

**IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF ANDHRA PRADESH**

S.A.No.1061 of 1999

Between:

Lingala Potha Raju (died) per LR's. and others

... Appellants

and

Chagantipati Annapurnamma and 3 others.

.... Respondents

DATE OF JUDGMENT PRONOUNCED: 02.01.2018

SUBMITTED FOR APPROVAL:

THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

1. Whether Reporters of Local Newspapers
may be allowed to see the judgments? Yes / No
2. Whether the copies of judgment may be
marked to Law Reporters / Journals? Yes / No
3. Whether His Lordship wish to
see the fair copy of the Judgment? Yes / No

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! Counsel for Appellants : Sri K.V.Subrahmanya Narsu

^ Counsel for Respondents : Sri O.Manohar Reddy

< Gist:

> Head Note:

? Cases referred:

- 1) AIR 1969 SC 1147
- 2) AIR 1955 SC 346
- 3) (2001) 7 SCC 503
- 4) MANU/SC/0285/2010



HONOURABLE SRI JUSTICE U.DURGA PRASAD RAO

SECOND APPEAL No.1061 of 1999

JUDGMENT:

This Second Appeal is preferred by defendants aggrieved by the judgment and decree in A.S.No.91 of 1991 dated 17.08.1999 passed by the learned II Additional Senior Civil Judge, Vijayawada whereby and whereunder the learned Judge allowed the appeal preferred by the plaintiff against the judgment and decree in O.S.No.474 of 1988 dated 12.07.1991, filed for partition.

2) The parties in this Second Appeal are referred as they were arrayed before the Trial Court.

3) The facts in nutshell are thus:

a) Parties are related to each other. Defendants 1 to 3 are brothers and defendant No.4 is the sister of plaintiff and all are residents of Penamaluru village; their mother—Saraswathamma died intestate on 02.09.1984 and their father—Veeraswamy also died intestate on 19.07.1987; Saraswathamma had Ac.0.66 cts. in R.S.No.87/1 of Chodavaram village and therefore, plaintiff is entitled to 1/5th share in the said property; as the defendants are evading to partition the suit property, she issued legal notice and filed the suit.

b) Defendant No.1 filed written statement admitting the relationship between the parties and also admitting that the suit property belonged to their late mother—Saraswathamma. Their case is that their father—Veeraswamy executed a Will dated 10.07.1987 bequeathing properties

including the share which he got from his wife to defendants 1 to 3 and hence plaintiff is entitled to only 1/6th share. They also pleaded the suit property is only Ac.0.52 cts. in R.S.No.86/3 but not Ac.0.66 cts as alleged. Thus, they prayed to dismiss the suit.

c) Defendants 2 and 3 filed a memo adopting the written statement of 1st defendant. Defendant No.4 was set *ex parte*.

d) Basing on the above pleadings, the trial Court framed the following issues.

- 1) *Whether the Will dated 10.07.1987 is true, valid and binding?*
- 2) *Whether the plaint schedule property is correct?*
- 3) *Whether the plaintiff is entitled to share as prayed for?*
- 4) *Whether the plaintiff has no cause of action?*
- 5) *To what relief?*

e) During trial, PWs.1 to 3 were examined and Exs.A1 to A14 were marked. DWs.1 to 3 were examined and Exs.B1 and B2 were marked on behalf of defendants.

f) The Trial Court accepting the genuineness of the Will propounded by the defendants held the plaintiff is entitled to 1/6th share in Ac.0.52 cts. in RS No.86/3.

g) Aggrieved in so far as granting 1/6th share to her, plaintiff filed A.S.No.91 of 1991 before the II Additional Senior Civil Judge, Vijayawada and the said appeal was allowed granting 1/5th share to the plaintiff. The lower Appellate Court held the due execution of the Will

was not established by the defendants inasmuch as they failed to examine the attestors but only examined the scribe. It may be noted that during pendency of first appeal, 1st respondent—died and respondents to 5 to 10 were brought on record as his LR.s. vide Court order dated 16.06.1997 in I.A.No.8093 of 1996.

Hence, the instant Second Appeal by defendant Nos.1, 2, 3, 5, 6, 7 and 10.

4) The following substantial questions of law were framed by this Court out of the grounds of appeal filed by the appellants:

- 1) *Whether the learned II Additional Senior Civil Judge is right in holding that Ex.B2 was not proved by not examining any of the attestors?*
- 2) *Whether the evidence of the scribe DW2 is not sufficient to prove the execution of the will, he having put his signature “ANIMO ATTESTANDI” as required under Section 68 of the Indian Evidence Act?*

5) Heard arguments of Sri K.V.Subrahmanya Narsu, learned counsel for appellants and Sri O.Manohar Reddy, learned counsel for respondents.

6) Appeal against R3 and R4 was dismissed for default vide Court order dated 25.06.2014

7) **Substantial Question Nos.1 and 2:** Since both the above questions are interconnected, they are taken up together. The main plank of argument of learned counsel for appellants is that though under law

attestors have to be examined in proof of Will, still Will can be proved by examination of scribe only if he could speak of all the facts concerned to the execution of the Will. In the instant case, the scribe had vividly stated about the due execution of the Will by late Veeraswamy. The witness stated that Ex.B2 was scribed by him on the instructions given by executant. He also stated that executant was in a sound and disposing state of mind. He further stated that attestors attested the Will and Veeraswamy affixed his thumb impression in his presence. In that view, learned counsel would submit, the due execution of the Will can be approved in spite of non-examination of the attestors. The trial Court rightly held the execution of the Will to have been proved but the lower appellate Court on a wrong appreciation of facts and evidence held execution of the Will was not duly proved.

8) Per contra, learned counsel for respondents, while supporting the judgment of the appellate Court argued that the execution of a Will can be established only by way of examining atleast one of the attestors to the Will and by no other mode. In the instant case, he argued, the attestors of the Will are very much alive, but the defendants for the reasons best known to them did not examine the attestors. However, they examined only the scribe. The job of the scribe is altogether different from that of the attestors. He cannot fit into the slot of attestors. Therefore, the defendants cannot claim to have proved the due execution of the Will by mere examination of the scribe. The appellate Court rightly rejected Ex.B2—Will. He thus prayed to dismiss the appeal.

9) Law on proof of execution of Wills is fairly settled and no more *res integra*. Wills under Section 63 of Indian Succession Act, Gifts under Section 123 and Mortgages under Section 59 of Transfer of Property Act are compulsorily attestable documents. What is attestation and how the due execution of a compulsorily attestable document has to be proved are dealt with by law.

10) Section 3 of Transfer of Property Act defined the term '*attested*' thus:

"Attested, in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his-signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary."

Then, Section 68 of Indian Evidence Act prescribes the manner in which compulsorily attestable documents have to be proved. Section 68 reads thus:

"Section 68. Proof of execution of document required by law to be attested:- *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 called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence;*

Provided that it shall not be necessary to call at 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, XVI of 1908 unless its execution by the person by whom it purports to have been executed is specifically denied.

- a) The Apex Court in ***M. L. Abdul Jabbar Sahib vs. M. V. Venkata Sastri and Sons and others***¹ happened to discuss whether scribe and identifying witnesses before the Sub-Registrar, can be treated as attesting witnesses. It was held thus:

*“Para 6: xx xx xx... It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation Under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature **animo attestandi**, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment 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.”*

In its further discussion, the Apex Court referred its earlier judgment in ***Girja Datt vs. Gangotri***², wherein it was held that two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put “*animo attestandi*”.

¹ AIR 1969 SC 1147

² AIR 1955 SC 346

Thus in the above two judgments the Apex Court held that the scribe or the identifying witnesses cannot be regarded as the attesting witnesses since they have not put their signatures as *animo attestandi*, i.e. not for the purpose to attest but with a different purpose.

b) In *N.Kamalam v. Ayyasamy*³ the facts were that one Masaney Gowder executed the Will which was attested by two attestors viz. D.Subbayya and P.Govindarajulu. The Will was scribed by one Arunachalam. In proof of the Will, the attestors were not examined but scribe was examined. The Apex Court, in that context, held that the due execution of the Will was not proved as scribe cannot prove due execution of the Will.

c) In similar circumstances as that of *N.Kamalam*'s case (3 supra), the Apex Court in *S.R.Srinivasa v. S.Padmamma*⁴ has observed thus:

“Para—28: *The aforesaid observations are fully applicable in this case. Admittedly, none of the attesting witnesses have been examined. Here signature of the scribe cannot be taken as proof of attestation. Therefore, it becomes evident that the execution of a Will can be held to have been proved when the statutory requirements for proving the Will are satisfied. The High Court has however held that proof of the Will was not necessary as the execution of the Will has been admitted in the pleadings in O.S. No. 233 of 1998, and in the evidence of P.W.1.*

Para—37: *The First Appellate Court pointed out that the execution of the Will has not been proved as none of the attesting witnesses have been examined. The scribe who was examined as DW.2 nowhere stated that he had attested the Will. The animus to*

³ (2001) 7 SCC 503

⁴ MANU/SC/0285/2010

attest was not evident from the document. In the Will, D.W.2 had described himself as the scribe of the Will and signed as such. Therefore, in view of the ratio of law laid down in N. Kamalam (supra) the statutory requirement of attestation was clearly not satisfied.”

d) Thus, on a close scrutiny of Section 3 of Transfer of Property Act, Section 68 of Evidence Act and the above precedential jurisprudence thereof, it is clear that when law ordains that a particular fact is to be proved in a specific mode that has to be followed. Compulsory attestable documents are concerned, Section 68 of Evidence Act ordains that the due execution of such documents can be established only by way of examining atleast one of the attestors. The precedents referred to supra would explain us that the scribe or identifying witnesses of an attestable document including Wills, cannot be regarded as attesting witnesses because there was no *animo attestandi* i.e. they have not signed on the document for the purpose of attestation but they have signed for a different purpose. In such an instance, examining them in stead of attestors will not amount to proof of due execution of the document.

e) It may be noted that under the proviso to Section 68 of Evidence Act, the necessity of calling an attesting witness is done away with in the case of a registered document, other than a will, unless its execution by the person by whom it purports to have been executed is specifically denied. Thus, if a registered document, required by law to be attested, not being a will, is produced before a Court of law and if its execution is not specifically denied, it may be proved by any other witness without calling the attesting witness. However, the Will stands on a different footing.

Mere registration of the Will does not obviate the propounder of the Will to prove its due execution by examining the attestors.

11a) Will is concerned, different persons play different roles to assist the executant to execute the Will. For instance, the scribe, on receiving the instructions from the executant, write down the last testament of the executant in black and white portraying the contents of his instructions in a legal and understandable form. His role is confined to that extent only. Sometimes, after scribing the contents to the satisfaction of the executant and reading over them to him, the scribe may leave some space for the signature/thumb impression of the executant and attestors and beneath, he will subscribe his signature mentioning as scribe and hand over the drafted Will to the executant and may depart. He need not necessarily see the executant and the attestors signing or putting their thumb impressions on the Will, which is not his duty. Later, the executant and attestors may affix their signatures at the respective slots. Still the Will can be held valid because it is not mandatory for the scribe to witness the due execution of the Will. The proof of due execution has to come from horse's mouth i.e. attestors but none others.

b) Going by the definition '*attested*', it is evident that attestors take upon the responsibility of witnessing the executant affixing his signature or thumb mark to the instrument or they have seen some other person signing the instrument in the presence and by the direction of executant or has received from the executant a personal acknowledgement of his

signature or mark or of the signature of such other person. Further, each of the attestors has signed the instrument in the presence of the executant.

c) Similarly, the role of identifying witness is also a different one. He only identifies the executant before the Sub-Registrar. His physical presence was not mandatory when executant was signing/putting his thumb mark on the Will.

d) Perhaps, in view of clear segregation of their roles, the law did not accept the scribe or identifying witnesses speaking for attestors. It was held, it was only the attestors who could speak for due execution of the Will. In a given case, may be the scribe and identifying witnesses have also witnessed the execution of the Will by the executant. However, law did not allow them to don the cloak of attestors to speak about execution as there was no *animo attestandi*. It is because, unlike other compulsory attestable documents, Will comes into life only after the death of the executant who cannot appear before the Court to speak of its truth or falsity. Hence, strict proof rule was imposed by law.

12) Having regard to the above law on the subject, it can only be held that the defendants failed to prove the due execution of Ex.B2—Will. The lower appellate Court thus rightly allowed the appeal. There is no perversity in it.

13) In the result, this Second Appeal is dismissed by confirming the judgment in A.S.No.91 of 1991 passed by the learned II Additional Senior Civil Judge, Vijayawada. No costs.

As a sequel, miscellaneous petitions pending, if any, shall stand closed.

Date: 02.01.2018
Scs/Murthy

U. DURGA PRASAD RAO, J

