
(1955) 09 AP CK 0016

In the Andhra Pradesh High Court

Case No : Second Appeal No. 253 of 1950 and C. M. P. No. 5131 of 1955

M. Venkatasubbaiah

APPELLANT

Vs

M. Subbamma and Others

RESPONDENT

Date of Decision : 15-09-1955

Acts Referred:

Evidence Act, 1872 — Section 120, 17(1), 68

Citation : (1955) 09 AP CK 0016

Hon'ble Judges : Chandra Reddy, J

Bench : Single Bench

Advocate : Kotayya and Suryanarayana, for the Appellant; V. Subralmianyam and B.V. Ramanarsu, for the Respondent

Final Decision : Dismissed

Judgement

Chandra Reddy, J.—This Second Appeal is prdmwlj by the Plaintiff. His suit to set aside a summary" order passed in E. A. 2158/45 in Cv S. 389/-1.") aW", to recover possession of the suit land from the defeo-"" dants etc., was dismissed by the Subordinate Jujj Guntur in appeal against the judgment of die; trict Munsif of Guntur decreeing the suit. The facts "necessary to appreciate the points arising in ejt-jM Second Appeal may be briefly narrated.

The Plaintiff claiming to be a donee from Be Ramayya filed O. S. 389/45 in the Court of the DM- trict Munsif Guntur for ejectment and for arrears. 7. This question has come up for judicial re-"w in a number of cases. In - "Parama Siva ayan v. Krishna Padayachi AIR 1918 Mad 491 (A), it was laid down that the writer of a docu-nt who signed his name as a scribe can be treated fm attesting witness if he had seen the executant |ing the document. There are earlier decisions |di have taken the same view - "Veerappa v. Muthu Karuppa 24 Mad LJ 534 (B), and l-"Ayyasami Iyengar v. Kylsam Pillai AIR 1915 Mad 2 (1) (v. 2) (C). f It is true in cases where the scribe signed the po before the document was actually executed, it Jd mean he did not witness the execution and it would not satisfy the requirements of that section if r such a person is examined as an

attesting witness. | An illustration of this is furnished by - "Badri Prasad¹ v. Abdul Karim 35 All 254 (D). Thus, it depends greatly upon the facts of each case; whether a scribe is also an attesting witness or not. In the instant case, the "writer of the document signed the same as a scribe after the attesting witnesses had affixed their signatures which implies that he has seen the executant: sign his name.

As already stated, he deposed that he saw not only (the executant affixing his signature but the attestation as well. The rule stated in - "Ranu v. Laxinarrao", 33 Bom 44 (E), is in accordance with the principle adumbrated above. It was stated there that an attesting witness is a "witness who has seen the deed executed and who signs it as a witness". On this discussion it follows that the gift deed Ex. A-4 was duly proved.

8. It was then contended by Mr. Ramanarsu for the Respondents that as the condition of the gift taking effect was the donee maintaining the donor, the latter could revoke the document u/s 126, Transfer of Property Act since the donee had neglected to maintain the donor. I do not think S. 126, Transfer of Property Act has any application to a case of this description. Section 126 provides that "the donor and donee may agree that on the happening of any specified event which does not depend upon the will of the donor a gift shall be suspended or revoked, but a gift which the parties agree shall be revocable wholly or in part, at the mere will of the donor is void wholly or in part as the case may be. A gift may also be revoked in any of the cases in which, if it were a contract it might be rescinded."

9. The present case cannot be brought within the ambit of the section firstly for the reason that there is no agreement between the parties that the gift should be either suspended or revoked: and secondly this should not depend on the will of the donor. Again, the failure of the donee to maintain the donor as undertaken by him in the document is not a contingency which could defeat the gift under Ex. A-4.

All that could be said is that the default of the donee in that behalf amounts to want of consideration. Section 120 itself provides against the revocation of a document of gift for failure of consideration. If the donee does not maintain the donor as agreed to by him, the latter could take proper steps to recover maintenance etc. It is not open to a settlor to revoke a settlement at his will and pleasure and he has to get it set aside in a Court of law by putting forward such pleas as bear on the invalidity of gift deed.

10. It was next urged by counsel for the Respondents that in any event effect should not be given to it as it was obtained by fraud or undue influence. This plea, in my opinion, is not available to a third party like Defendant 2 or one claiming under him, like Defendant 3. Defendant 1 is precluded from raising this question as the earlier adjudication operates as *res judicata* against her. ?

It follows that the Plaintiffs could rely upon Ex. A-4 as a source of title. But, this

will not entitle the Plaintiff either to have the summary order set aside or to recover the suit property unless the issue regarding partition between Nagayya and Ramayya is decided in his favour.

11. In proof of the case of Defendants 2 and 3 that there was partition between the brothers at which this item fell to the share of Nagayya, apart from oral evidence, they called in aid Ex. B-12 a partition list. The ground of attack against this document was two-fold. One was that this was not a genuine document and the other was that even if it were genuine it was inadmissible in evidence for want of registration. This document was impounded in the trial Court but as it was thought that it was not a genuine document the question of its admissibility for want of registration was not gone, into by the District Munsif.

On appeal the learned Judge came to the opposite conclusion on the question of the genuineness of Ex. B-12. He also felt that notwithstanding the inadmissibility of this document the partition was proved by overwhelming evidence. In the opinion of the learned Judge the partition between Nagayya and Ramayya at which the suit property was allotted to the share of Nagayya was established and as this property was bequeathed to his wife by Nagayya under a will Ex. B-1 her lessees' possession could not be disturbed by the Plaintiff and therefore the suit was liable to be dismissed.

12. This view of the learned Judge is attacked by Mr. Kotayya counsel for the Appellant. It is argued by him that Ex. B-12 an unregistered document being inadmissible in evidence for want of registration oral evidence could not be adduced to prove partition. For this position reliance was placed on a ruling of the Full Bench of the Madras High Court in - Nalam Ramayya and Others Vs. Nalam Achamma, (1931) 31 (F).

According to learned Counsel the cited case is authority for his contention that the result of the non-registration of the document was that the property remained as the joint family property and that Ramayya the sole surviving member of the family was entitled to the property and that Nagayya's widow Subbamma could not lay any claim thereto. The basis for this proposition is the passage at p. 551 of the report:

"As the property in suit admittedly had belonged to the joint family the change in its character must be proved. As the agreement for partition cannot be proved the Court can only regard the property as still belonging to the joint family." I do not think the rule stated in the passage extracted above is pertinent to the present case. In the Full Bench case, it only transpired in the course of the case that a partition had taken place and in that connection a document was drawn up and signed by the parties but the document was not produced. The Courts proceeded on the assumption that such a document came into existence. The position will be different if the document is filed in Court.

It is true that it cannot be used for proving division by metes and bounds, but it could surely be used for the purpose of ascertaining whether there was a division-

sr status or not. There is clear authority for this position in - Vatrappu Subbarao alias Pamireddi Subbareddi and Others Vs. Pamireddi Mahalakshamma, (G). This was referred to with approval by the Full Bench in AIR 1944 Mad 550 (AIR v. 31) (F). The same view was taken by Patanjali Sastri J. in - "Veeraraghava-

rao v. Gopal Rao AIR 1942 Mad 125 (AIR v. 29) (H), 18 & that a partition which was confirmed in Lettars . Patent appeal and 1 night within the r. which opinion found favour with the Full Bench in (15) The test p preference to the one expressed by Kumaiaswainytm& Abdur Rahma) Sastry and Venkatasubba Rao JJ. in - "Ramuchetty pshnayya", 1938 to v. Panchammal AIR 1926 Mad 402 (AIR v. 13) (I).

13. In these circumstances, even if this doe. ment should be regarded as deed of partition and is inadmissible in evidence for proving division lv metes and bounds its terms could Certainly be loold into to decide whether there was a division in st.ityj or not. This however need not detain inc. as the dutis-ment does not seem to be one which purports to \\\ah-t/on the properties and therefore does not conic v, f.V in (lie mischief of Section 17 (1)(b), Registration which requires non-testamentary instruments wLui purport or operate to create, declare, assign, limit (x cxtinguisli whether "vested or contingent to the of Rs. 100/- or upwards in or to Immovable pa party" to be registered.

In order to come within the scope of the sub-j t (jie view orig section the document should operate or at least pur-

section the document should operate or at least purport to operate to create or declare etc., some ligl: title or interest in any property. In other words the! deed by itself should either create or declaie any right, title or interest in the property. If, on the other hand, it contains a recital of what had already taken place the penalty for non-compliance with the requirement cannot be governed by that section. There is a clear distinction between a inwjf! recital of a fact and something which in itself create* title in any person. If the document is of the latter! category it is compulsorily registrable under the," above provision of law and failure to do so will result in. the exclusion of that document from evidence To put it in another way it is only in cases what, the document constitutes a bargain between the partirf) that it should be registered. If it is intended to eviA donee a past transaction it is excluded from the opcrow y pties so as" to (ion of that section.

Mr. Kotayya cited a ruling of the Punjab Ilig Court in - Narain Das Vs. Co-operative Society, (AIR v. 40) (J), as containing a contrary view. Bat; declaration .cont a reading of that decision" shows that it is far fr-oat giving any assistance to the Appellant. That Vib ir case in which a compromise embodied in a docui.vist arrived at between the parties by itself caused change of relation to the property which amongst all the parties and not a men, a past completed transaction.

In fact the learned Judges referred to ram Krishnaji v. Madan Krishmaji", 5 Bom -

and - AIR 1932 55 (Privy Council) (AIR v. 19) (L), and distied them from the case before them on (he is I that it was "not one which can be called roi.ttl -past transaction but it in itself created right-; in -moveable property which is covered by S. 17". t%A ease therefore is inappropriate in the present (.14) The view taken by me is reinforce I If; decided cases of the various High Courts and A t the Privy Council. 5 Bom 232 (K), contain:, i1 c position stated above. A passage from the j agtsus" of West J. is apposite in this context.

"Thus a deed of partition, which causes a tioagft of legal relation to the property divided amongst f J the parties to it, is a declaration in the intended j a letter containing an admission, direct or ixdetmQ that a partition once took place, does not declare nd #g!it within the meaning of the section/" in

15. The test propounded by Veakatasubba Rao m/JdAbdur Rahman JJ. in - "Bapayya v. Ilama-try" shnayya AIR 1938 Mad 568 (AIR v. 25) (M), is whe-; rr tlie documents constitute the bargain between u-" [parties or it was merely a record of an already is , iipleted transaction and whether there is sufficient ;iy Boeialion orvrhe transaction from the document, learned Judges referred to earlier rulings which m " ue taken the same view. The pronouncements oi: „-| s Privy Council in AIR 1932 55 (Privy Council) (AIR v. 19) (L), ii- j cord with the principle enunciated in the above-ii. | rationed cases.

it Their Lordships of the Judicial Committee after " bring to a number of rulings of the Indian Courts r J lich have taken the view indicated above re-markj that that they had no doubt that "this track of:" , seision is right" and "(hough the word "declare" "; {glit be given wider meaning they are satisfied "y at the view originally taken by West j. is right. Sis view was reaffirmed in subsequent: ease by the Ivy Council in - Subranniiu v. Lutchman AIR 1923 J 50 (AIR v. 10) (16) Applying this principle in mind, I have to !tt;" amine the terms of the document. At the outset, may be mentioned that the document is styled as IC".; partition list. This may not be decisive in decid- j whether tin"s is really a partition document or I- record of partition that took place some time; back, lie recitals in the document also indicate that it id leduced to writing something that had already Jcilned. It states that these properties were allot-.1 In the sh.ue iif Nagayya.

It does not give any indication that under lie"s tmiient any rights were created in any party. Mr.

(ii) argues that even it it relates to a past Iran-..(Jicin it has the effect: of declaring die rights of ipirlies so as to attract the provisions of Section 17.

1 do not think that the word "declare" has such ivide connotation as attributed to it: by Mr. Kotayya. ic declaration contemplated in that section should in PRAESENTI. It does not cover a statement fact relating to a past event.

17. Apart from the recitals in tlie document "e is abundant oral evidence that the partition place at least a month before Ex. B-I2 was ught into existence. The

lower appellate Court pted this evidence. Sitting in second appeal, it not open to me to differ from the lower appellate nut in regard to that matter.

The result of this discussion is that Ex. 11-12 is Ot a document which requires registration by rea-Ki of S. 17 (1) (b) and is admissible for proving not dly division in status but for the purpose of show-ig that there was a division by metes and bounds id the suit property was allotted to Defendant 2"s .band. If so, Defendant 2 is certainly entitled to and Defendant 3 who claims under her has a right-be in possession of the property during the; lease jod and the Plaintiff cannot ask lor any relief in ect thereof. The second appeal is therefore clis-icd without costs in view of the fact that the ipellant has succeeded on tlie question of validity Ex, A-4. No leave.

In the view I have taken above the leave for withdrawing the appeal with liberty to file a fresh suit has to be refused The petition is there-fore dismissed.