of the words in Tamil, equivalent to the English, "this scratch: the mark of Rangammal". It was attested by four witnesses. After attestation, there was the customary memorandum by the scribe that it was in his handwriting. It was contended that the will was not validly executed by Rangammal even if it was found to be genuine. The appeal was heard by Sundaram Chetty and Walsh, JJ. Who differed in their conclusion about the due execution of the will.

The point for difference between the learned Judges was this: Sundaram Chetty, J. was of opinion that when the execution of a will by a person other than the testator in his presence and by his direction took place, it was sufficient for that other to affix the signature of the testator himself. Walsh, J. thought that this was not the effect of S. 63 of the Succession Act, but a proper execution under

the section required that the other person executing the will under the direction of the testator must sign in his own name with sufficient indication to show that he had executed it under the testator's direction. Pandalai, J. by whom the appeal was disposed of, consequent on the difference of opinion between the two learned Judges who heard the case in the first instance, agreed with Sundaram Chetty, J. in holding that when the execution of a will by a person other than the testator in his presence and by his direction takes place, it is sufficient for that other to affix the signature of the testator himself, and that the form of such signature is for the other person to sign the name of the testator and not his own.

(11) Under Sec. 3(56) of the General Clauses Act, the word "sign" has been defined to mean a mark in the case of a person who is unable to write his name. On a true construction of the words "it shall be signed by some other person in his presence and by his direction," in Sec. 63(a) the proper form of such signature is, always has been recognized to be, for the other person to sign the name of the testator and not his own. In the above view, it must be held that the substantial requirements of law have been complied with and that the will has been properly executed.

(12) It is contended for the respondents that even supposing the requirements of Sec. 63 have not been complied with, yet the thumb-impression of the testator, which there is evidence to show was made from the deceased's thumb in the presence of the Sub-Registrar and the attesting witnesses who identified the testator, would constitute a proper execution. In *Theresa Vs. Francis J. Misquita, Fawcett, J.* has, in fact, held that where an illiterate testator admits the execution of a will before a Sub-Registrar and affixes his thumb impression thereto, there is proper execution of the will apart from the question whether there was such proper execution before. On this ground also, it must be held that Ex.B. 3 was duly executed.

(13) The more substantial question is whether the bequest in favour of the testator's daughter the termination of the life estate should be deemed to be a vested interest or only a contingent interest. As the argument in the appeal turned largely on the precise language employed in the document, it is necessary to quote textually its terms:

"Now I am about 60 years old and I am in a sound disposing state of mind. But as my legs and hands are shaking due to cough and asthma from which I am now suffering, I have made the following arrangement with regard to my immovable and movable properties so that there may not be any objection by my heirs and others after my life time. I have a wife, son, daughter, by names Biyyamma, Peddiah and Peddakka respectively. I got my son married with a girl by name Naramma. About two years after the marriage, my son by name Peddiah died. After the death of the said son of mine, I gave to my daughter-in-law, Ramanamma, all the Sthridhana properties that were given to her at the time of her marriage and (i) gave (also) a cash amount of Rs, 1,200/ (in words rupees twelve hundred) towards her life long maintenance also. I got also the

marriage of my daughter Peddakka performed with Guraka Sunkireddi's son China Bayanna, resident of Peddavaduguru. Now my wife Bayamma and my daughter Peddakka are alive. After my life time, my wife Bayamma should possession of the immovable properties belonging to me, that is, the lands which are in my possession and enjoyment and which are in the fields of the village of Dimnagudhi, Nagalapuram, Penakalapadu and Peddalvaduguru in this Taluk and the house and the hay-rick yard in Kattalapalli, the hamlet of Penkalapadu and the entire movable and immovable properties remaining after my life time and she shall enjoy all the said properties without alienating them in any manner. After her life time, my daughter Gurala Chinna Bayyanna's wife Peddakka, shall enjoy (the said property) with (powers) of gift, sale etc. But neither my heirs nor others shall have any manner of right or interest. This will shall come into effect after my life time. I shall have the power to cancel this will whenever I please. To this effect is this will executed by me out of free will."

(14) For the appellant it is maintained that the testator contemplated the contingency of his daughter, Peddakka, surviving his wife. It is urged that the words "after her life time, my daughter.... Peddakka shall enjoy the said property with powers of gift, sale etc." are indicative of the intention of the testator that he contemplated that his daughter should possess and enjoy the property after the death of her mother. It is on the other hand contended by the respondents that a life estate was bequeathed to the mother with an absolute gift over of the remainder to the daughter.

(15) The point for determination now is whether Peddakka got a vested or a contingent interest under the terms of the will.

(16) The distinction between vested and contingent interest is explained by a Division Bench of the Madras High Court in Sree Chand Sowcar Vs. T. Kasi Chetty alias Nagalingam Chetty and Others, thus:

"The ordinary distinction between vested and contingent interest consists in the nature of the event or condition upon which the done should take the property. If the interest created in favour of a person should take effect on the happening of an event which must happen, it is a vested interest, but if it is to take effect on the happening of a specified uncertain event which may or may not happen, the interest is a contingent one."

(17) Now, Sec. 104 of the Succession Act provides that if a legacy is given in general terms, without specifying the time when it is to be paid, the legatee has a vested interest in it from the day of the death of the testator, and, if he died without having received it, it shall pass to the representatives.

(18) The following passage from Jarman on Wills, volume 2. eighth edition, page 1346 may be usefully extracted here:

"The law", says Mr. Jarman, is said to favour the vesting of estates, the estates, the effect of which principle seems to be, that property which is the subject of

any disposition, whether testamentary or otherwise, will belong to the object of gift immediately on the instrument taking effect, at the death of the testator, it follows that any devise or bequest in favour of a person in esse simply (i.e. without any intimation of a desire to suspend or postpone its operation), confers an immediately vested interest.

"If words of futurity are introduced into gift, the question arises whether the expressions are inserted for the purpose of protracting the vesting, or point merely to the deferred possession or enjoyment."

At page 1347 occurs the following passage:

"Mr. Jarman continues: "It may be stated as a general rule that where a testator creates a particular estate, and then goes on to dispose of the ulterior interest, expressly in an event which will determine the prior estate, the words descriptive of such event, occurring in the later device, will be constructed as referring merely to the period of the determination of the possession or enjoyment under the prior gift, and not as designed to postpone the vesting. Thus, where a testator devises lands of A for life, and after his decease to B in fee, the respective estates of A and B (between whom the entire fee simple is parcelled out) are both vested at the instant of the death of the testator, the only difference between the devisees being, that the estate of the one is in possession, and that of the other is in remainder."

(19) This rule is embodied in Sec. 119 of the Succession Act, which reads:

"Where by the terms of a bequest the legatee is not entitled immediate possession of the thing bequeathed, a right to receive it at the proper time shall, unless a contrary intention appears by the will, become vested in the legatee on the testator's death, and shall pass to the legatee's representative if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest."

(20) The words of futurity in the present case are to be found in the penultimate clause of the will. They are:

"After the life-time of my wife, my daughter, Peddakka shall enjoy the property."

The words "after the death of my wife" are to be construed as merely referring to the period of the determination of the life-interest of his wife. There are no other terms in the will showing an intention on the part of the testator postponing the vesting till after the death of the widow. The words "after the death of my wife" received a similar construction by a Division Bench of the Calcutta High Court in *Sissir Chandra Maitra and Others Vs. Ajit Kishore Maitra and Others*,

(21) The decision of a Division Bench of the Madras High Court consisting of *Coutts-Trotter, C. J. and Srinivasa Aiyangar, J.* in *Ernest William Adams Vs. Mrs. H.S.F. Gray and Another*, is also in point. The learned Judge observed at page 713 (of Mad LJ): (at p. 602 of AIR) as follows:

"It is perfectly clear from all the text-books and the decided cases that if a bequest is to a person for life and after his death to his children, the bequest becomes vested in each child as and when he or she is born and the vesting is not postponed till the death of the life tenant. The expression "after his death" is taken to indicate merely the time when the gift over becomes reduced to possession and not the time when the right to such possession and not the time when the right to such possession vests..... The principle underlying this rule is that no contingency is imported by the mere fact that the legacy is given after a life-estate in the property bequeathed. As nothing is more certain than that every person who lives must die, the death of a life tenant is an event not contingent but certain; and therefore a gift on the death of a life-tenant is a bequest to take effect not on a contingency but on an event certain to happen..."

(22) In *Bhagabati Baramanya v. KalicharanaSingh*, ILR Cal 468 the testator by his will gave life-estates to his mother and wife and provided that on their death, his sister's sons G. and A, "this is to say their (sister's) sons who are now in existence as also those as may be born hereafter shall in equal shares hold the said property in possession and enjoyment by right of inheritance". Their Lordships of the Privy Council held that the nephews were intended to take a vested and transmissible interest on the death of the testator though their possession and enjoyment were postponed.

(23) In *Bilaso v. Munnialal*, ILR All 558 the testator gave all his property after the death of himself and his wife daughter and nephew. The nephew survived the testator but predeceased his wife. It was held that the nephew took a vested interest in the property on the death of the testator although possession and enjoyment were postponed till the death of the testator's wife and that vested interest so taken by the nephew was transmissible to his sons.

(24) In *Rewan Prasad v. Mt. Radha Beeby*, 4 Moo Ind App 137 (PC) the testator, by his will, gave his widow a life estate in all his property, and after her death he gave a moiety to his two sons. The brother and one of the sons died during the life time of the widow. The widow of the deceased son claimed her husband's share. On these facts, their Lordships of the Privy Council held that the sons took vested interest in the moiety bequeathed to them as tenants-in-common the actual enjoyment of the expectant interest being postponed till the termination of the life estate, and that in such circumstances it was not necessary that the deceased son's share should be reduced into possession during his life time to enable his widow to succeed to it.

(25) It is contended by the learned Advocate General that no gift was expressed in favour of the daughter until the death of the widow and no right vested in her unless she survived that period. In support of this contention reliance was placed on the decision of the Privy Council in AIR 1936 131 (Privy Council) There the material portion of the grant ran as follows:

"On the death of the last surviving widow the daughter of the late Raja, or, failing

her the next heirs of the late Raju, if any, will inherit the property."

Their Lordships of the Privy Council held that no gift was expressed in favour of the daughter until the death of the last survived widow, and no right vested in her until she survived that period. It was held that the words "or failing her" meant failing her survivance at the death of the last surviving widow. The decision in that case turned upon the words "failing her the next heirs of the late Raja"" which were considered to mean as containing a clear indication on the part of the testator that the daughter should inherit the property only in the event of her surviving the widow. We do not think that his decision is helpful in construing the will in the present case.

(26) On the construction of the terms of the will, Ex. B.3, we feel no difficulty in holding that Peddakka, the daughter, had a vested interest. There are no words of defeasance. It may be that the traditional words of a conveying counsel that a life estate should be followed by an absolute estate could have been employed; but if the testator was contemplating a defeasance, it is reasonable to assume that he would have provided for the contingency of the daughter not surviving his widow. There cannot be a vacuum where there is a life-estate followed by an absolute estate because the residue must rest some where. In the ultimately analysis, this is a case of deferred possession, not deferred vesting. We, therefore, hold that Peddakka had a vested interest in the suit property, and the conclusion reached by the Court below is correct.

(27) For the above reasons, the appeal fails and is dismissed with costs.

(28) Appeal dismissed.