**B. Poornima Vs. Thoomu Ramdasu and ors.**

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**SooperKanoon Citation** : sooperkanoon.com/430550

**Court** : Andhra Pradesh

**Decided On :** Feb-27-2006

**Reported in** : 2006(3)ALD365; 2006(4)ALT236

**Judge** : P.S. Narayana, J.

**Acts** : Evidence Act, 1872 - Sections 65, 66 and 74; ;Indian Registration Act, 1908 - Sections 57 and 57(5); ;Code of Civil Procedure (CPC) , 1908 - Sections 151

**Appeal No.** : CRP No. 372 of 2006

**Appellant** : B. Poornima

**Respondent** : Thoomu Ramdasu and ors.

**Advocate for Def.** : Vijajsen Reddy, Adv.

**Advocate for Pet/Ap.** : T. Koteshwara Prasad, Adv.

**Judgement** :
ORDER

**P.S. Narayana, J.**

1. This Court ordered Notice Before Admission on 31-1-2006 and granted interim stay for a limited period. Sri B. Vijaysen Reddy, learned Counsel representing the respondents-defendants, entered appearance.

2. Sri T. Koteswara Prasad, learned Counsel representing the petitioner-plaintiff would maintain that in the facts and circumstances of the case the learned I Additional District Judge, Warangal had committed an error in declining permission to the petitioner to file the document, i.e., the certified copy of the registered Will deed bearing Doc. No. 16/1964 dated 10-8-1964 executed by Sri Varadarajulu, and mark the same as an exhibit. The learned Counsel would also maintain that in the affidavit filed in support of the petition, initially by mistake it was mentioned that the original is in the 'public office', but, however, in the additional affidavit, the same was clarified and it was specifically stated at Paragraph 5 that neither the petitioner nor the respondents are the beneficiaries under the Will and the original was with the legal heirs of Varadarjulu and they also died and as such she is unable to produce the original. The learned Counsel would also maintain that in the light of the peculiar facts the learned Judge erred in dismissing the application relying on Section 65 of the Evidence Act, 1872, (hereinafter referred to as 'the Act' for the purpose of convenience), stating that the petitioner had not issued notice to any of the beneficiaries to produce the document. The learned Counsel would also maintain that in the light of the specific stand taken in the additional affidavit, this reasoning cannot be sustained. Even otherwise, the learned Counsel would maintain that in the light of the provisions of Sections 65 and 66 of the Act read along with Section 57 of the Indian Registration Act, 1908, the certified copy is admissible, especially, in the light of the specific stand taken that she is unable to produce the original for the reason that even the beneficiaries, the legal heirs of Varadarajulu, are no more and the next generation legal heirs are in hand-in-glove with defendants and hence, the original cannot be produced.

3. Sri B. Vijaysen Reddy, learned Counsel representing the respondents, on the other hand, would contend that the learned Judge recorded reasons in detail and came to the conclusion that inasmuch as the petitioner had not issued any notice to the beneficiaries to produce the document in question, unless such steps are taken, permission as prayed for by the petitioner cannot be granted. The learned Counsel had taken this Court through the reasons, which had been recorded by the learned Judge.

4. Heard learned Counsel on record and perused the impugned order.

5. B. Poornima, the revision petitioner herein as plaintiff instituted the suit O.S. No. 34 of 2002 on the file of the I Additional District Judge, Warangal, claiming the relief of partition. The first respondent-first defendant is the father, the second respondent-second defendant is the mother and the third respondent-third defendant is her sister. It appears that father is particular of denying the relief of partition to this daughter. Be that as it may, it is not necessary to go into further factual details, which may have to be decided at length at appropriate stage. Suffice to state that the revision petitioner filed an application under Section 65 of the Act read with Section 151 of the Code of Civil Procedure, 1908, (hereinafter referred to as 'the Code'), to permit the petitioner to file the certified copy of the registered Will deed vide document No. 16/1964 dated 10-8-1964 executed by Varadarajulu, and permit her to mark it as an exhibit. It is said that the first defendant, father, had taken a stand that the plaint schedule property was not inherited by him from her grandfather i.e., the father of the first defendant, but from his brother Varadarajulu. It is stated that she came to know that the said Varadarajulu executed a registered Will in respect of his properties and in the said Will he had mentioned entire details of his properties, and the properties of his brother as well and there is no mention that the plaint schedule property belonged to her grandfather and nowhere it was mentioned that the plaint schedule property was gifted to her father, the first defendant in the suit. In the said circumstances, the said Will deed is essential to be produced. But initially, no doubt, she had taken a stand that it is in the custody of the public office, but the said defect was rectified by filing an additional affidavit. Counter and additional counter had been filed and the application was resisted with all seriousness. It is not in controversy that neither the petitioner nor the respondents are parties to the said Will and they are third parties and are not beneficiaries under the Will. In the additional affidavit at Paragraph 5, it was stated that the original Will was with the legal heirs of Varadarajulu and they also died and hence, it cannot be secured. In the additional counter, the fact that the legal heirs of Varadarajulu are no more had not been controverted but, however, specific stand was taken that further legal heirs would be having the custody of the document since they are enjoying the property. This appears to be the respective stands taken by the parties on record.

6. The petitioner is no doubt making an attempt to bring in a document, the certified copy of a Will. In view of the peculiarity, no doubt the Will stands slightly on a different footing when compared to the other title deeds. But, however, specific stand was taken by the petitioner that the other legal heirs of Varadarajulu are no more and even the next generation legal heirs are hand-in-glove with the respondents-defendants, in such circumstances it appears, the stand taken by the revision petitioner, appears to be that the issuance of notice would be a futile exercise and in such circumstances, the certified copy of the Will is being produced. The recitals of the Will and the evidentiary value thereof, all these are matters to be decided at the appropriate stage. Now the question is whether the document in question, the certified copy of the Will be permitted, in the facts and circumstances of the case. In the light of the specific stand taken by the petitioner that the present legal heirs are hand-in-glove with the defendants and also the legal heirs of Varadarajulu said to be in custody of the Will are no more, dismissal of the application on the ground that no attempt was made to get the original from the hands of the beneficiaries, definitely cannot be sustained.

7. Section 65 of the Act reads as hereunder :

65. Cases in which secondary evidence relating to documents may be given : Secondary evidence may be given of the existence, condition or contents of a document in the following cases :

(a) when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person out of reach of, or not subject to, the process of the Court, or

of any person legally bound to produce it,

and when after the notice mentioned in Section 66, such person does not produce it;

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in-interest;

(c) when the original has been destroyed or lost, or when the part offering evidence of its contents cannot, for any other reason not arising from his own default or neglect, produce it in reasonable time;

(d) when the original is of such a nature as not to be easily moveable;

(e) when the original is a public document within the meaning of Section 74;

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in India, to be given in evidence;

(g) when the original consist of numerous accounts or other documents which cannot conveniently be examined in Court and the fact to be proved is the general result of the whole collection.

In cases (a), (c) & (d) any secondary evidence of the contents of the documents is admissible.

In case (b), the written admission is admissible.

In case (e) or (f), a certified copy of the document, but no other kind of secondary evidence, is admissible.

In case (g), evidence may be given as to the general result of the documents by an person who has examined them, and who is skilled in the examination of such documents.'

8. Likewise Section 66 of the Act reads as follows :

66. Rules as to notice to produce .- Secondary evidence of the contents of the documents referred to in Section 65, Clause (a), shall not be given unless the party proposing to give such secondary evidence has previously given to the party in whose possession or power the document is, or to his attorney or pleader, such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case:

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it;

(1) When the document to be proved is itself a notice;

(2) When, from the nature of the case, the adverse party must know that he will be required to produce it;

(3) When it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) When the adverse party or his agent has the original in Court;

(5) When the adverse party or his agent has admitted the loss of the document;

(6) When the person in possession of the document is out of reach of, or not subject to, the process of the Court.

9. It may be appropriate to have a look at Section 57(5) of the Indian Registration Act, 1908, which is specific that all copies given under the section shall be signed and sealed by the Registering Officer, and shall be admissible for the purpose of proving the contents of the original document. In relation to the certified copy of the registered Will in a couple of decisions it was no doubt held that in the absence of proof that the registered Will had been cancelled or revoked a certified copy thereof is admissible in evidence. This Court is not inclined to dwell further on this aspect.

10. In Periasamy v. K. Periyasamy AIR 2004 Mad. 75, it was held that Paragraph Nos.4, 5 and 6 as follows:

The only purpose of a notice under Sections 65 and 66 of the Indian Evidence Act is to give the party an opportunity of producing the original document. Secondary evidence is admissible when the party offering evidence of its contents cannot, for any reason, not arising from his own default or neglect, produce original document in reasonable time and under Section 66, the Court has absolute power to dispense with the notice when it deems it fit. Once it is established that the original

deeds are being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those title deeds can be tendered and if the secondary evidence happens to be certified copies of registered document, then the contents thereof can be read in evidence by virtue of Sub-section 5 of Section 57 of Registration Act.

In this case, admittedly, the petitioner herein was given notice to produce the document No. 2 but he has stated that it was not in his possession, hence certified copy of the same was allowed to be marked. In respect of document No. 1 is concerned, which is a sale deed under which the property was purchased in favour of the minor 1st defendant/2nd respondent herein represented by his mother. The 1st defendant did not appear in the suit. A notice was sent to the guardian which was returned as refused. Hence, the Court below has allowed to mark the certified copy of the said document. When the defendant is obliged to produce certified copy of the document, and if he do not do so, Section 57(5) of the Registration Act provides that all copies of documents given under Sub-section (1) shall be admissible for the purpose of proving the contents of the original document.

A combined reading of these two provisions makes it clear that when the original title deeds are lost or destroyed or being deliberately withheld by the party against whom they are sought to be used, secondary evidence in respect of those title deeds can be tendered and if the secondary evidence happens to be certified copy of the registered document, then the contents thereof can be read in evidence by virtue of Sub-section (5) of Section 57 of the Registration Act. Hence, I am of the opinion that the trial Court is right in allowing the documents to be marked.

11. It is no doubt true that in the said decision at Paragraph 5 it was referred that the petitioner herein was given notice to produce the document No. 2 and he has stated that it was not in his possession.

12. Reliance also was placed on S. Madasamy Thevar v. A.M. Arjuna Raju : AIR2000 Mad465 and in Karuppanna v. Kolanda Swamy : AIR1954 Mad486 .

13. Before parting with the case it is made clear that admissibility of secondary evidence of certified copy of a document given by the Sub-Registrar or Registrar's office and the procedure specified under Sections 65 and 66 of the Act are more procedural in nature and on procedural technicalities the substantive rights of the parties cannot be 'defeated. Here is a case where the daughter who is fighting a suit for partition, had taken a specific stand that the present heirs representing Varadarajulu branch are also hand-in-glove with the defendants, on the ground that a futile exercise of notice, had not been exercised by the petitioner, to record a finding to that effect and declining to receive the document in question, in the facts and circumstances of the case, is not warranted. This Court is thoroughly satisfied that in the facts and circumstances of the case, the petitioner is entitled to adduce the document in question as secondary evidence. But, however, all other questions as to how far the recitals would be helpful and the proof thereof, these questions are left open to be decided by the learned Judge at the appropriate stage.

14. The impugned order is hereby set aside and the civil revision petition is accordingly allowed to the extent indicated above. No order as to costs.