Janki Narayan Bhoir vs Narayan Namdeo Kadam on 17 December, 2002

Equivalent citations: AIR 2003 SUPREME COURT 761, 2003 (2) SCC 91, 2003 AIR SCW 177, 2002 (7) SLT 361, 2002 (9) SCALE 628, 2003 (3) SRJ 77, (2003) 3 ALLINDCAS 139 (SC), 2003 (1) BLJR 673, 2003 (3) ALLINDCAS 139, 2003 BLJR 1 673, (2003) 2 ALLMR 689 (SC), (2003) 1 MARRILJ 543, (2003) 1 CGLJ 190, (2003) 94 REVDEC 294, 2003 (2) ALL CJ 952, 2003 (1) UJ (SC) 708, 2003 (1) MARR LJ 543, (2003) 1 ORISSA LR 372, (2003) 1 RECCIVR 409, (2003) 2 GUJ LR 1493, (2003) 1 LANDLR 417, (2003) 2 ANDHLD 45, (2003) 1 SUPREME 297, (2003) 2 ICC 348, (2002) 9 SCALE 628, (2003) 1 WLC(SC)CVL 421, (2003) 2 GCD 1539 (SC), (2003) 1 INDLD 860, (2003) 50 ALL LR 455, (2003) 2 CAL HN 104, (2003) 2 CIVLJ 252, (2003) 1 CURCC 104, (2003) 4 BOM CR 358

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Bench: Doraiswamy Raju, Shivaraj V. Patil

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           CASE NO.:
Appeal (civil)  11194 of 1995

PETITIONER:
Janki Narayan Bhoir

RESPONDENT:
Narayan Namdeo Kadam

DATE OF JUDGMENT: 17/12/2002

BENCH:
Doraiswamy Raju & Shivaraj V. Patil.

JUDGMENT:
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J U D G M E N T SHIVARAJ V. PATIL J.

This appeal by special leave is by the defendant questioning the validity and correctness of the impugned judgment and decree passed by the High Court in the second appeal. The respondent herein filed the suit for possession of the suit properties comprised of agricultural land and a house as owner under the will said to have been executed by Honaji Dama Kadam. The trial court, accepting the will on the basis of evidence placed on record, decreed the suit. The District Judge in the Regular First Appeal set aside the decree passed by the trial court. The High Court in the second appeal by the impugned judgment and decree set aside the judgment of the first appellate court and

restored the judgment and decree passed by the trial court.

The contentions urged by the learned counsel for the appellant were that the will in question was not proved as required by law, having regard to Section 63 of Indian Succession Act read with Section 68 of the Indian Evidence Act,1872 the attestation of will by two witnesses was not established; the High Court committed an error in treating the scribe as an attesting witness when he did not sign as animo attestendi. The evidence of the one attesting witness examined does not establish the attestation of the will by another attesting witness; the other attesting witness though available, was not examined; the High Court committed a serious error in setting aside the judgment of the first appellate court which was based on proper appreciation of evidence in the absence of any substantial question of law that arose for consideration.

On the other hand, the learned counsel for respondent urged that although Section 63 of the Succession Act requires attestation of a will at least by two witnesses but the will could be proved by examining one attesting witness as per Section 68 of the Evidence Act and by leading other evidence as per Section 71 of the Evidence Act. He fairly conceded that the scribe was not and could not be treated as an attesting witness in this case.

We have carefully considered the respective contentions urged by the learned counsel for the parties.

The appellant is the only daughter of Honaji Dama Kadam (deceased). The respondent is the son of cousin brother of said Honaji Dama Kadam. The respondent is claiming the suit properties on the basis of the Will dated 23.10.1975, said to have been executed by the deceased Honaji Dama Kadam. The High Court, by the impugned judgment, set aside the judgment and decree of the first appellant court holding that the Will was duly established and restored the decree passed by the trial court. The District Judge on appreciating the evidence placed on record had held that the respondent failed to prove the execution of the Will; the respondent examined only one attesting witness and his evidence was not sufficient to establish that the Will was duly executed; in that view reversing the decree of the trial court dismissed the suit filed by the respondent. One Duttatray Raikar was the scribe of the Will. Ramkrishna Wagle and Prabhakar Sinkar were the attesting witnesses. During the trial the respondent, Raikar, the scribe, and Prabhakar Sinkar, one of the attesting witnesses, were examined. Prabhakar Sinkar, the attesting witness, in his deposition stated that he did not know whether other attesting witness Ramkrishna Wagle was present in the house of the respondent at the time of execution of the Will. He also stated that he did not remember as to whether himself and Raikar were present when he put his signature. He did not see witness Wagle at that time; he did not identify the person who had put thumb impression on the Will. The scribe Raikar in his evidence stated that he wrote the Will and he also stated that he signed on the Will Deed as a scribe. He further stated that attesting witness, namely, Wagle and Prabhakar Sinkar are alive. The High Court took the view that though Wagle, the other attesting witness, was not examined but his signature on the Will was not disputed; both the respondent and Raikar deposed that Wagle and Sinkar had signed the Will as attesting witnesses; in these circumstances the evidence of Raikar should have been accepted. The High Court was of the opinion that it was not necessary to examine both the attesting witnesses and in case one attesting witness examined was unable to remember whether the

other attesting witness was present and had signed, then it was open to the court to rely upon the surrounding circumstances as well as the testimony of other witnesses. The High Court also took the view that though Raikar had written down the Will he had also signed it and he could have been treated as an attesting witness as he had also signed the Will. Thus the High Court was of the opinion that the Will was proved and the District Judge was wrong in reversing the judgment and decree of the trial court. At the hearing the learned counsel for the respondent fairly submitted that Raikar was only the scribe and he was not the attesting witness. Even looking to the evidence of Raikar himself it is clear that he gave evidence as the scribe. There is nothing on record to indicate that he had any intention to attest the Will. The attesting witness Sinkar has not stated that the other attesting witness Wagle attested the Will in his presence. On the other hand, he has stated that he did not see Wagle present at the time of execution of the Will. Wagle, the other attesting witness, being alive ought to have been examined in order to prove the Will. Nothing is brought on record to show that any attempt was made to examine Wagle or there was any impediment in examining him. It is true that although will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Sections 68, Indian Evidence Act.

We think it appropriate to look at the relevant provisions, namely, Section 63 of the Indian Succession Act, 1925 and Sections 68 and 71 of the Indian Evidence Act, 1872 which read:

Section 63 of the Succession Act "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:-

(a) .....

(b) .....

(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 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."

Section 68 of the Evidence Act "68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving it's execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided..."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

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 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.

Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68, Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling 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 the 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 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 Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of 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 bye to the mandate of law relating to proof of execution

of a will. Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the Will inasmuch as he did not prove the attestation of the Will by the other attesting witness Wagle who though available was not examined. The scribe examined in the case was not an attesting witness, which is clear from the evidence on record and as rightly conceded so by learned counsel for the respondent before us. Hence, it is unnecessary to go into the question whether the scribe in this case could or could not be an attesting witness. The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of Section 68 of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of the respondent and the scribe could be considered under Section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and other attesting witness though available has not been examined. When the document is not proved as mandatorily required under Section 68 of the Evidence Act, the provision of Section 71 of the Evidence Act, which is permissive, and enabling in certain circumstances as discussed above does not help the respondent. In Vishnu Ramkrishna & Ors. v. Nathu Vithal & Ors. [(AIR) 1949 Bom. 266], Chagla, C.J., speaking for the Division Bench in similar circumstances has stated that although Section 63 of the Succession Act requires that a will has to be attested by two witnesses, Section 68 of the Evidence Act permits the execution of the will to be proved by only one attesting witness being called. Where the attesting witness, who is called to prove the execution, is not in a position to prove the attestation of the will by the second witness, the evidence of the witness called falls short to the mandatory requirements of Section 68. Section 71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document. This Section has no application when one attesting witness has failed to prove the execution of the will and other attesting witnesses were available who could prove the execution if they were called.

The view taken in Mt. Manki Kaur v. Hansraj Singh & Ors. [(AIR) 1938 Patna 301], on which heavy reliance was placed by the learned counsel for the respondent, in our view is not a correct view as to the scope and effect of Section 71 of the Evidence Act. That case related to an action taken on mortgage bond and not on a Will. There were four attesting witnesses. One of them was dead, two others, who were called, denied execution. But the absence of fourth from Court was not explained. On the facts of that case, the High Court took the view that the execution of the mortgage bond could be proved by other evidence having recourse to Section 71 of the Evidence Act. In our opinion, the position of law explained in relation to Section 71 of the Evidence Act in the judgment of Bombay High Court aforementioned is a correct view which we approve. In the case on hand it was not established that the two witnesses attested the Will. The High Court committed a serious error in reversing the judgment and decree of the first appellate court on a finding of fact, which was based on proper and objective appreciation of evidence. The High Court was also wrong in treating the scribe of the Will, Raikar, as an attesting witness without any basis. Further, the High Court while reversing the judgment and decree of the first appellate court did not indicate as to any substantial question of law that arose for consideration between the parties to deprive the suit properties to the only daughter of deceased Honaji Dama Kadam.

Under these circumstances we have no hesitation in holding that the High Court committed a manifest error in reversing the judgment and decree of the first appellate court. In this view the impugned judgment and decree cannot be sustained. Hence, they are set aside. The judgment and decree of the first appellate court are restored. In the result, the suit filed by the respondent-plaintiff shall stand dismissed. There shall be no order as to costs.