
(1987) 11 AP CK 0005
In the Andhra Pradesh High Court
Case No : A.S. No. 294 of 1930

P. Suryanarayana and Others	Vs	APPELLANT
V. Achamma and Anohter		RESPONDENT

Date of Decision : 20-11-1987

Acts Referred:

Evidence Act, 1872 — Section 45, 47, 58, 67, 68

Citation : (1987) 11 AP CK 0005

Hon'ble Judges : P. Kodandaramayya, J

Bench : Single Bench

Advocate : C. Poornaiah, for the Appellant; C. Krishnamurthy, for the Respondent

Final Decision : Dismissed

Judgement

P. Kodandaramayya, J.—Defendants 2 to 5 are the Appellants. The Plaintiff filed the suit for declaration of her title to an extent of Ac.2.50 cents bequeathed by her father in her favour under Ex.A-1 as a rival title was set up by her brothers, Defendants 1 and 2, under a subsequent Will, Ex.B-5. As seen from the plaint, the controversy between the parties is of the above two wills Exs.A-1 and B-5, which one is true and valid. The lower Court held that the second Will Ex.B-5 is not true and valid and accepted Ex.A-1 set up by the Plaintiff and accordingly decreed the suit. Against the said judgment and decree, the present appeal is filed.

2. The learned Counsel argued the truth and validity of both the Wills. First, I will take up Ex.B-5 will set up by Defendants 1 and 2. Defendants 1 and 2 are the brothers of the Plaintiff. The Plaintiff and Defendants 1 and 2 are the children of one Satheyya. The Will Ex.B-5 is a registered one. DWs 2 and 6 are the attestors and DW 3 is the scribe. The lower Court rejected the truth and validity of Ex.B-5. In support of its conclusion, the lower Court has given sufficient reasons and it is enough if I note some of them which are clinching. The first one is that the original Will, is not produced. In the absence of the original Will it is not possible

to that the truth of the thumb impression of the testator. Some evidence was produced saying that the original Will was lost. The lower court did not accept this reason; for a certified copy of the same was obtained as early as 1974. Further, there is no satisfactory explanation given as to how the Will was lost. The lower Court also commented that the testamentary capacity of the testator was not satisfactorily proved by calling the doctor and that there was no proof of his state of health on the date of execution of the document. The testator died suddenly on 4th August, 1969 while the Will was executed on 6th Feb., 1969. It is also seen that there is no proof of the execution and also of the testamentary capacity of the testator. Now even the draft of the document was produced. It is stated that the original Will was produced in a court and that therefore they could obtain a certified copy of the Will. The learned Counsel relied upon a decision of this Court in *v. Subbareddi v. Basivi Raddi* (1966) 1 AWR 271, where it was held that the registration extract of a Will can be relied upon. It is seen that the judgment of the proceedings where the Will was produced is not forthcoming. If the circumstances under which the Will was lost and its prior existence are proved, the court can accept the same. But in the present case, I am satisfied that the view taken by the lower Court that the existence of the original Will itself was not satisfactorily established and that the evidence of the witnesses in this regard was not safe to be relied upon is correct. DWs-2 and 5 are attestors and D.W.-3 is the scribe of the document. The learned Counsel has taken me through the evidence of these witnesses. They do not say about their intimacy with the testator. It does not appear that the testator had discussed with them and none of them could say the circumstances that compelled him to cancel the previous Will execute in favour of the Plaintiff. The Plaintiff is his daughter. There must be some compelling reason for a father, having executed a registered Will, to cancel the same. From the evidence of the attestors, we do not get any assurance that the attestors were connected with the execution of the Will which had occasioned the cancellation of the previous Will, Ex.A-1. Hence, I am of the view that the finding of the lower Court that Ex.B-5 is not proved is fairly sustainable.

3. The next question argued is that even assuming that Ex.B-5 is not proved, whether the Plaintiff has proved the truth of the Will Ex.A-1.

4. The learned Counsel for the Appellants, on this question, raises three points.

1. The statement in the written statement of D-1 and D-2 does not constitute an admission and even assuming that it constitutes an admission, the mandatory requirement of calling an attesor u/s 68 of the Evidence Act cannot be dispensed with.

2. In any view the admission In any view the admission of D-1 and D-2 is not binding on D-3 to D-5.

3. There is no proof of signature of the attestors and hence Section 68 is not satisfied.

5. It is necessary to look into Section 68 of the Evidence Act which reads as follows:

68. Proof of execution of document required by law to be attested; 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 and subject to the process of the Court and capable of giving evidence Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908) unless its execution by the person by whom it purports to have been executed is specifically denied.

6. It is true that the provision has no application to the case of a Will and the application of examining one witness in proof of the execution when the document is a Will is a mandatory requirement of the section. It is also a fact that the proviso speaks of specific denial in respect of other documents. However, it is seen if a party admits execution of the Will u/s 58 of the Evidence Act no proof is necessary. In this case Defendants 1 and 2 admitted that their father executed Ex.A-1 in favour of the Plaintiff. But they relied on the fact that it was subsequently cancelled by executing another Will, Ex.B-5. In view of the positive admission of the 2nd Defendant, which was adopted by the 1st Defendant, the only issue remains for consideration is whether the Will executed in favour of the Plaintiff is cancelled and whether Ex.B-5 which was executed in favour of Defendants 1 and 2 is true. Once Ex.B-5 which was executed in favour of Defendants 1 and 2 is true. Once Ex.B-5 is found to be not true, the Will in favour of the Plaintiff would stand. It is necessary to note the averments in the written statement of the 2nd Defendant. The 2nd Defendant specifically stated that as the Plaintiff was neglecting to maintain Satheyya, he came to the second Defendant and was being looked after by him. He got disgusted with the conduct of the Plaintiff and as such he revoked the Will dated 31st Dec, 1968 and executed a Will in favour of Defendants 1 and 2. It is clear that the existence of the Will in favour of the Plaintiff is admitted. But what is pleaded is, the cancellation of the said Will. Hence I hold that when the execution is admitted, there is no necessity of calling for the attestors in compliance with the provisions of Section 68.

7. However, the learned Counsel argued that this admission of D-1 and D-2 is not binding on Defendants 3 to 5 who are subsequent purchasers. It is seen that D-3 to D-5 are subsequent purchasers of D-1 and D-2 under Ex.B-1 dated 24th Aug., 1974. Further it is also not in dispute that Defendants 1 and 2 purported to convey the title as legatees under Ex.B-5. It is seen that D-3 to D-5 have no independent title apart from the title derived by D-1 and D-2. This is not a case where admission of a party who attested the document is relied on as contemplated u/s 70 and hence the decision in *G. Rajyalakshamma v. R. Satyavani* (1970) II AWR 88, has no application. If Defendants 3 to 5 set up

independent title without referring to the Will it might be that the Plaintiff will be required to comply with the terms of Section 68 of the Evidence Act without merely relying on the admission of Defendants 1 and 2.

8. However, I would like alternatively to deal with the question that admission of Defendants 1 and 2 is not binding on Defendants 3 to 5 and hence the proof required u/s 68 must be forthcoming. We have already noticed in the case of Will irrespective of the denial of its execution the requirement of calling one attester to prove the execution is mandatory. Unless that is done the document shall not be admissible in evidence. But in this case all the attestors were dead. Section 69 gives the mode of proof. When all the attestors died it enjoins that it can be proved that the attestation-of at least one attester is in his handwriting. The proof of handwriting or the signature is prescribed in Section 67. The Act does not require any particular mode of proof. It can be proved either u/s 45 by calling an expert or u/s 47 by producing the evidence by the person who is acquainted with his hand-writing. It is necessary in this connection to note Section 47 and explanation which reads as follows:

47. When the Court has to form an opinion as to the person by whom any document was written or signed, the opinion of any person acquainted with the hand-writing of the person by whom it is supposed to be written or signed that it was or was not written or signed by that person, is a relevant fact.

Explanation: A person is said to be acquainted with the hand-writing of another person when he has seen that person write, or when he has received document purporting to be written by the person in answer to documents written by himself or under his authority and addressed to the person, or when in the ordinary course of business, documents purporting to be written by the person have been habitually submitted to him.

(emphasis added).

9. As per the above Explanation to Section 47 apart from the several modes of proving the signature of the hand-writing a person is said to be acquainted with the hand-writing of another person when he has seen that person writing. Hence if a person deposes that he saw a particular person signing he must be deemed to have acquainted with the signature and his evidence is sufficient to prove his hand-writing. It was ruled in Namberumal Chettiar v. Raghavachar AIR 1921 Mad 701.

there must be cases where all the attesting witnesses are dead when the requirement of the law would be satisfied by any evidence which would show that the document was executed in the presence of two attesting witnesses.

So, if the evidence is forthcoming that the attestors signed the document, in the presence of the witness who deposed such attestation it is sufficient proof of the hand-writing of the attester.

10. In this case PW1 deposed that the attester signed the document and they

signed in her presence. The fact that she did not depose that she knew the signature of the attestors is not fatal. When she deposed that she saw the attestation herself, that satisfies the requirement of proof of signature as contemplated u/s 47 and that satisfies the requirement u/s 69 and consequently Section 68 and hence there is clear proof of the execution of the Will set up by the Plaintiff.

In the result, the appeal fails and is dismissed.