



**IN THE HIGH COURT OF ANDHRA PRADESH  
AT AMARAVATI  
(Special Original Jurisdiction)**

**[3397]**

**TUESDAY, THE SECOND DAY OF DECEMBER  
TWO THOUSAND AND TWENTY FIVE**

**PRESENT**

**THE HONOURABLE SRI JUSTICE VENUTHURUMALLI GOPALA  
KRISHNA RAO**

**SECOND APPEAL NO: 145/2014**

**Between:**

Immadi Venkata Muttiah @ Baburao,

**...APPELLANT**

**AND**

Sunkara Babaji Chowdary and Others

**...RESPONDENT(S)**

**Counsel for the Appellant:**

1. VENKAT CHALLA

**Counsel for the Respondent(S):**

1. C VENKAIAH

2. KAMBHAMPATI RAMESH BABU

3. K SITA RAM

**The Court made the following:**

**HONOURABLE SRI JUSTICE V. GOPALA KRISHNA RAO**

**SECOND APPEAL No.145 of 2014**

**JUDGMENT:**

This second appeal under Section 100 of the Code of Civil Procedure is filed aggrieved against the judgment and decree, dated 29.07.2013, in A.S.No.121 of 2012, on the file of the VIII Additional District Judge, Eluru, West Godavari District, reversing the judgment and decree, dated 07.08.2012, in O.S.No.205 of 2001, on the file of the Additional Senior Civil Judge, Eluru, West Godavari District.

2. The plaintiff initiated action in O.S.No.205 of 2001, on the file of the Additional Senior Civil Judge, Eluru, West Godavari District, with a prayer for declaration that the plaintiff is the absolute owner of the plaint schedule properties and for recovery of possession of item Nos.2 and 3 after ejecting the 1<sup>st</sup> defendant therefrom and also for future profits that are to be determined on a separate application and further seeking permanent injunction restraining the defendants from interfering with possession and enjoyment of item No.1 of the plaint schedule property by the plaintiff and for costs and such other reliefs.

3. The learned Additional Senior Civil Judge, Eluru, West Godavari District, decreed the suit with costs. Felt aggrieved of the same, the unsuccessful 2<sup>nd</sup> defendant in the above said suit filed the aforesaid appeal before the first appellate Court. The learned VIII Additional District Judge,

Eluru, West Godavari District, allowed the appeal by setting aside the judgment and decree passed by the learned trial Judge. Aggrieved thereby, the plaintiff approached this Court by way of second appeal.

4. The appellant herein is the plaintiff, the respondent No.1 herein is the 2<sup>nd</sup> defendant in O.S.No.205 of 2001 and the other respondents are the defendant Nos.1, 3 and 4. The sole appellant died and his legal representatives are brought on record as appellant Nos.2 to 5.

5. For the sake of convenience, both parties in the second appeal will be referred to as they are arrayed in the suit O.S.No.205 of 2001.

6. The case of the plaintiff, in brief, as set out in the plaint averments in O.S.No.205 of 2001, is as follows:

The plaintiff and the defendant No.1 are the sons of one late Immadi Narayana Murthy and Bhavanamma and in their family partition, the suit schedule properties were allotted to their mother Bhavanamma. While so, Bhavanamma has been looked after by the plaintiff till her death and out of love and affection, the said Bhavanamma executed a Will deed dated 10.03.2000 under Ex.A-1, bequeathing the suit schedule properties in favour of plaintiff. The plaintiff further pleaded that, when the defendant was trying to interfere with his peaceful possession and enjoyment of some of the suit schedule properties, the plaintiff got issued a notice under Ex.A-2 and found that the defendant No.1 executed a sale deed dated 01.10.2001 under Ex.B-1 in favour of the defendant No.2 in respect of Ac.1.05 cents of land out of item

No.1 of the plaint schedule property, claiming that their mother executed a Will deed dated 07.02.1995 under Ex.B-2 and under the guise of Ex.B-1, the 2<sup>nd</sup> defendant is trying to interfere with the plaintiff's peaceful possession and enjoyment of item No.1 of the plaint schedule property. As such, the plaintiff is constrained to file the present suit seeking declaration of his title in respect of item Nos.1 to 3 and for recovery of possession of item Nos.2 and 3 and also for permanent injunction in respect of item No.1 of the suit schedule property.

7. The 1<sup>st</sup> defendant was set *ex-parte* in the trial Court on 22.08.2002 and thereafter, he did not participate in the trial at any stage. The 2<sup>nd</sup> defendant, who is the alienee in respect of Ac.1.05 cents of land in Rs.No.910, which is a part of item No.1 of the plaint schedule property, resisted the claim of the plaintiff. The 2<sup>nd</sup> defendant pleaded that he purchased Ac.1.05 cents of land in R.S.No.910 from the 1<sup>st</sup> defendant under the registered sale deed dated 01.10.2001 under Ex.B-1. Before purchasing the said property, the 2<sup>nd</sup> defendant made all reasonable and possible enquiries with various persons including the plaintiff and having got confirmed that Immadi Bhavanamma executed a Will for an extent of Ac.1.05 cents of land in R.S.No.910, in favour of the 1<sup>st</sup> defendant, the 2<sup>nd</sup> defendant purchased the said property along with some other properties of the 1<sup>st</sup> defendant in the same survey number.

The 2<sup>nd</sup> defendant further pleaded that he also got issued a reply to the notice issued by the plaintiff and the Will deed dated 07.02.1995 is the last testament executed by Smt. Bhavanamma, the 1<sup>st</sup> defendant acquired Ac.1.05 cents of land under the said Will deed, which was alienated in favour of the 2<sup>nd</sup>

defendant under Ex.B-1 sale deed. He further pleaded that the plaintiff has neither title nor possession to Ac.1.05 cents of land out of item No.1 of the plaint schedule property and requested to dismiss the suit.

8. On the basis of above pleadings, the learned trial Judge framed the following issues for trial:

- 1) Whether the plaintiff is entitled for declaration of his title to suit schedule properties as prayed for?
- 2) Whether the plaintiff is entitled for recovery of possession of item Nos.2 and 3 of suit schedule property after ejecting the 1<sup>st</sup> defendant therefrom?
- 3) Whether the plaintiff is entitled for future profits over item Nos.2 and 3 of suit properties?
- 4) Whether the plaintiff is entitled for permanent injunction against the defendants in respect of item No.1 of suit property? and
- 5) To what relief ?

9. During the course of trial in the trial Court, on behalf of the plaintiff, P.Ws.1 to 6 were examined and Exs.A-1 to A-22 were marked. On behalf of the defendant No.2, D.Ws.1 to 4 were examined and Exs.B-1 to B-5 were marked. Ex.X-1 was also marked.

10. The learned trial Judge after conclusion of trial, on hearing the arguments of both sides and on consideration of oral and documentary evidence on record, decreed the suit. Felt aggrieved thereby, the unsuccessful

2<sup>nd</sup> defendant filed the appeal suit in A.S.No.121 of 2012, wherein the following points came up for consideration:

- 1) Whether there are suspicious circumstances surrounding the execution of Ex.A.1 will deed? If so, whether the plaintiff successfully dispelled those suspicious circumstances and established the execution of Ex.A.1 Will deed by Smt. Bhavanamma?
- 2) Whether the decree and judgment of trial Court dated 07.08.2012 in respect of Ac.1.05 cents of land out of item No.1 of the plaint schedule property is liable to be set aside? and
- 3) To what relief?

11. The learned first appellate Judge after hearing the arguments, answered the points, as above, against the plaintiff and allowed the appeal by setting aside the judgment and decree passed by the learned trial Judge. Felt aggrieved of the same, the unsuccessful plaintiff in O.S.No.205 of 2001 filed the present second appeal before this Court.

12. On hearing both sides' counsel at the time of admission of the second appeal on 15-03-2022, a learned Judge of this Court admitted the second appeal and framed the following substantial questions of law:

- 1) Whether the first appellate Court is right in holding that the appellant failed to adduce further evidence to prove the genuineness of the Ex.A.1 Will when mandatory requirement under Section 68 of the Evidence Act, is complied with?

- 2) Whether the first appellate Court is right in holding that the appellant is not entitled for the relief against respondent No.1/defendant No.2 contrary to the findings of the Hon'ble High Court in C.M.A.No.1 of 2011, which is held that so far as the decree against the defendant No.1 is remained intact through whom respondent No.1/defendant No.2, claiming suit title?
- 3) Whether the first appellate Court is right in ignoring the fact that respondent No.1/defendant No.2 claiming his title through respondent/defendant No.1 against whom the decree became final vide the judgment in C.M.A.No.1 of 2011? and
- 4) Whether the appellate Court is right in reversing the well considered judgment of the trial Court on the ground that the 2<sup>nd</sup> attestor was not examined when the appellant proved the Ex.A.1 by examining, which requires as per Section 68 of the Evidence Act?

13. Heard Sri Venkat Challa, learned Counsel for the appellants/plaintiffs and Sri C.Venkaiah, learned counsel for the respondents /2<sup>nd</sup> defendant.

14. The law is well settled that under Section 100 of CPC, High Court cannot interfere with findings of fact arrived at by first appellate Court, which is final Court of facts, except in such cases where such findings were erroneous being contrary to the mandatory provisions of law, or its settled position on the basis of the pronouncement made by the Apex Court or based upon inadmissible evidence or without evidence.

In the case of ***Bhagwan Sharma v. Bani Ghosh***<sup>1</sup>, the Apex Court held as follows:

“The High Court was certainly entitled to go into the question as to whether the findings of fact recorded by the First Appellate Court which was the final Court of fact were vitiated in the eye of law on account of non-consideration of admissible evidence of vital nature.”

In the case of ***Kondira Dagadu Kadam v. Savitribai Sopan Gujar***<sup>2</sup>, the Apex Court held as follows:

*“The High Court cannot substitute its opinion for the opinion of the First Appellate Court unless it is found that the conclusions drawn by the lower appellate Court were erroneous being contrary to the mandatory provisions of law applicable or its settled position on the basis of pronouncements made by the Apex Court, or was based upon inadmissible evidence or arrived at without evidence.”*

15. Learned counsel for the appellants would contend that Ex.A-1 unregistered Will is validly proved by the appellant, but the First Appellate Court came to a wrong conclusion that Ex.A-1 Will is not proved by the appellant. He further contended that Ex.A-1 Will is proved by the appellant/plaintiff by examining one of the attestors of Ex.A-1 Will as P.W.2 and the subject matter of the appeal herein is Ac.1.05 cents in Item No.1 of the plaint schedule property, which is the subject matter under Ex.A-1 Will. To prove Ex.A-1 Will, the plaintiff examined one of the attestors of Ex.A-1 Will as P.W.2. The First Appellate Court came to only one conclusion that since there are several suspicious circumstances surrounding the execution of Ex.A-1, the 2nd attestor needs to be examined.

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<sup>1</sup> AIR 1993 SC 398

<sup>2</sup> AIR 1999 SC 471

16. It was contended by the learned counsel for the respondent/2<sup>nd</sup> defendant that no reasons were mentioned in Ex.A-1 Will deed for not giving any part of the property to the defendant No.1. Admittedly, the defendant No.1, who is none other than the own brother of the propounder of Ex.A-1 Will, is not a beneficiary under Ex.A-1 and it is not the specific case of the defendant No.1 that since no property was given under Ex.A-1 to him, Ex.A-1 has to be suspected. Though the defendant No.1 engaged an Advocate, he did not file a written statement, he remained *set exparte* and did not participate in the trial proceedings, and the Ex.A-1 Will is not challenged by the defendant No.1. It is the specific case of the plaintiff that since his brother/defendant No.1 discarded their mother Bhavanamma, therefore his mother is staying with him. The recitals in the Ex.A-1 Will deed clearly go to show that the testatrix was having two sons i.e. the plaintiff, the defendant No.1 and five (05) daughters and she had performed the marriages of her five (05) daughters. After the death of her husband, all the family properties were partitioned between the plaintiff, defendant No.1 and the testatrix in the presence of the elders, from out of which she got one share and the plaintiff and the defendant No.1 got one share each in all the joint family properties. The recitals in Ex.A-1 further go to show that from out of her share of the property, she sold some of it to third parties and for remaining property, Ex.A-1 Will was executed. It was further recited in Ex.A-1 that the plaintiff is attending all her needs including her health and that she wants to give her entire share of her property to the plaintiff under Ex.A-1 Will. But the First

Appellate Court failed to appreciate the contents of Ex.A-1 Will in a proper manner and came to a wrong conclusion that no share in the property was given by the mother to the defendant No.1. It is undisputed by both sides that after the death of the father of the plaintiff and the defendant No.1, there was a family partition among the plaintiff, the defendant No.1 and their mother. In their family partition, the plaintiff got one share, defendant No.1 got one share and the remaining one share was got by their mother. As per the recitals in Ex.A-1, the testatrix sold some part of the property to third parties by way of registered sale deed and for remaining property, which is the subject matter under Ex.A-1, is in her possession and she executed a Will under Ex.A-1 in respect of the divided property in favour of the plaintiff, who is attending to her medical needs and welfare.

17. Another finding given by the First Appellate Court to disbelieve the Ex.A-1 Will is that Ex.A-1 Will is not referred in Ex.A-4 representation said to have been given by the plaintiff and Ex.B-2 Will is only referred. As seen from Ex.A-4 representation, addressed to the Mandal Revenue Officer, Kamavarapukota, by the plaintiff and in Ex.A-4 representation, it was clearly mentioned by the plaintiff that in the Will executed in the year 1995, their mother has given her property to the plaintiff and the defendant No.1 and later the defendant No.1 is not attending the welfare of their mother and that his mother stayed with him for a period of five (05) years prior to her death i.e. on 21.05.2000, since he is looking after the needs, food and welfare of his mother, from out of love and affection, his mother executed Ex.A-1 Will in

respect of the total share of the property which was got by her in a family partition. Therefore, it is evident that the testatrix had executed another Will in the year 1995 and later another Will, i.e. Ex.A-1, was executed on 10.03.2000, which is her last testament.

18. The First Appellate Court held in its judgment that *"there is no specific reference of Ex.B-2 in Ex.A-1 although there is a reference to the Will which was executed by Bhavanamma in the year 1995 in Ex.A-4 bequeathing Ac.1.05 cents to the defendant No.1 and Ac.2.06 cents to the plaintiff from out of the plaint schedule."* Ex.A-4 is a representation addressed by the plaintiff to the Mandal Revenue Officer, whereas Ex.A-1 Will is executed by the testatrix Bhavanamma. No doubt, there is no reference about Ex.B-2 Will in Ex.A-1 Will, but it was specifically mentioned in Ex.A-1 Will that earlier Wills shall stand cancelled.

19. Another suspicious circumstance surrounded by Ex.A-1 as pointed out by the First Appellate Court is that no reasons were given in Ex.A-1 for obtaining the thumb impression as well as the signature of Bhavanamma in Ex.A-1. As seen from the Ex.A-1 alleged will, besides the signature, the thumb impression of the testatrix has been taken, which fortify the bona fides of the Ex.A-1 and not otherwise, the testatrix in this case had signed as well as affixed her thumb impression in the Ex.A-1 Will. It is in the evidence of P.W.2 that the testatrix, being a very old woman when she signed, they felt that it was shaky and therefore asked her to affix her thumb mark, and that in addition to the signature, the testatrix also affixed her thumb mark on Ex.A-1

Will. A woman who is aged about 80 years naturally tends to be shaky in her physical activities. Moreover, as seen from the evidence of P.W.6, who was the Secretary for Co-operative Society, Kamavarapukota, the said Bhavanamma had a Savings Bank Account in the society and she opened the same in the year 1988 and closed it in the year 1996, and a ledger was produced by P.W.6 during the course of the trial before the trial Court, which contains the signature and thumb impression of Bhavanamma. For the aforesaid reasons, the above alleged suspicious circumstances surrounded by Ex.A-1 as pointed out by the First Appellate Court are not even suspicious circumstances. Furthermore, the appellant examined one of the testators in Ex.A-1 Will as P.W.2. Admittedly, P.W.2 is not related to either of the parties to the suit or the testatrix and he is an independent witness.

20. P.W.2, who is one of the attestors in Ex.A-1 disputed Will, deposed in her evidence that on 10.3.2000, Bhavanamma called him and he went to the house at about 11 A.M., when he reached there he found one Sri. Nanduri Apparao and a document writer by name Gottumukkala Narasimharao present, Bhavanamma told that she is going to execute Will in respect of her properties that he has to attest the same. He further deposed that Bhavanamma gave instructions to the Document Writer and showed some documents, the document writer drafted the Will on white papers as per the instructions of Smt. Bhavanamma, after drafting the Will, the document writer read over the contents, then Bhavanamma signed and also put her thumb impression on the Will. He further deposed that himself and Nanduri Apparao

seen Bhavanamma putting her signature on the Will, then himself and Nanduri Apparao put their signatures as attestors and the document writer signed as scribe, two months later, she died. Except some weakness due to old age, she has not other ailments.”

The evidence of P.W.2 is unchallenged by the defendant No.1, who is the blood relative of the plaintiff. The defendant No.1 remained set ex parte and the defendant No.2 is claiming right in respect of Ac.1.05 cents in Item No.1 of the plaint schedule property and the subject matter of the property in Ex.A-1, which includes the total extent of property which was bequeathed to the plaintiff under Ex.A-1 by the testatrix. Though P.W.2 was cross-examined by the learned counsel for the defendant No.2, the evidence of P.W.2 is not at all disturbed on the material aspects of the case with regard to the execution of Ex.A-1 Will in favour of the plaintiff. In fact the First Appellate Court has not given any specific finding that P.W.2 is an interested witness to the plaintiff. Admittedly, P.W.2 is not related to either of the parties to the suit or to the testatrix. The law is well settled that *“Will could be proved by examining at least one attesting witness and the said attesting witness shall also speak about himself witnessing not only the execution of Will by the testator, but also about himself witnessing the other attestor attesting the Will.”* P.W.2 narrated in his evidence about witnessing the execution of Ex.A-1 Will by the testatrix as well as witnessing the other attestor in attesting the Ex.A-1 alleged Will.

21. Learned counsel for the respondent placed reliance in **S.R.Srinivasa and Others Vs. S.Padmavathamma**<sup>3</sup>. The ratio laid down in the aforesaid case law relates to the Section 15(2) of the Hindu Succession Act, but does not relate to the execution of a Will.

22. Learned counsel for the respondent/defendant No.2 placed reliance in **Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and others**<sup>4</sup>, wherein the Apex Court held as follows:

*“In a case in which a will is prepared under circumstances which raise the suspicion of the court that it does not express the mind of the testator it is for those who propound the will to remove the suspicion. What are suspicious circumstances must be judged in the facts and circumstances of each particular case if, however, the propounder takes a prominent part in the execution of the will which confers substantial benefits on him that itself is a suspicious circumstance attending the execution of the will and in appreciating the evidence in such a case, the court should proceed in a vigilant and cautious manner.”*

23. Learned counsel for the respondent/defendant No.2 placed reliance in **H.Venkatachala Iyengar Vs. B.N. Thimmajamma and others**<sup>5</sup>.

Learned counsel for the respondent/defendant No.2 placed reliance in **Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and others**<sup>6</sup>.

24. Learned counsel for the respondent/defendant No.2 placed reliance in **Gurdial Kaur and others Vs. Kartar Kaur and others**<sup>7</sup>, wherein the Apex Court held as follows:

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<sup>3</sup> 2010 (4) ALT 12 (SC)

<sup>4</sup> AIR 1968 Supreme Court 1332

<sup>5</sup> 1959 Supp (1) SCR 426

<sup>6</sup> (1977) 1 Supreme Court Cases 369

*“4. The law is well settled that the conscience of the Court must be satisfied that the will in question was not only executed and attested in the manner required under the Indian Succession Act, 1925 but it should also be found that the said will was the product of the free volition of the executant who had voluntarily executed the same after knowing and understanding the contents of the will. Therefore, whenever there is any suspicious circumstance, the obligation is cast on the propounder of the will to dispel suspicious circumstance.”*

25. Learned counsel for the respondent/defendant No.2 placed reliance in ***B.Venkatamuni Vs. C.J.Ayodhya Ram Singh and others***<sup>8</sup> and also placed another reliance in ***Kavita Kanwar Vs. Mrs.Pamela Mehta and Ors.***<sup>9</sup>, wherein the Apex Court held as follows:

*“The Will in question cannot be viewed with suspicion only because the appellant had played an active role in execution thereof though she is the major beneficiary; or only because the respondents were not included in the process of execution of the Will; or only because of unequal distribution of assets; or only because there is want of clarity about the construction to be carried out by the appellant; or only because one of the attesting witnesses being acquaintance of the appellant; or only because there is no evidence as to who drafted the printed part of the Will and the note for writing the opening and concluding passages by the testatrix in her own hand; or only because there is some discrepancy in the oral evidence led by the appellant; or only because of any other factor taken into account by the Courts or relied upon by the respondents. The relevant consideration would be about the quality and nature of each of these factors and then, the cumulative effect and impact of all of them upon making of the Will with free agency of the testatrix. After considering the facts and circumstances related with the Will, it would be too far stretched and unnatural to assume that by the reason of special affection towards plaintiff, the mother drifted far away from the other children, including the widowed daughter who was residing on the upper floor of the same house and who was taking her care.”*

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<sup>7</sup> (1988) 4 Supreme Court Cases 384

<sup>8</sup> (2006) 13 Supreme Court Cases 449

<sup>9</sup> AIR 2020 Supreme Court 2614

26. Learned counsel for the respondent/defendant No.2 placed reliance in ***Sushila Bala Saha Vs. Sarasawati Monda***<sup>10</sup> and also placed another reliance in ***Misri Lal (dead) by LRs. and another Vs. Smt Daulati Devi and another***.<sup>11</sup>

In the case at hand, the evidence of P.W.2, one of the attestors to Ex.A-1, inspires confidence about the execution of Ex.A-1 Will. As stated supra, P.W.2 is an independent witness and his evidence also speaks about himself witnessing not only the execution of the Will by the testator, but also about himself witnessing the other attestor attesting the Will. P.W.2 narrated in his evidence about witnessing the execution of Will by the testatrix as well as witnessing the other attestor in attesting the Will. Admittedly, P.W.2 is not related to either of the parties to the suit or the testatrix of Ex.A-1. The defendant No.2 is a third party to the family of the plaintiff and the defendant No.1. The defendant No.1 is the own brother of the plaintiff and he is not at all disputing the execution of Ex.A-1. No reasons were assigned by the First Appellate Court in its judgment for not taking into consideration the evidence of P.W.2, even though his evidence is not at all disturbed on the material aspects of the case. Though the First Appellate Court found some suspicious circumstances surrounding the execution of Ex.A-1, those are not at all suspicious circumstances as stated supra.

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<sup>10</sup> AIR 1991 Calcutta 166

<sup>11</sup> AIR 1997 Supreme Court 3819

27. Learned counsel for the appellant relied on a judgment in **Corra Vedachalam Chetty, 17,Old No.45, Strotten Muthiah Mudali Street. Madaras-600079 and another Vs. G.Janakiraman<sup>12</sup>**, wherein the High Court of Madras held as follows:

*“26. This need for caution, cannot be exploited by unscrupulous caveators who choose to cull out imaginary suspicions with a view to prevent the legatees under the Will from claiming the benefit there under and to render the last Will of the deceased wholly ineffective. In this context, the conduct of the persons who raise the alleged ground for suspicion is also to be looked at, to know as to how credible are the grounds for suspicions sought to be raised by such persons. In this case, the suspicion is sought to be raised by a person who is keenly interested in making the Will ineffective and whose conduct is far from one which would inspire confidence in truthfulness of his statements.”*

28. Learned counsel for the appellant relied on a judgment in **Civil Appeal Nos.5941-5942 of 2005**, in between **Pentakota Satyanarayana and Ors. Vs. Pentakota Seetharatnam and Ors.<sup>13</sup>**, wherein the Apex Court held as follows:

*“.....Section 68 of the Indian Evidence Act, 1872 deals with proof of execution of document required by law to be attested. This section lays down that if the deed sought to be proved is a document required by law to be attested and if there be an attesting witness alive and subject to process of the Court and capable of giving evidence, he must be called to prove execution. Execution consists in signing a document written out, read over and understood and to go through the formalities necessary for the validity of legal act. Section 63 of the Indian Succession Act gives meaning of attestation as under:-*

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<sup>12</sup> 2001(3) CTC 283

<sup>13</sup> 2001(3) CTC 283

**"Section 63: Execution of unprivileged will.-** 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:

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(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 will.

(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 the testator a personal acknowledgment 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".

It was contended by the learned counsel for the respondent/defendant No.2 that though another attester is very much available, the plaintiff failed to examine him as a witness. As stated supra, it is not at all the case of the defendant No.2 that P.W.2 is an interested witness to the plaintiff. P.W.2 is not related to either of the parties to suit and he is an independent witness.

29. The legal position in this regard is no res integra, and the same has been well settled by the Hon'ble Apex Court in a catena of judgments.

In a case of **Janaki Narayan Bhoir Vs. Narayan Namdeo Kadam**<sup>14</sup>,  
the Apex Court held as follows:

*“10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one*

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<sup>14</sup> (2003) 2 Supreme Court Cases 91

*attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”*

30. Learned counsel for the respondent relied on a judgment in ***Ipparapali Bhoodevamma Vs. Ipparapalli Subbarayudu***<sup>15</sup>. In the aforesaid case law, a witness/P.W.2 was an interested witness, but in the case at hand P.W.2 herein is a disinterested witness.

31. Learned counsel for the respondent placed reliance on a judgment in ***Balathandayutham and another Vs. Ezhilarasan***<sup>16</sup>. In the case at hand, there are no suspicious circumstances surrounded the execution of Ex.A-1 Will.

32. Learned counsel for the respondent relied on a judgment in ***Addepalli Venkata Laxmi Vs. Ayinampudi Narasimha Rao and others***<sup>17</sup>, wherein it was held as follows:

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<sup>15</sup> 1965 LawSuit (AP) 224

<sup>16</sup> 2010 (4) ALT 8 (SC)

<sup>17</sup> AIR 1994 Andhra Pradesh 72

*“.....The law is that all the attestors have to be examined when the will is executed in suspicious circumstances. Admittedly, along with P.W. 3 another attestor was also alive but he was not examined for the reasons best known to the plaintiff. When one/ of the attestors who is closely related to the husband of the plaintiff and is found to be interested witness and has given self-interested testimony, the common thing that is expected is that at least one independent person who is not related to the person in whose favour the properties are willed should be examined to dispel the suspicious circumstances throwing a doubt on the genuineness of the will.”*

33. Learned counsel for the respondent further relied on a judgment in ***Babu Singh and Ors. Vs. Ram Sahai @ Ram Singh***<sup>18</sup>. The facts in the aforesaid law are different to the instant case. In the case at hand, P.W.2 is not related to either of the parties or testatrix of Ex.A-1 Will and he is a disinterested witness.

34. The appellant/plaintiff herein is claiming rights in Item Nos.1 to 3 of the plaint schedule property by virtue of Ex.A-1 Will said to have been executed by his mother. The First Appellate Court remanded the matter to the trial Court to examine Ex.A-1 Will by giving an opportunity to the plaintiff to produce P.W.3 for cross-examination *vide* its judgment in A.S.No.40 of 2006 dated 25.10.2010. Against the said remand order passed by the First Appellate Court in A.S.No.40 of 2006, the plaintiff herein filed C.M.A.No.01 of 2001 before this Court, wherein this Court observed that the decree of title and possession granted by the trial Court against the defendant No.1 in respect of Item Nos.1 to 3 of the plaint schedule property, except Ac.1.05 cents in Item

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<sup>18</sup> AIR 2008 Supreme Court 2485

No.1 of the schedule property, need not be disturbed because no appeal was filed by the defendant No.1 against the said finding.

35. It is needless to state that the defendant No.2 herein is claiming rights from the defendant No.1 in respect of Ac.1.05 cents in Item No.1 of the suit schedule property, and Item Nos.1 to 3 are the subject property in Ex.A-1 Will. The finding of the trial Court is that the plaintiff is the owner of the property under Ex.A-1 in respect of Item Nos.2 and 3 of the plaint schedule property, and the said finding has reached its finality. Item No.1 of the suit schedule property is also a part of the property which is covered under Ex.A-1 Will. Once Ex.A-1 Will deed is accepted for determining the rights of the plaintiff in respect of Item Nos.1 to 3 of the suit schedule property, an extent of Ac.1.05 cents, which is a part of the property in Item No.1 of schedule property under Ex.A-1 Will, cannot be discarded in respect of Ac.1.05 cents of land, which is a part of the property covered under Ex.A-1 Will. Moreover, the defendant No.1 is not a beneficiary under Ex.A-1 Will deed, and the defendant No.1 did not produce any defense to show that Ex.A-1 is not genuine. The defendant No.1 remained set ex parte before the trial Court, and a decree in respect of Item Nos.2 and 3 of the suit schedule property, and also Item No.1 of the suit schedule property except Ac.1.05 cents in Item No.1 of the suit schedule property, was passed against the defendant No.1 to declare the title of the plaintiff. For reasons best known to the defendant No.1, he did not choose to participate in the trial proceedings. Moreover, the defendant No.2 is claiming rights through the defendant No.1 in respect of Ac.1.05 cents of land in Item

No.1 of the suit schedule property, after the death of his mother, which happened in the month of May 2001, the plaintiff herein is the absolute owner of the schedule property. Since the defendant No.1 does not have any rights in Item No.1 of the suit schedule property, he cannot transfer a portion of Item No.1 of the suit schedule property, i.e., land to an extent of Ac.1.05 cents, to the defendant No.2.

36. In the case at hand, the evidence of P.W.2, i.e., the evidence of one of the attesting witnesses fulfills and proves all the formalities required under Section 63 of the Indian Succession Act. The learned counsel for the respondent/defendant No.2 contended that Ex.B-2 Will is a registered Will, which was executed in the year 1995. The law is well settled that “even though Ex.B-2 alleged Will is a registered Will, no importance will be given to the registered Will and it cannot be treated as genuine unless it was proved in terms of Section 68 of the Indian Evidence Act read with Section 63 of the Indian Succession Act.” Ex.B-2 Will relates to the year 1995, whereas Ex.A-1 Will is the later Will, which relates to the year 2001. Therefore, Ex.A-1 is the last testament said to have been executed by the testatrix/mother of the plaintiff and the defendant No.1. Though Ex.B-2 is proved, the enforceability of Ex.B-2 shall depend upon the finding of Ex.A-1. Ex.A-1 is a Will dated 10.03.2000, and Ex.B-2 is a Will dated 27.02.1995. Since Ex.A-1 Will dated 10.03.2000, is proved which is a later Will, the later Will prevails over the earlier Will/Ex.B-2.

37. Learned counsel for the appellant would contend that Ex.B-2 Will is not at all proved by the defendants in accordance with law. As seen from the material available on record, two attestors and the scribe of Ex.B-2 Will have been examined as D.Ws.2 to 4. The evidence of D.Ws.2 to 4 establishes the execution of Ex.B-2 Will. Moreover, the plaintiff himself referred that the Will relates to the year 1995 in Ex.A-4 representation, addressed to the Mandal Revenue Officer concerned. One of the propounders of the part of the property under Ex.B-2 Will/defendant No.1 failed to contest in the suit proceedings. The defendant No.2, who purchased Ac.1.05 cents of property from the defendant No.1, has taken pains to examine both the attestors and the scribe of Ex.B-2 Will as D.Ws.2 to 4, and their evidence establishes about the execution of Ex.B-2 Will. As stated supra, Ex.A-1 Will is a last Will dated 10.03.2000, duly proved by the plaintiff, and Ex.A-1 Will is a later Will than that of Ex.B-2 Will. Therefore, Ex.A-1 Will prevails over Ex.B-2 Will, and Ex.B-2 would cease to be operative and cannot be enforced, since Ex.A-1 Will is the last testament of the testatrix and is duly proved in accordance with law.

38. The respondent/defendant No.2 is claiming title in respect of Ac.1.05 cents in Item No.1 of the plaint schedule property, and he is claiming rights through his vendor/defendant No.1. Ex.A-1 Will is a later Will, and it is duly proved by the propounder of the Will/plaintiff in accordance with law. The testatrix died in the month of May 2001; therefore, by virtue of Ex.A-1 Will, the plaintiff, who is the sole beneficiary under Ex.A-1 Will, will get title in the entire property covered under Ex.A-1 Will. The sale deed of the defendant No.2 in

respect of purchase of Ac.1.05 cents from the defendant No.1 dated 01.10.2001 is ineffective, since the plaintiff got a valid title in Ac.1.05 cents in Item No.1 by virtue of Ex.A-1 Will, consequent to the death of his mother in the month of May 2001, the plaintiff got absolute right and title in the said Ac.1.05 cents of land, which was sold by the defendant No.1 to the defendant No.2 without any title in the said property.

39. As stated supra, Ex.A-1 Will is the last testament of the testatrix, and the same is duly proved in accordance with law. The testatrix under Ex.A-1 died on 21.05.2000; therefore, after the death of the testatrix on 21.05.2000, Ex.A-1 Will came into force, and the plaintiff is having absolute rights and title in the total Ex.A-1 property, which includes Ac.1.05 cents of the agricultural land that is the subject matter of the present second appeal. Therefore, since the defendant No.1 does not have any right and valid title in the said Ac.1.05 cents of land, the same cannot be transferred to the defendant No.2.

40. The respondent/defendant No.2 relied on Ex.B-5 dated 05.03.2002, which is the certificate said to have been issued by the Village Secretary, Gram Panchayat. Ex.B-5 shows that by virtue of Ex.B-1 sale deed, the defendant No.2 is in possession of Ac.4.16 cents in Sy.No.910, and there is no specific recital in Ex.B-5 that the disputed Ac.1.05 cents land is in the possession of the defendant No.2. Moreover, Ex.B-5 is dated 05.03.2002, and the sale deed is dated 01.10.2001. To prove possession in the said Ac.1.05 cents of land in Item No.1 of the agricultural land, no land revenue receipts are filed by the defendant No.2.

41. As stated supra, the plaintiff is having a valid right and title in respect of Ac.1.05 cents of land. Learned counsel for the respondent/defendant No.2 placed reliance on ***Yadla Venkata Subbamma and others Vs. Yadla Punnamma and others***<sup>19</sup>. The ratio laid down in the aforesaid case law relates to the suit for partition.

Learned counsel for the respondent/defendant No.2 placed another reliance on a judgment in ***Balakrishna Menon and another Vs. Padmavathy Amma and another***<sup>20</sup>. The ratio laid down in the aforesaid case law relates to the validity of appointment of 2<sup>nd</sup> Commissioner.

42. Learned counsel for the respondent/defendant No.2 placed reliance on a judgment in ***Jagadish Prasad Patel (Dead) through Legal Representatives and another Vs. Shivnath and others***<sup>21</sup>, wherein the Apex Court held as follows:

*“44. In the suit for declaration for title and possession, the plaintiffs-respondents could succeed only on the strength of their own title and not on the weakness of the case of the defendants- appellants. The burden is on the plaintiffs-respondents to establish their title to the suit properties to show that they are entitled for a decree for declaration. The plaintiffs-respondents have neither produced the title document i.e. patta-lease which the plaintiffs-respondents are relying upon nor proved their right by adducing any other evidence. As noted above, the revenue entries relied on by them are also held to be not genuine. In any event, revenue entries for few Khataunis are not proof of title; but are mere statements for revenue purpose. They cannot confer any right or title on the party relying on them for proving their title.”*

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<sup>19</sup> 2012 (3) ALD 88

<sup>20</sup> AIR 1993 Kerala 218

<sup>21</sup> (2019) 6 Supreme Court Cases 82

43. For the aforesaid reasons, it is quite clear that the plaintiff, who is the appellant herein, had proved the Ex.A-1 Will in accordance with law. Though Ex.B-2 Will is proved, since Ex.A-1 Will is a later Will, and the enforcement of Ex.B-2 Will depends upon the validity of Ex.A-1 Will. Since, Ex.A-1 Will is proved, the later Will/Ex.A-1 Will will prevail over Ex.B-2, and Ex.B-2 would cease to be operative and cannot be enforced since the later Will/Ex.A-1 Will is duly proved by the propounder of the Will/plaintiff. Since the defendant No.1 does not have any valid right and title in Ac.1.05 cents of land, which is the subject matter of the second appeal property, he cannot transfer any rights and title in the said property to the defendant No.2. Admittedly, to prove the possession of the defendant No.1 in the said Ac.1.05 cents of land, no scrap of paper is filed by the defendant No.1.

44. For the aforesaid reasons, this Court holds that the First Appellate Court, without re-appreciating the evidence on record in a proper manner, came to a wrong conclusion and allowed the first appeal filed by the defendant No.1. Therefore, the decree and judgment passed by the First Appellate Court vide A.S.No.121 of 2012 dated 29.07.2013, is liable to be set aside.

45. In the result, the second appeal is allowed and the judgment and decree dated 29.07.2013, in A.S.No.121 of 2012, passed by the learned VIII Additional District Judge, Eluru, West Godavari District, is hereby set aside and the judgment and decree, dated 07.08.2012, in O.S.No.205 of 2001, on the file of the Additional Senior Civil Judge, Eluru, West Godavari District, is hereby confirmed.

Pending applications, if any, shall stand closed. Considering the facts and circumstances of the case, each party do bear their own costs in the second appeal.

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**V. GOPALA KRISHNA RAO, J.**

Date: 02.12.2025

SRT