

(2004) 04 MAD CK 0190
In the Madras High Court
Case No : L.P.A. No. 32 of 2000

Govindaraju (died), G. Saraswathi and V. Sumathi	APPELLANT
Vs	
Rathinammal and 6 others	RESPONDENT

Date of Decision : 21-04-2004

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 8 Rule 5
Evidence Act, 1872 — Section 58, 59, 68

Citation : (2004) 04 MAD CK 0190

Hon'ble Judges : N. Kannadasan, J;K. Govindarajan, J

Bench : Division Bench

Advocate : T.M. Hariharan, for the Appellant; K. Raghunathan for R1, R2 died and No Appearance for R3 to R5, for the Respondent

Judgement

K. Govindarajan, J.—The plaintiff, who got a decree before the trial court in O.S. No. 210/1982, on the file of the Sub-Court, Tirupur, which was reversed by the learned single Judge in A.S. No. 630/1984, preferred the above appeal. The plaintiff filed the said suit for specific performance of the agreement of the sale deed dated 12.9.1982 or in the alter-native for recovery of a sum of Rs. 1,19,000/- paid as advance.

2. The suit property originally belonged to one Murugesh as he purchased the same under Ex.B2.He settled the property under Ex.B1 in favour of his daughter, the 2nd defendant on 15.9.1973.The same was cancelled by Murugesh, her father, on 25.2.1975.Thereafter, an agreement was executed by Murugesh in favour of the 1st appellant under Ex.A3 on 12.2.1982.Time was extended to perform the contract by making endorsement under Ex.A4, dated 9.5.1982.Under Ex.A5, a sum of Rs. 82,000/- was paid by the 1st appellant to Murugesh and possession was given by executing "Athakshi". Subsequently, under Ex.A6, dated 12.9.1982, a fresh agreement was entered into between the 1st appellant and Murugesh. The said Murugesh died on 27.10.1982.Thereafter, notices were issued asking the respondents to execute the sale deed after

receiving the balance amount of Rs. 5,000/-, which was not accepted by the respondents and so the 1st appellant filed the said suit.

3. The 2nd defendant filed a written statement stating that her father constructed two houses with the help of her husband as he was working as Assistant Engineer at Salem in 1970. According to her, the plaintiff is not correct in stating that the settlement deed dated 15.9.1973 was executed by her father under threat, intimidation, coercion and undue influence. According to her, possession of the property was given to her even on the date of settlement deed. The title deeds also were handed over to her and so Murugesh, the father has no right to cancel the settlement deed executed in her favour and the cancellation deed was obtained fraudulently by adopting dubious methods. She came to know about the said cancellation deed only through the 5th defendant after the death of her father and the said cancellation deed does not bind her. On that basis, she came forward with the case that the 1st appellant/plaintiff is not entitled to specific performance as prayed for and also the amount claimed in the suit.

4. The trial court, considering the above said pleadings and evidence found that the 2nd defendant failed to prove the execution of the settlement deed executed in her favour as contemplated under Sec.68 of the Evidence Act, hereinafter called "the Act", that Ex.B 1 did not come into force, and that the cancellation deed dated 25.2.1-975 is a valid document and so Murugesh is having every right to enter into agreement with the 1st appellant/plaintiff and it would bind the 2nd defendant. On the basis of the above said findings, the trial court granted the decree for specific performance and consequently rejected the consequential relief. Aggrieved against the same, the 2nd defendant preferred an appeal in A.S. No. 630/1984. The learned Judge in the order dated 30.10.1998 reversed the judgment and decree of the trial court and allowed the appeal and gave liberty to the 1st appellant/plaintiff to proceed against the attached sum of Rs. 75,000/- in bank mentioned in his evidence and also against the assets of the deceased Murugesh in the hands of the legal representatives. Aggrieved against the same, the above appeal is preferred.

5. Learned counsel for the appellants mainly submitted that as an agreement holder of the suit property, to sustain the agreement, the 1st appellant/plaintiff is entitled to challenge the validity of Ex.B1 settlement deed regarding the execution of the said document. Since the 1st appellant/plaintiff raised such a plea, unless the 2nd defendant proves the said document as contemplated under Sec.68 of the Act, the settlement deed cannot be relied on to establish the right of 2nd defendant. Learned counsel relying on the findings of the trial court submitted that admittedly the 2nd defendant has not examined any one of the attester of Ex.B1 to prove that Ex.B1 was duly executed and attested in accordance with law and so the cancellation deed Ex.A2 and the agreement under Ex.A6 are valid and they are entitled to execute the same.

6. On the basis of the above pleadings and argument, the following points arise for consideration in this appeal:-

1) Whether Ex.B1 has to be rejected as it shall not be used as evidence to claim right in the suit property by the 2nd defendant as she has not examined any attester to prove the said document?

2) Whether the pleadings in the plaint filed by the 1st appellant/plaintiff could be construed as "specific denial" to make the proviso to Sec.68 of the Indian Evidence Act, as not applicable to the present case?

7. Before dealing with Point No. 1, we incline to deal with Point No. 2 first. According to Sec.68 of the Act in case of will, if there be any attesting witness alive and subject to the process of court and capable of giving evidence, the said will shall not be used as evidence until one attesting witness at least is called for the purpose of proving its execution. But with respect to other documents which also require to be attested, not being a will, such procedure need not be followed to prove the execution of the document if it is registered in accordance with the provisions of the Indian Registration Act, 1908. But such a procedure has to be followed if the execution by a person by whom the document purported to have been executed is specifically denied.

8. In the present case, the executants of Ex.B1 has admitted the execution of Ex.B1. Only the 1st appellant/plaintiff who is the agreement holder came forward with the plea that the said document is void or voidable. It is well settled that such a denial as contemplated under the proviso to Sec.68 of the Act, need not be necessarily by the executants of the document but that it may be by any one of the party to the suit interested in the denial of the execution of the document, if such a document is put against his claim even if the executants of the document admits execution of the same. So it cannot be said that the 1st appellant/plaintiff is barred from denying execution of Ex.B1 so as to say that the said proviso is applicable to the present case.

9. The proviso to Sec.68 of the Act was inserted by Act 31 of 1926 for the purpose of saving time and expenses. Though the object of attestation being to provide proof of the genuineness of the document, such a proof is unnecessary where the execution is either admitted or being not specifically denied. But in the case of a will, the said proviso has no application. Under the proviso to Sec.68 of the Act, the obligation to produce at least one attesting witness, stands withdrawn if the execution of any such document, not being a will, which is registered, is not specifically denied. Therefore, everything hinges on the recording of the fact of such denial. If there is no specific denial, the proviso to Sec.68 of the Act comes into play. But if there is denial, the said proviso does not apply.

10. The admission of execution of Ex.B1 by the settlor is available in this case, who executed a cancellation deed under Ex.A2, cancelling Ex.B1 in which it is stated as follows:-

From the above said recitals, it is clear that Ex.B1 settlement deed was executed by Murugesh and only due to the subsequent attitude of the 2nd defendant, he

executed Ex.A2. cancelling Ex.B1. In support of the above said finding as found by the learned Judge, evidence is available to show that the original title deeds were given to the 2nd defendant by the said Murugesh and the same were marked as Exs.B2 and B4 to B6.

11. But, in this case, learned counsel for the appellants has come forward with the submission that since the 1st appellant/plaintiff denied the execution of Ex.B1, the 2nd defendant cannot rely on the proviso to Sec.68 of the Act and so she cannot rely on Ex.B1 to establish her title, as the same has not been proved by examining one of the attestor as contemplated under Sec.68 of the Act. If the averments in the plaint connote the specific denial as contemplated under the proviso to Sec.68 of the Act, the 2nd defendant cannot rely on Ex. B1 to establish her title as she did not examine any one of the attestor.

12. So it has to be appreciated whether the 1st appellant/plaintiff has come forward with any such "specific denial". So we have to appreciate the averments in the plaint regarding the denial, which are as follows:-

5. ...It was no wonder, therefore, that Murugesh fell an unwilling prey to their designs and succumbed ultimately to the pressure tactics. An involuntary document dated 15.9.1973 was extorted from Murugesh by the second defendant, purporting to be an irrevocable settlement of the suit properties.

6. It is submitted that the said document was void abinito. It was not acted upon. Possession was not given to the second defendant thereunder Murugesh continued to be the owner and was in possession. The second defendant too did not accept the gift. It was, as stated earlier, the result of threat, intimidation coercion and undue influence and was in the same legal position as a voidable contract.

Except these vague statements, there is no other averment in the plaint with respect to execution of Ex.B1 by Murugesh. So it is for us to decide whether such pleading in the plaint can be construed as "specific denial", "specific" means expressly, distinctly or definitely and not an ambiguous or vague stage. It should be something over and above a general denial as some meaning must be given to the word "specific". What has to be specifically denied or disputed is the execution of the document or the attestation.

13. The learned Judges of the Calcutta High Court in the decision in Nund Kishore Lal v. Kanee Ram Tewary, ILR 29 Calcutta 355, while dealing with the statement in the written statement that the execution of the deed had been brought about by fraud of the plaintiff, held that the same was not a specific denial of execution of the document.

14. While considering the defence that they had knowledge of the transaction and that, if genuine, it was hollow, the learned Judges of the Bombay High Court in the decision in Yacub Khan v. Guljar Khan, AIR 1928 Bombay 267, observed that: "the defendants in their written statement had not specifically denied

execution within the meaning of Act 31 of 1926 and therefore it was not strictly necessary for the appellant to call the attesting witness in proof of execution."

15. Their Lordships of Rangoon High Court in the decision in *R.M.A.R.M. Chettiyar Firm v. V. Htaw*, AIR 1933 Rang 6. held with respect to the scope of Sec.68 of the Act. as follows:-

the meaning and effect of S.68 is that in the case of a mortgage within S.59 of the Transfer of Property Act it is incumbent upon the party relying upon it to provide the due execution of the mortgage by adducing the evidence of at least one attesting witness in that behalf as laid down in S.68 of the Evidence Act, provided that unless its due execution, that is to say, its signature by the mortgagor in the presence of two attesting witnesses is specifically denied, the execution of the mortgage deed in the form required by law may be proved "aliunde" by adducing other evidence in that behalf.

(emphasis supplied)

16. The Allahabad High Court in the decision in *Jhillar Rai and Others Vs. Rajnarain Rai and Others*, has held as follows:-

There has been a subsidiary argument that the plaintiffs cannot claim to be co-sharers, because the mortgage deed has not been proved. The argument is based on the provisions of Section 68, Evidence Act. It appears that the execution of the mortgage was proved, but not by the production of a marginal witness. u/s 68 as it now runs, it is not necessary to prove or to produce a marginal witness unless the mortgage is specifically denied. It is obvious that there would be no necessity to prove the deed at all if it was admitted and consequently the section contemplates a distinction between the position where execution is not admitted and a position where execution is specifically denied. In the present case the plaintiffs in the first paragraph of the plaint stated that they were mortgagees under the deed dated 23rd September, 1929, and that they had been in possession of the plots in question. The defendants said in their written statement that they did not admit this paragraph. But it is clear from the additional pleas that what they were questioning really was not the execution of the deed but the fact of possession. No issue was framed clearly on the question of execution. In these circumstances it cannot be held that the execution of the mortgage was specifically denied. The mortgage was therefore sufficiently proved.

The above said decision has been approved as correct proposition of law by the Apex Court in the decision in *Brij Raj Singh [dead] by L.Rs. and Others Vs. Sewak Ram and Another*,

17. In a case where a defence was taken as the mortgage was a sham transaction, the Full Bench of this Court reported in the decision in *Vedachala Chettiar Vs. Ameena Bi Ammal and Others*, held as follows:-

We have now to consider whether the mortgage is enforceable against the fourth defendant. His learned advocate has contended that the averments in his written

statement also amount to a specific denial of execution and that he is in the same position as the second defendant. We are unable to accept this contention. In his written statement, the fourth defendant attacked the mortgage deed on the ground that it represents a sham and nominal transaction, entered into by the first and second defendants in order to defeat him. This is not a specific denial of execution. A document may represent a sham transaction, notwithstanding that it has been executed by the person who is mentioned in the document as being the executants. In order to call in aid section 68. the fourth defendant had to deny execution, which he did not.

(emphasis supplied)

18. The learned Judge of the Mysore High Court in the decision in K. Narasimhappav. Lakkanna, AIR 1959 Mysore 148. has held, while dealing with the scope of proviso to Sec.68 of the Act, as follows:-

Looking to the wording of the proviso, it is apparent that what the law requires is not a mere denial but a specific denial, which means, not only that the denial must be in express terms but that it should be definite and unambiguous. What has to be specifically denied is the execution of the document. Other contentions not necessarily and distinctly referring to the execution of the document by the alleged executants cannot be covered by the denial contemplated in this proviso. Such contentions may be. for instance, in respect of the consideration for the document or the sham or colourable nature of the transaction evidenced by the document.

19. Even in the decision in Chhuttan Lal Vs. Shanti Prakash and Others, . while dealing with the averments in the plaint while attacking the gift deed on the ground that it was obtained by fraud or undue influence, held, such plea cannot be construed as specific denial and thereby the plaintiff cannot derive any advantage from the defendant's failure to prove the gift deed in accordance with Sec.68 because in the circumstances of the case such a proof was not necessary to resist the same.

20. The Division Bench of the Kerala High Court in the decision in Kannan Nambiar v. Narayanai Amma & Ors., 1984 KLT 855, had an occasion to consider the meaning of the expression "specific" used in the Proviso to S.68 of the Evidence Act, and held as follows:-

"specific" means with exactness, precision in a definite manner. It is clear that something more is required to connote specific denial in juxtaposition to general denial. Specific denial of execution of gift is an unambiguous and categorical statement that the donor did not execute the document. It means not only that the denial must be in express terms but that it should be unqualified, manifest and explicit. ... Other contentions not necessarily and distinctly referring to the execution of the document by the alleged executants cannot be gathered, for the denial contemplated in the proviso.

21. Even with respect to the will, the Division Bench of the Kerala High Court in the decision in *Thayyullathil Kunhikannan and Others Vs. Thayyullathil Kalliani and Others*, took a view that if there is no specific denial of any rule of law or of pleading, the proof is not required as contemplated under Sec.68 of the Act, and held as follows:-

34. Order 8 Rule 5 of the C.P.C, provides that unless there is a specific denial of any allegation of fact made in the plaint, it shall be taken to be admitted. Section 58 of the Evidence Act provides that no fact need be proved in any proceedings, which by any rule of pleadings in force at the time, the parties are deemed to have admitted by their pleadings. In this case, in the absence of any denial in the written statement, the genuineness and the validity of the will Ext.A1 must be deemed to have been admitted by the law of pleadings, namely Order 9 Rule 5. and therefore that fact was not required to be proved at the trial. Section 68 states that if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive. The proviso to the Section which was introduced by the amending Act 31 of 1926 makes an exception in the case of any document, not being a will, which has been registered, unless its execution by the persons by whom it purports to have been executed, is specifically denied. The fact that the proviso is not applicable to wills, and that it does not make an exception in the case of registered wills, does not lead to any inference that a will cannot be acted upon or used as evidence, unless it has been proved by examining an attesting witness. The only effect of the proviso is that registration of the will by itself does not obviate the necessity of calling an attesting witness to prove it, if it is otherwise required to be proved. The proviso does not speak of a case where a will is not in dispute. Section 68 relates to those documents which require to be proved at the trial of a suit. If by any rule of law or of pleadings, such proof is not required, S.68 cannot operate to insist on formal proof by calling an attesting witness. Section 58 has to be read as overriding S.68 and as obviating the necessity for calling an attesting witness, unless the execution of the will or the attestation is in dispute. In the absence of any such plea in the written statement, it will be the height of technicality and waste of judicial time to insist on examination of an attesting witness, before a will could be used as evidence. Phipson on Evidence 12th Edition (1976) explains the rationale behind examining an attesting witness as that he is the witness appointed or agreed upon by the parties to speak to the circumstances of its execution, "an agreement which may be waived for the purposes of dispensing with proof at the trial", (paragraph 1751). In paragraph 1757, the learned author points out that proof of execution of documents required by law to be attested is dispensed with (although the attesting witness may be alive and in Court)) "when the execution has been admitted for purposes of trial". Order 8 Rule 5, C.P.C, deems the execution of the will to be admitted in the absence of any denial thereof in the written statement. Examination of an attesting witness is therefore unnecessary when the parties have not joined issue

on the validity or genuineness of the will.

22. Even the learned Judge of the Kerala High Court in the decision in Kadiya Umma v. Matyankutty, 1992(1) KLT 461, while dealing with the pleadings mentioned in the plaint with respect to the gift deed to the effect that they were obtained by misrepresentation, undue influence and not executed in good faith and no reason for execution of such gift deed, found as follows:-

15. I have carefully gone through the pleadings in para 5 of the plaint on which great reliance was placed by counsel for plaintiffs, but I am unable to see anything in the pleading which can be described as specific denial of execution of the documents. The plea that plaintiffs were not aware of the execution of the documents would not amount to specific denial of execution. The decisions referred to above fully support this view. In the circumstances, in my opinion, the lower appellate court went wrong in holding that since there is want of proof of execution, the impugned gift deeds should fail.

23. Even the Apex Court in the decision in Surendra Kumar Vs. Nathulal and Another, while considering the plea taken in the written statement by way of defence that the deed of gift was a collusive transaction, held that the same is not a specific denial and observed as follows:-

11. On a perusal of the written statement filed by Defendant 3, who is Respondent 1 herein, it appears that the assertion in the plaint that Chand Bai has executed a deed of gift in favour of the plaintiff and, therefore, he is entitled to redeem the mortgage property and recover possession of the same was not specifically denied. In paras 5 and 6 of the written statement, there was merely a general denial of the averments in the plaint. Regarding the deed of gift the plea taken in the written statement was that it was a collusive transaction. The further case-pleaded by Defendant 3 was that he has no privity of contract with the plaintiff as he got the property by mortgage from Smt Parsadi and Hanumandas and, therefore, the plaintiff is not entitled to redeem the mortgage and recover possession of the property.

The said pleading was construed, on the basis of Sec.68 of the Evidence Act. as follows:-

on a plain reading of the proviso, it is manifest that a registered deed of gift can be received in evidence without examining one of the attestor if the person who has executed the deed of gift has not specifically denied its execution. In the present case, the donor Chand Bai has specifically admitted execution of the deed of gift in favour of the appellant. Therefore, the lower appellate court was in error in holding that the deed of gift has not been duly proved since one of the attestor has not been examined as a witness.

24. Applying the above said principles of law dealt with in the decisions cited above, the averment in the plaint cannot be taken as denial of execution of the document or attestation therein. Only two facts have been set out in the written

statement. namely, (1) the said document is involuntary document which was extracted from Murugesh by the 2nd defendant; (2) the said document was executed in result of threat intimidation, coercion and undue influence. Similar defence had been construed in the above said decisions and found that the similar averment taken cannot be construed as "specific denial" so as to prevent the 2nd defendant to rely on Ex.B1 on the ground that she did not examine any one of the attestor. As stated already and also as found by the learned Judge, the execution of Ex.B1 by the 2nd defendant's father was proved otherwise as the executor had admitted the execution of Ex.B1 under Ex.A2, the cancellation deed. The 2nd defendant had proved the execution of Ex.B1 through other evidence, though not examined any one of the attestor. The learned Judge also found that the execution of Ex.B1 has been proved and has been acted upon. So the submission of the learned counsel for the appellants that the 2nd defendant cannot rely on Ex.B1 claiming right in the suit property and to resist the plaintiffs claim for specific performance cannot be countenanced. Since the suit property has been settled in favour of the 2nd defendant, the vendor has no right to cancel the same under Ex.A2 and so the said cancellation deed cannot be put against the 2nd defendant and consequently the 1st appellant/plaintiff did not derive any right under Ex.A6 agreement which is sought to be enforced in the suit. The learned Judge also safeguarded the interest of the 1st appellant/plaintiff to recover the amount paid to his vendor. For all the reasons stated above, the judgment and decree of the learned Judge dated 30.10.1998 are confirmed and this Appeal is dismissed. No costs.