

Paramu Radhakrishnan Vs. Bharathan

Paramu Radhakrishnan Vs. Bharathan

SooperKanoon Citation : sooperkanoon.com/718320

Court : Kerala

Decided On : Aug-09-1989

Reported in : AIR1990Ker146

Judge : M.M. Pareed Pillay, J.

Acts : [Evidence Act, 1872](#) - Sections 68, 69 and 115

Appeal No. : S.A. No. 495 of 1984

Appellant : Paramu Radhakrishnan

Respondent : Bharathan

Advocate for Def. : C.P. Sudhakara Prasad and; K.V. Prakash, Advs.

Advocate for Pet/Ap. : G. Sivarajan and; K.N. Krishnan Namboodiri, Advs.

Disposition : Appeal allowed

Judgement :

1. Plaintiff is the appellant. His suit for injunction to restrain the defendant from trespassing into the plaint schedule property was dismissed by the Munsiff and it has been confirmed by the District Judge. The case of the plaintiff is that the plaint schedule property having an extent of 7 1/2 cents which is a purambokc land is in his possession for the past 20 years, that he has made valuable improvements in it, that he has constructed a building and that he has been residing there.

Defendant contended that the property belonged to Paramu, father of the plaintiff and the defendant, that as per the will Ext. B1 three cents of property on the eastern side has been allotted to him and that he is in possession of the same. It is conceded by the defendant that 4 1/2 cents of property is in the possession of the plaintiff.

2. Learned District Judge held that the defendant is a co-owner of the property along with the plaintiff and so the plaintiff is not entitled to the injunction prayed for in the suit. To hold so, the learned District Judge relied on Ext. B2 will. Learned counsel for the plaintiff submitted that the will has not been proved as contemplated under Section 68 of the Indian Evidence Act and as none of the attestors to the will was examined, it is not admissible in evidence. The learned District Judge relying on *Mahadeo Prasad v. Ghulam Mohammad*, AIR 1947 All 161 held that though the will has not been proved by examining the attestor, Section 68 of the Evidence Act does not prevent the document from being used in evidence under Section 72 for any other collateral purpose.

3. In the case cited supra Allahabad High Court held thus:

'Section 68 (Evidence Act) applies only if a document is relied upon as one requiring attestation e.g. a will. Non-compliance with the provisions of Section 68, however, does not prevent the document from being used in evidence under Section 72 for any other or collateral purpose.'

The above decision refers to *Mathra Pershad v. Cheddi Lal*, AIR 1915 All 254; *Moti Chand v. Lalta Prasad*, AIR 1918 All 201 and *Shyam Lal v. Lakshmi Narain*, AIR 1939 All 269. In AIR 1947 All 161, the main question that was decided was whether the statement contained in Sahodra's will was admissible in evidence and the lower Court was right in relying on the same. Validity or invalidity of the will was not a disputed question in the above case. The Court held that Section 68 of the Evidence Act would certainly apply if any of the parties to the litigation has founded his claim on the will, a document requiring attestation. In the above decision, it was also held that non-compliance with Section 68 does not prevent the document from being used in evidence under Section 72 for any other collateral purpose.

4. In *Moti Chand v. Lalta Prasad*, ILR 40 All 256 : (AIR 1918 All 201) the Allahabad High Court observed :

'Where a document, itself legally inadmissible in evidence, was subsequently referred to and partly incorporated in a second document of similar import duly executed between the same parties and registered according to law, it was held that the earlier document might be referred to for the purpose of explaining and amplifying the terms of the second, and of arriving at a correct conclusion as to the true nature of the transaction into which the parties had entered.'

Learned counsel for the defendant relied on *Tofaluddi Peada v. Mahar Ali Shaha*, (1899) ILR 26 Cal 78 where it has been held that when a suit is brought upon a mortgage bond, although the mortgage is held to be invalid on the ground that the requirements of Section 59 of Transfer of Property Act were not satisfied, plaintiff is entitled to recover upon the covenant money which defendant covenanted to pay. In *Sada Kavaur v. Tadepally Basaviah*, (1907) ILR 30 Mad 284 the Madras High Court held that non-compliance with the rule laid down in Section 59, T.P. Act as to attestation, does not render the personal covenant void. In *Shyam Lal v. Lakshmi Narain*, AIR 1939 All 269 it is held as follows :

'Section 68 does not intend that a document required by law to be attested should not be used as evidence for any purpose until one attesting witness has been called. Section 68 does not apply to the case of a document which is merely to be proved for the purpose of an admission. The mere fact that a document requires to be executed with attestation and that attestation must be proved for the purpose of giving legal effect to the document has no bearing on the question as to what proof should be given of the document, where it is tendered merely to prove an admission in writing.'

In *Mathra Pershad v. Cheddi Lal*, AIR 1915 All 254 question arose where a mortgage deed not attested was produced. The Allahabad High Court held that where a mortgage deed is not properly attested in accordance with the provisions of Section 59 of the Transfer of Property Act, it is not admissible in evidence as a mortgage-deed, but it is admissible in evidence as a simple money-bond.

5. Contrary views have been taken in AIR 1924 Oudh 255 and AIR 1922 Cal 160. In *Awadhu Ram v. Mahbub Khan*, AIR 1924 Oudh 255 the Court held thus ;

'There is no distinction between documents which are the basis of a suit and those whose production is required for a collateral purpose so far as their admissibility in evidence is in question. The direction in Section 68, Evidence Act, is mandatory and draws no such distinction.'

In the above case, the Court held that the documents (mortgage deeds) ought not have been received in evidence as the attesting witness who is alive was not examined in the Court by the plaintiffs. The Court was not prepared to draw any distinction between the documents which are the basis of a suit and those whose production is required for a collateral purpose, so far as their admissibility in evidence is in question and held that the direction in Section 68 is mandatory and draws no such distinction. In *Shib Chandra v. Gour Chandra Paul*, AIR 1922 Cal 160 the Court held thus (at p. 162):

'Section 68 of the Evidence Act applies not only to cases where the document is attempted to be enforced to prove the legal right or relation it creates, but in a case where such document is sought to be proved for a collateral purpose.'

In the above case, a mortgage deed was produced and attempt was made to show that Kashinath and his widow made statements to the effect that they had not created any such subordinate interest in the property. The Calcutta High Court held that as the document (mortgage deed) was not legally proved Section 68 of the Evidence Act is a bar to the admissibility of the document in evidence.

6. The moot point for decision is whether Ext. B1 will can be considered for any collateral purpose when the defendant himself relies on the will to prove his right in the property. Section 68 of the Evidence Act postulates that 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 examined to prove its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence. The proviso to Section 68 envisages 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 unless its execution by the person by whom it purports to have been executed is specifically denied. Thus, from a reading of Section 68 it is evident that a document which is required by law to be attested shall not be used as evidence until one of the attesting witnesses at least has been examined to prove its execution. The imperative and stringent wording of Section 68 makes it clear that it does not permit the use of a document which is required by law to be attested as evidence until it is proved strictly in accordance with the provisions of the section. From a reading of Section 68 and its proviso it is not possible to hold that the rigour of the section can be watered down to a case where a will which is required by law to be attested can be used in evidence for collateral purposes without strictly complying with the section.

7. The position is entirely different when a party wants to propound a will and thereby consequently sets up a right in the property from a suit based on mortgage and the Court granting decree on the amount claimed though it held requirements under Section 59 of the T. P. Act were not satisfied. When a party claims right in the property as per a will, it is for him to prove the will before the Court as provided under Section 68 of the Evidence Act. Without proving the will as provided under the law, he cannot rely on the same to claim right in the property on the ground that certain references in the will can be profitably used in his favour.

8. As Section 63 of the Indian Succession Act enacts that a will has to be attested by two or more witnesses, it is undoubtedly a document which comes under the purview of Section 68 of the Evidence Act. Section 69 of the Evidence Act provides that if no such attesting witness can be found, 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. Defendant has no case that the attesting witness cannot be found and so he is unable to examine him.

9. The decisions in *Shyam Lal v. Lakshmi Narain*, AIR 1939 All 269 and *Mathura Prasad v. Chhedi Lal*, AIR 1915 All 254 cannot help the defendant as he relies on the will not for a collateral purpose like proving the handwriting of the executant or

for any other incidental purpose but to prove his right in the property. Defendant examined as D. W. I asserted that his claim to the property is on the strength of Ext. B1 will. Having stated so and having produced the will for that purpose, defendant cannot turn round and use Ext. B1 will for a collateral purpose.

10. As Ext. B1 will has been produced before the Court by the defendant to substantiate his contention that 3 cents of property was bequeathed to him by his father Paramu and as it is for a specific purpose of establishing his right in the property that the will was produced before the Court, it cannot be said that the mandate of Section 68 of the Evidence Act can be got over by maintaining that it can be used for the purpose of showing the filial relationship between Paramu and the defendant. The production of the document (Ext. B1 will) was for the purpose of establishing right in the property and not relationship between the defendant and the testator. As the prime purpose in producing Ext. B1 will is to establish right in the property, strict compliance of Section 68 is mandatory and without adhering to the provision it cannot be used for any collateral purpose.

11. Defence counsel contended that plaintiff has not cared to dispute the validity of Ext. B1 will and therefore he cannot belatedly raise any objection with regard to its contents. There cannot be two opinions that in a case where a document has been admitted without objection, the opposite party cannot challenge it at a later stage in the appellate Court. But in a case where evidence has been received without objection in direct contravention of an imperative provision of the law, the principle on which unobjected evidence is admitted, be it acquiescence, waiver or estoppel is not available against a positive legislative enactment. The inflexible rule as laid down in Section 68 cannot be deviated in the matter of proof of a will especially when its proviso specifically exempts a will from its ambit. In *Kamalakshy v. Madhavi Amma*, 1980 Ker LT 493 this Court held that mandate of Section 68 has to be complied with even where the opposite party does not specifically deny execution of a will in the written statement.

12. As the defendant has failed to prove the execution of Ext. B1 will on the strength of which he claims right in the property, he cannot take an alternative stand that though the will has not been proved the recitals in the will can be used

in support of his case that he is a co-owner of the property. It is true that the Allahabad High Court had held that in a case where a party relied on a mortgage and as the mortgage has not been duly proved to have been executed it is possible to grant a decree on the basis of evidence with regard to the money transaction. That analogy cannot be applied in the case of a will and it cannot be contended that though the will has not been proved as provided under Section 68 of the Evidence Act it can be used as evidence for a collateral purpose. The lower appellate Court was not justified in relying on Ext. B1 will to hold that defendant is a co-owner of the property and so the plaintiff is not entitled to the injunction sought for in the suit.

13. Admittedly plaintiff is residing in the property. Plaintiff has produced Exts. A1 and A2, two municipal tax receipts to prove his possession over the property. Ext. C1 report of the Commissioner and Ext. C2 mahazar would show that the property lies in a compact block and there is no demarcating boundary to separate the three cents of property claimed by the defendant from the rest of the property. It is specifically mentioned in Ext. C2 that the plaintiff is residing in the building in the property. Though defendant contended that he is in possession of three cents in the plaint schedule property pursuant to the will, he could not substantiate his case. In the written statement itself, it is admitted by the defendant that plaintiff is residing in the building in the property. As there is ample evidence with regard to the possession of the property by the plaintiff and as the right in the property claimed by the defendant as per Ext. B1 will has not been established, I hold that plaintiff is entitled to the injunction prayed for in the suit. Both the Courts below went wrong in dismissing the suit.

14. Judgment and decree of the trial Court which have been confirmed by the lower appellate Court are set aside and the suit is decreed granting permanent injunction as prayed for in the suit. The suit stands decreed. The Second Appeal is allowed. The parties are directed to bear their respective costs throughout.