
(2011) 12 AP CK 0008
In the Andhra Pradesh High Court
Case No : Second Appeal No. 1326 of 2005

Raavi Nookaraju

APPELLANT

Vs

Kotaru Latchayamma and others

RESPONDENT

Date of Decision : 15-12-2011

Acts Referred:

Evidence Act, 1872 — Section 68, 69, 90
Transfer of Property Act, 1882 — Section 123, 3

Citation : (2012) 3 ALT 58

Hon'ble Judges : L. Narasimha Reddy, J

Bench : Single Bench

Advocate : S. Rajan, for the Appellant; V.V.N. Narayana Rao, for the Respondent

Final Decision : Allowed

Judgement

L. Narasimha Reddy

1. The parties herein are referred to as arrayed in the suit.
2. The 1st defendant in O.S. No. 21 of 2002 in the Court of Principal Junior Civil Judge, Yellamanchili, is the appellant. The 1st respondent i.e. plaintiff, filed the suit for the relief of partition of an extent of Ac.1.20 cents of land into four equal shares and to put her in possession of one such share, besides passing a decree for possession of Ac.0.60 cents of the plaint schedule land, said to have been gifted to her by her father.
3. The plaintiff, defendant No. 6 and Appala Narasa, mother of defendants 2 to 5, are the three daughters and the 1st defendant is the son of late Raavi Appala Murthy. Two bits of land in survey No. 334 of Yellamanchili Village, viz., Ac.1.60 cents and Ac.0.60 cents were purchased by Appala Murthy, through separate sale deeds, on 01-02- 1967. Out of the total extent of Acs.2.20 cents, Ac.0.40 cents was acquired by the Government. The plaintiff pleaded that, her father executed a deed of gift/settlement, dated 11-02-1970 (Ex.A.1), in her favour as regards, Ac.0.60 cents and that in the remaining Ac.1.20 cents, she is entitled to a share

of one-fourth, namely Ac.0.30 cents. Though she sought for the relief of partition in respect of Ac.1.20 cents, she has included some more items, such as a property of Ac.0.10 cents in survey No. 334, and Ac.0.35 cents of vacant land; in the suit schedule.

4. The principal contest to the suit was by the 1st defendant. He pleaded that the land in survey No. 334 was purchased by their father, after selling an item of ancestral property through Ex.B.1, dated 29-04-1967 and that Ex.A.1 could not have been executed by their father by treating it as his self-acquired property. It was further pleaded that Ex.A.1 was forged and that it does not give rise to any rights, in favour of the plaintiff.

5. The trial Court passed a preliminary decree through judgment dated 09-09-2004. The 1st defendant filed A.S. No. 31 of 2004 in the Court of Senior Civil Judge, Yellamanchili. The appeal was dismissed on 04-07- 2005. Hence, this Second Appeal.

6. Sri S. Rajan, learned counsel for the 1st defendant, submits that the trial Court and the lower Appellate Court committed errors on several legal aspects. He contends that the preliminary decree passed in respect of the items of suit schedule property was opposed to the very text of the judgment, wherein, relief was granted only in respect of item No. 1 of A-schedule. He submits that the trial Court and the lower Appellate Court have recorded finding as to the proof of Ex.A.1, contrary to the purport of Sections 68 and 69 of the Evidence Act. Learned counsel further submits that the finding on the question as to whether the land in survey No. 334, was the joint family property or selfacquisition of Appala Murthy is defective, since it was clearly established that the said property was purchased with the proceeds of an item of joint family property, sold through Ex.B.1. He places reliance upon certain decided cases.

7. Sri V.V.N. Narayana Rao, learned counsel for the plaintiff, on the other hand, submits that though in the relief portion of the plaint mention was made only to item No. 1 and the discussion was also devoted to it, reference was made to all the items; in the body of the plaint. He contends that an item of joint family property was sold under Ex.B.1, after item No. 1 of A-schedule in the present suit was purchased and thereby, it cannot be treated as the joint family property. As regards the proof of Ex.A.1, learned counsel submits that the proviso to Sections 68 and 90 of the Evidence Act govern the situation and the findings recorded by the trial Court, as upheld by the lower Appellate Court, are correct.

8. The relief claimed by the plaintiff was a bit complex, in nature. On the one hand, she prayed for partition in respect of Ac.1.20 cents of land; and on the other hand wanted a decree for recovery of possession of Ac.0.60 cents of land, which is said to have been settled in her favour under Ex.A.1. Further, though the relief was claimed in respect of an extent of Ac.1.80 cents, two more items were included in the schedule, without there being any claim vis-a-vis the said properties. The 2nd defendant reported that she does not intend to file any

written statement. Defendants 3 to 5 remained ex parte. Therefore, the contest to the suit was by the 1st defendant alone.

9. The trial Court framed the following issues for its consideration:

- i) Whether the plaintiff is entitled for partition of the plaint schedule property and separate possession as prayed for?
- ii) Whether the suit in the present form without seeking the relief of declaration is maintainable?
- iii) Whether there is cause of action to file this suit?

10. On behalf of the plaintiff, PWs.1 to 4 were examined and Ex.A.1 was filed. On behalf of the 1st defendant, DWs.1 and 2 were examined and Exs.B.1 to B.7 were filed. On the suit being decreed, the 1st defendant filed A.S. No. 31 of 2004 in the Court of Senior Civil Judge, Yellamanchili, and the lower Appellate Court framed the following points for its consideration:

- i) Whether the plaintiff is entitled for partition of plaint schedule property and for separate possession as prayed?
- ii) Whether the schedule property is the ancestral property of first defendant?
- iii) Whether the Gift Settlement Deed dated 11.02.1970 is true, nominal and sham?

The appeal was dismissed, through its judgment dated 04-07-2005.

11. On hearing the extensive arguments advanced by the learned counsel for the parties, this Court is of the view that the following substantial questions of law arise for consideration:

- a) Whether a deed, which is required to be attested can be said to have been proved when none of the attesters are examined and no evidence is adduced to prove that the executant had signed the document? and
- b) Whether an item of property, acquired by the Karta of a family with the sale proceeds of an item of ancestral property can be treated as self acquisition, because the document for sale of ancestral property was executed few months subsequent to the date on which another item of property was purchased?

12. The plaintiff claimed that an extent of Ac.0.60 cents is her exclusive property and prayed for partition of the balance of Ac.1.20 cents. The basis for the claim in respect of Ac.0.60 cents is, Ex.A-1, dated 11-02-1970. It is a gift deed said to have been executed by her father, in her favour. Section 123 of the Transfer of Property Act prescribes the procedure to be followed for execution of a gift deed. A gift deed is one of the few documents, which is required to be "attested".

13. Sections 68 and 69 of the Evidence Act stipulate the norms for proof of document, which is required to be attested. "Attestation" is a typical

phenomenon, through which the execution of the document is witnessed. It substantially differs from the process of a witness signing a document in token of his presence when a document, which is not required to be attested, is executed.

14. A perusal of the definition of the word "attested" u/s 3 of the Transfer of Property Act discloses that it is a process wherein:

- (a) two or more witnesses shall be present when the document is executed,
- (b) each one of them have seen the executant sign or affix his mark to the instrument, and
- (c) each one of them have signed the instrument in the presence of the executant.

However, it is not necessary that all of them must sign the document at one and the same time, or that the attestation must be in a particular form.

15. Section 68 of the Evidence Act mandates that if a document is required to be attested, it shall not be used in evidence until atleast one attesting witness has been examined to prove it. The proviso thereto directs that in case the document is registered, it shall not be necessary to examine any witness; unless the executant of the document has denied the execution. The procedure to prove a document required to be attested, in the event of none of the attesting witnesses being available, is prescribed u/s 69 of the Evidence Act. Sections 68 & 69 of the Evidence Act 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: 1[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.]

69. Proof where no attesting witness found. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

16. In the instant case, neither the attesting witnesses nor the executant are alive; the document, however, is registered. Learned counsel for the plaintiff argued that proviso to Section 68 of the Evidence Act gets attracted to the facts of the case, and that it is not necessary to examine any attesting witness or any other person. However, a close reading of the proviso to Section 68 of the Evidence Act discloses that the exemption from calling any witness to prove such

a document would be available only if the execution of the document is not denied.

17. The last part of the proviso, viz., "unless its execution by the person by whom it purports to have been executed, is specifically denied" was the subject matter of discussion in several judgments and interpretation thereof, was not uniform. A plain reading of the expression, referred to above, would give an indication that it is only when the executant of the document denies its execution, that, the necessity to examine attestors, would arise; notwithstanding the fact that the document was registered. A pertinent question as to whether the denial can be by the executant alone, or by any party to a suit, who is adversely affected on account of the document, arose in many cases. One view to which the Kerala High Court in *Paramu Radhakrishnan Vs. Bharathan*, the erstwhile High Court of Oudh in AIR 1943 416 (Oudh) and the High Court of AIR 1949 149 (Nagpur) subscribed, was that the denial need not be by the executant alone. This view appears to be correct. If the expression is to mean the executant alone, serious consequences would flow in cases, particularly where the executant is not made a party, but the document is pressed into service against a person who is a party to the suit. It is a different matter, that if the executant deposes as a witness and admits the execution, the further steps may virtually become redundant. The 1st defendant in this case specifically denied the execution of Ex.A-1 by their father. Hence, the proviso to Section 68 of the Evidence Act does not get attracted to the facts of the case.

18. The plaintiff was under obligation, to comply with Section 69 of the Evidence Act. There is a radical difference regarding proof of an attested document, a) when an attesting witness is available to depose and b) when such witness is not alive or available. Examination of an attesting witness would suffice, u/s 68 of the Evidence Act. What all he has to depose is that he figured as an attessor to the document. Beyond that no other proof is needed. Where, however, the attesting witness is not available, two aspects need to be proved through other available evidence, viz., that (a) atleast one attesting witness has attested the document and that (b) the signature on the document is in the hand-writing of the executant. In other words, the deposition of an attesting witness would obviate the necessity to examine the executant or to otherwise prove the execution, his non-availability places an obligation to prove the execution also, in addition to prove attestation. Unless these two aspects are proved, the person relying upon the document cannot avail the benefit thereof.

19. The only witness examined by the plaintiff in relation to Ex.A-1 was PW-4. He stated that his father figured as an attessor to Ex.A-1 and that he can identify his signature. Beyond that he did not state anything, nor did he place before the Court, any document containing undisputed signature of his father. Even if his evidence is to be accepted, it cannot be said that Ex.A-1 is proved. Therefore, this point is answered against the plaintiff and in favour of the 1st defendant.

20. The second point, is about the nature and character of the suit schedule property. According to the plaintiff, it was the self acquisition of their father. It is

a matter on record that the property was purchased in February 1967. The concerned document was not placed before the trial Court. The 1st defendant pleaded that the said item of property was purchased with the sale proceeds of an item of ancestral property. To prove his contention he filed Ex.B-1, dated 29-04-1967, through which Raavi Appala Murthy sold an item of ancestral property. It may be true that the suit schedule property was purchased one or two months earlier to the sale under Ex.B-1. However, the recitals in Ex.B-1 disclose that the consideration therein was already received by the vendor i.e. Appala Murthy. Once, the sale proceeds of that property were available and the suit schedule property was purchased contemporaneously, the inevitable conclusion is that the suit land acquired the character of ancestral property.

21. It is too well settled that whenever the Kartha of a joint family purchases an item of property by selling an item of joint family property, the one so purchased needs to be treated as owned by the joint family. As long as the sale of the joint family property and purchase of a new item are contemporaneous, it is not necessary to prove with mathematical precession, that the sale proceeds were sufficient to purchase the new item or that timing was accurate. Therefore, this point is also answered against the plaintiff and in favour of the 1st defendant.

22. The result is that Ex.A-1 is not proved or the plaintiff does not have exclusive right vis-a -vis Ac.0.60 cents of land. The extent of Ac.1.80 cents needs to be divided in four equal shares. The relief needs to be moulded in the light of the findings recorded above.

1. The second appeal is, accordingly, allowed,

(a) setting aside the decree passed by the trial Court and the judgment of the lower Appellate Court;

(b) passing of a preliminary decree directing that the plaintiff, defendants 1 and 6 shall be entitled to one-fourth share each, and defendants 2 to 5 shall together be entitled to one-fourth share in the properties left by Appala Murthy;

(c) the preliminary decree shall as of now, cover Ac.1.80 cents of land in survey No. 334 of Yellamanchili Village, but it shall be open to the parties to seek division of any other items of property in the course of final decree proceedings in case there exist other items owned by the joint family.

23. There shall be no order as to costs.