

(1958) 04 AP CK 0012
In the Andhra Pradesh High Court
Case No : Appeal No. 1039 of 1953

Putti Lakshmayya and others

APPELLANT

Vs

Garlapati Tirupathamma and others

RESPONDENT

Date of Decision : 12-04-1958

Acts Referred:

Evidence Act, 1872 — Section 65, 67, 68, 90
Registration Act, 1908 — Section 60

Citation : AIR 1958 AP 720

Hon'ble Judges : Sanjeeva Rao Naidu, J; Bhimasankaram, J

Bench : Division Bench

Advocate : C.V. Narasimha Rao and M.V. Srinivasa Rao, for the Appellant; N. Chandramouli, for the Respondent

Judgement

Bhimasankaram, J.—This appeal is by the defendants three in number in original suit No. 21 of 1952 on the file of the Subordinate Judge's Court, Guntur. The 1st defendant is the father and defendants 2 and 3 are his so. The suit was instituted by 5 plaintiffs who are respondents here and they are the daughters of the defendant by his wife late China Annamma, (sic) was also the mother of the defendants 2 and 3. (sic) plaintiffs claimed recovery of possession of the (sic) perties described in the plaint A to C schedules a past and future profits.

Their claim was based upon the allegation (sic) these properties formed part of the estate of (sic) deceased maternal grand-father one Makkena Papa and upon the further allegation that their mo(sic) China Annamma became entitled to them absolu(sic) under the last will and testament dated 26-4-1916 Papayya. They stated that under the law they (sic) the heirs to the streedhana of their mother and (sic) entitled to the suit property. They seek recovery possession of the property from their father and there who were in management of the property behalf of their mother until her death on 10-5-19.

2. In their written statement, the defend stated that they were not aware of the truth or of (sic) wise of the will referred to in the plaint and se(sic) rather

inconsistently a family arrangement whe(sic) China Annamma directed that the properties were be enjoyed by her sons and not by her daughter.

According to them, when they disputed certain al(sic)tions made by China Annamma of properties (sic) she had obtained from her father, the dispute settled in the presence of mediators by the afor(sic) arrangement which provided also that the defen(sic) 2 and 3 should not question the alienations ma(sic) then by Chinna Annamma and that having rega(sic) the fact that the 1st defendant had married and (sic) suitable provision for the daughters out of his properties, the sons should get their maternal g(sic) father's properties.

3. The principal questions that arose for (sic)mination at the trial were the following :

(1) Whether the will of Papayya set up b(sic) plaintiffs was true and valid? and

(2) Whether the arrangement pleaded by the defendants was true and binding upon the plaintiff. There was also a minor issue as regards the qu(sic) of mesne profits to which reference will be m(sic) the end of the judgment.

4. The trial Court found that the will of Paset up by the plaintiffs was true and valid. I found that the arrangement pleaded by the defendant was not true. On those findings, it gave the pl(sic) a decree for possession. It determined the a(sic) of mesne profits payable as Rs. 1,250/-.

5. On this appeal, Mr. C.V. Narasimha Rao, learned counsel for the appellants has raised the following contentions :

6. In the first place, he contended that the will (sic)f Papayya has not been duly proved. He argued that (sic)ere is no proof (1) that Papayya signed the documents, (2) "that the document was duly attested, and (sic)) that Papayya executed it in a sound disposing (sic)ate of mind.

7. It is to be noted that at the trial what was produced was not the original of the will but a certi(sic)ed copy of the same marked as Ex. A-10. The original was stated to have been lost while in the custody P.W. 10 (Kondaveeti Nayudamma) the husband of Papayya's last daughter, Chinnamma. It is pointed (sic)t that although Ex. A-10 is a certified copy of a (sic)cument more than 30 years old, the presumption (sic)ailable under S. 90 of the Evidence Act cannot be (sic)sed with respect to the original, because the original itself is not produced.

8. In AIR 1935 132 (Privy Council) , their Lordships the Privy Council overruled the view taken in (sic)etter Chunder Mookerjee v. Khetter Paul Sree(sic)tno, ILR 5 Cal 886 (B), Ishri Prasad Singh v. Lalli (sic)Kunwar, ILR 22 All 294 (C) and Dwarka Singh Ramanand Upadhia, ILR 41 All 592: (AIR 1919 All (sic)) (D), that S. 90 of the Evidence Act applied even cases where the original document was not ac(sic)ly produced in Court and where only secondary (sic)lence was admitted under S. 65 of the Evidence (sic) after proof that the original had been lost while proper custody.

Although the ruling of the Full Bench of the (sic)ras High Court in P. Subrahmanya Somayajulu and Others Vs. Y. Seethayya and Others, which had also taken the same view as the (sic)s overruled, was not referred to by their Lord (sic)s of the Privy Council, it is clear that that deci(sic) is no longer good law and this has been noticed Divisional Bench of the Madras High Court in Gadey Venkata Ratnam (deceased) and Others Vs. Gadey Sitaramayya and Others, , wherein the learned Judges, were also dealing with the case of a will observ(sic)at even though the certified copy with which were dealing was of a will more than 30 years (sic)ts due execution could not be presumed but (sic)d be proved "in some way known to law, at by approved circumstantial evidence."

9. Now, the question therefore, is whether, in present case, there is such circumstantial evidence (sic)pport of the original of Ex A-10. The lower (sic) has relied upon the evidence of two witnesses (sic) 9 and 10 in holding that the execution of the (sic)y Papayya in a sound disposing state of mind (sic)uly proved. P.W. 9 is a nephew of Papayya P.W. 10 as already stated is a son-in-law of (sic)oth of them have deposed that they were pre(sic)t the time of Papayya's execution of the origi(sic) Ex. A-10. P.W. 10 states that Papayya was in (sic) disposing state of mind when he executed it. (sic)oth of them deposed that Papayya was brought (sic) his native village which is about 20 miles away (sic)ntur hospital for treatment and when he was (sic)at he was in serious condition he desired to (sic) a will and execute the original of Ex. A-10. Instrument is stated to have been drafted by a of Guntur, one Mr. Survanarayana by name not by the time of the trial of this suit. There was (sic)ous cross-examination of these witnesses in re(sic) these statements of theirs. No suggestion (sic) of consideration was made against their dis(sic)edness. The trial Court has accepted their evidance and we have not been shown any reason why evidence should not be acted upon.

10. Apart from this oral testimony, there is in our opinion sufficient evidence of the due execution of the document. So far as the signature of the testator is concerned, it must be noticed that Ex. A-10 shows that the original contained an endorsement by the Sub-Registrar who registered the will made under S. 60 of the Registration Act that the testator was identified before him and that he admitted his execution of the instrument. It seems to us that as provided by sub-s. (2) of that Section itself, this endorsement can be taken as evidence of the fact that the original contained Papayya's signature. As their Lordships of the Privy Council pointed out in AIR 1943 83 (Privy Council) there is, further as a matter of law, a presumption that registration proceedings were regular and honestly carried out and unless it is shown that the person admitting registration before the Registrar is an imposter, it should be taken that Papayya himself admitted his signature in the will.

On this matter we are not prepared to accept as good authority the decision relied on by AIR 1942 84 (Nagpur) where a single Judge of the Nagpur High Court seems to have held that the certificate of the Registrar under S. 60 of the

Registration Act cannot be considered as substantive evidence but only for the purpose of corroboration and that S. 67 of the Indian Evidence Act requires independent proof that the alleged signature of the executant was in his handwriting and that mere proof of admission of execution does not satisfy the requirements of that section. We cannot see our way to accept this view. We are clearly of the opinion that the endorsement of the Registrar under S. 60 of the Registration Act can constitute evidence that a registered document contains the signature of the person who purports to be its executant.

11. The next question is whether there is proof of due attestation. The instrument was written by P.W. 4 (Bollapragada Venkataramanaiah) whose deposition was recorded by a Commissioner appointed by the trial Court. It would appear that he was about 80 years old at the time when his evidence was taken. He has no recollection of the part he took in the execution of the will. He plainly says that he has been ill for some time and that he has lost his memory. The only fact that his evidence establishes is that four out of all the five attestors of the will are dead.

As regards the attessor who is alive, P.W. 10 has stated in his evidence that he was not in a fit condition to give evidence. This statement of his was not disputed in the cross-examination of the witness. But It would appear that although the plaintiffs who took out a commission for the examination of the living attessor gave up his examination as the Commissioner found that the witness was not in a proper condition to be examined, the defendants requested the Commissioner to examine him as a witness on their side. This suggestion the learned advocate for the plaintiffs successfully opposed on the ground that if the defendants wanted to examine him they should make an appropriate application to the Court for the purpose.

The defendants however took no further steps. It is argued by Mr. Narasimha Rao on these facts that the requirements of S. 68 of the Evidence Act have not been complied with and that it cannot be said that the attestation of the will has been proved. We are however satisfied that Subbarayudu, the only living attessor, was incapable of giving evidence and that therefore due attestation of the will could be proved by other evidence. It seems to us also possible to take the view that P.W. 4 the scribe too was an attessor and that S. 68 of the Evidence Act has been thus satisfied. P.W. 4 has been examined although his evidence it is true, is unhelpful to the plaintiffs by reason of his physical and mental infirmity.

12. The circumstantial evidence however afforded by the following facts is sufficient in our opinion to enable us to draw the presumption that the will was duly and properly attested. It was executed 5 years before the testator's death. The testator had no sons but six daughters and he made dispositions in favour of them all as also in favour of his wife. Inter alia, he directed that his first two daughters, of which China Annamma was one should get a larger share than the rest and further provided that certain properties in which he gave his wife a life estate should pass to his first two daughters after her death.

The oral evidence in the case establishes that all the daughters enjoyed the property in accordance with his directions ever since his death in 1921. It is to be remembered that all the daughters were married and if there was any defect in the will there were sufficient people interested in challenging its validity. China Annamma herself admittedly enjoyed without a dispute, a larger share than her younger sisters and this she could have done only under the will.

Further, after her mother's death in the year 1932, it is admitted that China Annamma came into possession of some of those items of which her mother died possessed in accordance with the directions in the will. Both the parties admit that China Annamma alienated some of these items which fell to her share though the defendants would have it that they disputed the right of alienation. The fact that this will which came into effect in the year 1921 has not been disputed at all by any one of the several persons who could have disputed it, is the strongest piece of evidence that everybody interested and likely to have personally known or to have been in a position easily to ascertain the facts took it for a valid will.

13. As regards the sound disposing state of mind of Papayya at the time when he executed the original of Ex. A-10 we have already stated that there is the evidence of P.Ws. 9 and 10. Their oral evidence is fortified by the circumstantial evidence already referred to. The will has been assumed to embody the real intentions of the testator and has been acted upon, as shown in the previous paragraph, for nearly 30 years by every party likely to be interested. The same circumstances that raise a presumption that the will was duly attested and executed also afford evidence that the testator was in a sound disposing state of mind when he executed it. We therefore think that there is no substance in the first contention of Mr. Narasimha Rao.

14. We may add that the "family arrangement" set up by the plaintiffs themselves is really a sort of settlement made by their mother, in short, an oral will and this itself implies that she was capable of dealing with the property as a full owner, which she could only do by a disposition in her favour of absolute rights in the property. Such a disposition is found only in Ex. A-10.

15. The next point raised by Mr. Narasimha Rao is that his clients, defendants 2 and 3, are entitled upon a proper construction of the will to share the property with the plaintiffs. He relies in the first instance upon the clause of the will which says that the daughters are to enjoy the property from son to grandson. This submission however, in our opinion, is unsound. The intention of the testator was clearly to bestow upon each of his daughters an absolute estate in regard to whatever property he gave them. The words "that they should enjoy it from generation to generation or from sons to grand-sons" are plainly not words of purchase but words of limitation.

16. Alternatively, Mr. Narasimha Rao has argued that in respect of the property which was given for life to Govindamma the wife of Papayya & after her death to

China. Annamma there is no specific provision in the will that the property is to be enjoyed absolutely by China Annamma and that therefore (sic) would not constitute her streedhana so as to entitled the plaintiffs to claim it. This refers to the C schedule property. But we are satisfied that there is no substance even in this contention. The language in o(sic) opinion is too plain to admit of any construction other than this viz., that whatever property was to com(sic) into the possession of the first two daughters after the death of Govindamma was to be enjoyed absolute by them.

17. Lastly, it is contended that the amount mesne profits awarded to the plaintiffs is excessive. The plaintiffs claimed only mesne profits for the ye(sic) 1951-52 and they estimated the amount at Rs. 2,000. The property is described as wet land of the exte(sic) of more than 10 acres and the defendants in the written statement claimed that the lands would (sic) fetch more than Rs. 900/- per annum adding however that in the year 1951-52, as the crops fai(sic) for want of rains they realised nothing. It may stated that the defendants 2 & 3 who would appellant to be 50 and 24 years respectively at the time the plaint have not come into the witness box. The 1st defendant as D. W. 1 says in his evidence wh(sic) was given on 25-6-1953 as follows :

Year before last I realised a net income of 400/- from the suit lands on account of failure rains. If there are good rains the net annual inc(sic) would be Rs. 1,000/-.

He admitted in the cross-examination that tob(sic) could be grown on the suit land and that it was (sic)tually grown for one year. He has not stated how(sic) what crops he raised in the year 1951-52. It w(sic) appear that pending the suit, the defendants the selves purchased the leasehold eights in the suit (sic) for the year 1953-54 at an auction held by a Commissioner under the directions of Court for a su(sic) Rs. 1,250/-. The lower Court took this as affor(sic) the correct basis for determining the quantum (sic) mesne profits for the year in question. We se(sic) reason to differ from the conclusion reached by learned Subordinate Judge.

18. The result is that this appeal fails ar(sic) dismissed with costs.