

(1999) 09 AP CK 0139

In the Andhra Pradesh High Court

Case No : Appeal No. 1750 of 1985 and Cross-Objections

Pulipati Rajarao

APPELLANT

Vs

Gondrala Sithamahalakshmi and Others

RESPONDENT

Date of Decision : 08-09-1999

Acts Referred:

Evidence Act, 1872 — Section 68
Transfer of Property Act, 1882 — Section 3

Citation : (1999) 6 ALT 584 : (2000) 1 CivCC 318

Hon'ble Judges : J. Chelameswar, J

Bench : Single Bench

Advocate : T. Veerabhadrayya and T.S. Anand, for the Appellant; T. Bali Reddy, for the Respondent

Final Decision : Allowed

Judgement

J. Chelameswar, J.—Aggrieved by the Judgment and Decree in O.S. No. 234 of 1979 on the file of the Additional Subordinate Judge, Guntur dated 28-02-1985, this appeal is preferred by the first defendant in so far as the Judgment and decree went against him. Aggrieved by that part of the judgment which went against the plaintiffs, the plaintiffs preferred the Cross-objections.

2. The dispute in the suit pertains to the property of one late Pulipati Kotaiah. The appellant in A.S. No. 1750 of 1985 is the son of the said Kotaiah. The second respondent is the wife of the pre-deceased son of said Kotaiah, by name Pulipati Rama Lingaiah and the first respondent is the married daughter of the said Rama Lingaiah. Both of them, as plaintiffs filed the above-mentioned suit O.S. No. 234 of 1979. The respondents 3 to 5 are the alienees of some of the properties which fell to the share of late Pulipati Kotaiah at the time of partition between him and his sons in the year 1965 evidenced by Ex.A-3 dated 20th July, 1965, which is a registered document.

3. The case of the respondents 1 and 2 (plaintiffs) is that there was a registered partition between (sic. under) Ex.A-3 dated 20th July, 1965 under which the joint

family properties of late Pulipati Kotaiah were partitioned between Kotaiah, the appellant herein and respondents 1 and 2 representing the branch of the predeceased son of Kotaiah and the wife of said Kotaiah by name Mahalaxmamma who died during the pendency of the suit and was the second defendant in the suit. Admittedly the suit schedule properties were the properties which fell to the share of late Pulipati Kotaiah at the time of the above mentioned partition. The plaintiffs alleged that Kotaiah died intestate during some time in the year 1970 and that the plaintiffs are entitled for 1/3rd share in the said property along with the appellant herein and the deceased second defendant as Class-I heir of late Pulipati Kotaiah. The plaintiffs further alleged that for some time after the death of the said Pulipati Kotaiah, both the plaintiffs and defendants 1 and 2 i.e., the son and wife of Kotaiah lived together and the first defendant; the appellant herein was managing the property and from time to time paying 1 /3rd share of the profits arising out of the said property to the plaintiffs. The plaintiffs further asserted that they reliably came to know that the defendants 1 and 2 were concocting false and frivolous documents to claim the entire property of late Pulipati Kotaiah and were creating false documents creating encumbrances on some of the items of the said property and hence the suit.

4. The defendants 1 and 2 contested the suit. The first defendant filed an elaborate written statement, which was adopted by the second defendant during her life time and after the death of the second defendant, an additional written statement was filed by the first defendant claiming to be a legatee of the second defendant. The substance of the case of the defendants is that late Pulipati Kotaiah executed a Will on 4-4-1970 (Ex.B-1), where under he bequeathed items 1, 2, 4, 5 and 6 of the plaint schedule property in favour of his wife for her life and the vested remainder of the properties was granted to the first defendant. With regard to item No. 3 of the plaint schedule property, the first defendant claimed that the said property was bequeathed exclusively in favour of the first defendant. Kotaiah died some time in the month of November, 1970, and thereafter, the defendants took possession of the properties and were in continuous possession and enjoyment of the property. The averments in the plaint that subsequent to the death of the Pulipati Kotaiah, the plaintiffs lived jointly with defendants 1 and 2 for some time was denied and also the averment that the first defendant-appellant was managing the properties and paying 1/3rd of the profits arising out of the property to the plaintiff.

5. After the death of the second defendant, the plaintiffs amended their pleadings claiming a larger share of the property as the heirs of the deceased second defendant. In turn, the first defendant filed an additional written statement claiming to be a legatee of the second defendant under a registered Will dated 16-11-1973 (Ex.B-2), under which the first defendant-appellant claimed to be the sole legatee of all the properties of the second defendant.

6. On the above mentioned pleadings, the trial Court framed various issues. The

issues insofar as relevant for the purpose of this appeal are the issue No. 1 and the additional issues which read as follows:

Issue No. 1

Whether the plaintiffs are entitled to partition and separate possession as prayed for;

Additional Issue No. 1 framed on 23-11-1981

Whether the Will dated 4-4-1970 pleaded in the written statement is true;

Additional Issue framed on 25-2-1985

Whether the Will dated 16-11-1973 executed by D-2 in favour of D-1 is true, and binding on the plaintiffs.

7. On these issues, the trial Court found that the Will dated 4-4-1970 (Ex.B-1) is not satisfactorily proved and further held that the Will dated 16-11-1973 (Ex.B-2) is satisfactorily proved and therefore, came to the conclusion that the plaintiffs are entitled to partition and separate possession of their 1/3rd share in the plaint schedule property.

8. The learned Counsel for the appellant Sri T.S. Anand argued that the conclusion of the trial Court that Ex.B-1 is not satisfactorily proved is erroneous in law. The Trial Court came to the conclusion that Ex.B-1 is not satisfactorily proved in view of the Section 68 of the Evidence Act, which require that if a document is required by law to be attested, such a document should 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.

9. Admittedly the Will dated 4-4-1970 is an unregistered Will. It is attested by two witnesses, namely Sidde Nagaiah and Chavalavada Venkateshwarlu. None of them were examined to prove the execution of the Will. On the other hand, one Guthe Mallikarjun Rao who is the scribe of the Will was examined to prove the Will as D.W. 3. The explanation given by the first defendant in his evidence is that the first attesting witness died three or four years prior to the trial of the suit and the whereabouts of the second Attestor were not known and therefore, only the scribe of the Will was examined to prove the Will. The Trial Court placing reliance on a judgment reported in Redrouthu Nammayyamma v. Kancheralapalli Musalayya and 8 Ors. 1980 (2) An.W.R. 350 came to the conclusion that the Will has not been proved as required u/s 68 of the Evidence Act and the Trial Court opined that though one of the attesting witnesses died, the other attesting witness is not reported to have died and only his whereabouts are said to be not known. Therefore, the Trial Court came to the conclusion that the propounder of the Will ought to have let in evidence by examining somebody who is the family member of the second attesting witness to establish the fact that the whereabouts of the second attesting witness are not known.

10. The learned Counsel for the appellant placed his reliance in support of his contention on two judgments reported in *M. Venkatasubbaiah v. M. Subbamma and Ors.* AIR 1956 Andh 195 and *Dhruba Sahu (dead) and after him Nalumoni Sahu and Another Vs. Paramananda Sahu*, .

11. In the judgment referred (2) supra, a learned single Judge of this Court while dealing with the proof of a Gift Deed, which is also a document required to be attested under law falling within the purview of Section 68 held that:

"The proof contemplated in Section 68 can be furnished by the scribe of the document who could speak to the execution of it and it is not essential that it should be proved only by at least one of the attesting witnesses"

12. The learned single Judge reached that conclusion basing on the earlier decisions reported in *Parama Siva Udayan v. Krishna Padayachi* AIR 1918 Mad. 491 and *Veerappa Udayan v. Muthu Karuppa* 24. Mad LJ. 534 (B) and *Ayyasami Iyengar v. Kysam Pillai* AIR 1915 Mad. 1052 wherein the Madras High Court came to the conclusion that a scribe can be treated as an attesting witness, if he had seen the Executant signing the document. However, the learned single Judge observed that:

"Thus, it depends greatly upon the facts of each case, whether a scribe is also an attesting witness or not".

So it all depends on the facts, whether the scribe in fact witnessed the execution of the document.

13. Coming to the Judgment of Orissa High Court referred to (3) supra, it was also a case of Gift Deed. The Orissa High Court came to the conclusion that the scribe of a document by performing a dual role, he may be an attesting witness as well as the scribe. However, the Orissa High Court held that:

"Such a person will not be an attesting witness, unless he intends to sign the document as an attesting witness".

14. In my view, the opinion of the Orissa High Court is slightly at variance with the opinion of this Court expressed in *M. Venkatasubbaiah*'s case referred to (2) supra. This Court did not make any further qualification for treating the scribe as an attesting witness, as was done by the Orissa High Court.

15. In fact Section 3 of the Transfer of Property Act, defines the expression attested in the following terms:

"attested" in relation to an instrument means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary

that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary".

16. It can be seen from the above definition that the legal requirement is that the person attesting an instrument must have actually seen the executant or some other person duly authorised by the executant actually signing or affixing his mark to the instrument.

17. On the other hand, the learned Senior Counsel Sri T. Bali Reddy appearing on behalf of the respondents submitted that the scribe would be incompetent to prove the execution of a document, which falls within the ambit of Section 68 of the Evidence Act, in view of the express language of the said section. He further submitted that the decision of this Court reported in *M, Venkatasubbaiah*'s case, referred to (2) supra, is distinguishable as it pertains to a Gift Deed. The learned Senior Counsel sought to make this distinction on the basis of the scheme of Section 68 of the Evidence Act, which reads as follows:-

"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).

18. In view of the proviso to Section 68, the learned Counsel argued that whatever be the legal position, as regards the other documents which fall within the proviso to Section 68 of the Evidence Act, that class of documents which are known as Wills are strictly required to be proved by at least one of the attesting witnesses and by none others.

19. In this connection, the learned senior Counsel for the respondents placed his reliance on the judgment of the Supreme Court reported in *Kashibai w/o. Lachiram and Anr. v. Parwatibai w/o. Lachiram and Ors.*, Judgments To-day 1995 (7) SC 48.

20. The scheme of Section 68 is that all documents/ which are required to be attested by law shall be proved by one of the attesting witnesses, of course subject to the various contingencies mentioned in Section 68. However, the proviso to Section 68 creates an exception to the general rule to the enacting part of Section 68 by declaring that it shall not be necessary to call an attesting witness for the purpose of proving the execution of any document, which is registered in accordance with the provisions of Indian Registration Act. But there are two exceptions to the declaration contained in the proviso. The exception contained in the proviso does not apply to the documents known as Wills. Secondly that such an exemption is not available in case, where the execution of

the document, is specifically in dispute. In fact, in Kashibai w/ o. Lachiram's case, referred to (7) supra, their lordships were dealing with the issue of proof of Will and held that:

"A reading of Section 68 will show that "attestation" and "execution" are two different acts one following the other. There can be no valid execution of document which under the law is required to be attested without the proof of its due attestation and if due attestation is also not proved, the fact of execution is of no avail. Section 63 of the Indian Succession Act, 1925 also lays down certain rules with regard to the execution of unprivileged Wills. Clause (c) of Section 63 provides that the Will shall be attested by two or more witnesses, each one of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark or the signature of such other person; and each of the witnesses should sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time and no particular form of attestation shall be necessary".

21. It can be seen from the above that their Lordships make a distinction between "attestation" and "execution". Their Lordships further held that to constitute a valid execution of a document, both the aspects must be complied with, as required u/s 68 of the Evidence Act.

22. Therefore, I see no conflict in the view propounded by this Court in M. Venkatasubbaiah's case, referred to (2) supra, with the view expressed by their Lordships of the Supreme Court in Kashibai w/o. Lachiram referred to (7) supra. What is required is that ultimately it has to be established before the Court that the Executant of an instrument falling within the ambit of Section 68 of the Evidence Act, must be proved to have signed the document before an attesting witness and the attesting witness, who had in fact seen the executant signing the instrument must also sign the document in proof of the fact of witnessing the execution of the document. As there is no specific form of attestation under the law, any person who actually witnesses the act of signing by the executant of an instrument and subscribes his signature to the document, in my opinion, can be treated as an attesting witness, having regard to the definition of the term "attested" according to the Transfer of Property Act and also as per the judgment in M. Venkatasubbaiah 's case referred to (2) supra.

23. Sri T. Bali Reddy, the learned Senior Counsel for the respondents also placed his reliance on the judgment of this Court in Redrouthu Nammayamma's case referred to (1) supra. In fact it was this decision, on the basis of which, the trial Court came to the conclusion that Ex.B-1 was not proved as required u/s 68 of the Evidence Act. I am of the opinion that the above mentioned judgment has no application to the facts of the present case, as the issue therein was whether a person who served as an identifying witness before the Registrar at the time of the execution of the document in question could be treated as an attestor within

the meaning of Section 3 of the Transfer of Property Act. Dealing with the said question, the learned Judge of this Court came to the conclusion that such a person could not be treated as an attestor within the meaning of the definition assigned to the expression under the Transfer of Property Act.

24. Coming to the facts of the case, D.W. 3 who scribed Ex.B-1 categorically stated in his chief-examination that he scribed Ex.B-1 at the instance of late Kotayya and at that time the wife and sons of Kotayya and the attestors were present along with Kotayya. He also deposed that Kotayya signed Ex.B-1 in the presence of the attestors and the attestors signed in the presence of Kotayya. Even in the cross-examination, the witness stated that first Kotayya signed Ex.B-1, thereafter the attestors signed it. There was no suggestion in the cross-examination that D.W. 3 did not witness the act of signing either by Kotayya or the attestors. There is no dispute about the fact that D.W. 3 was a scribe. On the other hand, the suggestion was that Ex.B-1 was a forged document which suggestion was clearly denied by the witness. In the said circumstances and in view of the legal position as discussed by me earlier, I am of the opinion that the trial Court came to a wrong conclusion that Ex.B-1 is not proved as required u/s 68 of the Evidence Act.

25. The trial Court also recorded a finding that the signature of Pulipati Kotaiah (executant) on Ex.B-1 does not tally with the undisputed signature of the said Pulipati Kotaiah under Ex.A-2. Apart from the correctness of the trial Court, embarking upon an enquiry, one fact that is required to be taken note of is that there is a gap of about seven years between the dates of execution of the above mentioned two documents and further the executant was in the last leg of his life and is said to have died within almost six or seven months of execution of Ex.B-1. There is also some evidence on record to show that the executant was suffering from some disease at the time of execution of Ex.B-1. In the circumstances, I am of the opinion that the trial Court ought not to have hazarded a guess about the genuineness of the signatures of the executant on Ex.B-1 and in view of my conclusion on the other aspect of the proof of Ex.B-1, this finding of the trial Court also must be set aside.

26. For all the above-mentioned reasons, it must be held that Ex.B-1 was duly proved and in view of that conclusion and in view of the bequest made under Ex.B-1, it may not be necessary for me to go into the other question whether the finding of the trial Court as regards the execution of Ex.B-2 Will dated 16-11-1973 by the deceased second defendant. Once the Will dated 4-4-1970 (Ex.B-1) is accepted to have been duly proved and in view of the bequest made under the Will in favour of the defendants 1 and 2, granting lifetime estate to the second defendant in items 1, 2, 4, 5 and 6 of the suit schedule property and the vested remainder to the first defendant and an exclusive bequest in favour of the first defendant insofar as the item 3 of the plaint schedule property is concerned, irrespective of the validity of Ex.B-2, the first defendant, the appellant herein would automatically be entitled to the suit schedule property.

27. For all the above mentioned reasons, A.S. No. 1750 of 1985 is allowed and the Cross-Objections are dismissed. But in the circumstances, the parties are directed to bear their own costs.