

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 27.06.2016

Coram

The Hon'ble Mr. Justice A.SELVAM  
and  
The Hon'ble Mr. Justice P.KALAIYARASAN

O.S.A.No.397 of 2008

S.V.Balasubramanian .. Appellant

Vs

V.Lakshminarayanan .. Respondent

Appeal preferred under Order XXXVI Rule I of O.S. Rules r/w  
Clause 15 of the Letters Patent against the order dated  
22.09.2008 made in T.O.S.No.34 of 2006.

For Appellant .. Mr.R.Sathishkumar

For Respondent .. Mr.K.U.Subramaniam, Sr.counsel  
for Mr.S.Chandrasekaran

JUDGMENT

(Judgment of the Court was delivered by A.SELVAM, J.)

This Original Side Appeal has been directed against the  
judgment and decree dated 22.09.2008, passed in T.O.S.No.34 of  
2006, by the learned Single Judge of this Court.

2. The respondent herein has filed a petition so as to  
grant Letters of Administration and subsequently converted into  
T.O.S.No.34 of 2006, wherein, the present appellant has been  
shown as sole defendant.

3. The material averments made in the plaint are that  
the plaintiff, defendant and the persons, namely, Venkatramani  
and S.V.Janakiraman are brothers and their father's name is  
S.V.Venkatasubramania Dikshithar and he voluntarily executed a  
Will dated 18.4.1978 and he passed away on 24.4.1979. Under  
the said circumstances, the present suit has been instituted for  
getting the relief sought therein.

4. In the written statement filed on the side of the

defendant, it is averred that the relationship mentioned in the plaint is correct. But it is false to aver that the deceased has executed a Will dated 18.4.1978 and he passed away intestate. Under the said circumstances, the relief sought in the plaint cannot be granted in favour of the plaintiff and therefore, the present suit deserves to be dismissed.

5. On the basis of the rival pleadings raised on either side, the learned single Judge has framed necessary issues and after analysing both the oral and documentary evidence, has decreed the suit as prayed for. Against the judgment and decree passed by the learned single Judge, the present Original Side Appeal has been preferred, at the instance of the defendant, as appellant.

6. The consistent case put forth on the side of the plaintiff is that the plaintiff, defendant and the persons namely, Venkatramani and Janakiraman are the sons of S.V.Venkatasubramania Dikshithar and he voluntarily executed a Will dated 18.4.1978, wherein, it has been specifically stated that the plaintiff has to run management of his business and further it is directed to give 10% of profits to other persons and he passed away on 24.4.1979 and therefore, the Will dated 18.4.1978, has come into force and under the said circumstances, the present suit has been instituted for getting the relief sought therein.

7. The main defence put forth on the side of the defendant is that the relationship mentioned in the plaint is correct; but the deceased Venkatasubramania Dikshithar has not executed any Will much less, on 18.4.1978 and he simply passed away intestate and therefore, the relief sought in the plaint cannot be granted.

8. On the basis of the divergent evidence available on record, the learned single Judge has decreed the suit as prayed for.

9. The learned counsel appearing for the appellant/defendant has sparingly contended to the effect that the Will dated 18.4.1978 has been marked as Ex.P1, wherein, two persons, namely, N.Srinivasan and Dr.V.Srinivasan have put their signatures as attesting witnesses and they passed away and for the purpose of proving due execution as well as attestation of Ex.P1, sufficient evidence is not available on the side of the plaintiff and the learned single Judge, without considering lack of evidence with regard to the said legal aspects, has erroneously decreed the suit and therefore, the decree and judgment passed by the learned Single Judge, are liable to be set aside.

10. In order to remonstrate the contentions put forth on the side of the appellant/defendant, the learned counsel appearing for the respondent/plaintiff has also equally contended that in the instant case, both the attestors have passed away and one person by name V.Srinivasan has put his signature in Ex.P1 as an identifying witness in the Sub-Registrar Office and he has given specific evidence to the effect that EX.P1 has been executed by the deceased and apart from his evidence, one of the daughters of the executant, viz., Lalithambal has been examined as P.W.5 and her specific evidence is that her father has executed Ex.P1, wherein, N.Srinivasan and Dr.V.Srinivasan have put their signatures as attesting witnesses and the learned single Judge, after considering the over all evidence available on record, has clearly come to a definite conclusion to the effect that the due execution as well as attestation of Ex.P1 have been clearly proved on the side of the plaintiff and consequently decreed the suit as prayed for and therefore, the judgment and decree passed by the learned Single Judge are not liable to be interfered with.

11. On the basis of the divergent submissions made on either side, the Court has to look into as to whether the Will dated 18.4.1978, viz. Ex.P1, has been clearly proved with regard to its execution as well as attestation, as per Section 68 of the Indian Evidence Act, 1872.

12. It is a settled principle of law that as per Section 68 of the said Act, a Will cannot be treated as evidence unless one of the attestors has been examined with regard to its due execution as well as attestation. Further it is also a settled principle of law that if both the attestors have passed away or not found, any person, who knows their signatures as well as signature of the executant, can be examined.

13. In the instant case, it is an admitted fact that both attestors have passed away. For the purpose of proving the due execution as well as attestation of Ex.P1, the Will, dated 18.4.1978, one V.Srinivasan has been examined as P.W.2 and his specific evidence is that the executant, viz., Venkatasubramania Dikshithar has put his signature in his presence in Sub-Registrar Office. Further, on the side of the plaintiff, one of the daughters of the executant, viz., Lalithathambal has been examined as P.W.5 and her specific evidence is that her father has executed the Will, dated 18.4.1978, wherein, family Doctor by name V.Srinivasan and family friend by name N.Srinivasan have put their signatures as attestors. In fact, the evidence given by P.W.5 plays a pivotal role so as to prove the due execution as well as attestation of Ex.P1.

14. It is also a settled principle of law that if sufficient evidence is available for the purpose of proving the due execution as well as attestation of a particular Will, the same can be a basis for coming to a conclusion that the Will in question has been duly executed as well as attested. In the instant case, P.W.5, is none other than one of the daughters of the executant of the Will and her specific evidence is that Ex.P1, the Will, dated 8.4.1978, has been executed by her father and to certain extent she speaks attestation. Therefore, the evidence given by P.W.5 would be sufficient for coming to a conclusion that the Will dated 18.4.1978 has been clearly proved on the side of the plaintiff with regard to its execution as well as attestation.

15. The learned counsel appearing for the respondent/plaintiff has relied upon the following decisions:

(i) AIR 1977 Supreme Court 63 - Beni Chand vs. Smt.Kamla Kunwar and others, wherein, at paragraph No.8, the Honourable Supreme Court has observed as follows:

"8. There is no substance in the grievance that the proof of the will in this case is incomplete for want of an attesting witness's evidence. Section 68 of the Evidence Act deals with proof of the execution of documents required by law to be attested. It provides that such documents shall not be used as evidence until at least one attesting witness has been called to prove the execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since by section 63 of the Succession Act, 1975 a will has to be attested by two or more witnesses, section 68 of the Evidence Act would come into play and therefore it was incumbent on the propounder of the will to examine an attesting witness to prove due execution of the will. But this argument overlooks that Dwijendra Nigam is himself one of the three persons who made their signatures below the thumb impression of Jaggo Bai. None of the three is described in the will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence showing due execution of the document. By attestation is meant the signing of a document to signify that the attester is a witness to the execution of the document; and by section 63(c) of the Succession Act, an

attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant regards the execution of the document. Nigam's evidence shows that he and the other two witnesses saw the testatrix putting her thumb-mark on the will by way of execution and that they all signed the will in token of attestation in the presence of the testatrix, after she had affixed her thumb-mark on the will."

(ii) In 2006-2-L.W.658 - Pentakota Satyanarayana & Others vs. Pentakota Seetharatnam and Others, at paragraph Nos.24 and 25, the Honourable Supreme Court has observed as follows:

" 24. It is clear from the definition that the attesting witness must state that each of the two witnesses has seen the executor sign or affix his mark to the instrument or has seen some other persons sign the instrument in the presence and by the direction of the executant. The witness should further state that each of the attesting witnesses signed the instrument in the presence of the executant. These are the ingredients of attestation and they have to be proved by the witnesses. The word 'execution' in Section 68 includes attestation as required by law.

25. A perusal of Ex.B9 (in original) would show that the signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement were, in our opinion, sufficient attestation within the meaning of the Act. The endorsement by the sub-registrar that the executant has acknowledged before him execution did also amount to attestation. In the original document the executants signature was taken by the sub-registrar. The signature and thumb impression of the identifying witnesses were also taken in the document. After all this, the sub-registrar signed the deed. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his Will or not and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and the

testament of departed testator."

(iii) In 2003 (12) Supreme Court Cases 35 - Bhagat Ram and Another vs. Suresh and Others, in paragraph No.17, the Honourable Supreme Court has observed as follows:

"17. We have carefully perused the submissions so made. In the case of Dharam Singh (supra), the two witnesses did not support the execution of the Will. The trial Court had relied upon the statement of the registering authority. The decision of the trial Court was reversed by the first appellate Court and the decision by latter was upheld by the High Court. In a short judgment this Court held that the appellate Court and High Court were right in their conclusion that the Registrar could not be a statutory attesting witness. There is no further discussion. Presumably what was sought to be contended before this Court was that the Registrar having discharged his statutory duty ought to be treated as a statutory attesting witness; for the Registrar would not register the document unless execution of the document was admitted by the executant and acknowledged to the Registrar. In Dharam Singh's case the Court has relied on two earlier decisions of this Court in M.L. Abdul Jabbar Sahib v. H. V. Venkata Sastri & Sons, [1969] 3 SCR 513 and Beni Chand (since dead) now by Lrs. v. Smt. Kamla Kumar, [1977] 1 SCR 578. In Abdul Jabbar's case this Court has held by reference to the definition of 'attested' as given in Section 3 of the Transfer of property Act, 1882 that to be an attesting witness it is essential that the witness should have put his signature animo attestandi, i.e. for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose e.g. to certify that he is a scribe or an identifier or a registering officer he is not an attesting witness. Prima facie the registering officer puts his signature on the document in discharging of his statutory duty under Section 59 of the Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgement of his signature. The evidence adduced in the case

did not show the registering officer having signed the document with the intention of attesting it nor was it shown that the registering officer signed it in the presence of the executant. In these circumstances, the Court concluded that the registering officer was not an attesting witness. Beni Chand's case (supra) deals with general principles relating to execution of the Will and does not deal with the question whether a registering officer can be an attesting witness or not. The ratio of the several decisions by the High Court of Punjab and Haryana cited at the Bar is that, in the facts and circumstances of a given case, the Registrar may also fulfill the character of an attesting witness as required by law and if, on entering into witness box as required by Section 68 of the Evidence Act, he proves by his testimony the execution of document by deposing to having witnessed himself the proceedings as contemplated by Section 63 of the Succession Act, he can be an attesting witness. The certificate of registration under Section 60 of the Registration Act, 1908 raises a presumption under Section 114 illustration (e) of the Evidence Act that he had regularly performed his duty and therefore the facts spelled out by the endorsements made under Sections 58 and 59 of the Registration Act may be presumed to be correct without formal proof thereof. The duties discharged by the registering officer do not include attestation or verification of attestation of will as required by the rules enacted by Section 63 of the Succession Act. An endorsement by registering officer is not by itself a proof of the will having been duly executed and attested."

(iv) In (2013) 7 Supreme Court Cases 490 - M.B.Ramesh (dead) by LRs. vs. K.M.Veeraje Urs (Dead) By LRs.and Others, at paragraph No.20, the Honourable Supreme Court has observed as follows:

"20. In the present case, we may note that in para 21 of his cross examination, P. Basavaraje Urs has in terms stated, "Mr. Mallaraje Urs and Smt. Nagammanni, myself and one Sampat Iyanger were present while writing the will." One Mr. Narayanmurti was also present. In para 22 he has stated that Narayanmurti had written Exhibit 3 (will) in his own handwriting

continuously. The fact that M.Mallaraje Urs was present at the time of execution of the will is not contested by the defendants by putting it to PW2 that M. Mallaraje Urs was not present when the will was executed. As held by a Division Bench of the Calcutta High Court in a matter concerning a will, in para 10 of A.E.G. Carapiet Vs. A.Y. Derderian reported in [AIR 1961 Calcutta 359],..."Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is a rule of essential justice". As noted earlier the will was executed on 24.10.1943 in the office of the advocate Shri Subha Rao situated at Mysore, and was registered on the very next day at Mysore. The fact that the will is signed by Smt. Nagammanni in the presence of PW2 on 24.10.1943 has been proved, that PW2 signed in her presence has also been proved. Can the signing of the will by Smt. Nagammanni in the presence of M. Mallaraje Urs and his signing in her presence as well not be inferred from the above facts on record? In our view, in the facts of the present case, the omission on the part of PW2 to specifically state that the signature of M. Mallaraje Urs on the will (which he identified) was placed in the presence of Smt. Nagammani, and that her signature (which he identified) was also placed in the presence of M. Mallaraje Urs, can be said to be a facet of not recollecting about the same. This deficiency can be taken care of by looking to the other evidence of attendant circumstances placed on record, which is permissible under Section 71 of the Evidence Act."

(v) In (2007) 11 Supreme Court Cases 621 - Savithri and Others vs. Karthyayani Amma and Others, at paragraph Nos.16 and 17, the Honourable Supreme Court has observed as follows:-

"16. It is not correct to contend that DW-2 could not have the attesting witness. He in his deposition categorically stated that he had seen the Will being read over to the propounder. The witnesses and he had seen Krishnan Nair putting his signature on the Will. Krishnan Nair had also

seen the witnesses putting their signatures. This satisfies the requirements of the provisions of the Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. [See Apoline D Souza v. John D Souza 2007 (7) SCALE 766].

17. The legal requirements in terms of the said provisions are now well- settled. A Will like any other document is to be proved in terms of the provisions of the Indian Succession Act and the Indian Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the propounder must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before it can be accepted as genuine."

From a cumulative reading of the decisions referred to supra, it is made clear that even an identifying witness as well as scribe can act as an attesting witness, provided, their evidence is related to attestation as well as execution.

16. Further, as adverted to earlier, if there is substantial compliance of Section 68 of the Indian Evidence Act, 1872, there is no incertitude in coming to a conclusion that a particular Will has been proved with regard to its execution as well as attestation.

17. In the instant case, it has already been pointed out that one of the daughters of the executant, viz., Lalithambal has been examined as P.W.5 and she has given categorical evidence to the effect that her father has executed Ex.P1 and her family Doctor, by name, V.Srinivasan and family friend by name N.Srinivasan, have acted as attesting witnesses. The evidence given by P.W.5 would be sufficient for coming to a conclusion that both the acts of execution as well as

attestation of Ex.P1 have been substantially proved on the side of the plaintiff. In view of the foregoing discussion of both the factual and legal aspects, this Court has not found any force in the contentions put forth on the side of the appellant/defendant.

18. The learned single Judge, after considering the overwhelming evidence available on record, on the side of the plaintiff, has rightly decreed the suit. In view of the discussion made earlier, this Court has not found any illegality nor infirmity in the judgment and decree passed by the learned single Judge and altogether, the present Original Side Appeal deserves to be dismissed.

In fine, this Original Side Appeal is dismissed without cost. The judgment and decree passed, in T.O.S.No.34 of 2006, are confirmed.

Sd/-  
Assistant Registrar(CS VII)

//True Copy//

Sub Assistant Registrar

msk

To

1. The Sub Assistant Registrar,  
Original Side, High Court, Madras.

2. The Record Keeper,  
Original Side, High Court, Madras.

1 cc to Mr.R.Sathishkumar, Advocate, sr.35772  
1 cc to Mr.S.Chandrasekharan, Advocate, sr.35587

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