Bharatam Kamaladevi Vs Balijepalli

L.P.A. No. 58 of 1982

Court: Andhra Pradesh High Court

Date of Decision: Sept. 7, 1987

Acts Referred:
Succession Act, 1925 â€" Section 238

Hon'ble Judges: Rama Rao, J; Raghubir, J

Bench: Division Bench

Advocate: C.P. Sarathy, for the Appellant; J.V. Suryanarayana Rao, for Respondent Nos. 2 and 3 and M.S.K. Sastry, for the Respondent

Final Decision: Allowed

Judgement

Rama Rao, J.
The Plaintiff is the Appellant. This appeal arises out of a suit for partition of the plaint schedule property comprising of Act

4-11 belonging cents to the deceased Suryanarayana Rao. The Plaintiff is the nephew of the said Suryanarayana Rao who is stated to have

executed is the will dt. 1.10.1953. The will is not produced. In support of the execution of the will, Ex.A-1 dt. 24.10.1953 which is a letter

addressed by the deceased to the Plaintiff, Ex.B-8 dt. 24.10.1953 which is a letter addressed by the deceased to another nephew i.e. 3rd

Defendant and the evidence of P.W.2 are relied upon. The trial Court, on an appreciation of the evidence, arrived at the conclusion that the

secondary evidence as to the lost will cannot be acted upon and dismissed the suit. On appeal, the learned single Judge reversed the judgment and

decree of the trial Court and decreed the suit in part.

2. Learned Counsel for the Appellant contends that there is no plausible or convincing evidence in support of the execution of the will and the

secondary evidence that it sought to be adduced for proof of the contents of the lost will is not satisfactory. Learned Counsel for the Respondents,

seeking to support the judgment of the learned single Judge contends that Section 238 of the Indian Succession Act is applicable to the situation

and, when will is lost, the secondary evidence is admissible and Exs.A-1 and B-8 are fully corroborated by the evidence of P.W.2 and, in the

circumstances, the finding of the learned single Judge is not liable to be interfered with

3. Ex.A-1 is a letter addressed by the deceased to the Plaintiff. At the outset it may be stated that the Plaintiff who is the nephew of the deceased

Suryanarayana Rao, is a pleader"s clerk as stated in Ex.A-1 itself and he must be presumed to be well versed with all these affairs including the

execution of the will and the effect of such a document. Ex.A-1 is a letter addressed by Suryanarayana Rao Stating that he desired to give certain

portions of his property to his relations and he wrote the will but lost it and he called upon the Plaintiff to write the will in English and send it on to

him. This clearly proves that the testator did not complete the execution of the will and he was expecting that the will written in English would be

sent to him by the Plaintiff incorporating the wishes expressed by him in the letter. Further, after 1.10.1953, the date on which the will is said to

have been executed, the testator was admittedly alive for more than two months; and during that period, his natural conduct would be to write

another will if he really lost the will and he could have as well taken the guidance of his nephew and could have written a fresh will. This aspect is

emphasised to demonstrate the natural conduct of a person who says that he has lost the will. But, however, Ex.A-1 clearly shows that the will as

such has not been completed though the testator expressed the wish. On the same day, the testator addressed a letter to another nephew of his i.e.

the 3rd Defendant, wherein he stated that he lost the will.

4. Again, P.W.3, the Doctor, who attended on the deceased while he was in the Hospital in Kerala, is a crucial witness in the case. He states that

the deceased informed him that he had written a will and asked him to attest it and at his request he arrested it and another impatient was intended

to attest it. He says that he does not know the surname of that inpatient and that he died, later on P.W.2 does not state anything about the contents

of the will. Therefore, the observation of the learned single Judge that Ex.A-1 is corroborated by P.W.2 is not correct in view the fact that P.W.2

did not state as to the contents of the will. In the absence of such corroboration, the only evidence that has to be considered is Ex.A-1.In Ex.A-1

the testator only evinced interest to execute the will in favour of his relations. But the will is not completed.

5. Further, in a case where the will is lost the evidence should be substantial and it should be beyond any reasonable doubt as to its execution and

contents. Learned Counsel for the Respondents strenuously contended that Section 238 of the Indian Succession Act is applicable and secondary

evidence is admissible. It is true that Section 238 enables the parties to adduce secondary evidence in a situation where the will is destroyed or lost

Section 238 provides that where a will has been lost or destroyed; and in the commentary by S.K. Bose it is stated that if a will is destroyed

without the knowledge of the testator, secondary evidence can be given. But however, the commentary is silent as to a situation where the will is

lost during the life time of the testator himself. Further as held in Woodward v. Goulstone (1886) RII Ac. 469, there must be congent and highly

satisfactory evidence to prove the contents of the lost will and the secondary evidence should be admitted and accepted with great circumspection

and it is only in a situation where evidence establishes the contents of the will beyond doubt that the evidence regarding the lost will can be

accepted. In the circumstances, the judgment and decree of the learned single Judge is set aside and the judgment and decree or the trial court is

restored. The appeal is accordingly allowed. In the circumstances, the parties are\directed to bear their own costs.