

(1925) 11 MAD CK 0051
In the Madras High Court

(Kalakantharam) Rukmani Ammal

APPELLANT

Vs

Ka Ki Ankama Naidu and Others

RESPONDENT

Date of Decision : 06-11-1925

Acts Referred:

Citation : AIR 1926 Mad 744 : (1926) 23 LW 664

Hon'ble Judges : Venkatasubba Rao, J;Kumaraswami Sastri, J

Bench : Full Bench

Judgement

Kumaraswami Sastri, J.—The 3rd defendant is the appellant. One Venkatasubbayya died on 6th April 1904. He became a Sanyasi on 2nd February 1904, and it is alleged in the plaint that he left a Will, dated 2nd February 1904, making certain dispositions of his property. The plaintiff claimed under a mortgage deed, dated 14th April 1910, executed by Defendants 1 and 2 and the 3rd defendant's deceased husband. The 1st defendant was the sister's son of the testator and he also married the predeceased son's daughter of the testator. The 2nd defendant married the brother's daughter of the testator, The 3rd defendant's husband is dead. The main pleas of the defendants in their written statements, to be considered at present, are that Venkatasubbayya became a Sanyasi on 2nd February 1904, that the Will referred to in the plaint was executed after he became a Sanyasi, the exact date not being known, between the 9th and 12th. of March and that it was antedated to 2nd February. Other contentions were raised which it is unnecessary to consider for the purpose of this appeal. The Will was registered on 17th March and so far as it appears from the evidence there was no dispute raised as regards this Will till we come to the present suit. The plaintiff filed the suit on 4th April 1922, so that we have to decide the question as to the exact date of Ex. B, the will, twenty years after its execution and registration. The District Judge was of opinion that, although Venkatasubbayya became a Sanyasi, he was not a true Sanyasi under the Hindu Law having renounced the world and gone through the necessary ceremonies and that he did not divest himself of all the properties as required, but continued to deal with them and that his professed Sanyasam would not prevent his willing

away the properties, even though the Will was executed after he became a Sanyasi. In this view, he is of opinion whether the Will was executed on the 2nd February or subsequently it will not make much difference, even though he was inclined to the view that the will was executed subsequent to his becoming a Sanyasi.

2. The first question that arises in this case is what was the date of the will, whether it was executed on the 2nd or whether it was executed subsequently and ante-dated ? In cases where a document has been executed and registered, and the question arises as to the date it bears, there can be little doubt that the presumption is that the document was executed on the date it bears. If any authority were needed for this proposition 1 may refer to the decision of their Lordships of the Privy Council in *Mina Kumari Bibi v. Bijoy Singh Dudhuria* [1917] 44 Cal. 662. The onus, therefore, is on the 3rd defendant who is the contesting defendant to show that although the document was executed so long ago as 1904 and bears the date 2nd February, it was executed subsequently. In all such cases lapse of time does strengthen the onus cast. Venkatasubbaya is dead. His widow is dead, and so far as the evidence goes we have to rely mainly on the evidence of P.W.2 who was the only attesting witness to the Will who has been examined. (The judgment then deals with the evidence of several witnesses and concluding that on the evidence it could not be held that Ex. B was ante-dated, proceeded further.) I think it is unnecessary to consider the question whether Venkatasubbayya was a Sanyasi in the strict sense of the term under the Hindu Law having undergone all the ceremonies and consequently civilly dead and unable to dispose of the property. If knowledge of the Mantrams and the understanding of the ceremonies are essential very few ceremonies now performed by Hindus could be upheld. I do not agree with the District Judge that knowledge of any mantram is necessary, repetition being sufficient in these days. All you have to see is whether a person performs his ceremony repeating the mantras. Where a ceremony is admittedly performed, the presumption is that it was performed in accordance with the Shastras.

3. Then the next question is whether the decree as passed by the learned Judge is correct. The plaintiff admits and bases the title of the mortgagors on the Will Ex. B. The mortgagors under Ex. B are three out of the eight persons who are entitled to the properties bequeathed. The decree as it stands is a decree against the entire property irrespective of any shares of the mortgagors. I do not think that such a decree can be passed. The decree ought to be limited to the interest of the mortgagors in the property under the Will. What that interest is it is necessary to determine in this case.

4. It is clear that in a suit on a mortgage the mortgagors are estopped from disputing that they have not got the interest which they said they had and which the mortgagees bargained for. But it is open to third parties to state and prove what that interest is. It is open to third parties to say that the mortgagors have no interests or lesser interests than those prescribed for in the mortgage. The

position of the 3rd defendant in this case peculiar. She is a daughter of the testator and she is also the widow of one of the executants of the mortgage. She could not as legal representative of the mortgagor set up any title adverse to the title which the husband prescribed for. But in her own right as daughter it is open to her to set up any title which she may have, but that is not possible in a mortgage suit where she is the legal representative of one of the mortgagors. It has been decided by their Lordships of the Privy Council that you ought not in a mortgage suit to join parties claiming a paramount adverse title. Therefore it is unnecessary to determine what her rights are as daughter of the testator. Though Mr. Krishnaswami Aiyangar invites us to discuss this question in view of the fact that according to him one of the legatees under the will has forfeited his right but in view of the fact that this circumstance is not admitted we cannot go into the question.

5. The question as to 3rd defendant's rights as daughter need not be determined in this case as her position is that of the legal representative of a mortgagor and as legal representative she cannot be allowed in this suit to contest the right of her husband who executed the mortgage. The decree will be only as regards the interests of the mortgagors in the property mortgaged without determining what that interest is in these proceedings. The appeal is dismissed. As the main contentions have not been substantiated the appellant will pay the respondents' costs. Time for redemption six months from this date.

Venkatasubba Rao, J.

6. I entirely agree ; and but for the fact I strongly feel that the defence put forward is unrighteous in the extreme, I should not take the trouble to deliver a separate judgment. The defence is strikingly ingenious and has the merits of being original. The suit is brought to enforce a mortgage executed by certain legatees under the will of Venkatasubbayya who died in April 1904. The mortgage was executed by Defendants 1 and 2 and the husband of the 3rd defendant. In 1910, the mortgage was effected and the present suit was brought in 1922.

7. The principal contesting defendant is the third and her defence is that at the time of the making of the Will her father was a sanyasi. The Will bears the date 2nd of February 1901 and was registered on the 17th of March 1904; the defence suggests that Venkatasubbayya became a Sanyasi on the 2nd of February and that the Will was not executed on that day previous to his having become a sanyasi, but that, as a matter of fact, it was made some time between the 9th and the 12th of March and that it was ante-dated to make it appear that the testator executed it while still a householder. It is then contended that as a sanyasi Venkatasubbayya would be civilly dead and that his Will would be invalid. If this contention succeeds, it would follow that the suit would fail, the mortgagee having acquired no right. The District Judge has dealt with two questions: 1. Was the Will ante-dated ? and (2). Did Venkatasubbayya become a sanyasi in the strict sense of that term ?

8. He has devoted a large portion of his judgment to a discussion of the second question and has come to the conclusion that the deceased did not become a sanyasi and that he was not, therefore, incompetent to make a Will. In regard to the other question, the learned Judge has not dealt with it quite as fully as he might have done, for, in his opinion, on his finding that the testator was not a sanyasi it was not necessary to consider very fully the plea of the ante-dating of the Will. All the same he has recorded a finding that the Will was ante-dated.

9. In the view I take of the case, it is unnecessary to decide whether the deceased did or did not become a sanyasi. But I wish to make one observation. The District Judge is perfectly justified in demanding the strictest proof possible of the fact that the testator did become a sanyasi. The Will is challenged 18 years after its execution. It was duly executed, attested and registered. It was acted on and the mortgagee, a stranger to the family, was led to believe that it was perfectly valid. At this distance of time the testator's daughter, the 3rd defendant, chooses to deny its validity. This is one aspect of the case. Then again, the suggestion made is that Venkatasubbayya became an "apath-sanyasi." This form of renunciation of the world is clearly not the approved form.

10. Renunciation is considered meritorious, but a man renounces only what he may keep and gives up what he may retain. In the case of an apath-sanyasi, the man is face to face with death and he makes a virtue of necessity and gives up earthly things when he cannot help doing so. He expects that he is dying and goes through the form of renouncing the world. This is a sort of sanyasi which Venkatasubbayya is supposed to have become. That he did wear kashaya and change his name, there can be no doubt. But when the consequences of holding that the deceased became a sanyasi are so grave, the District Judge, in the circumstances, is entitled to demand a most rigorous proof of the fact alleged. Whether the District Judge's conclusion is right or wrong I need not pause to consider, because I am perfectly satisfied that the Will was not ante-dated and that his judgment must be supported on that ground.

11. As I have said the District Judge's discussion of the issue, was the Will antedated, has been somewhat scrappy, but after hearing Mr. Krishnaswami Aiyangar for the appellant, I have come to the conclusion that he has hopelessly failed to make out a case. (The judgment here deals with the evidence and concluding that the theory of ante dating was resorted to by the third defendant in her desperate attempt to get rid of a just claim, proceeded.) In regard to the form of the decree, I agree with what has fallen from my learned brother. I do not think that the plaintiff has asked for more than what we are going to give him by our judgment. The first two defendants have been impleaded because they are mortgagors and the 3rd defendant because she is the widow and heir of the deceased mortgagor Rangiah. The mortgage decree can affect only the interest of the mortgagors, and in so far as the 3rd defendant represents Rangiah, she can have no answer. Any paramount right of the 3rd defendant, granting she has one, is not affected by the mortgage decree.

12. I, therefore, agree that the decree shall be modified in the way suggested by my learned brother.

13. The appeal otherwise stands dismissed with costs.