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AS.No.348/2014

IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON 18.11.2022

DELIVERED ON 22.12.2022

CORAM :

THE HONOURABLE MR. JUSTICE S.S. SUNDAR

and

THE HONOURABLE MRS. JUSTICE N.MALA

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1.Mr.Rathinavel
2.Mr.Gopal
3.Mr.Chinnapaiyan
4.Mr.Jayavel
5.Mrs.Saradha

... Appellants

Vs.

1.Rajamanickam
2.Mrs.Sagunthala
3.Mrs.Panchali @ Rathna
4.Mrs.Selvam @ Selvi
5.Salem Granite
rep.by its Proprietor
D.Kannan
No.4/36-177, Muthunaikenpatti
Main Road, Ramagoundanur Kattuvalavu
Ayyamperumampatti Post
Salem District.

... Respondents



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PRAYER : Appeal suit filed under Section 96 of CPC against the judgment and decree passed by the learned 3rd Additional District Judge, Salem in OS.No.150/2010 dated 30.08.2013.

For Appellants : Mr.V.Manohar

For Respondents: Mr.T.S.Vijayaraghavan

JUDGMENT

S.S.SUNDAR, J.,

(1)The unsuccessful plaintiffs in the suit in OS.No.150/2010 on the file of the III Additional District Court, Salem are the appellants in the above appeal.

(2)Brief facts that are necessary for the disposal of this appeal are as follows:-

(a)The appellants filed the suit in OS.No.150/2010 for partition of their 5/9th shares in all the suit properties and for consequential reliefs.

(b)The appellants are the sons and daughters of one Thiru. Periyapaiya Gounder [hereinafter referred to as "Thiru.PPG] through his third wife by name Lakshmiammal. Defendants 1 to 4 are also the sons and daughters of Thiru.PPG through his second wife by name Palaniammal.



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(c) It is admitted that the suit properties are the absolute properties of one Nallammal who is the first wife of Thiru.PPG. The said Nallammal purchased the suit properties under various documents and it is admitted before the Trial court and before this Court that the suit properties were the absolute properties of the said Nallammal.

(d) It is the case of the plaintiffs that the said Nallammal after selling some of the properties acquired by her to third parties, executed five Wills in favour of the plaintiffs bequeathing a few properties to each of them on 10.06.1999. It is also stated by the plaintiffs/appellants that the said Wills were executed in their favour out of love and affection and that the said Wills were acted upon. The husband of Nallammal, namely, Thiru.PPG predeceased his wife and he died in the year 1984. It is stated that Smt.Nallammal also died on 13.06.1999 leaving behind the suit properties.

(e) Stating that plaintiffs and defendants 1 to 4 are the legal heirs of Smt.Nallammal, it is contended by the plaintiffs that they are entitled to 5/9th shares. The 5th defendant in the suit is admittedly a tenant in respect of first item of suit property and it is contended by



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the plaintiffs that the 5th defendant is paying a monthly rent of Rs.8,000/- and that the plaintiffs are also entitled to the rent and other income from all the properties.

(f) The suit properties consists of four items. Even though the first item is shown as agricultural land measuring an extent of 1.36 acres, it is stated in the course of trial that an extent of 36 cents had already been sold by Smt.Nallammal.

(g) The suit was contested by the 1st defendant by filing a detailed written statement and the said written statement was adopted by the other defendants, namely, defendants 2 to 4. Defendants 1 to 4 admitted that Tmt.Nallammal acquired all the suit properties and that the properties belonged to her absolutely. However, it is stated by defendants 1 to 4 that the said Nallammal bequeathed the suit properties in favour of 1st defendant / 1st respondent herein, by way of a registered Will dated 17.10.1988 in the presence of witnesses. Since Tmt.Nallammal subsequently bequeathed some of her properties to plaintiffs/appellants by separate Wills, it is contended that the Will in favour of defendants 1 to 4 which was executed on 17.10.1988 is a valid one and is binding on all parties.



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(h) In the written statement, it is further stated that defendants 1 to 4 are running a Touring Talkies in the first item measuring 1.36 acres and the said property absolutely belonged to the 1st defendant and that the rental income from the said property is being received only by the 1st defendant as the owner of the same. Defendants 1 to 4 also contended that one of the property in the first item of the suit properties measuring an extent of 21 cents was sold by the 1st defendant and possession is with the purchasers.

(i) The Trial Court, on the admitted facts held that the properties are the properties of Tmt.Nallammal and the Wills executed by Tmt.Nallammal in favour of plaintiffs as well as defendants 1 to 4 are valid as they were proved in the manner known to law. Before the Trial Court, plaintiffs examined P.W.1 and P.W.2 and marked Exs.A1 to A11. The 1st defendant examined himself as D.W.1 and examined the attesor of the Will dated 17.10.1988 as D.W.2 and marked Ex.B1-Will dated 17.10.1988.

(j) Relying upon the evidence of the attesor [DW2] and the fact that the testator namely Smt.Nallammal had also given some properties by way of independent Wills in favour of appellants, the Trial Court held Ex.B1-Will in favour of defendants 1 to 4 is valid as the



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same was proved by examining one of the attestors of the Will [DW2] and on the ground that there is no suspicious circumstances surrounding the Will. Since the Trial Court held that the Will executed by Smt.Nallammal in favour of defendants 1 to 4 under Ex.B1 is proved, the suit filed by the plaintiffs for partition was dismissed. Aggrieved by the same, the plaintiffs are before this Court by preferring the above Appeal Suit.

(3) This Court heard the submissions of the learned counsel for the appellants and the learned counsel appearing for respondents 1 to 4 and also perused the materials placed before it.

(4) The learned counsel for the appellants at the beginning of his arguments, brought to the notice of this Court that the Will which is marked as Ex.B1 dated 17.10.1988 is attested by a lone attesor and therefore, the Will is not a valid one. He also submitted that the document-Ex.B1 cannot be accepted as a valid document to convey the properties of testator in favour of defendants 1 to 4. Learned counsel also submitted that there are several contradictions in the statement of DW1 prompting anyone to doubt the factum of attestation by DW2. Referring to the fact that a Power of Attorney Deed was also executed by the testator in favour of the 1st defendant on the same day when the



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Will was executed, the learned counsel submitted that the Trial Court ought to have seen that the Will is not genuine as the disposition is quite unnatural. Though a specific ground was raised by the learned counsel for the appellants that the Will was attested only by one witness in the grounds, this Court is unable to find any clue from the judgment of the Trial Court as to whether this point was focused before the Trial Court. Be that as it may, on a perusal of the original Will, this Court also finds that the Will is attested only by one witness even though the said Will is registered before the Sub Registrar. Since the plaintiffs and defendants 1 to 4 are admittedly the legal heirs of Tmt.Nallammal and the properties would go to them in equal share in the absence of any Will, the only point that arise for consideration before this Court in this appeal is whether the Will stated to have been executed by Tmt.Nallammal in favour of defendants 1 to 4 / respondents 1 to 4 is valid and proved as required in law.

(5)Learned counsel for the respondents 1 to 4 appears to be surprised when he was to confront with the present situation that the document of Will under Ex.B1 is found attested by a single witness. He made a submission that the Will under Ex.B1 was executed in the year 1988 and that the plaintiffs who had knowledge about the Will never



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disputed the Will and therefore, the Court may consider the overall circumstances and the evidence of all the other witnesses to hold that the Will is validly executed and attested. The learned counsel then submitted that the Courts in India have reiterated the principle that attestation need not be in the last page and it can be in any page and in any space in the document which requires to be attested. Referring to the fact that the document-Ex.B1 in this case has been registered, the learned counsel submitted that the attestation can be proved by examining the Registrar or the witness who had signed before the Registrar as identifying witness. He relied upon the Full Bench decision of this Court [decided by 5 member Bench] in the case of ***H..Venkata Sastri and Sons rep.by its Manager Vs. Rahila Bi and others*** reported in ***74 Law Weekly 701*** and submitted that two witnesses including the attestor have signed the document at the time of registration as identifying witnesses and that the other witness and the Sub Registrar can also be examined to prove attestation. Therefore, prayed for an opportunity to defendants 1 to 4 / respondents 1 to 4 herein to prove the Will by examining either the Sub Registrar or the other witness who has signed the document at the time of registration of the Will. It is to be seen that the attestor of Ex.B1 has also signed at



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the time of registration as identifying witness. Therefore, the learned counsel suggested that the signature of the other witness who was present at the time of execution was not obtained by mistake in the document before registration. Learned counsel submitted that nevertheless the other witness who has signed the document at the time of registration can be called as a witness to depose to satisfy the requirement of Section 63[c] of the Indian Succession Act.

(6)The law is settled almost on every issue regarding proof of Will. First of all, a Will has to be attested at least by two witnesses. Section 3 of Transfer of Property Act also interprets/defines "attested" and thereby mandates the essential conditions of a valid attestation. As regards Will, S.63[a],[b],[c] of Indian Succession Act speaks about the statutory requirements of valid execution and attestation. The testator should sign or affix his marks to the Will. The signature or mark of the testator should appear to show that it was intended to give effect to the writing as a Will. Attestation must be by two or more witnesses, each of whom has seen the executant sign or affix his mark to the Will or has received from the executant a personal acknowledgment of his signature or mark ; and each of them shall sign the Will in the presence of the testator. It is also held in several precedents that the witness



should put his signature with *animo attestandi*.

(7) The learned counsel for the respondents relied upon the decision of a Full Bench of this Court in the case of ***H.V.Venkata Sastri and Others*** reported in ***74 LW 701 : AIR 1962 MAD 111***, when a registered security bond attested by one attestor but duly registered was sought to be proved as a valid document to create charge by examining the Sub Registrar who has also signed at the time of registration. The question posed before the Full Bench [5 Member Bench] was whether the decision in ***Veerappa Chettiyar Vs. Subramania Iyer*** reported in ***1952 Mad 123 : 28 LW 955 [Full Bench-3 Member Bench]*** requires reconsideration.

(8) The question that arose before the Full Bench [3 Member Bench] in ***Veerappa Chettiyar's case [cited supra]*** was whether the signature of the Registering Officer and the identifying witnesses to the registration endorsement would constitute valid attestation within the meaning of Section 3 of the Transfer of Property Act. It was held in ***Veerappa Chettiyar's case*** that the Registering Officer and the identifying witnesses perform the same duty as attestor under the Registration Act as would be done by the attesting witness under the Transfer of Property Act and therefore, the Registering Officer and the identifying



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witnesses to the registration endorsement would constitute valid

attestation within the meaning of Section 3 of the Transfer of Property

Act. Since the judgment in *Veerappa Chettiyar's case* was not accepted and it was found that there are several judgments expressing contrary view, particularly a few judgments of Allahabad High Court, the matter was referred to the Full Bench consisting of 5 Hon'ble Judges. *Ramachandra Iyer, J.*, speaking for the Bench, considered the question referred to the Bench and came to the conclusion that the Full Bench is unable to share either of the extreme views represented on the one hand in a catena of judgments to hold that the Registering Officer or identifying witnesses cannot be treated as attesting witnesses but agreed only to the limited extent of the view taken in *Veerappa Chettiyar's case*, that the requisites of a valid attestation can be proved by examining the Registrar or any other identifying witnesses as attestors. The Full Bench, consciously overruled the decision in *Veerappa Chettiyar's case* to the extent that the signatures of the Registering Officers and the identifying witnesses can be taken to prove attestation by Registrar and identifying witnesses who have signed the document at the time of registration of the document. In other words, the Full Bench answered the Reference by indicating that



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the decision in the case of ***Veerappa Chettiyar's case*** can be held to be correct only to the extent that the signatures of the Registering Officer and of the identifying witnesses, if the requisites of a valid attestation are proved, be treated as those of attesting witnesses.

(9) The relevant portions of the Judgment of the Full Bench of this Court ***H.Venkata Sastri and Sons's case [cited supra]*** reported in **74 LW 701** are extracted below for convenience:-

*"7. Before considering the questions, it is necessary to dispose of two subsidiary points. It is contended for the appellant that as neither the registering officer nor the identifying witnesses purport to sign the registration endorsement as attesting witnesses, they should, as a matter of law, be held to sign only for the purpose enjoined by Ss. 58 and 59 of the Transfer of Property Act. Support was sought for the contention in the judgment of Gajendragadkar, J., in **Thimmava Dandappa V. Channayya Appayya** reported in **AIR 1948 Bom 322**, where the learned Judge relying on two earlier decisions of the Bombay High Court observed that an attesting witness must be a person who signs the document purporting to do so as an attesting witness. Thus, however, is not the view*



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taken by our court. In **Paramasiva Udayan v. Krishna Padayachi**, reported in **ILR 41 Mad 535 : 7 LW 241**, it was held that a scribe who described himself only as a scribe, could be an attesting witness if he saw the signing of the document by the executant and that the court could allow evidence to be let in for the purpose of showing that he was an attesting witness. Therefore, the decisive test for ascertaining whether a witness signing a document as attestor, is not one of name or designation by which the person styles himself or to the phraseology used to describe him, but the character he fills and this can be ascertained by what he does with due regard to the intention accompanying his act. In **Abinash Chandra v. Dasarath Malo**, reported in **56 Cal 598 : AIR 1929 Cal 123**, Rankin, C. J. Observes that in order to constitute proper attestation no formal attestation clause is necessary; nor is it necessary that the signature of the attesting witness should appear in any particular place. This view is accepted and followed in **Balyaram Melaram a Firm v. Kaluram Agarwalla** reported in **AIR 1950 Cal 149**. We are of opinion that the view taken in this court and by Rankin, C. J. is to be preferred to the one accepted by the Bombay High Court.



8. In **Girija Datt V. Gangoti Datt** reported in **AIR 1955 SC 346**, the Supreme Court accepted the position that identifying witnesses appending their signatures to the registration endorsement (who did not describe themselves as attesting witnesses) could be attesting witnesses if they had the animus to attest. This would show that a person can be proved to be an attesting witness notwithstanding the fact that he did not describe himself as such.

9. Another contention was raised on behalf of the appellant. Relying on the decision in **Ma Thein Shin v. Ma Ngwe Nu**, reported in **AIR 1939 Rang 211**, that an attestation is required for 28-11-2022 (Page 5 of 16) www.manupatra.com Honble Mr. Justice S.S. Sundar the instrument it was said that the registering officer and identifying witnesses who did not sign the instrument properly so called, could never be attestors. We do not consider that the place where the signature of a person is put will always decide the character in which he put it. Further, that part of the document (generally the reverse side of the document) on which endorsements are made at the time of registration is also deemed to be part of it under the Registration Act. Sections 52 and 58 of the



*Registration Act state that endorsements should be made on the document; the signatures thereto would also be on the document. That would be sufficient to satisfy the definition of the terms "attest". As stated earlier Rankin, C. J., in **Abinash Chandra Vs. Dasarath Mail** reported in **56 Cal 598 : AIR 1929 Cal 123**, expressed the view that it was not necessary that an attesting signature should appear in any particular place in the document. We agree with the view taken by the learned Chief Justice.*

10.Once it is accepted that a person (other than the party) purporting to affix his signature to a document in one capacity can be shown to have done so in another capacity as well, there can be no objection in principle for the persons signing the registration endorsements from being attesting witnesses unless the statute itself prohibits it. Section 34 prescribes the duties to be performed by the registering officer when a document is presented for registration and sub-sec. (3) thereto states that the officer shall enquire whether the document was executed by the person by whom it purports to have been executed and satisfy himself as to the identity of the persons who appear before him, claiming to have executed the



document. Section 35 prescribes the procedure to be followed where there has been either an admission or denial of execution and sub-sec. (2) thereto enables the officer to examine any one present in his office in regard to the persons appearing before him. It is unnecessary for the present purpose to refer to the provisions contained in Ss. 71 to 77 which relate to the case where there has been a denial of execution; where execution of the document has been admitted, S. 52 enjoins the registering officer to endorse on every document presented the day, hour and place of presentation and obtain the signature of the person presenting it and direct that every document admitted for registration shall without unnecessary delay be copied in the appropriate book according to the order of its admission. Section 58 sets out the particulars to be endorsed on the document by the registering officer. This is to be done on the date of presentation and is distinct from the certificate of registration which is to be endorsed on the same document under S. 60 after the completion of registration. Section 58 requires the signatures of the person admitting execution and of every person examined with reference to the document (e.g., the identifying witnesses), being taken on the



document. Section 59 directs the registering officer to affix his signature to the endorsement on the same day as that of the presentation. Section 60 provides for the endorsements of a certificate and the signing of the same by the officer on the document containing the word "registered" together with the other particulars regarding the book in which it is copied.

*11.It will be noticed that the signature of the registering officer to the endorsement made under S. 58 need not be made in the presence of the executant or even made at the same time as when the latter puts his signature. That can be affixed at any time in the course of the day. Nor does the statute contemplate that the executant should admit execution to or in the presence of the identifying witness. The signature of the registering officer under S. 60 will necessarily have to be after an interval of time, namely that which would be necessary for copying the document and completing the other formalities. Therefore, the mere fact that the registering officer the identifying witnesses append their signatures to the endorsements made under S. 58 cannot prove that they are attesting witnesses. In **Surendra Bahadur V. Behal Singh** reported in **1939 [2] MLJ 762 : 50 LW 58**, the*



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*Privy Council observed that in the case before them where there was no evidence that the Sub-Registrar and the identifying witnesses affixed their respective signatures in the presence of the executant the endorsements made at the time of registration as a whole, giving them their natural meaning, would be relevant only to the matter of registration; similarly the signatures of the identifying witnesses would only vouch the identification. This would indicate that the mere existence of a registration endorsement containing the particulars under S. 58 and being signed by the registering officer and the identifying witnesses cannot be availed of as proving an attestation. But that is not the same thing as saying that in no circumstances can their signature be taken as those of attesting witnesses. In **Lachman Singh V. Surendra Bahadur Singh** reported in **54 AII 1051** and **Thimmava Dundappa V. Channayya Appayya** reported in **AIR 1948 Bom 222**, it was held that the Registrar and the identifying witnesses who performed certain functions prescribed by the Registration Act cannot be attesting witnesses. With great respect to the learned Judges, we are unable to share that view. There is nothing in the various provisions of the Registration Act to which we have*



made reference, to preclude either the registering officer on the identifying witness from being attesting witnesses. Cases may arise where the admission of execution is made to the registering officer and to the identifying witnesses and they or any of them put their signatures in the presence of the executant with the idea of also attesting the document. We have earlier held that a witness to a document can occupy a dual role. The statutory definition of the word "attest" includes a case where there has been an acknowledgment is made to the registering officer; so also in a case where it is made to the witness who attends the Registrar's office for identification. There is, therefore, nothing in principle which would preclude either the registering officer or the identifying witnesses who subscribe only to the registration endorsement from being attesting witnesses to the document. This is, of course, subject to the other requirements of the qualification of an attesting witness being satisfied.

12. One contention which was accepted in the Allahabad and Bombay decisions referred to earlier and which was pressed before us on behalf of the appellant is, that as it is clear from Sec. 59 of the Transfer of Property Act, that execution and attestation must precede registration, a completed



document alone could be presented for registration and therefore the statute does not contemplate an unattested document being attested in the process of registration. We would however point out that an unattested document cannot always be held to be an incomplete document. For example, a document which purports to effect a mortgage containing a personal covenant if unattested can still operate as a bond. An unattested or imperfectly attested document cannot be said to be an incomplete document when the executant has signed it, though it may not operate to create that interest which under the law only a duly attested deed could create. Such a document can be presented for registration. If in the illustration given above the unattested mortgage bond is registered the creditor can enforce the personal covenant within the period of limitation prescribed for registered documents. Therefore, if under the law a valid attestation could take place simultaneously with the endorsements under Ss. 58 and 59, the document which was valid as a personal bond will become a mortgage according to its tenor. It is, however, contended that registration is a single process starting from the presentation of the document to the affixing of the certificate thereon under S. 60 and no other act



*except registration can be done during that process. It can be conceded that there can be no attestation of the document after registration; nor even one during the time when the document is being copied in the books. But what is registration? Actually it is the recording of a copy of the document in the office of the Registrar (see **Majid Hossain v. Fazluanissa**, ILR 16 Cal 468). Strictly speaking presentation of the document is only an essential preliminary step thereto, though it might be said to be integrally connected with it. It may be that a party to the document once admitted to registration may have no power to add to it even by way the attestation; but that does not mean that one of the integral steps connected with registration cannot under the law operate as attestation of the document. Under the statute there are two distinct stages in a registration, separated at any rate in point of time. In certain cases presentation of document may even happen at the residence of the executant; while registration can only be in the Registrar's office. The two stages are (1) presentation, identification of executant, admission of execution, and the making of the endorsement under Ss. 58 and 59 and (2) the actual registration and endorsing of the certificate under S. 60. The*



*signatures of the registering officer and of identifying witnesses in the first stage that is under S. 58 and 59 do precede registration de facto. There can be no bar to the attestation being simultaneous with the making of those endorsements. The judgment of the Supreme Court in **Girija Datt V. Gangoti Datt** reported in **AIR 1955 SC 346**, does contemplate an imperfect document becoming perfect during the course of registration. It is contended for the appellant that the observations of the Supreme Court in that case should be restricted to the case of a will. There is however no intelligible reason behind any such distinction.*

*13. We are therefore unable to share either of the two extreme views represented on the one hand by the decision in **Lachman Singh V. Surendra Bahadur Singh** reported in **1954 All 1051** and on the other in **Veerappa Chettiar V. Subramania Iyer** reported in **52 Mad 123 : 28 LW 955**. In our opinion, such signatures of the registering officer and the identifying witnesses endorsed on a mortgage document can be treated as those of attesting witnesses, if (1) the signatories are those who have seen the execution or received a personal acknowledgment from the executant of*



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*his having executed the document, (2) they sign their names in the presence of the executant, and (3) while so doing they had the animus to attest. The mere presence of the signatures of the registering officer or the identifying witnesses on the registration endorsements would not by themselves be sufficient to satisfy the requirements of a valid attestation; but it would be competent for the parties to show by evidence that any or all of these persons did in fact intend to and did sign as attesting witnesses as well. The decision of this court in **Veerappa Chettiar V. Subramania Iyer** reported in **52 Mad 123 : 28 LW 955**, can be held to be correct only to this limited extent, namely, that the signatures of the registering officer and of the identifying witness can, if the requisites of a valid attestation are proved, be treated as those of attesting witnesses; with great respect to the learned Judges who decided that case we are unable to accept the statement of the rule in the unqualified form in which it has been enunciated, namely, that the signatures of the registering officer and identifying witnesses affixed to the registration endorsement would be sufficient attestation. For this reason and to the extend indicated above, that decision has to be overruled.*



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We would, therefore, answer the question referred to us in the affirmative and further state as our opinion that the signatures of the registering officer and/or of the identifying witnesses affixed to the registration endorsement under Ss. 58 and 59 of the Registration Act would amount to valid attesting signatures to the document, within the meaning of S. 59 of the Transfer of Property Act if the conditions necessary for a valid attestation under S. 3 of that Act have been satisfied and the persons affixing the signatures thereto had the animus to attest."

(10)The Full Bench has followed the views approved by Hon'ble Supreme Court and this Court in several precedents to hold that while considering whether the identifying witness before the Sub Registrar or Sub Registrar can be an attesting witness to a document, it is essential that the attesting witness had the animus to attest. It also approved the view in ***Veerappa Chettiyar's case*** to the extent that it would be competent for the Sub Registrar and the witnesses identifying the executant at the time of registration to be the attesting witnesses to the document if the Court can infer animus to attest but, consciously held that mere affixing of signatures by the Registering Officer and the



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identifying witnesses will not satisfy the statutory requirement.

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(11) The above judgment of the Full Bench of this Court [5 Member Bench] appears is based on sound principles and several precedents. Hence, this Court has no quarrel with the proposition of law laid down by the Full Bench.

(12) After the decision of Full Bench answering the question referred to the Bench in the affirmative, the appeals was heard by a Division Bench and held that Registering Officer who was examined as PW1 did not show that he signed the document with an intention to attest the document and that he cannot be treated as an attesting witness to the security bond. On further appeal to Hon'ble Supreme Court, the judgment of Division Bench was set aside by holding that the security bond is not required to be attested. However, the finding that the instrument is not duly attested was upheld by Hon'ble Supreme Court in ***M.L.Abdul Jabbar Sahib Vs. H.Venkata Sastri & Sons and others*** reported in ***AIR 1969 SC 1147***. It is useful to refer to the following paragraphs in the said judgment:-

"8. Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words :



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“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.

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.

9. *"In every case the Court must be satisfied that the names were written animo attestandi", see Jarman on Wills, 8th ed. 137. Evidence is admissible to show whether the witness had the intention to attest. "The attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the intention or not," see Theobald on Wills, 12th ed. p. 129. In Girja Datt v. Gangotri A.I.R. 1955 S.C. 346 the Court held that the 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". In Abinash Chandra Bidvanidhi Bhattacharya v. Dasarath Malo I.L.R. Cal. 598 it was held that a person who had put his name under the word "scribe" was not an attesting*



witness as he had put his signature only for the purpose of authenticating that he was a "scribe". In *Shiam Sundar Singh v. Jagannath Singh* 54 M.L.J. 43 the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees.

10. The Indian Registration Act. 1908 lays down a detailed procedure for registration of documents. The registering officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identity of the executant, Section 34(3). He can register the document if he is satisfied about the identity of the person executing the document and 'if that person admits execution, [Section 25(1)]. The signatures of the executant and of every person examined with reference to the document are endorsed on the document, (Section 58). The registering officer is required to affix the date and his signature to the endorsements (Section 59). Prima facie, the registering officer puts his signature on the document in discharge of his statutory duty Under Section 59 and not for the purpose of attesting it or certifying that he has received from the executant a



personal acknowledgment of his signature.

11. The evidence does not show that the registering officer D;W. Kitto put his signature on the document with the intention of attesting it: Nor is it proved that he signed the document in the presence of the executant. In these circumstances he cannot be regarded as an attesting witness, see Surendra Bahadur Singh v. Thakur Behari Singhi (1939) 2 M.L.J. 762 Likewise the identifying witnesses Senkaranarayana and Kaki Abdul Aziz; put their signatures on the document to authenticate the fact that they had identified the executant. It is not shown that they put their signatures for the purpose of attesting the document. They cannot therefore be regarded as attesting, witnesses.

12. It is common case that B. Somnath Rao attested the document. It follows that the document was attested by one witness only."

(13)The Hon'ble Supreme Court in the case of **Brij Raj Singh V. Sewak**

Ram and Another reported in **1994 [4] SCC 287** held that as per Section 3 of the Transfer of Property Act, no particular form need be followed in the matter of attestation and an attestation could be at the first or at the last page of the Settlement Deed. Considering the fact



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that the execution or validity of a registered Gift Deed was not raised either in the written statement or in the cross examination, the Hon'ble Supreme Court held that the document need not be proved by examining any attesting witness.

(14) The learned counsel for the appellants relied upon the judgment of Hon'ble Supreme Court in the case of ***N.Kamalam [Dead] and Another V. Ayyasamy and Another*** reported in ***2001 [7] SCC 503*** to to understand the scope of Order 41 Rule 27 of CPC to produce further evidence to prove a Will and what is *animo attestandi* or animus or intend to attest with reference to Section 63[c] of the Indian Succession Act. The Hon'ble Supreme Court after referring to Order 41 Rule 27 of CPC and Section 63 of the Indian Succession Act, 1925 has explained the position in the following manner:-

"17. Admittedly, the two attesting witnesses to the will being Exhibit A-I have not been examined in proof of due execution thereof. The learned trial Judge in a very detailed and exhaustive judgment held that while the sale deed in their favour from Kamalam has been obtained but the plaintiffs have miserably failed to prove due execution of the will and consequently the sale



deed, though may be a fact but cannot be termed to be otherwise as a legal and valid document since the vendor has no right, title and interest therein to execute the sale deed, and as such the suit for partition thus failed.

18. Turning attention on to the issue of additional evidence, be it noted that Order 41 Rule 27 prescribes specific situation where production of additional evidence may otherwise be had. For convenience sake, Order 41 Rule 27 reads as below:

“27. (1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate court. But if—

(a) the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the appellate court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause,



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the appellate court may allow such evidence or document to be produced or witness to be examined.

(2) Whenever additional evidence is allowed to be produced by an appellate court, the court shall record the reason for its admission.”

*19. Incidentally, the provisions of Order 41 Rule 27 have not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the court of appeal — it does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the appellate court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in *Municipal Corpn. of Greater Bombay v. Lala Pancham* [AIR 1965 SC 1008 : 67 Bom LR 782] has been candid enough to record that the requirement of the High Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. In para 9 of the judgment, this Court observed: (AIR p. 1012)*

“This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a



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case. It does not entitle the appellate court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports 'in a large measure' the plaintiffs' contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under clause (b) of sub-rule (1) of Rule 27 cannot be exercised for adding to the evidence already on record except upon one of the grounds specified in the provision."

Further in Pramod Kumari Bhatia v. Om Prakash Bhatia [(1980) 1 SCC 412 : AIR 1980 SC 446] this Court also in more or less an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court,



question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The time-lag in the matter under consideration is also enormous and the additional evidence sought to be produced was as a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree therein was passed in 1983. The first appeal was filed before the High Court in April 1983 but the application for permission to adduce additional evidence came to be made only in August 1993. Needless to record that the courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time. In our view, a plain reading of Order 41 Rule 27 would depict that the rejection of the claim for production of additional evidence after a period of 10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted. The learned trial Judge while dealing with the matter has, as a matter of



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fact, very strongly commented upon the lapse and failure on the part of the plaintiffs even to summon the attestors to the will and in our view contextually, the justice of the situation does not warrant any interference. The attempt, the High Court ascribed it to be a stage-managed affair in order to somehow defeat the claim of the respondents — and having had the privilege of perusal of record we lend our concurrence thereto and the finding of the High Court cannot be found fault with for rejecting the prayer of the appellants for additional evidence made in the belated application. In that view of the matter, the first issue is answered in the negative and thus against the plaintiffs, being the appellants herein.

20. *Turning attention on to the second count on which very great emphasis has been placed viz. the scribe also can discharge the function of attesting witness and since the scribe has subscribed his signatures on to the will, the lacuna if any, of not having the evidence of the attesting witnesses stands rectified and both learned trial Judge and the High Court were in error in not placing reliance thereon. Section 63 of the Indian Succession Act as noticed hereinbefore read with Section 68 of the Evidence Act and Section 3 of the*



Transfer of Property Act makes a mandatory obligation to have the document attested and evidence of such attestation be made available before the court at the time of the trial.

21. The factual score depicts that the will in question has been written by one Arunachalam who was examined as PW 5. The will stands attested by one D. Subbaya and the second attestor being P. Govindaraju, two signatures said to have been subscribed by the above-named two persons and the same appear in the body of the will as attestors but no attempt has been made to examine either of the persons. Incidentally, no summons were even taken out for the purpose of such an examination of the attesting witnesses. Section 68 of the Evidence Act as noticed above, requiring a document to be attested must be proved by calling at least one of the attesting witnesses. While it is true that there are existing certain exceptions, to wit: failure to find after honest and diligent search but there is no evidence whatsoever on record so as to justify such a conclusion presently. Significantly, the English law though seems to be at variance with the principles of law prevalent in this country, but a perusal of Section 9 of the Wills Act, as amended by the Administration



of Justice Act, 1982 does not depict a contra rule or law. Section 9 of the Wills Act, 1837 (as amended) provides as below:

“9. No will shall be valid unless —(a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and

(b) it appears that the testator intended by his signature to give effect to the will; and

(c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and

(d) each witness either—

(i) attests and signs the will; or

(ii) acknowledges his signature,

in the presence of the testator (but not necessarily in the presence of any other witness),

but no form of attestation shall be necessary.”

22. As regards the requirement of attestation, Halsbury's Laws of England has the following to state:

“The testator's signature must be made or acknowledged by him in the presence of two or more witnesses present at the same time. Each witness must then either attest and sign the will or acknowledge his signature,



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in the testator's presence. The testator's complete signature must be made or acknowledged when both the attesting witnesses are actually present at the same time and each witness must attest and sign, or acknowledge, his signature after the testator's signature has been so made or acknowledged. Although it is not essential for the attesting witnesses to sign in the presence of each other, it is usual for them to do so. Each witness should be able to say with truth that he knew that the testator had signed the document but it is not necessary that the witness should know that it is the testator's will. There is, however, no sufficient acknowledgement unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator expressly states that the paper to be attested is his will or that his signature is inside the will.” (Halsbury's Laws of England: 4th Edn., Vol. 50, para 312)

23. It is in this context reference may be made to Williams on Wills wherein it has been stated vis-à-vis position of attestation in a will as below:



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“Section 9(e) does not specify where the witnesses are to sign (f), and the signatures may therefore be placed on any part of the will, if it is clear that they were placed there with the intention of attesting the signature of the testator (g). The attestation may be on the sheet next to where the testator has signed, i.e. overleaf (h), or on separate sheet so long as it is attached (i). Where the will is signed on more than one sheet, it seems that the signature on the last sheet should be duly attested but the decisions on the point are not uniform (j). It is clear, however, that no part of the will which is shown to be written after attestation is valid (k).

24. Incidentally, be it noted that though no special form of the attestation clause is essential, there are two well-recognised forms of this clause showing that the requirements of the statute have been complied with and one of them should always be used to avoid any difficulty in securing a grant.

25. The requirement of attestation presently in the country is statutory in nature, as noticed hereinbefore, and cannot as such be done.



away with, under any circumstances. While it is true that in a testamentary disposition, the intent of the attestor shall have to be assessed in its proper perspective but that does not however mean and imply non-compliance with a statutory requirement. The intention of the attestor and its paramount importance cannot thwart the statutory requirement. No doubt the scribe has subscribed his signature but a scribe in accordance with common English parlance means and implies the person who writes the document. Significantly, however, in England the King's Secretary is popularly known as Scribaregis. Be that as it may, in common parlance an attribute of scribe as a mere writer as noted above, does not stretch the matter further. In the contextual facts, while the writer did, in fact, subscribe his signature but the same does not underrate the statutory requirement of attestation as more fully described hereinbefore. True it is, that strenuous submissions have been made in support of the appeal that "attesting witnesses" have no other role to play but to subscribe their signatures in order to prove the genuineness of the will and that in fact, when the scribe signs the will, the same can be read as attestation. Needless to record, however, that the



scribe Arunachalam was examined and it is on this score the learned advocate contended that the evidence of an attesor thus can be said to be on record so as to make the document namely the “will” in the instant case thus otherwise in accordance with law.

*26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, requiring attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe. The Full Bench judgment of the Madras High Court in *H. Venkata Sastri and Sons v. Rahilna Bi* [AIR 1962 Mad 111 : (1962) 1 MLJ 78 (FB)] wherein Ramachandra Iyer, J. speaking for the Full Bench in his inimitable style and upon reliance on Lord Campbell's observation in *Burdett v. Spilsbury* [(1842-43) 10 Cl & F 340 : 8 ER 772] has the following to state pertaining to the meaning to be attributed to the word “attestation”: (AIR pp. 113-14, paras 3-4)*

“(3) ... The definition of the term ‘attested’ which is almost identical with that



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contained in Section 63(c) of the Indian Succession Act, has been the result of an amendment introduced by Act 27 of 1926. Prior to that amendment it was held by this Court that the word 'attested' was used only in the narrow sense of the attesting witness being present at the time of execution. In Shamu Patter v. Abdul Kadir Ravuthan [ILR (1912) 35 Mad 607 : 39 IA 218 (PC)] the Privy Council accepted the view of this Court that attestation of a mortgage deed must be made by the witnesses signing his name after seeing the actual execution of the deed and that a mere acknowledgement of his signature by the executant to the attesting witness would not be sufficient. The amending Act 27 of 1926 modified the definition of the term in the Transfer of Property Act so as to make a person who merely obtains an acknowledgement of execution and affixed his signature to the document as a witness, an attesor. It will be noticed that although Section 3 purports to define the word 'attested' it has not really done so. The effect of the definition is only to give an



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extended meaning of the term for the purpose of the Act; the word 'attest' is used as a part of the definition itself. It is, therefore, necessary first to ascertain the meaning of the word 'attest' independent of the statute and adopt it in the light of the extended or qualified meaning given herein. The word 'attest' means, according to the Shorter Oxford Dictionary 'to bear witness to, to affirm the truth of genuineness of, testify, certify'. In Burdett v. Spilsbury [(1842-43) 10 Cl & F 340 : 8 ER 772] Lord Campbell observed at p. 417:

'What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness.'

The Lord Chancellor stated,

'the party who sees the will executed is in fact a witness to it, if he subscribes as a witness, he is then an attesting witness'.

The ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could then alone vouch for.



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the execution of the document. In other words, the attesting witness must see the execution and sign. Further, attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the executant, it is obvious that he should have the necessary intention to vouch it. The ordinary meaning of the word is thus in conformity with the definition thereof under the Transfer of Property Act before it was amended by Act 27 of 1926. Before that amendment, admission of execution by the executant to a witness who thereupon puts his signature cannot make him an attestor properly so called, as he not being present at the execution, cannot bear witness to it; a mere mental satisfaction that the deed was executed cannot mean that he bore witness to execution.

(4) After the amendment of Section 3 by Act 27 of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal acknowledgement of



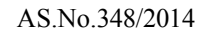
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his signature, mark etc. Thus of the two significant requirements of the term 'attest', namely, (1) that the attestor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution by subscribing his name as a witness, which implies a consciousness and an intention to attest, the amending Act modified only the first; the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgement from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement, namely, certifying execution which implies that the attesting witness had the animus to attest."

27. It was next contended that in the event of there being an intent to attest, that itself should be sufficient compliance with the requirement of law. While the introduction of the concept of animus to attest cannot be doubted in any way whatsoever and we also do feel it relevant in the matter of proof of a document requiring



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Coimbatore.

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Arunachalam”

The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself — this is again, however, not the situation existing presently in the matter under consideration. Some grievance was made before this Court that sufficient opportunity was not being made available, we are however, unable to record our concurrence therewith. No attempt whatsoever has been made to bring the attesting witnesses who are obviously available."

(15)The Hon'ble Supreme Court has dealt with a situation similar to this



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case and upheld the decision dismissing the application for additional evidence and the finding as to the validity of Will. Therefore, we are unable to permit further evidence to fill up lacuna by examining the Sub Registrar or the other person who signed the document as identifying witness especially when it is not shown that the identifying witness or the Sub Registrar saw the testator sign the document as executant and the identifying witness or the Sub Registrar has signed the document in the presence of testator.

(16) In the present case, the Will stated to be executed on 17.10.1988 was not signed by the testator in the presence of two witnesses. Therefore, the execution of Will on 17.10.1988 as per Ex.B1 is not complete. The question whether such incomplete document can be accepted for registration is also a relevant issue. A Will which was executed should be a perfect and valid document when it is presented for registration. It is not the case of the defendants 1 to 4 in the present suit that the Will was signed by the testator on 17.10.1988 and attested at the time of registration. Therefore, there must be at least proper pleading before proving the due execution of the Will by examining the Sub Registrar or the identifying witnesses who have signed the document at the time of registration.



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(17)The learned counsel for the respondents 1 to 4 relied upon the judgment of the Hon'ble Supreme Court in the case of ***Girija Datt V. Gangotri Datt's case [AIR 1955 SC 346]*** where the document of Will

was attested by two witnesses but the attesting witnesses examined have failed to satisfy the requirement of proper attestation as required under Section 63[c] of Indian Succession Act. Therefore, this Court is unable to countenance the argument of the learned counsel for the respondents 1 to 4 that the matter should be remanded back to the Trial Court for giving a liberty to defendants 1 to 4 to prove due attestation by examining the Sub Registrar or identifying witnesses to satisfy requirement of Section 63[c] of the Indian Succession Act, 1965.

(18)It is to be noted that the Courts after referring to Section 63 of the Indian Succession Act and Section 3 of the Transfer of Property Act, has repeatedly held that the execution and attestation of the Will are mandatory in nature and any failure and deficiency in adhering to the essential requirements would result in invalidation of the instrument. Several issues have been decided consistently by the Hon'ble Supreme Court and this Court on the statutory requirement of a Will. Even in a case where the document of Will is signed by two attestors,



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examination of one witness is held insufficient if the attestor examined does not speak about the attestation by the other witness.

(19)The law is well settled that the conscience of the Court must be satisfied that the Will in question is executed and attested in the manner required under the Indian Succession Act. The Will is executed to alter the mode of succession. In other words, if a person wants his properties to go to his natural heirs, there is no necessity at all for executing a Will. However, the propounder of the Will has to remove all the suspicious circumstances which would raise some genuine doubt having regard to the nature of transaction, relationship of parties and other surrounding circumstances. Even though mere exclusion of natural heirs cannot always be held to be suspicious circumstance, it is the bounden duty of the propounder of the Will to dispel all suspicious circumstances to satisfy the Court.

(20)As to the statutory requirement to prove the Will, the situation dealt with by the Hon'ble Supreme Court in the case of ***Raj Kumari and Others V. Surinder Pal Sharma*** reported in ***2019 SCC Online SC 1747*** is relevant and the relevant portions of the judgment are extracted hereunder:-



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25. Majority of earlier judgments like *Vishnu Ramkrishna* (supra) follow the ratio in *Dhira Singh* (supra), with a few exceptions like *Mt. Manki Kaur v. Hansraj Singh*. The issue was resolved beyond controversy and debate in *Janki Narayan Bhoir* (supra) wherein it has been held that clause (c) of Section 63 of the Indian Succession Act requires and mandates attestation of a Will by two or more persons as witnesses, albeit Section 68 of the Evidence Act gives concession to those who want to prove and establish a Will in the court of law by examining at least one attesting witness who could prove the execution of the Will viz., attestation by the two witnesses and its execution in the manner contemplated by clause (c) to Section 63 of the Indian Succession Act. However, where one attesting witness examined fails to prove due execution of the Will, then the other available attesting witness must be called to supplement his evidence to make it complete in all respects to comply with the requirement of proof as mandated by Section 68 of the Evidence Act. It was held:



“11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It



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cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by “other evidence” as well. At the same time Section 71 cannot be read so as to



absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will.”

26. This judgment overruled the judgment of Manki Kaur (supra) and approved the ratio of Vishnu Ramakrishna (supra) to the effect that Section 71 of the Evidence Act can be requisitioned when the attesting witnesses who were being called have failed to prove the execution of the Will by reason of either denying their own signatures, denying the signature of the testator or due to bad recollection as to the execution of the document. Section 71 has no application when only one attesting witness who was called and examined has failed to prove the execution of the Will and the other available attesting witness was not summoned.

27. The ratio in Janki was reiterated in Benga Behera v. Braja Kishore Nanda¹¹. This judgment also examines the issue and question whether a Sub-Registrar in the matter of



registration of documents under the provisions of Indian Registration Act, 1908 can possibly be treated as a witness. Reference was made to Sections 52 and 58 of the Registration Act to observe that the duty of the Registering Officer is to endorse the signature of every person presenting the document for registration and to make an endorsement to that effect, that is, to endorse only the admission or execution by the person who presented the document for registration. The Registering Officer can also endorse and certify the payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document. The expression 'attesting witness' within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Indian Succession Act means "bearing witness to a fact". The two valid conditions of attestation of documents are - (i) two or more attesting witnesses have seen the executant sign the instrument; (ii) each of them has signed the instrument in the presence of the executant. Further and importantly, attestation requires animus attestandi, that is, a person puts his signature on a document with the intent to attest it as a witness. If a person puts his signature on a document only in discharge of a



statutory duty, he may not be considered as an attesting witness as was held in Dharam Singh v. Aso¹². Similarly, a scribe or an advocate who has drafted the document may not be the attesting witness as was held by this Court in Jagdish Chand Sharma (supra), for attestation requires that the witness should have put his signature animus attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.

28. Returning to the facts of the present case, it is submitted by Surinder Pal Sharma, the respondent before us, that summons/notice were issued to Mr. M.N. Sharma, Advocate to appear as a witness but he could not be served and hence was not examined. Ramesh Kumar, it is submitted, was not summoned or examined as he was none other than the husband of Raj Kumari and would not have supported execution of the Will. The High Court has accordingly held that the Will being registered was proved in terms of section 71 of the Evidence Act. This finding of the High Court is unacceptable, for recourse to Section 71 of the Evidence Act is impermissible without examination of Ramesh Kumar. It would not matter if Ramesh



Kumar is husband of Raj Kumari. Section 71 of the Evidence Act would come into operation, once and if all the attesting witnesses deny or do not recollect the execution of the document, that is, the Will. In that event, the execution can be proved by other evidence. The respondent accepts that Ramesh Kumar though a witness was not summoned and asked to depose as a witness and therefore, it cannot be said that Ramesh Kumar as an attesting witness had denied or did not recollect execution of the Will."

(21) This Court in several cases has reiterated the importance of statutory requirements to prove the Will irrespective of the fact whether the execution of the Will or the signature of the testator in the Will is admitted or not. This Court in cases of this nature has expressed reluctance in similar circumstances to remit the matter to prove the Will by satisfying the statutory requirements when this Court finds that the Will is not proved in accordance with Section 63 of the Indian Succession Act. It is interesting to note that after the judgment of the Full Bench [5 Member Bench] in ***H.V.Venkata Sastri's case*** [cited *supra*], the appeals were heard by a Division Bench led by ***Ramachandra Iyer, O.C.J.***, and were disposed of on merits. The said



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Bench considered the request of the learned counsel for the respondents therein for the liberty to re-examine the Registering Officer as well as identifying witnesses for finding out whether they had the intention to attest while affixing their signatures to the registration endorsement. The request was rejected by the Full bench in the following lines:-

"Learned counsel for the respondent requested us that an opportunity might be given to the latter to re-examine the Registering Officer as well as the identifying witnesses for finding out whether they had the intention to attest, while affixing their signature to the registration endorsement. We cannot accede to that request, in view of the categorical statements made in the evidence a remand at this stage would only tempt the parties to procure if possible perjured evidence."

(22)Therefore, this Court is unable to give further opportunity to the respondent to prove attestation by exercising the Registering Officer or



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the other identifying witness as further evidence after this length of time will not bring truth. Since the Will is not validly executed satisfying the statutory requirements, there is no scope of upholding the Will. As a result, we hold that the Will is not valid and its execution is not proved. In view of the conclusions reached above regarding the validity of Ex.B1-Will, this Court finds that the appellants are entitled to a decree for partition.

(23) During the course of hearing, it is admitted that the appellants were given a few properties which are also covered by the Will under Ex.B1. It is seen from the plaint that the appellants have not included any of the properties which were bequeathed in their favour by the testator before his death. Since the five Wills executed by the testator in favour of appellants are not with reference to the suit properties, the validity of those Wills are not an issue in this appeal. However, in the written statement, it was contended by defendants 1 to 4 / respondents 1 to 4 that the 1st defendant has dealt with a portion of the property bequeathed in his favour under Ex.B1-Will. If any alienation in favour of third parties had taken place before institution of the suit, this judgment may not be binding on such alienees as they have not been impleaded as parties in the present suit.



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(24) In the result, the Appeal Suit is **allowed** and the judgment and decree

passed by the learned 3rd Additional District Judge, Salem in

OS.No.150/2010 dated 30.08.2013 are set aside and the suit in

OS.No.150/2007 is decreed as prayed for. No costs.

[SSSRJ] [NMJ]
22.12.2022

AP

Internet : Yes

Index : Yes / No

To

1. The III Additional District Judge,
Salem.

2. The Section Officer
VR Section, High Court, Chennai.



WEB COPY



AS.No.348/2014

S.S. SUNDAR, J.

AND

N.MALA, J.

AP

Judgment in
AS.No.348/2014

22.12.2022