(1999) 09 AP CK 0022

Andhra Pradesh High Court

Case No: Second Appeal No. 830 of 1985

Kesrapu Manikyalu		APPELLANT
	Vs	
Veena Perumallayya (died) and Others		RESPONDENT

Date of Decision: Sept. 9, 1999

Acts Referred:

- Civil Procedure Code, 1908 (CPC) - Section 100
- Evidence Act, 1872 - Section 68, 90

Hon'ble Judges: B.S. Raikote, J

Bench: Single Bench

Advocate: C. Poornaiah, for the Appellant; S. Ashoka, Ananda Kumar for Mr. Krishna Murthy Nayani, for the Respondent

Final Decision: Dismissed

Judgement

B.S. Raikote, J.
This is an appeal preferred by the first defendant being aggrieved by the judgment and decree dated 15th December, 1984 passed by the Principal Subordinate Judge, Kakinada on his file A.S. No. 103 of 1979. By the impugned judgment and decree the lower appellate Court set aside the judgment and decree of the 1 Additional District Munsif of Kakinada dated 12th December, 1978 passed on his file in O.S. No. 175 of 1972 and consequently decreed the plaintiffs suit as prayed for by allowing the appeal.

2. The Learned Counsel appearing for the appellant-first defendant contended the appellate court has erred in raising presumption in favour of will dated 17.5.1944 filed in the suit at E.\\.A-2. u/s 90 of the Evidence Act. He further contended that unless one of the attesting witnesses is examined, the will could not be proved and in such a case no presumption can be raised u/s 90 of the Evidence Act and accordingly he submitted that the appellate Court has erred in decreeing the

plaintiffs suit. He further submitted that according to the evidence of P.Ws. 1 and 2 attestor numbers 1 and 2 by name Borra Tamanna and Koppana Satyam have died, but there is a 3rd attestor by name Borra Venkata Raidu. But according to the evidence of P.W. 2 his whereabouts ate not known and said Borra Venkala Raidu is not yet dead. Therefore, the said person could have been examined and without examining such a witness ho presumption can be raised u/s 90 of the Evidence Act. having regard to the requirements of Section 68 of the Evidence Act. Therefore, the findings of the appellate Court based on the wilt Ex. A.2 arc liable to be set aside. On the other hand, the counsel appearing for the respondent plaintiff contended that the person by name Borra Venkata Raidu in fact was not one of the attesting witnesses and even otherwise his whereabouts are not known as deposed by the witness and in such circumstances his non-examination would not affect merits of the case. He further submitted that since document is of 30 years old a presumption could be raised in favour of the document Ex. A-2 and the appellate Court having regard to the presumption raised in favour of the will and also evidence on the side of the plaintiff has rightly dismissed the suit had this Court cannot interfere with such finding of fact u/s 100 of CPC and accordingly he submitted that there are no merits in the appeal and the same is liable to be dismissed.

3. In order to appreciate rival contentions, I have to note brief feels of this case. The plaintiffs numbers in 1 to 4 are the sons of the one late Vennapu China Gurayya and defendants arc the neighbours of the suit property and the suit schedule house originally belonged to Meddi Sooramma and her two sons. They have sold this property to one Smt. Koorakula Atchayyamma vide Ex. A-1 dated 2.5, 1926 and said Atchayyamma in turn has executed a registered will dated 17.5.1944 vide Ex. A-2 in favour of the plaintiffs and accordingly the plaintiffs were put in possession of the property. But. in the year 1970 when the plaintiffs were away the defendants have constructed the brick walls and put up thatched pandal for using the same as cattle shed, bill hey did not have any right, title and interest to do so and as such their possession is illegal and consequently they are liable to be ejected by pulling the plaintiffs in possession. Therefore, the plaintiffs have filed this present suit for possession The first defendant filed written statement denying the case of the plaintiffs. It is further contended that the alleged will is not genuine and not binding. The first defendant stated that the suit properly was purchased under the registered sale deed dated 5.7.1967 from the third defendant and his son had constructed the compound wall in the year 1971 by spending an amount of Rs. 2,000/- and from 1971 the first defendant has been in possession and enjoyment of the property as owner. Therefore, the plaintiffs suit is liable to be dismissed D-2 filed a separate written statement contending that D-2 and D-3 are the divided brother in the partition, taken place about 10 years back and the suit schedule property had fallen to the share of defendants Nos.2 and 3. But. later they came to know that the properly belonged to the plaintiff and after the death of Atchayyamma the suit scheduled property was acquired by the plaintiffs father under the will executed by

her D-3 filed a separate memo adopting the written statement of D-1. In support of their case plaintiffs examined three witnesses as P.Wsl to 3 and got marked Exs.A-I to A-3. On the side of the defendants. DW-1 to DW-4 were examined and documents Ex. B- I was marked. On the appreciation of the entire evidence on record, the trial Court dismissed the suit holding that the will Ex. A-2 is not proved in accordance with law since one of the witness by name Bora Venkata Raidu was not examined by the plaintiffs and the document is not proved in accordance with Section 66 of Evidence Act. under which at least one attesting witness shall be examined to prove the execution of the document.

Even though, the document is 30 years old a presumption could not be raised because Borra Tamanna was alive and was not examined. Accordingly, it held that will was not proved and consequently dismissed the suit. On appeal the appellate Court held that even though one attesting witness was not examined in terms of Section 68 of the Evidence Act, an exception is created in favour of the document which is of 30 years old u/s 90 of the Evidence Act, and in view of the presumption arising in favour of the Ex. A-2 will it cannot be said that the Ex. A-2 is not proved on the basis of the evidence on record more so when the will has come from the proper custody and it was not the case of the defendants that the attestor was not in sound and disposing slate of mind. The appellate Court further held that non-examination of Borra Venkata Raidu is not fatal to the case since according to the evidence of P.W. 2.his whereabouts were not known and in view of the presumption arising u/s 90 of the Evidence Act in favour of Ex. A-2, it cannot be said that Ex. A-2 is not proved. The appellate Court took into consideration that the will in question was also registered will and consequently decreed the suit. It is in these circumstances, the first defendant has approached this Court.

4. From the evidence on record and also from the contentions urged on both sides, I find that the sale deed dated 2.5.26 executed by Meddi Sooramma in favour of Atchayyamma vide Ex A-1 is not seriously disputed. It is the case of the defendant No. 1 that he purchased the property from defendant No. 3 under a registered sale deed Ex. B-I dated 5.7.1967. But there is no evidence on record to show as to how defendants 2 and 3 had acquired this property from Atchayyamma. There is no evidence worth the name on record, as to how the defendant No. 3 became the owner of the property so as to sell the property in favour of defendant No. 1 vide Ex. B-1. At any rate, Ex. B-l is dated 5.7.1 967 audit is subsequent to Ex. A-1 sale deed dated 2.5.1926 in favour of Atchayyamma. The alleged registered will dated 17.5.1944 is executed by Atchayyamma in favour of the plaintiffs'' father was thus much earlier to the alleged sale deed Ex. B-l dated 5.7.1967. Having regard to these circumstances, Atchayamma was the owner of the property having purchased the same from Sooramma under Ex. A-l dated 2.5.1926 has remained unchallenged in this case. Therefore, the other point required for consideration for this Court would be whether Ex. A-2 will dated 17.5.1944 is executed by Atchayamma in favour of the plaintiffs'' father is proved or not. It is no doubt true that u/s 68 of the Evidence Act

regarding the document compulsorily in attestable one of the attesting witnesses has got to be examined. As per the evidence on record, there were two attesting witnesses and both of them have died. This fact is not disputed by the defendants side also. But, what is their case is that their is one 3rd person by name Borra Venkata Raidu and he is alive and his non-examination would be fatal to the case and consequently presumption u/s 90 of Evidence Act could not be raised. When both the counsels were contesting on this issue, 1 went through the evidence of P.W. 2. According to the evidence of P.W. 2 he was the person present during the time of registration of the will Ex. A-2 by Atchayamma. He signed the will as identifying witness before the Sub-Registrar and the will was executed about more than 30 years ago. He further staled that there was another person present who identified the executants. His name was Saraswathi Mulem Ravi and he died and person by name Borra Tamanna also had died, but he stated that Venkata Raidu was living in the village. He stated that Chinna Venkata Sastry. the scribe of A-2 has also died. It is on the basis of his statement that Borra Venkata Raidu was living, the trial court observed that he being one of the attesting witnesses should have been examined. I verified from Ex. A-2 and found that Borra Venkala Raidu was not the attesting witness. P.W. 2 except saving that such Venkata Raidu was alive did not state that he was one of the attesting witnesses.

Assuming that a person by name Borra Venkaia Raidu is alive, his examination would not be necessary unless he was one of the attesting witnesses, and none of the witnesses said that he was one of die attesting witnesses. However, the appellate Court also proceeded by a wrong assumption that this person was one of the attesting witnesses only because the trial Court discussed regarding his non-examination without looking into the evidence of P.W. 2. Since P.W. 2 did not state that Borra Venkata Raidu was an attesting witness, his non-examination would not be fatal to the case. On the basis of the evidence on record, it is clear that there were only two attesting witnesses and one scribe and all of them have died, If the attesting witnesses are not alive the question of their examination in terms of Section 68 of the Evidence Act would not arise. At any rule, Ex. A.2 is a registered will of 30 years old and in these circumstances, the appellate Court in the light of the evidence of witnesses on record and also on the basis that the document was of 30 years old raised a presumption under S. 90 of the Evidence Act and consequently held that Ex. A.2 will was proved. Having regard lo the evidence on record. I do not think that this finding of fact recorded by the appellate Court suffers from any infirmity.

5. However, the Learned Counsel appearing for the appellant-defendant No. 1 relied upon the judgment of this Court rendered in Yarlagadda Venkakka Choudary (dead) and Another Vs. Daggubati Lakshminarayana (dead) and Others, and Mohd. Jamal and Others Vs. Mohd. Sharfuddin (Died) by LRs. and Others, contending that will cannot be said to have been proved unless one of the attesting witnesses is examined to prove its execution. But even otherwise in the decision cited (1) supra,

it is held that a document compulsorily actable cannot be used in evidence until at least one attesting witness alive is examined to prove its execution, in the instant case, as I have already noticed above that there were only two witnesses and a scribe to the document, but all of them have died according to both sides. As I have already staled above that Borra Venkata Raidu was not one of the attesting witnesses to Ex/A-2 at all. both on the basis of evidence of P.W. 2 as well as looking into Ex. A-2 itself. In this view of the matter, the law laid down in those low judgments docs not apply to the facts of this case. The fact also remains on record that P.W. 2 was one of 1 he identifying witnesses before the Sub-Registrar and he has clearly deposed that the attestor has executed Ex. A-2 in favour of the plaintiffs'' father and the document is more than 30 years old. In view of this evidence on record now the other point that would arise for consideration would be whether the appellate Court has erred in raising presumption in favour of Ex. A-2 will.

6. As noticed by the appellate Court, it is no doubt true u/s 68 of the Evidence Act all documents compulsorily attestable should be proved by examining one of the allocating witnesses. But Section 90 of the Evidence Act creates an exception and even in, the absence of formal proof as required one can seek raising of the presumption u/s 90 of the Evidence Act if the document is 30 years old Babu Nandan and Others Vs. The Board of Revenue and Others, . At this juncture the counsel for the appellant contended that as on the date of filing if the suit the documents could not be one of 30 years old. The will is dated 17.5.1944 and the suit is filed on 20th January. 1972 and by the date of filing of the suit only 28 years had been completed, but not 30 years Therefore, no presumption could be raised u/s 90 of the Evidence Act. But. I do not find any substance in this argument in view of the consistent law declared by the Court in India as to the computing of 30 years period. In AIR 1936 15 (Privy Council) the similar question arose and the Privy Council has observed as under:

Atone time it was argued that S. 90 would not apply to this document by reason that it was filed in Court by the plaintiffs on 11th November, 1918. Their Lordships are, however, of opinion that under S. 90, Evidence Act, the period of 30 years is to be reckoned, not from the date upon which the deed is filed in Court but from the date on which, it having been tendered in the evidence, its genuineness or otherwise becomes the subject of proof. This was decided in (179) 5 CLR 135.

7. To the similar effect also was the law declared by Division Bench of High Court of Lahore in AIR 1924 145 (Lahore) In this judgment. it was held that "the period to be reckoned, not from the dale on which the document is not into Court, but from the date on which, after the document has been tendered in evidence, its genuineness becomes the subject of proof."

8. To the same effect is also the law declared by the High Court of Calcutta in Sarat Chandra Mondal and Others Vs. Panchanan Mondal and Another, in which the Division Bench of trial Court followed the judgment of Privy Council (supra) which I

have already referred to above. The other High Courts in G. Konda Reddi and Another Vs. P. Pichireddi and Others, . Mahadeo Prasad v. Nasiban, AIR 1920 Oudh 11 (1) and in Duluram vs. Rameshwar AIR 1955 NUC 4606 also have taken the same view and they have held that the period of 30 years should be computed from the date of his execution, to the dale when the document was sought lo be marked in evidence. In the instant case, it is not in dispute that as on the date the evidence was recorded in the year 1978, 30 years period had completed and if that is so as on the dated the document was sought to be put into evidence 30 years period had completed and the appellate Court rightly raised presumption u/s 90 of the Evidence Act as to its genuineness and execution of the document Ex. A-2 I have already pointed out that P.W. 2 at any rate is one of the persons who identified the executants at the time of its registration before the Sub-Registrar. In view of this evidence on record and in view of the fact that the document is registered document of more than 30 years old and absolutely there arc no suspicious circumstances, in my opinion the raising of such a presumption by the appellate Court cannot be found fault with. At any rule, there is no evidence on the side of the defendants which can rebut the presumption. Apart from that their specific case is that defendant No 3 has sold property to defendant No. l under E.\\.B-1. But, it is not established on record as to how defendant No. 3 has become the owner as there is no evidence that cither the defendant No. 2 or defendant No. 3 or any person purchased the property from the admitted owner Koorakula Atchayamma. The appellate Court also has given a clear finding that absolutely there is no evidence to show that the defendant No. 1 or defendant No. 3 were in possession of the properly on the basis of Ex. B-1 since no document evidencing their possession was produced in the case and there is also no evidence as to their alleged possession for more than a statutory period of 12 years consequently decreed the suit.

9. In view of my above discussion, I do not think that it is a fit case or interference of this Court u/s 100 C.P.C. Accordingly; I pass the order as under:

10. The appeal is dismissed. But. in the circumstances without costs.