

(2009) 02 KAR CK 0059

In the Karnataka High Court

Case No : Regular Second Appeal No. 895 of 2007

Smt. Giddamma and Another

APPELLANT

Vs

Smt. Venkatamma, (Dead by LRS) and Others

RESPONDENT

Date of Decision : 16-02-2009

Acts Referred:

Evidence Act, 1872 — Section 67, 68
Succession Act, 1925 — Section 59, 63

Citation : (2009) ILR (Kar) 992 : (2009) 4 KarLJ 696

Hon'ble Judges : A.N. Venugopala Gowda, J

Bench : Single Bench

Advocate : Y.R. Sadasiva Reddy and Assts, for the Appellant; B.N. Muralidhar, for R1-4, for the Respondent

Final Decision : Dismissed

Judgement

Venugopala Gowda, J.—This appeal arises from a suit for partition brought against the appellants by the respondent and another in the Court of Principal Civil Judge (Sr. Dn.), Kolar. Defendants in the suit are the appellants and respondent (dead) represented by her legal representatives, was the 1st plaintiff. For the sake of convenience, the parties will be referred to hereinafter, with reference to their rank in the suit.

2. The material facts in regard to the relationship of the parties, which are not in dispute are that, one Muniyappa and his wife Nasamma, who have died, have left behind three daughters namely, (1) Venkatamma (1st plaintiff) (2) Chinnamma (2nd plaintiff) and (3) Giddamma (1st defendant). Said Venkatamma and Chinnamma filed the suit for a decree of partition and separate possession of their 2/3rd share in the plaint schedule property against their sister Giddamma and her son B. Nanjappa, inter alia contending that, the second defendant is attempting to alienate the suit property without effecting partition and allotting the shares to them. Defendants in their written statement, disputed the right and claim of the plaintiffs inter alia contending that, the suit property belonged to

Nasamma, who bequeathed the same in favour of the 2nd defendant under a will dated 10.11.1960 and after her death, the 2nd defendant became the owner and he is in possession and enjoyment of the same, in view of which, the suit for partition is not maintainable.

3. During the pendency of the suit, Chinnamma, the 2nd plaintiff passed away, her legal representatives were not brought on record and the suit as far as she was concerned, stood abated. On the basis of the pleadings, the learned Trial Judge framed issues. Plaintiffs examined PW-1 and Exs.P1 to P3 were marked and the defendants examined DWs 1 to 3 and Exs.D1 to D10 were marked. The learned Trial Judge has held that, the defendants have failed to prove that Nasamma executed the will - Ex.D1, in respect of the suit land in favour of the 2nd defendant and consequently, the plaintiffs are having 2/3rd share and they are entitled to partition and separate possession of their 2/3rd share in the suit land.

4. As against the said decree, defendants preferred an appeal in the lower Appellate Court. Considering the record and the rival contentions, the lower Appellate Court raised the points for consideration and it held that, the defendants have failed to prove the execution of will - Ex.D1 and that the plaintiffs are entitled to a share. Taking into consideration, the abatement of the suit in so far as the 2nd plaintiff was concerned, the decree passed by the Trial Court was modified holding that, the plaintiffs together are entitled for half share and possession. The appeal was allowed in part, by modifying the Judgment and Decree passed by the Trial Court.

5. Against the Decree passed by the lower Appellate Court, this second appeal has been filed, inter alia contending that, the Courts below are not justified, in not properly considering the contention that the property in question belonged to Nasamma, who had validly executed the will bequeathing the same under Ex.D1 in favour of the 2nd defendant, consequent upon which, the suit for partition was not maintainable and the suit ought to have been dismissed. It has also been contended that, in view of the death of the attestors and the scribe, DW-3 who was the son of the scribe, having been examined and that he having identified the signature of the scribe and the handwriting on the document, the execution of Ex.D1 has been proved and non consideration of the said material aspect by the Courts below in the proper perspective has resulted in the impugned Decrees being illegally passed and hence, interference is called for.

6. Sri. Y.R. Sadasiva Reddy, learned Advocate appearing for the appellants, by taking me through the impugned judgments of the Courts below, strenuously contended that, the will - Ex.D1 executed by Nasamma, has been duly proved, in view of which, the suit property being not a joint family property, the Decree for partition passed is illegal and hence, a substantial question of law with regard to the manner of proof of Ex.D1 by examination of DW-3, arises for consideration and hence, the appeal be admitted and considered. The contention is untenable and the appeal is devoid of merit.

7. Since the main contention raised by Sri. Sadasiva Reddy, is directed against the concurrent findings of the Courts below that, the execution of the will - Ex.D1 has not been proved, it is necessary to notice the legal position in the matter of proof of will. A party propounding a will or otherwise making a claim under a will, is no doubt seeking to prove a document and in deciding how it is to be proved, it is necessary to notice the provisions which govern the proof of documents contained in Sections 67 & 68 of the Indian Evidence Act, 1872 ("Act" for short). u/s 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting and for proving such a handwriting, under Sections 45 & 47 of the Act, the opinions of experts and of persons acquainted with the handwriting of the persons concerned are made relevant. Section 68 deals with the proof of execution of the document required by law to be attested and it provides that, such a document shall not be used as evidence until one attesting witness at least, has been called for the purpose of proving its execution. It is for the person who relies on such a document, to produce the proof in terms of the said statutory provisions. Ex.D1 being a will, it is necessary to also notice Sections 59 & 63 of the Indian Succession Act, 1925 ("Succession Act" for short). Section 59 provides that, every person of sound mind, not being a minor, may dispose of his property by will. Section 63 stipulates that, the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and the signature or the mark shall be made that it shall appear, that it was intended thereby to give effect to the writing as a will. The said section requires that the will be attested by two or more witnesses as prescribed. In the light of the said provisions, have the defendants proved the due execution of Ex.D1 is the point for consideration.

8. Section 68 of the Act lays down the mode of proof of a will. The mandatory requirement is that, at least one of the attesting witnesses should be examined. When the genuineness/execution of the will is questioned, the due execution has to be proved by the person who produces the document to make or establish any claim. Hence, to prove the execution of the will, the examination of at least one attesting witness is necessary. However, though a will, ordinarily must be proved, keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event of the unavailability of the attesting witnesses on account of death or other similar circumstances being brought on record, the proof of execution of the will and attestation can be considered in the relaxed manner by having recourse to the exceptions provided under Sections 69, 70 & 71 of the Act. Section 69 provides for proof of a document where no attesting witness is found. Section 70 provides for admission of execution by party to the attested document. Section 71 is in respect of a situation where the attesting witness denies or does not recollect the execution of the document and only in that eventuality, the document's execution may be proved, by other evidence. Keeping in view, the stand taken by the appellants, it is Section 69 of the Act which applies and hence, its scope needs examination. It reads as follows:

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.

9. The lower Appellate Court has recorded the finding that, evidence of DW-2 is not helpful to prove the execution of will - Ex.D1. DW-3 has been examined to prove the signature and handwriting of the scribe. DW-3 in his deposition, has stated that late Dodda-Junjappa is his father; he can identify the handwriting and document written by his father, Ex.D1 is in the handwriting of his father; Ex.D1(b) is the signature of his father and he has no personal knowledge of Ex.D1. The First Appellate Court, being the last Court on facts, appreciating the evidence, has recorded the finding that, absolutely there is no evidence identifying and establishing that, Ex.D1 contains the thumb mark of Nasamma or the signature of attesting witnesses Annayyappa and thumb mark of Papaiah. It has recorded a finding that, mere identification of the signature and handwriting of the scribe, will not prove that, the document was executed by the executent and therefore, the defendants have failed to prove the execution of Ex.D1. Whether, from the evidence of DW.3, the mandatory requirements of Section 69 of the Act has been fulfilled is the point for consideration.

10. From the concurrent findings recorded by the Courts below, it is clear that, what has been attempted to be proved by the defendants is the fact that, Ex.D1 is in the handwriting of the father of DW.3 and Ex.D1 (b) is the signature of the scribe. A careful reading of Section 69 of the Act shows that, if attesting witnesses cannot be found or if the document purports to have been executed in the U.K., then it must be proved that, the attestation of one attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. The provision contemplates that, the handwriting of atleast one attesting witnesses and the signature of the person executing the document is required to be identified and proved through the witnesses. The proof of handwriting and/or the signature of a scribe is not the stipulation u/s 69 of the Act. Hence the evidence of DW.3, merely identifying the handwriting and also the signature of his father, the scribe of Ex.D1, is of no legal consequence and does not meet the stipulation u/s 69.

11. Ex.D1 has neither been proved in terms of Section 68 nor Section 69 of the Act and hence, the Courts below are justified in holding that the defendants have failed to prove the due execution of Ex.D1 by late Nasamma. Consequently, suit property being liable for partition amongst her children, the decree passed is justified.

12. The trial and lower Appellate Courts have correctly cast the burden of proof taking into consideration the pleadings of the parties, have examined the record and have correctly recorded the findings. There is neither perversity nor illegality

committed in ordering the partition and separate possession, in terms of the impugned judgment of the first Appellate Court.

For the foregoing discussion, no substantial question of law arises for consideration and consequently, the appeal is liable to be rejected. Ordered accordingly.