

(1963) 07 AP CK 0001

In the Andhra Pradesh High Court

Case No : Second Appeal No. 162 of 1960

Ketharaju Rajeshwari

APPELLANT

Vs

Kanthamraju Varalakshamma and Another

RESPONDENT

Date of Decision : 29-07-1963

Acts Referred:

Evidence Act, 1872 — Section 67, 68, 70, 77, 90
Registration Act, 1908 — Section 57, 60, 60(2)

Citation : AIR 1964 AP 284

Hon'ble Judges : Gopalrao Ekbote, J

Bench : Single Bench

Advocate : P.M. Gopal Rao, for the Appellant; A.V. Krishna Rao and G. Sitarama Sastry, for the Respondent

Final Decision : Dismissed

Judgement

Gopalrao Ekbote, J.—The action out of which this second appeal has arisen was laid by the 1st respondent who is the plaintiff before the District Munsif, Guntur for recovery of possession of certain lands and for Rs. 200/- as amount due for Makta for the year 1954-55 and for future mesne profits. It was alleged by the plaintiff that the suit property belonged to one Pulliah who under a will conveyed the title to his wife Venkayamma. After Pulliah's death, Venkayamma became the absolute owner of the suit property. As there was no one to look after Venkayamma she looked for help to her brother, Lingiah. As a consideration for the assistance and service Venkayamma conveyed the suit property to her brother, Lingiah through a gift deed dated 13-6-1924 and put Lingiah in possession. Although Venkayamma had adopted a boy, Sitaramanjaneyula, but the suit property was not vested in the adopted boy.

It was alleged that as the adopted son did not look after Venkayamma, Lingiah executed a settlement deed on 9-10-1924 in favour of his sister, Venkayamma through which she was allowed to enjoy the usufruct of the property for her life without any right for alienating the same. It was also stipulated that the property

would revert after her death to Lingiah. Venkayamma died on 12-11-1954. The 2nd respondent was the lessee from Venkayamma for the year 1954-55 on a rent of Rs. 50/- per acre. As the lessee failed to pay the amount for that year, the plaintiff who became the heir after Venkayamma's death and entitled to the suit property claimed the lease amount as well as the possession from the 2nd respondent, who instead of handing over the possession and paying the amount joined hands with the 1st defendant in an attempt to deprive the plaintiff of her right.

2. The 1st defendant denied that Venkayamma ever executed any gift deed in favour of Lingiah and that Lingiah had settled the property for life in favour of Venkayamma. She alleged that both the documents although registered appeared to be fictitious. She claimed that Venkayamma was the absolute owner of the property and that it was gifted away by her to the 1st defendant through a deed dated 22-4-1953. She claimed that the 2nd respondent is her lessee and not that of Venkayamma.

3. The second respondent however alleged that he was the lessee of Venkayamma and that her power of attorney holder collected the lease amount from him. He admitted that he has to pay Rs. 240/- for the year 1955-56. He stated that the area under lease was six acres and as the plaintiff was claiming four acres, the defendant is liable proportionately. He also stated that the 1st defendant gave him a notice on 12-2-1955 putting her claim forward to the land in dispute on the basis of a gift deed dated 22nd April, 1953.

4. Upon these pleadings the District Munsif, Guntur, framed several issues and after recording the evidence of the parties decreed the plaintiff's suit with costs and for future profits against the 2nd defendant from 1955-56 onwards at Rs. 160/- per year till he delivers the possession.

5. Dissatisfied with that it is the 1st defendant who went in appeal before the Subordinate Judge Guntur. The 2nd defendant did not prefer any appeal. The appellate Court dismissed the appeal with costs. Both the Courts have found that Venkayamma was the absolute owner of the property, that she gifted away the same to her brother, Lingiah, that Lingiah settled back the property in favour of Venkayamma for her life and that after the death of Venkayamma the plaintiff being the legal heir is entitled to the suit property. They also held that the 2nd defendant is the lessee of Venkayamma. It is this view of the Court below that is assailed now in this second appeal.

6. Mr. P. M. Gopal Rao, the learned advocate for the appellant, argued that the original settlement deed, Ex. A.2, has not been produced in the Court and that without laying the necessary foundation for secondary evidence the lower Court has erred in receiving secondary evidence. He has submitted that there is no evidence regarding the execution of the settlement deed. Consequently, in his submission, the plaintiff's suit is time-barred, as she has failed to prove that she was in possession within twelve years before the suit, or that Venkayamma's

possession was a permissive possession.

7. Before I deal with Ex. A.2 and the arguments advanced in regard to the same, it is necessary briefly to refer to Ex. A.1 which is the gift deed executed by Venkayamma in favour of Lingiah. It was faintly argued that although the original of Ex. A.1 is produced, but it was denied by the 1st defendant and as there is no evidence in regard to the execution of the gift deed, Venkayamma could not be considered to have gifted away the property to Lingiah. I do not see my way to accede to this argument. Admittedly Ex. A. 1 is a document which is more than 30 years old. u/s 90 of the Evidence Act, there fore, when the document is admittedly of over thirty years old and has been produced from proper custody, the trial Court, in my judgment, has

not erred in exercising the discretion for presuming that the gift deed is properly executed and attested by the person whose signature appeared on the deed. Both the Courts below have concurrently held that Ex. A. 1 is proved. I do not see therefore any reason to interfere with that conclusion. Nothing particular has been pointed out during the course of argument as to why the finding of fact in this respect should be disturbed by this Court. When Ex. A. 1 is proved it follows that Venkayamma conveyed the suit property through Ex. A. 1 to her brother, Lingiah. She ceased to have therefore any interest in the suit property.

8. Now in regard to Ex. A.2, the settlement deed executed by Lingiah in favour of Venkayamma, what I am called upon to consider is whether the execution of Ex. A.2 is satisfactorily proved. What is contended by the learned Counsel for the appellant is that sufficient foundation was not laid for receiving secondary evidence. It is no doubt true that the original of Ex. A.2 has not been produced. It is also true that the plaint does not disclose as to in whose custody the document is. But in the written statement also except bare denial of the execution of the settlement deed no further averment was made. It was not objected that as the original was not proved, the certified copy which has been produced by the plaintiff is not admissible in evidence.

The trial Court did not frame any issue in respect of Ex. A.2 either in regard to the admissibility of the certified copy obtained from the Registrar's Office, or about the execution of the same. The defendant did not during the course of trial raise any objection even in regard to the omission to frame issues regarding these matters. It cannot be seriously disputed that when a party gives evidence on a certified copy without alleging or proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of the admission and any objection taken subsequently will not be entertained. This position is based on the principle that if the objection has been taken at the proper time, the party affected could have met it and regularise the proceeding. It is admitted that no such objection was taken at the time when the certified copy was received in evidence by the trial Court. It does not, therefore, in my judgment, lie in the mouth of the 1st defendant to object subsequently to the secondary evidence which was received by the trial Court.

9. Although no issues in this respect were framed by the trial Court, at the time of arguments the trial Court seems to have heard the objections and disposed them of in favour of the plaintiff. Even then, in my opinion, there is no substance in the objection that sufficient foundation was not laid by the plaintiff in order to adduce secondary evidence. Although it was not alleged in the plaint, nor any notice was given to the defendant but in the natural course of events the settlement deed ought to be in possession of Venkayamma, who was allowed her enjoy the usufruct of the suit property during her lifetime.

It is not suggested by the defendant that either during the life time of Venkayamma, or subsequent to her death, the plaintiff has any occasion to come in possession of the said settlement deed. On the other hand, it will not be wrong to infer that when the alleged gift deed Ex. B.1 was executed by Venkayamma in favour of the 1st defendant, a year before her death, she must have handed over the settlement deed to the 1st defendant. Assuming that she died without handing over the settlement deed either to the 1st defendant, it was obvious to the 1st defendant that if, she calls upon the plaintiff to tender any evidence in regard to the settlement deed, the plaintiff will not be in a position to produce the original settlement deed as she in the circumstances cannot be in possession of the same.

In view of the circumstances and nature of the case the 1st defendant ought to know that she will be required to produce the settlement deed as in the natural course of business she would be considered to be in possession of the same. Having got a gift deed executed by Venkayamma, it is to her interest to suppress the original settlement deed and not to the interest of the plaintiff. If the settlement deed is produced, it will clearly prove that Lingiah had given Venkayamma during her life-time the permission to enjoy the usufruct of the suit property, and any contention contra in that regard advanced by the defendant will be repelled. When Venkayamma was, persuaded to execute the gift deed in favour of the 1st defendant, it will not be wrong to infer that she also was interested in suppressing the document.

Whether therefore the original document was in possession of Venkayamma or has been in possession of the 1st defendant it was not necessary for the plaintiff to issue any notice u/s 66 to the 1st defendant, as she knew or she ought to know that she would be required to produce the original. This apart, as stated above, the 1st defendant never objected that sufficient foundation was not laid and therefore the certified copy ought not to be received. I do not therefore think that there is any substance in the argument that as no foundation was laid, secondary evidence ought to be rejected in this case.

10. It is, however, true that on mere production of a certified copy of a document which is more than 30 years old, no presumption is permitted regarding its genuineness or execution u/s 90 of the Evidence Act. Section 90 requires production in Court of the particular document in original in regard to which the Court is asked to draw the statutory presumption of its execution. In AIR 1935

132 (Privy Council) their Lordships of the Privy Council observed:

"Their Lordships approve of the decision in *Shripuja v. Kanhayalal* 15 Nag LR 192: AIR 1918 Nag 114 in which the Judicial Commissioner held that production of a copy was not sufficient to justify the presumption of due execution of the original u/s 90, and they are unable to agree with the subsequent overruling of that decision in AIR 1934 67 (Nagpur) ."

This view has now been affirmed by the Supreme Court in *Harihar Prasad v. Deonarain Prasad*, (S) AIR 1956 SC 305 at p. 310. Although" therefore a certified copy may be used to prove the contents of a document, but no statutory presumption u/s 90 of the Evidence Act is available in a case where the original is not produced but a certified copy alone is produced.

11. The necessary question which arises from the above is: Is the certified copy of the settlement deed given by the Registrar's Office admissible to prove the execution of the settlement deed? I do not think it can be seriously disputed that the certified copy although admissible in evidence as secondary evidence may be enough to prove the contents of the document, but is not enough to prove its execution. Subba Rao, C. J., as he then was, in *Padmanabhachari v. Sithapathi Kao*(1954) 2 MLJ 75 observed that "the certified copy of the suit mortgage bond is admissible in evidence, but this will not dispense with the proof of the execution of the same."

It cannot however be contended that the certified copy is not admissible in evidence to prove even the contents of the document. Section 66 of the Evidence Act embodies the general rule that the contents of the documents may be proved either by primary or secondary evidence. The terms "primary" and "secondary evidence" have been explained in Sections 62 and 63. It is Section 64 which lays down that documents must be proved by primary evidence except in the cases where secondary evidence is permitted under the Evidence Act. This section rests on the maxim that the "best evidence" must always be produced. But when it is proved the original is either lost, or has been wilfully suppressed or cannot be produced for reasons beyond the control of the plaintiff, secondary evidence can certainly be looked into.

Now u/s 65 secondary evidence may be given of the existence, condition or contents of a document when the original is a public document within the meaning of Section 74. Section 74 defines what are public documents. Subsection (2) of Section 74 states that public records kept in any State of private documents are also public documents. This Section therefore refers to such records also as are kept under the Indian Registration Act, particularly Sections 51 and 57-Section 51 refers to the register-books to be kept in the several registration offices. u/s 57 registering officers are under a legal obligation to allow inspection of certain books and indexes, and to give certified copies of entries. Under Sub-section (5) of Section 57 all copies given under the said Section are to be signed and sealed by the registering officer. These certified

copies shall be admissible for the purposes of proving the contents of the original document.

Under Section 77 of the Evidence Act also certified copies are admissible to prove the contents of the public documents. There is however some difference between Section 57 of the Registration Act and Section 77 of the Evidence Act. Whereas Section 57 of the Registration Act makes the certified copies admissible to prove the contents of the original documents. Section 77 of the Evidence Act makes the certified copies admissible to prove the contents of the public documents. This difference does not alter the effect as far as this case is concerned. This Section i.e., Section 57, therefore, permits a certified copy to be used for the purposes of proving the contents of the original document. Similarly u/s 60(2) of the Registration Act a certificate containing the word. "registered" together with the number and page of the book in which the document has been copied-shall be signed and sealed and dated by the registering officer. This certificate u/s 60(2) is admissible for the purpose of proving that the document has been duly registered in the manner provided by this Act and that the facts mentioned in the endorsement referred to in Section 59 have occurred as therein mentioned.

Although therefore a mere registration of a document may not by itself constitute sufficient proof of the execution of the document, but in view of Sections 57 and 60 of the Registration Act the-certified copy and the certificate issued by the Registrar, do, in my judgment, constitute sufficient evidence to prove the contents of the document and also to some extent an evidence of the execution of the document. It may be that proof of admission of execution before the Registrar may not satisfy completely the requirements of Section 67 of the Evidence Act which requires that the signature of the executant must be proved to be in his handwriting. But it cannot be argued that admission of signature before the Registrar cannot in any case form an evidence of the execution of the document. It may be argued validly that merely on the basis of admission before the Registrar "it may be dangerous to declare the execution of the document as proved, but certainly if there is other corroborating evidence the admission of execution before the Registrar can be a relevant piece of evidence from which presumption of execution can legitimately be drawn. After all the solemnity of the registration of a document cannot be lost sight of. The statutory inference which gives rise from the solemnity of the registration, cannot be, therefore, ignored,

A combined reading of Sections 57 and 60 of the Registration Act and Section 67 of the Evidence Act lead me to the conclusion that mere production of a certified copy of a document registered may not be enough to prove the execution of the document. But it is sufficient to prove the contents of the document. A certificate issued by the Registrar u/s 60 is acceptable in evidence to prove to some extent the admission of execution made by the executor before the Registrar. It may be that an imposter approached the Registrar and got the registration made, but no such allegation is made in this case. It is not even suggested to any one in the

witness box. It would therefore not be correct to say that the admission of signature before the Registrar by Lingiah does not even constitute a relevant piece of evidence which can legitimately be taken into consideration along with the other evidence in the case. In this case apart from the certified copy and the certificate of registration in which Lingiah admits the execution of the settlement deed, there are two witnesses who say that Venkayamma admitted before them that she is permitted to have the usufruct of the suit property during her life-time and that after her death the property will revert to Lingaiah or his family. I am not therefore prepared to agree with the submission made by the learned Counsel for the appellant that in this case apart from the certified copy there is no other evidence of the execution of the settlement deed.

12. In this respect it, is perhaps useful to refer to some of the decisions which support the reasoning and the conclusions as stated above. In *Gangamoyi Debi v. Troilukhya Nath*, 33 Ind App 60 (PC) their Lordships referring to the facts of the case stated that

"on the day before his death, according to the respondents" evidence, he went to the registry office, and there at 4 P.M. presented for registration the will in dispute..... The execution of the will was admitted by Brojo Nath Chowdhry. - who was identified by two witnesses, and then the will was registered."

"There was however one Lakhi Nath Mazumdar who had affirmed that he had seen Brojo Nath Chowdhry putting his signature on the document. "But their Lordships observed:

"This evidence would be quite sufficient in their Lordships" opinion, to answer the observations of the Subordinate Judge. But they desire to put the case on a higher ground. The registration is a solemn act, to be performed in the presence of a competent official appointed to act as registrar, whose duty it is to attend the parties during the registration and see that the proper persons are present and are competent to act, and are identified to his satisfaction; and all things done before him in his official capacity and verified by his signature will be presumed to be done duly and in order. Of course it may be shown that a deliberate fraud upon him has been successfully committed; but this can only be by very much stronger evidence than is forthcoming here,"

13. Similarly in *Ehtisham AH v. Jamna Prasad* 48 Ind App 365 at p. 372: (AIR 1922 PC 56 at p. 58) their Lordships observed:

"There is no doubt that the deed was executed, for it was registered, and registered in a regular way, and it is the duty of the Registrar, before registering to examine the grantor, or some one whom he is satisfied is the proper representative of the grantor, before he allows the deed to be registered. There can be no doubt, therefore, that Ehsan AH Khan executed the deed and was party to its registration etc. etc."

It is true that there were two witnesses in this case also who swore that they had

seen the deed signed. Nevertheless it was found in that case that all the three witnesses to the deed were dead. Their Lordships apart from the oral evidence took into account in the above said passage the solemnity of the act of registration.

14. The Privy Council made the position clearer in AIR 1943 83 (Privy Council) Their Lordships observed:

"The registrar's endorsements show (see Sub-section (2) of Section 60, Registration Act, 1877), that in 1881 a person claiming to be this Parshotam Das, and to have become son of Harish Chandra by adoption made by his widow Manki Bahu, presented the receipt for registration and admitted execution. He was identified by two persons -- one Sheo Prasad and the other Girja Pra-sad, who was the scribe of the document and was known to the Registrar. What remains to be shown is that the person admitting execution before the Registrar was this Purshotam Das and no imposter. The question is one of fact except in so far as there was as matter of law a presumption that the registration proceedings were regular and honestly carried out: 33 Ind App 60 at p. 65 (PC) 48 Ind App 365 at p. 372 : (AIR 1922 PC 56). It seems clear that any objection to the sufficiency of the proof upon this point would have been idle, the circumstances being such that the evidence of due registration is itself some evidence of execution as against the plaintiffs. Wills and documents which are required by law to be attested raise other questions but this receipt was not in that class."

It is obvious from the abovesaid decisions that their Lordships distinguished cases where the attestation under the law is necessary and the cases where it is unnecessary. Settlement deeds admittedly do not require statutory attestation, although it was argued before me that this settlement deed is in fact a gift deed -- an argument which I am not inclined to accept. Since the settlement deed does not require statutory attestation it follows that it is unnecessary in this case to prove along with execution of the document the attestation also. Even otherwise Section 71 of the Evidence Act says that if the attesting witness denies or does not recollect the execution of the document, its execution must be proved by other evidence.

15. Similar is the view expressed in (1954) 2 MLJ 75, Kalu Nimbaji v. Bapurao. AIR 1950 Nag 6, Mukanda and Others Vs. State, and Piara v. Fathu, AIR 1929 Lah 711.

16. It follows from what has been discussed above that if apart from the admission incorporated in the certificate of the Registrar u/s 60(2) of the Registration Act, there is other evidence to corroborate the admission, the execution of the document can be considered as proved. In this case except D. W. 3 no other attesting witness or the scribe is alive. It was never the case of the defendant that some of the attesting witnesses are alive. D. W. 3 who is interested in the 1st defendant denied that he ever attested the settlement deed. It may be noted that D. W 3 Ravuri Pattabhiramaiah, accepted the gift under Ex.

B-2 on behalf of his minor daughter, the 1st defendant. He is one of the identifying attestors of the. original of Ex. A-2. His interested ness in the 1st defendant however appears to have compel, led him to deny the attestation of Ex. A-2. It was rot suggested even to D. W. 3 that the other witnesses are alive.

It was not doubted by the trial Court or by the first appellate Court that the other witnesses are dead. The argument submitted before me therefore has no significance that the plaintiff must prove that all the attesting witnesses are dead. Now the position in the case is that the scribe, the executor and the attesting witnesses except D. W. 3 are all dead. D. W; 3 denied having attested the document, but it is admitted by D. W. 1 that there is no other person by the name of D. W, 3 in the village. The trial Court and the appellate Cour therefore have not erred in my judgment when they disbelieved D.W. 3. I have already referred to Section 71 of the Evidence Act which says that if the attestor denies the attestation of the execution, the execution of the document can be proved by other evidence. Now the other evidence can also be oral evidence provided it is admissible in evidence. In this case there are two witnesses, P. Ws. 3 and 4, who told the Court that Venkayamma admitted in their presence that she obtained from Lingaiah life interest in the suit property, and that the property will be reverted to Lingiah or his family after he death. This admission of Venkayamma who is dead is admissible in evidence u/s 32 (3) of the Evidence Act. Section 32(3) is in the following terms:

"32. Statement, written or verbal, or relevant facts made by a person who is dead, or who cannot, be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases: (3) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages."

It is obvious that such statements are received on the basis that what a man says against his interest is in all probability true. The principle of admissibility of such a statement is that in ordinary course of business a person is not likely to make a statement to his own detriment unless it is true. The Courts below have believed the statements of these two witnesses. Nothing has been shown to me as to why these witnesses could not be believed. Even otherwise sitting as I am in second appeal I am not prepared to ignore that the conclusion of fact is binding on me except it is shown that it is perverse. No argument in that behalf was advanced before me. The statement thus made by Venka-yamma in the presence of P. Ws. 3 and 4 being admissible in evidence and true ought to be taken into account along with the admission made by Lingaiah before the Registrar.

The statement made by Venkayamma is also admissible against her representative. The 1st defendant claims that she got the suit property through

Venkayamma. The statement of Venkayamma therefore is admissible in evidence against the 1st defendant. See *Rani Srimati v. Khajendra Narayan Singh* 31 Ind App 127 at p. 130 (PC). Such a statement may either be verbal or written though the former may be entitled to less "weight than the latter. Needless to say that when the Courts below have found these statements relevant and reliable, it cannot be argued in the second appeal that the statements ought not to be believed. That apart the trial Court has also relied on Ex. B-4 in this respect. I am therefore satisfied that the Courts below have not erred in coming to the conclusion that Ex. A-2 is satisfactorily proved.

I am not persuaded to agree with the contention of the learned Advocate of the appellant that there is no record on the basis of which Ex. A-2 could be considered as proved. As stated above, the statements of the two witnesses being admissible and true apart from Ex. B-4 constitute sufficient corroborative evidence to the admission of execution made by Lingiah and incorporated by the Registrar in the certificate u/s 60(1) of the Evidence Act. That such an evidence can be received and is admissible in evidence is supported by the abovesaid Nagpur ruling. In that case also oral evidence of the same character was accepted and was considered along, with the admission made in the certificate. I am therefore satisfied that the lower Court were perfectly justified in declaring that Ex. A-2 also is satisfactorily proved.

17. The fact that the 2nd defendant admitted that he was the lessee of Venkayamma, cannot be ignored. The 1st defendant has failed to prove that after the gift deed was executed by Venkayamma, the 2nd defendant became her tenant. The written statement of the 2nd defendant clearly belies the story put forth by the 1st defendant. I therefore agree with the conclusion of the Courts below that the 2nd defendant was the lessee of Venkayamma and therefore after her death it is the plaintiff who is entitled to receive the lease amount.

In view of the finding stated above it follows (that Venkayamma was in possession on the basis of Ex. A-2, and that after her death the property must revert accordingly to Lingiah or his successors". The plaintiff admittedly is the successor of Lingiah. When Venkayamma executed Ex. A-1, she ceased to have any interest in the property and she was therefore incompetent to execute Ex. B-2 and transfer any interest in the suit property to the 1st defendant. In view of my finding that Ex. A-2 is proved and that the possession of Venkayamma was a permissive possession on behalf of Lingiah under Ex. A2, no question of limitation arises in this case. I must also not omit to note that the question of limitation was never raised in the lower Court by the 1st defendant.

18. It was then faintly argued by Mr. Gopal Rao that in the presence of the adopted son Venkayamma could not be considered to have interest in the suit property after the adoption. It was however forgotten that the 1st defendant also claims the suit property on the basis of a gift deed executed in her favour by Venkayamma. The gift deed clearly discloses that Venkayamma treated the suit

property as her absolute property.

It cannot therefore be doubted that she got the same through the will of her husband. Although adoption took place, she was not divested of this property as it was her own. When the defendant also claims through Venkayamma, the question of adoption does not affect the fact that the property belonged to Venkavamma. It was a common ground in the lower appellate Court also that Venkayamma was the absolute owner of the property. That being the position which the defendant took in both the Courts below I am not persuaded to agree with the contention of Mr. Go-pal Rao, the learned Advocate for the appellant, that in the presence of the adopted son Venka-yamma had no interest to convey to Lingiah.

19. For all the reasons which I have attempted to state this second appeal must fail and is hereby dismissed with costs. The Appellant will pay the Court-fee. No leave.