

**(1977) 12 OHC CK 0006**  
**In the Orissa High Court**  
**Case No : Second Appeal No. 260 of 1974**

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|-----------------------------------|----|------------|
| T. Venkat Sitaram Rao and Another | Vs | APPELLANT  |
| T. Kamakshiamma and Others        |    | RESPONDENT |

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**Date of Decision :** 20-12-1977

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 100  
Evidence Act, 1872 — Section 68  
Succession Act, 1925 — Section 63

**Citation :** AIR 1978 Ori 145 : (1978) 45 CLT 323

**Hon'ble Judges :** S. Acharya, J

**Bench :** Single Bench

**Advocate :** P.V. Ramdas and N.V. Ramdas, for the Appellant; A. Das, S. Kr. Mohanty, S.N. Senapati and D.S. Misra, for the Respondent

**Final Decision :** Dismissed

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## Judgement

S. Acharya, J.—Defendants 2 and 3 have preferred this appeal against the decision of the court below confirming that of the trial court.

2. The plaintiff's suit is for partition and allotment of her 1/4th share of the suit property and for other consequential reliefs.

3. One Telikicharia Narasimha Murty had 2 sons and 2 daughters. Defendants 1 and 2 are his two sons and the plaintiff and defendant No. 3 are his two daughters. The said Narasimha Murty died on 21-12-61 leaving behind him the suit properties. The above-mentioned facts are not disputed.

4. The plaintiff's case, shorn of unnecessary details, is that the said Narasimha Murty did not have sufficient income to acquire the suit properties and that those properties were acquired by Mm by selling his ancestral properties in Srikakulam district of Andhra Pradesh. After the death of Narasimha Murty, defendants 1 and 2 possessed the suit properties without allowing the plaintiff any share in the same though she is entitled to a share in those properties. The plaintiff asked the

defendants to amicably partition the said properties, but as they turned a deaf ear to her request she instituted this suit.

5. Defendant No. 1 in his written statement supports the plaintiff's case of acquisition of the suit properties by Narasimha Murty out of the sale proceeds of his ancestral properties in the district of Srikakulam. He further states that all the suit properties were enjoyed as ancestral joint family properties of the parties; Narasimha Murty was not keeping fit, both physically and mentally, and as he was staying with defendant No. 2 he was under the influence and control of the 2nd defendant. It is further stated that defendant No. 3 is colluding with and is supporting the cause of defendant No. 2 as the latter is the son-in-law of the former; and that the averments made in the plaint are mostly true and the averments made in the written statements of defendants 2 and 3 are false. He claims 5/12th share in the suit properties.

6. Defendants 2 and 3 actually contested the suit. In the written statements filed by them it is alleged that the suit properties are the self-acquired properties of Narasimha Murty; he executed a will on 19-4-60 bequeathing his self-acquired properties in a particular manner and that being the last will of the testator the allotment of his said properties has to be done strictly in accordance with his last wish as specified in the said will, and the plaintiff cannot ask for a partition of the said properties.

7. Both the courts on independent assessment of the evidence on record have arrived at the findings that the plaint A schedule properties are the self-acquired properties of Narasimha Murty as he obtained the same by gift from his employer; the plaint B and C schedule properties were acquired by Narasimha Murty out of the sale proceeds of the ancestral lands of the family situated in the district of Srikakulam; and that the will Ext. L/2 filed by defendants 2 and 3 has not been proved in accordance with law and so it cannot be acted upon. The lower appellate court has further held that apart from the fact that attestation of the said will has not been proved in accordance with law, it is also established in this case that Narasimha Murty at the relevant time of the execution of the will was not in a fit state of mind to dispose of his properties. On the above findings the suit for partition has been decreed fixing the shares as mentioned in the operative portion of the trial court judgment.

8. It is contended by Mr. Ramdas, the learned counsel for the appellants, that the findings of the court below that the will has not been proved in accordance with law and that the testator at the relevant time was not in a fit condition of mind to dispose of his properties are illegal and incorrect,

9. The courts below have found that defendants 2 and 3, who filed the unregistered document Ext. L/2 and who want to assert that the said document is the last will of T. Narasimha Murty, have not been able to prove due attestation of that document and go the said document has not been proved in accordance with law and hence it cannot be acted upon. Ext. L/2 is an unregistered

document. The finding of the court below that the will has not been proved in accordance with law is based on the fact that the only attester D.W. 2, examined in this case, has not stated in so many words that he signed the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of that document, as required u/s 63(c) of the Indian Succession Act. True it is that this witness has not stated so, but from his later statement it is evident that T. Narasimha Murthy told him that the said document was a will and he asked him to sign that document and accordingly he signed that document. Mr. Ramdas, the learned counsel for the appellants, contends that the court should not insist on evidence regarding attestation to be given in the exact term and language in mathematical precision in which it is stated in Section 63(c) of the Indian Succession Act, but the court should construe the entire evidence on record in order to find out if attestation as required under the law was actually made. In the present case before me, excepting the evidence of D.W. 2 none else has stated anything about the attestation of the said document. On his evidence that the executant told the attester to sign the document after telling him that it was a will the attester signed the same in the presence of the executant, one may say that the attester signed the document in the presence of the executant after receiving a personal acknowledgment from the executant as regards the execution of that document. On such construction of the evidence of D.W. 2 it can be said that it has been proved in this case that the document was attested as required under the law by one witness.

10. A person propounding a will or otherwise making a claim under the will has to prove that the said will was executed in accordance with the statutory requirements.

Section 63(c) of the Indian Succession Act provides :--

"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."

Therefore, in order to prove that a will was properly executed and was intended to be given effect to as such, it has to be proved, apart from other things, that the said document was attested by two or more witnesses in the manner provided under the above-quoted sub-section,

The provision of Section 68 of the Evidence Act makes it obligatory on the person propounding the will or claiming under the will to call one of the attesting witnesses, if alive, and subject to the process of the court and capable of giving

evidence for the purpose of proving the execution of the will. That does not absolve that person to prove due execution of the will as required u/s 63(c) of the Indian Succession Act. Therefore, one has to prove that the document was attested according to law by two persons. Proof of attestation of the document by only one witness would not satisfy the statutory requirement of attestation of a will, and so long it is not proved that the document was attested by two attesting witnesses it cannot have the legal sanctity of a will. So, though u/s 68 of the Evidence Act only one attesting witness, if alive and subject to the process of the court and capable of giving evidence, has to be called to prove the execution of the document, it would be incumbent on the propounder or the person claiming under the will to prove that the said document was executed as required u/s 63(c) of the Indian Succession Act, and then only that document can be given effect to as a will. In this case, there is absolutely no proof of the fact that Ext. L/2 was attested in accordance with law by two witnesses. Nobody has proved that the document has been attested in accordance with law by two witnesses, In the absence of proof of attestation of the document by two attesting witnesses, the said document does not operate as a will. True it is that it is not necessary to specifically label the signatures of attesting witnesses under that description, nor a mere label to that effect under a signature in a document would suffice to prove that the document had been, attested by some such witness. The statutory requirement of attestation of a document by the two witnesses has to be proved in accordance with law. This aspect of the matter was not noticed by any of the courts below. In the absence of proof of attestation of Ext. L/2 by two witnesses, the said document cannot have the effect of or operate as a will.

My above view is directly supported by the decision reported in *Roda Framroze Mody Vs. Kanta Varjivandas Saraiya*, wherein it has been held as follows :

".....Reading Section 63, Succession Act, with Section 68. Evidence Act, it seems to me to be clear that what the person propounding the will has got to prove is that the will was duly and validly executed and that must be done by not simply proving that the signature on the will was that of the testator but that the attestations were also properly made as required by Clause (c) of Section 63, No doubt Section 68, Evidence Act, says that it is not necessary to examine both or all the attesting witnesses, but it does not follow therefrom that if one attesting witness only proves that the testator had acknowledged his signature to him, it is not necessary that the acknowledgment by the testator before the other attesting witness need be proved."

In the decision reported in AIR 1949 149 (Nagpur) it has been held that :

".....It is, therefore, clear from this definition that it is not enough if an attesting witness merely states that the executant has signed in his presence and he witnessed the execution of the document. In addition to this, there must be some more evidence to show that the other attesting witness was also present at the time when the executant signed the document in token of execution or at

least he attested the document after he had received from the executant a personal acknowledgment of his signature or mark etc. In other words, if the document is required by law to be attested by at least two witnesses, no valid attestation can be said to have been proved unless there is evidence that two attesting witnesses, one of whom has been examined in the case, have signed the document after witnessing the signature of the executant or receiving from him a personal acknowledgment of his signature."

In *Karri Nookaraju Vs. Putra Venkatarao and Others*, it has been held that (at p. 15),

"12. But, proof of execution by the testator alone is not sufficient. A will is a document which is required to be attested by at least two witnesses. That is clear from Clause (c) of Section 63 of the Indian Succession Act. Section 68 of the Evidence Act forbids the using of a document which is required by law to be attested as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive. What is required to be proved by calling at least one attesting witness is the execution of the document. By execution of a will is meant the whole process prescribed u/s 63 of the Indian Succession Act. Indeed its marginal note reads execution of unprivileged wills. Such execution includes not only the signing or affixing the mark of the testator to the will or by somebody else in his presence and by his direction but also attestation by two witnesses, Reading Section 63 it is quite plain that attestation as postulated by Clause (c) is a part of execution of a will. Such attestation has to be by two or more witnesses. Each of them must have either 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. It is also necessary that each of the witnesses shall sign the will in the presence of the testator. However, it is not incumbent that more than one witness be present at the same time. Nor, is there any particular form of: attestation prescribed."

The view taken in the above-mentioned decisions has also been accepted with approval in the decision reported in *A. Rangaswami Pillai Vs. A. Subramania Pillai and Others*, .

In the decision reported in AIR 1966 All 570 (*Krishna Kumar v. Kayastha Pathshala*) it has been held that it has to be proved that each of the attesting witnesses saw the testator sign the will or received from the testator a personal acknowledgment of his signature and that each of the witnesses signed the will in the presence of the testator.

In the case reported in *Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others*, it was held that as D and two others had signed below the thumb impression of the testatrix and D was examined and his evidence showed that he and the two others saw the testatrix putting her thumb

mark in the will by way of execution and that they all signed the will in token of attestation in the presence of the testatrix after she had affixed her thumb mark in the will, the execution was held proved in terms of Section 63 of the Indian Succession Act read with Section 68 of the Evidence Act. The aforesaid observation in the said decision supports my view that in order to prove that a will was executed by a person it has to be proved that the said document was executed and attested in the manner specified in Clause (c) of that section, and so long that is not done that document cannot have the legal status of a will.

Mr. Ramdas could not cite a single decision in support of his submission that a will is proved and it will operate as such if the executant's signature is proved and one attesting witness only is examined to say that he attested the said document, The decisions cited by Mr. Ramdas, such as H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, do not deal with the above-mentioned point. In most of the above decisions the execution of the will by the testator and attestation of the same in accordance with law by two attestors had been proved. The points for determination in each of the above-mentioned cases were different and the question involved in this case was not posed directly or indirectly for decision.

11. As in this case it is not proved that Ext. L/2 was attested by two witnesses in accordance with law, that document cannot be used as a will and cannot be given effect to as a will for any purpose, That being so, the disposition of property made therein has no legal effect.

12. Apart from the fact that Ext. L/2 has not been proved to be a will, it has also been found by the court below that T. Narasimha Murty at the relevant time of the execution of the alleged will was not in a fit state of mind to dispose of his properties. This latter finding is a pure finding of fact, and it could not be assailed on any such ground on which such a pure finding of fact can be assailed in a second appeal.

13. The concurrent findings of both the courts below that the plaint B and C schedule properties are the joint family properties of the parties are based on proper consideration of the relevant evidence on record, and I do not see any reason to interfere with the same.

14. On the above findings, the disposition of properties made in Ext. L/2 cannot be given effect to, and the suit properties have now to be partitioned in accordance with law amongst the sons and daughters of the deceased Narasimha Murty. The courts below have found that the plaint A schedule property is the self-acquired property of Narasimha Murty. That being so, each of the two sons and two daughters of Narasimha Murty will get 1/4th share in the said property. The plaint B schedule properties have been found to be the joint family properties of the parties. Accordingly, defendants 1 and 2, i.e. the two sons of late Narasimha Murty, will each have 5/12th share in the said properties, and the plaintiff and defendant No. 3, the two daughters of the said Narasimha Murty, will

have each 1/12th share in the said properties. Necessary adjustments may be made if in the meantime any of the shareholders has sold any portion of his share in the above-mentioned properties in favour of any other party or parties to this suit. The allotment of shares made by the trial court and confirmed by the first appellate court, as it appears, is also to the same effect.

15. I do not find any merit in this appeal and it is accordingly dismissed with costs.