

(2004) 03 AP CK 0093

In the Andhra Pradesh High Court

Case No : CRP No's. 3982 and 4349 of 2003

Dr. Mandakini Naik

APPELLANT

Vs

G.K. Naik and Others

RESPONDENT

Date of Decision : 03-03-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 1
Hindu Succession Act, 1956 — Section 30
Registration Act, 1877 — Section 17
Succession Act, 1925 — Section 2

Citation : AIR 2004 AP 525 : (2004) 2 ALD 732 : (2004) 3 ALT 829 : (2004) 2 APLJ 183

Hon'ble Judges : G. Yethirajulu, J

Bench : Single Bench

Advocate : Mahmood Ali, for the Appellant; C. Sindhu Kumari, for the Respondent

Final Decision : Dismissed

Judgement

G. Yethirajulu, J.—CRP No. 3982 of 2003 is preferred by the 6th Defendant in O.S. No. 821 of 1986 against the order of the II Senior Civil Judge, City Civil Court, Hyderabad, dated 17-6-2003 refusing to receive two documents, which are described as Wills, in support of his evidence.

2. CRP No. 4349 of 2003 is also filed by the 6th defendant against the order of the 11 Senior Civil Judge, City Civil Court, Hyderabad dated 25-7-2003 in review petition covered by I.A. No. 788 of 2003 in O.S. No. 821 of 1986.

3. The revision petitioner-6th defendant while getting herself examined as DW-2 in O.S. No. 821 of 1986 sought to mark two documents describing them as "Wills". The Lower Court passed order on 17th June, 2003 upholding the objection raised by the plaintiff and rejecting to receive those documents in evidence. Against the said order, she filed I.A. No. 788 of 2003 under Order 47 Rule 1 C.P.C. before the lower Court requesting to review the said order. The

lower Court after considering the contents of the documents and the legal position came to a conclusion that there are no grounds in the application to review its order dated 17-6-2003. It ultimately dismissed the review petition on 25-7-2003. The revision petitioner questioned the said order through CRP No. 4349 of 2003.

4. Since the orders passed by the lower Court in O.S. No. 821 of 1986 and I.A. No. 788 of 2003 in O.S. No. 821 of 1986 relate to the same point, both the revisions are clubbed and this common order is passed.

5. Plaintiffs filed O.S. No. 821 of 1986 for partition of the suit schedule properties and to put them in possession of 1/5th share each, after dividing the property by metes and bounds. The defendants, including the revision petitioner-6th defendant, resisted the suit. After commencement of trial, the plaintiffs' evidence was completed and the evidence of defendants was being recorded. The revision petitioner was examined as DW-2. During the chief-examination she sought to mark two documents describing them as "Wills". The plaintiffs raised objection for marking those documents by contending that though the documents are titled as "Wills", they cannot be treated as such. Therefore, they cannot be received and marked by the 6th defendant on her behalf.

6. It is contended by the learned Counsel for the revision petitioner that the lower Court ought to have treated the documents as "Wills" by taking into consideration the intention of the testator to give the properties mentioned in the documents to the persons thereafter his life-time.

7. The learned Counsel for the revision petitioner submitted that the lower Court ought to have taken into consideration the background of the parties and whether the contents of the document lead to a conclusion that they are the "Wills", even in the absence two essential ingredients. He further submitted that the absence of certain recitals in the document does not invalidate the document. He also submitted that the contents of the first document would lead to conclusion that it is a will and the contents of the second document discloses that it is a codicil. He therefore requested to direct the lower Court to receive the documents subject to objection if any at the time of the marking.

8. The learned Counsel for the respondents submitted that the contents of the two documents disclosed that the properties were bequeathed in the present time and there is no indication that they should come into operation after the life time of the alleged executant. In order to test the nature of the document the reading of all the contents is essential. The surrounding circumstances under which these two documents which excluded all other legal heirs of the executant have to be taken into consideration. The other circumstance that those documents do not contain any special reasons for giving the property to the sixth defendant in exclusion of all other legal heirs. He further submitted that the lower Court after going through the contents of the documents declared that they are inadmissible in evidence and hence they are in the nature of conveying

the property, they require stamp duty and registration. He therefore requested to dismiss the revision petition by confirming the order of the lower Court.

9. The learned Counsel for the respondents/plaintiffs further submitted that since the documents lack two essential ingredients viz., (1) bringing the terms of the documents to force after the death of the testator, and (2) reserving the right to revoke the document at any time before the death of testator, they cannot be treated as "Wills" and cannot be marked as such.

10. The word "Will" is defined u/s 2(h) of the Indian Succession Act, 1925 (for short "the Act"). Section 2(h) reads as follows:

The legal declaration of the intention of the testator with respect to his property, which he desires to be carried into effect after his death.

11. The fundamental idea of execution of a "Will" is that the testator should dispose of his property or such part thereof as his personal law permits him to bequeath by a "Will", in such manner as seems to him best. A "Will" is an expressed intention as to what should happen to the property on the death of the testator. A "Will" though executed by a living person, takes effect only on his death. It should have the characteristics viz., it must be intended to come into effect after the death of the testator and it must be revocable.

12. Section 2(b) of the Indian Succession Act, defined codicil which reads thus:

"codicil" means an instrument made in relation to a will and explaining, altering or adding to its dispositions, and shall be deemed to form part of the will"

13. Since the second document did not alter any of the terms and conditions of the first document it cannot be treated as a codicil.

14. The learned Counsel for the respondents-plaintiffs" submits that since the documents did not specify the characteristics of a "Will", they cannot be treated as such.

15. In order to know the intention of the testator, I wish to extract the essential contents of the two documents in question. The document dated 8.5.1962 was executed by Sri Krishnaji S/o Srinivas Naik wherein he mentioned as follows:

I bequeathed my immovable property to my daughter in absolute right. This is my last Will and testament.

16. In the above document, the executant has not mentioned that the direction given by him should come into force after his death or that he is reserving his right to revoke the document at any time before his death.

17. Document dated 21.9.1962 was executed by Sri Krishnaji S/o Srinivas Naik and the essential contents of the document are to the following effect.

I bequeathed by this Will my one-half joint share in the house absolutely to my daughters in equal shares. This is my last Will which I make.

18. The contents of this document also do not indicate that it has to come into operation after the death of the executant and that he has reserved the right to revoke the document during his life-time.

19. A plain reading of the contents of the above documents do not indicate that they shall come into force after the death of the executant or that he reserved the right to revoke the "Wills" at any time prior to his death. The lower Court therefore, rightly observed that they cannot be accepted as "Wills" and rejected to receive those documents in evidence.

20. In the review petition the lower Court observed that as there is no error apparent on the face of the record and as there is no ambiguity in understanding the contents of the documents, it is devoid of merits and accordingly dismissed the same.

21. The learned Counsel for the respondents C. Sindhu Kumari placed strong reliance on certain decisions in support of her submission regarding the ingredients necessary for a valid "Will".

22. In *Jagannatha Bheema Deo v. Kunja Behari Deo* AIR 1922 PC 102, the Privy Council while considering the contents of an unregistered "Will" executed by a Hindu in favour of his wife to the effect "I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner" held as follows:

The document is not a Will, but only a power to adopt, and as such ought to have been registered as being an authority to adopt a son, not conferred by a Will within the meaning of Section 17 of the Indian Registration Act, 1877.

23. In *Parvathy Nadachy, Umayaparvathy Nadachy v. Ramalekshmy Seethalekshmy Ammal* AIR 1956 Tra 127 (DB), Trivendrum Bench of Kerala High Court considered the distinction between a "Will" and "gift" and held:

The essential characteristic of a Will is that it is a mere declaration of an intention so long as the testator is alive, a declaration that may be revoked or varied according to the variations in his intention; a disposition that requires the testator's death for its consummation and is but ambulatory or without fixed effect until the happening of that event. A gift, on the other hand, is a transfer of property that is voluntary gratuitous and absolute conferring immediate rights. (Para 4)

24. In *Ramautar Singh Vs. Sm. Ramsundari Kur and Others*, , a learned Single Judge of the Patna High Court while dealing with the golden rule in interpreting the word "Will" held:

The golden rule in interpreting a Will is to give effect to the testator's intention as ascertained from the language, which he has used. The overriding duty of a Court of construction is to construe the language which the testator has in fact employed giving the due weight to all the words and rejecting none to which a

meaning can reasonably be assigned. The Court is entitled to put itself into the testator's armchair.

25. In *Pavitri Devi and Another Vs. Darbari Singh and Others*, , the Supreme Court, while considering the scope of the explanation to Section 30 of the Hindu Succession Act, 1956 observed:

The Testamentary disposition would mean disposition of the property which would take effect after the death, instead of *eo instanti* on the execution of the document. A testamentary disposition is generally effected by a Will or by a codicil which means an instrument made in relation to a will extending, altering or adding to its disposition and is to be deemed to form part of the Will.

While the gift being a disposition in *presenti*, it becomes effective on due execution and registration and generally delivery of the possession. Section 30 makes it clear that testamentary disposition under the Act would be dealt within accordance with the Indian Succession Act.

26. In *The Brahma Vart Sanatan Dharm Mahamandal Vs. Kanhyalal Bagla and others*, , Supreme Court held:

No doubt the law is well settled that to determine any document as a Will, the document has to be read as a whole. The Will has to be understood and construed in the light of the statutory rules governing the Will and to get the intention of the testator by reading the Will as a whole.

27. In *Dr. Mahesh Chand Sharma Vs. Smt. Raj Kumar Sharma and others*, , the Supreme Court while dealing with the applicability of Section 119(iii) of the Hindu Succession Act in a dispute relating to the date of vesting of legacy to the legal heirs basing on a Will of the testator, held that the property is vested to defendant No. 1 on the date of death of the testator, even though word "heirs" instead of "heir" is used in the Will. Merely because a prior interest in the bequest is given to the widow, it would not indicate a contrary intention within the main limb of Section 119. A Will has to be understood and construed in the light of the statutory rules governing the Will.

28. The above rulings make the position clear that unless a document satisfies the two characteristics i.e., it must be intended to come into effect after the death of the testator and it must be revocable, it cannot be treated as a Will. A document cannot be treated as a Will by a mere reading of the heading of the document. After repeated reading of the documents in question, the learned Counsel for the revision petitioner-6th defendant could not locate from the documents the essential ingredients of a Will, The lower Court was therefore, right in refusing to receive the documents of the revision petitioner and to mark them on her behalf.

29. Since the review petition was filed requesting to review the impugned order in CRP No. 3982 of 2003, the order in the review petition became superficial. I do not find any grounds in both the revision petitions to interfere with the orders

of the lower Court.

30. In the result, CRP Nos. 3982 and 4349 of 2003 are dismissed. The impugned orders of the lower Court are confirmed. Each party to bear its own costs.