Nagulapati Lakshmamma

Vs

Mupparaju Subbaiah

Civil Appeals Nos. 1401 and 1402 of 1988

(M. Srinivasan, G. N. Ray JJ)

15.04.1998

JUDGMENT

M. SRINIVASAN, J. -

1. The appellant herein is one of the four daughters of Madamanchi Velugondaiah who had no son. He died in 1946 leaving his widow Punnamma and three daughters as his eldest daughter had predeceased him leaving one daughter. Valugondaiah had left several properties some of which were dealt with by Punnamma by execution of settlement deeds. Disputes arose between the parties resulting in three suits OSs. Nos. 186 and 187 of 1971 and 52 of 1975 on the file of the Subordinate Judge, Ongole. The appellant was the first defendant in OSs. Nos. 186 and 187 of 1971 and plaintiff in OS No. 52 of 1975. The respondent who was the son of the second daughter of Velugondaiah was the second plaintiff in the two suits of 1971 and the only defendant in the suit of 1975. Punnamma who was the first plaintiff in the two suits of 1971 died during the pendency thereof and the respondent was recorded as her legal representative.

2. Though several issues were raised in the suits, we are concerned only with one of them which was the pivotal issue. According to the appellant Velugondaiah executed a Will on 2-7-1945 bequeathing his properties in a particular manner. The genuineness of the Will was challenged by the respondent and Punnamma. The Subordinate Judge held that the Will was proved by the appellant to be true and valid. On that footing the suits were disposed of by grant of appropriate reliefs. On appeals, the District Judge, Ongole concurred with the Subordinate Judge and dismissed the same. The matter was taken in second appeals to the High Court of Andhra Pradesh.

3. At this stage, it is better to advert to the following undisputed facts. The Will purports to have been attested by five persons. Two of them had signed. The other three had not affixed their thumb impressions or made any mark. They have been described as "nishanis". It is also written in the Will as against their names "LTI mark of ...." though there is no thumb impression or mark actually. Out of the two attestors who had signed, one was dead and the other was not examined though admittedly alive. One of the three persons described as "nishanis", namely, Kondaiah, son of Madhumanchi Narayya was examined as DW 2. Admittedly he had not affixed his thumb impression or made any mark on the Will. While the Subordinate Judge and the District Judge treated him as an attesting witness and believing him held the Will to be proved, the High Court held that he was not an attestor in the eye of law and his evidence could not prove the Will. It is also worthwhile extracting the following passage in the judgment of the High Court :

> "... It is no doubt true that both the courts have accepted the evidence of DW 2 who said that he attested the Will. Beyond that DW 2 does not say anything. He does not

> mention the person, who has written his name. He stated in the cross-examination that nobody asked him to put his thumb impression and he was asked by one Karanam Venkatappaiah to touch the pen. He does not even say who wrote his name. Karanam Venkatappaiah is not even the scribe. There is no evidence that his name was written at his instance or under his direction or in his presence. The observation of the courts below that his name was written by the scribe at his instance is an error apparent on the face of the record ...."

On the aforesaid reasoning, the High Court held that the Will was not proved as required by law and allowed the second appeals, setting aside the judgments and decrees passed by the courts below.

4. Aggrieved thereby, the appellant has approached this Court. The only contention urged by the appellant's learned counsel is that DW 2 is an attesting witness inasmuch as the scribe had on his directions written "LTI of Kondaiah, son of Madhumanchi Narayya". According to her, DW 2 had thereby "signed" in the Will as an attestor. She has placed reliance on the definition of the word "signed" in Stroud's Judicial Dictionary and drawn our attention to the decisions of some High Courts.

5. Thus the question of law which arises for consideration is whether a person who has not himself signed or made any mark on a Will can be said to be an attesting witness if another person on his authority or direction signs or makes a mark or writes his name on his behalf. Before examining the relevant provisions of law and the decisions of the High Courts, we would like to place on record that we have perused the deposition of DW 2 and we are entirely in agreement with the observations of the High Court contained in the passage extracted earlier. The High Court has stopped short of giving a factual finding that DW 2 was not present at the time of the execution of the Will. Probably the High Court hesitated to do so as it was dealing with the matter in its second appellate stage. Hence the High Court was and we are now obliged to consider and decide the question of law.

6. Section 68 of the Indian Evidence Act, 1872 enjoins the calling of at least one attesting witness for the purpose of proving execution of a Will. Section 63 of the Indian Succession Act, 1925 which prescribes how an unprivileged Will is to be executed reads as follows :

> 63. Execution of unprivileged Wills. - Every testator, not being a soldier employed in an expedition or engaged in actual warfare, (or an airman so employed or engaged,) or a mariner at sea, shall execute his Will according to the following rules :
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> (a) The testator shall sign or shall affix his marks to the Will, or it shall be signed by some other person in his presence and by his direction.
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> (b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.
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> (c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time,

> and no particular form of attestation shall be necessary.

7. The section makes a vital distinction between the testator and the attestors in the matter of signing the Will. The testator may sign or affix his mark himself or direct some other person to sign in his presence. The reason for such a provision is quite obvious. Many a time, people who are desirous of making testamentary dispositions may be physically incapacitated from signing their names or affixing their marks on account of illness or other causes. Such persons should not be deprived of an opportunity of making a Will. Such persons can instead of signing or affixing their marks themselves can direct some other person to sign in their presence. But in the case of attestors such an enabling provision is absent. The section expressly states that each of the witnesses shall sign the Will in the presence of the testator. The privilege or power of delegation, if we may say so, is not available to the attesting witnesses under the section. When the same section makes a distinction expressly between a testator and an attestor it is not possible to accept the contention that an attestor can also direct some other person to sign 6r make a mark on his behalf. If a witness to the execution of the Will chooses to do so, he is not an attesting witness as there is no attestation by him as contemplated by Section 63(c) of the Indian Succession Act. Consequently, he will not be an attesting witness for the purpose of Section 68 of the Indian Evidence Act.

8. According to learned counsel for the appellant the word "sign" occurring in the last part of Section 63(c) would mean "sign his name or affix his mark himself or get it signed by some other person in his presence and by his direction". In support of this argument, reliance is placed on Stroud's Judicial Dictionary. At pp. 2431 and 2432, Vol.5 of the Fifth Edn., the word "signed" is defined as follows :

> "Signed; Signature. (1) Speaking generally, a signature is the writing, or otherwise affixing, a person's name, or a mark to represent his name, by himself or by his authority (R. v. Kent Justices ((1873) 8 QB 305 : 42 LJMC 112)), with the intention of authenticating a document as being that of, or as binding on, the person whose name or mark is so written or affixed. In Morton v. Copeland (16 CB 535), Maule, J., said, 'Signature does not, necessarily, mean writing a person's Christian and surname, but any mark which identifies it as the act of the party', but the reporter adds in a note, 'provided it be proved or admitted to be genuine, and be the accustomed mode of signature of the party'. Without more 'to sign' is not the same as 'to subscribe'.
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> (2) The minute requisite of a signature will vary according to the nature of the documents to which it is affixed, e.g. -
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> (a) Deeds;
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> (b) Wills;
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> (c) Contracts;
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> (d) Bills of exchange and promissory notes;
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> (e) Solicitors' bills;
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> (f) Electioneering paper;
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> (g) Judge's orders and legal proceedings;

> (h) Office copies
>
> and 'in every case where a statute requires a particular document to be signed by a particular person, it must be a pure question on the construction of the statute whether the signature by an agent is sufficient' (per Bowen, L.J. in Whitley, Re ((1886) 32 Ch D 337 : 55 LJ Ch 540))."

9. We are unable to accept the argument. When there is an express statutory provision in this regard, the definition contained in the Judicial Dictionary cannot be invoked by the appellant.

10. In some cases decided before the advent of the General Clauses Act, 1897 some High Courts took the view that it was necessary for the validity of a Will that the actual signature, as distinguished from a mere mark, of at least two attesting witnesses should appear on the face of the Will. See D. Fernandez v. R. Alves (ILR (1879) 3 Bom 382) and Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar (ILR (1885) 11 Cal 429). The General Clauses Act which came into force in 1897 contained a definition of the word "sign" in Section 3(56) thereof as follows :

> "3. (56) 'sign' with its grammatical variations and cognate expressions, shall, with reference to a person who is unable to write his name, include 'mark' with its grammatical variations and cognate expressions;."

But even thereafter, in a case which arose under the Transfer of Property Act, 1882 a Single Judge of the Madras High Court held in Venkataramayya v. Nagamma (AIR 1932 Mad 272 : 1931 MWN 1242) that a mark by an attesting witness although valid at the date of execution of a deed of gift made in 1912 should be held to be inoperative in view of the law as amended on the point by Act 27 of 1926 which was expressly made retrospective in effect. The learned Judge referred to the definition of the word "attested" in Section 3 of the Transfer of Property Act and held that inasmuch as the witnesses were required to sign the instrument it was not sufficient if they made their mark or affixed their thumb impression. It has to be pointed out that the definition of the word "attested" contained in Section 3 of the Transfer of Property Act is almost a verbatim reproduction of sub-section (c) of Section 63 of the Indian Succession Act. However the judgment of the learned Single Judge referred to above was reversed on appeal by a Division Bench in Nagamma v. Venkataramayya (AIR 1935 Mad 178 (2) : ILR 58 Mad 220). The Bench held that the definition of "sign" in the General Clauses Act would apply and therefore the word "sign" in Section 3 of the Transfer of Property Act included also a mark by the attestor.

11. A Single Judge of the Calcutta High Court held in Rajani Mandal v. Digindra Mohan Biswas (AIR 1932 Cal 440 : 36 CWN 188) that in Bengal there was a customary practice among illiterate persons to sign documents by touching the pen and authorising another person to sign by writing their name for them in their presence, and therefore an endorsement of payment of interest made by the scribe and also signed by him on behalf of the debtor who was illiterate and made no mark beneath the endorsement, amounted to acknowledgement of payment of interest by the debtor within the meaning of Section 120 of the Limitation Act (1908). It is not necessary in this case to consider the correctness of that judgment.

12. A Full Bench of the Allahabad High Court upheld the validity of "attestation" of a Will when it found that the attesting witnesses had affixed their marks. The Full Bench agreed with the view expressed by the Division Bench of the Madras High Court in Nagamma v. Venkataramayya (AIR 1935 Mad 178 (2) : ILR 58 Mad 220) referred to earlier.

13. The Bombay High Court took a similar view in Annu Bhujanga Chigare v. Rama Bhujanga Chigare (AIR 1937 Bom 389 : 39 Bom LR 606) and held that a Will was validly attested if an illiterate attesting witness made a thumb impression on it.

14. Our attention has been drawn to two judgments of the Patna High Court which arose under the Transfer of Property Act. In Dahu v. Jamadar Rai (AIR 1951 Pat 368 : ILR 28 Pat 158) the Court held that when one of the two attesting witnesses to a mortgage signs for himself and also on behalf of the other at his instance and in the presence the signature would be a good signature, though no mark is affixed by the other witness and the mortgage, therefore, is valid as duly attested. The Division Bench referred to the judgment of the Bombay High Court in D. Fernandez v. R. Alves (ILR (1879) 3 Bom 382) and the Calcutta High Court in Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar (ILR (1885) 11 Cal 429) and observed, "obviously other considerations arise with regard to the Transfer of Property Act". Though the language in Section 3 of the Transfer of Property Act in the definition of "attested" is the same as the language in Section 63(c) of the Indian Succession Act, it might be possible to make a distinction between testamentary and non-testamentary instruments. It might also be possible to contend that Section 63 of the Indian Succession Act deals with both "execution" and "attestation" of a Will and it should be interpreted in a particular manner whereas Section 3 of the Transfer of Property Act defines only the expression "attested" and it does not deal with execution as such. In our opinion, it is not necessary for us to consider whether a distinction can be maintained between cases arising under the Transfer of Property Act and cases arising under the Indian Succession Act. The ruling in the aforesaid case has no application in the present matter inasmuch as the Division Bench has expressly opined that other considerations arise with regard to Transfer of Property Act.

15. The other decision of the Patna High Court is in Bishwanath Raut v. Babu Ram Ratan Singh (AIR 1957 Pat 485). That case related to a deed of gift. The Division Bench held that a document can be attested by an illiterate person by a signature affixed by the scribe. Though the Division Bench referred to the earlier cases, it failed to take note of the principle thereof. The Bench referred to the Full Bench decision of the Allahabad High Court in Maikoo Lal v. Santoo (AIR 1936 All 576 : 1936 All LJ 782) and erroneously purported to follow it. The Division Bench overlooked that the Allahabad Full Bench dealt with the case of a Will under the provisions of the Indian Succession Act and had only ruled that the affixing of a mark by the "attestor" would be sufficient for the purpose of valid attestation. The Division Bench did not also correctly understand the decisions in D. Fernandez v. R. Alves (ILR (1879) 3 Bom 382) and Nitye Gopal Sircar v. Nagendra Nath Mitter Mozumdar (ILR (1885) 11 Cal 429).

16. A Single Judge of the Patna High Court had occasion to consider a case under the Indian Succession Act in Kawaldeo Singh v. Hari Prasad Singh (1962 BLJR 939). The learned Judge held that it is not necessary that an attesting witness must either sign himself or put a thumb mark on the document and if a third person has signed on his behalf, the attestation is valid. The learned Judge has not referred to any prior ruling or discussed the question in any manner. He has not even adverted to the language of Section 63(c) of the Indian Succession Act. He has proceeded as if the proposition is axiomatic. We have no hesitation to hold that the said judgment is erroneous and not good law.

17. Though there is no direct decision of this Court on the above question, the ruling of the Constitution Bench in CIT v. Keshab Chandra Mandal (AIR 1950 SC 265 : 18 ITR 569) will govern the situation. The question before the Court was whether the declaration in the form of return submitted under the Bengal Agricultural Income Tax Act, 1944 which was not signed by the

assessee himself who was an illiterate but signed by his son should be treated as properly signed and a valid return. The High Court answered the question in the affirmative. That was challenged by the Commissioner of Agricultural Income Tax in this Court. It was found that there was no physical contact between the assessee and the signature appearing on the return. This Court answered the question in the negative and reversed the judgment of the High Court by holding that if on a construction of a statute signature by an agent is not found permissible then the writing of the name of the principal by the agent however clearly he may have been authorised by the principal cannot possibly be regarded as the signature of the principal for the purposes of that statute. The Court rejected an argument of hardship or inconvenience and observed that hardship or inconvenience cannot alter the meaning of the language employed by the legislature when such meaning is clear on the face of the statute or the rules. It is advantageous to quote the following passage which is instructive :

> "It is quite true that when signature by an agent is permissible, the writing of the name of the principal by the agent is regarded as the signature of the principal himself. But this result only follows when it is permissible for the agent to sign the name of the principal. If on a construction of a statute signature by an agent is not found permissible then the writing of the name of the principal by the agent however clearly he may have been authorised by the principal cannot possibly be regarded as the signature of the principal for the purposes of that statute. If a statute requires personal signature of a person, which includes a mark, the signature or the mark must be that of the man himself. There must be physical contact between that person and the signature or the mark put on the document."

18. With great respect, we adopt the aforesaid reasoning and hold that for the purpose of valid attestation under Section 63 of the Indian Succession Act it is absolutely necessary that the attesting witness should either sign or affix his thumb impression or mark himself as the section does not permit an attesting witness to delegate that function to another. It follows that in the present case DW 2 is not an attesting witness and in the absence of the evidence of any other attesting witness the decision of the High Court that the Will propounded by the appellant has not been proved is unassailable. Hence the appeals fail and are dismissed. As the parties are closely related, we direct them to bear their respective costs.