# N. Kamalam (Dead) And Anr vs Ayyasamy & Anr on 3 August, 2001

## Equivalent citations: AIR 2001 SUPREME COURT 2802, 2001 AIR SCW 2907, (2002) 1 MAD LW 460, (2001) 4 PAT LJR 147, 2001 (7) SCC 503, (2001) WLC(SC)CVL 621, (2001) 44 ALL LR 737, (2001) 3 MAD LJ 150, (2001) 5 ANDHLD 69, (2001) 5 SUPREME 689, (2001) 5 SCALE 65, 2002 ALL CJ 1 266, (2001) 6 ANDH LT 44, (2001) 2 HINDULR 345, (2001) 3 LANDLR 388, (2002) 1 MAHLR 276, (2001) 3 SCJ 75, (2001) 4 RECCIVR 193, (2001) 2 UC 613, (2001) 6 JT 219 (SC), (2001) 2 DMC 177, (2001) 2 MARRILJ 404, (2001) 4 SCALE 440, (2001) 5 SUPREME 723, (2001) 5 SUPREME 723.1, 2003 (10) SCC 609

## Bench: A.P. Misra, Umesh C. Banerjee

CASE NO.:
Appeal (civil) 3164-3166 of 1997

PETITIONER:
N. KAMALAM (DEAD) AND ANR.

Vs.

RESPONDENT:
AYYASAMY & ANR.

DATE OF JUDGMENT: 03/08/2001

BENCH:
A.P. Misra & Umesh C. Banerjee

JUDGMENT:

BANERJEE, J.

The latin expressions onus probandi and animo attestandi are the two basic features in the matter of civil courts exercise of testamentary jurisdiction: Whereas onus probandi lies in every case upon the party propounding a will - the expression animo attestandi means and implies animus to attest: to put it differently and in common parlance it means intent to attest. As regards the latter maxim, the attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of the will and the evidence is admissible to show whether such was

the intention or not (see in this context Theobald on Wills 12th Ed. Page 129). This Court in the case of Girja Datt v. Gangotri Datt (AIR 1955 SC 346) held that two persons who had identified testator at the time of registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put animo attestandi. In an earlier decision of the Calcutta High Court in Abinash Chandra Bidvanidhi Bhattacharya v. Dasarath Malo : I.L.R 56 Cal.598, it was held that a person who had put his name under the word scribe was not an attesting witness as he had put his signature only for the purpose of authenticating that he was a scribe. In the similar vein, the Privy Council in Shiam Sunder Singh v. Jagannath Singh (54 M.L.J. 43) held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting witnesses and were not disqualified from taking as legatees. In this context, reference may be made to the decision of this Court in M.L. Abdul Jabhar Sahib v. H.V. Venkata Sastri & Sons & Ors. (1969 (3) SCR 513) wherein this Court upon reference to Section 3 of the Transfer of Property Act has the following to state:

> It is to be noticed that the word attested, the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under s.3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgement of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature animo attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.
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> For proper appreciation of the observations of this Court in Venkata Sastris case (supra), Section 3 of the Transfer of Property Act, in particular, the meaning attributed to the word attested ought to be noticed and the same reads as below:
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> attested, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary;
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> Turning on to the former expression onus probandi, it is now a fairly well-settled principle that the same lies in every case upon the party propounding the will and may satisfy the courts conscious that the instrument as propounded is the last will of a free and capable testator, meaning thereby obviously, that the testator at the time

when he subscribed his signature on to the will had a sound and disposing state of mind and memory and ordinarily, however, the onus is discharged as regards the due execution of the will if the propounder leads evidence to show that the will bears the signature and mark of the testator and that the will is duly attested. This attestation however, shall have to be in accordance with Section 68 of the Evidence Act which requires that if a document is required by law to be attested, it shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution and the same is so however, in the event of there being an attesting witness alive and capable of giving the evidence. The law is also equally well- settled that in the event of there being circumstances surrounding the execution of the will, shrouded in suspicion, it is the duty paramount on the part of the propounder to remove that suspicion by leading satisfactory evidence.

In this context, reference may be made to a decision of this Court in Seth Beni Chand (since dead) by LRs v. Smt. Kamla Kunwar and others (1976 (4) SCC 554).

As regards the true legal position in the matter of proof of wills, we rather feel it tempted to incorporate the succinct expression of law, in extenso, even though rather longish in nature, by Gajendragadkar, J. in the case of H. Venkatachala Iyengar v. B.N. Thimmajamma & Others (1959 Supp. (1) SCR 426). The learned Judge had the following to state:

It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or other- wise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under s. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, ss. 59 and 63 of the Indian Succession Act are also relevant.

section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression a person of sound mind in the context. Section 63 requires that the testator shall sign or affix his mark to the ill or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing

as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by s.63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

Having discussed the basic law on the subject as above and before however adverting to the contextual facts we also deem it fit to record the statutory provision as engrafted in the Indian Succession Act as regards the execution of the wills. Section 63 of the Act of 1925 has three several requirements as regards the execution of will viz.

> (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.
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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 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.

Turning attention on to the contextual facts, it appears that the learned Subordinate Judge of Coimbatore dealt with two several suits being Nos.364 of 1981 and 603 of 1982: whereas suit No.364 was filed by Ganesan and Kamalam for partition of the suit property into two equal share by metes and bounds with demarcation of proper boundary and after so partitioned, one half share of the suit property should be allotted to the plaintiffs and the properties kept on the eastern side of the suit property should not be removed from that place or in the suit property the user right of the plaintiffs may not be obstructed by the respondents and for which the joint plaintiffs have prayed for an order of permanent stay against the respondents Iyyasamy and Shanmugam together with a further prayer of restraining them from any way interfering with the plaintiffs right of possession of their share. The plaint in Suit No.364 records that an half portion of the eastern side has been purchased by the plaintiff from two persons viz., Amasaveni and Attiammal being two sisters who inherited property by virtue of a will executed by their father one Masaney Gowder in their favour on 29.1.1969. The

plaint further proceeds that after the purchase of the property, the plaintiff obtained possession of the property. The respondents, defendants in the Suit, however, disputed the right of disposition on the basis of the will since the suit property was not and cannot by any stretch be termed to be the personal property of the aforesaid Masaney Gowder, as such execution of the will in favour of the plaintiffs in the suit would not arise. It has been contended that the suit property was purchased from the funds of the joint family in the name of Byrammal during 1922 and the suit property has always been treated as joint family property and as such Masaney Gowder has had no right to execute a will over the half portion of the suit property on the eastern side neither he was eligible to sell the same. The defendant contended that the suit properties have never been under the possession and enjoyment of Amsaveni and Attiammal. As a matter of fact, it has been the defendants specific case that on 6.3.1981, the plaintiffs have trespassed into the suit property and have stored their properties on the pathway in the absence of the respondents. There was, as a matter of fact, an assertion of a forceful trespass and occupation of the plaintiffs being wrongful. The sale deed though executed and registered in favour of the plaintiffs, are all false and fictitious documents, since the vendor has no right to sell the property to the plaintiffs. Diverse issues were raised in the suit No.364 of 1981 wherein presently we are concerned with one single issue viz., whether WILL dated 29.1.1969 is a true one and whether it is valid and has a binding effect?

Incidentally, subsequent to the initiation of the suit as above in 1981 Ayyasami also filed another original suit being O.S. No.603 of 1982 having a prayer inter alia for a relief of permanent injunction restraining the respondents Ganesan and Kamalam in any way interfering with the peaceful enjoyment of the suit property by the plaintiff, obviously, the same stands as a counter blast against the suit of Ganesan and Kamalam.

Significantly, however, the decree as passed by the Subordinate Judge answers the suit property as the self-earned property of Masaney Gowder and as such the contention of the defendants being the respondents herein, as regards the joint family property stands negatived. The other principal issue as regards the will has, however, been answered in the negative and the learned Subordinate Judge records a finding that it has not been proved as per law with sufficient evidence that Masaney Gowder has executed the will. As a matter of fact, the learned Subordinate Judge observed that the documents produced depict that the will cannot be termed to be a true one and the same will not bind the respondents.

The factual score further depicts that subsequently, an application was moved before the High Court to allow additional evidence to be produced by examining one Mr. Govindaraju being one of the attestor either in the High Court itself or to direct the Trial Court to take his evidence and send it back to the Court where the Appeal No.330 of 1983 preferred against the decree and judgment dated 10.3.1983 in O.S.No.364 of 1981 on the file of the Court of the 1st Additional Subordinate Judge, Coimbatore was pending. The learned Single Judge in the High Court in appeal in his order dated 29.3.1994 while however allowing the application for additional evidence recorded the contents of the affidavit filed in support of the application for additional evidence, which reads as below:

> Unfortunately when I approached the two attestors of the will to give evidence in respect of their attestation, both of them declined to figure as witnesses since the first

respondent is very close associate of theirs. Hence I could not prove the will as required by law.

It has also been recorded by the learned Single Judge that after filing the appeal, the Appellants contended that when they approached the attestors and represented that the appellant had lost the case only on account of their refusal to give evidence in respect of their attestation and requested them to reconsider and after four months, both of them agreed to figure as witnesses and speak about their attestation and as a token of their assurance, they have come to swear the affidavit to the effect that they had attested the will. The learned Single Judge further recorded, that one of the attesting witnesses by name Govindarajulu is also very old and not keeping good health and the other witness Subbiah Gounder died in January 1993 and the appellant could not examine them only on account of the reasons as noticed above.

On the factual score, however, the counter affidavit on record stands rather significant, which records as below:

when the petitioners were informed of the necessity to examine the attestors and several adjournments were obtained to take steps therefore and the petitioners preferred not to examine them. It is therefore clear that the present averment of the petitioners are all false and contrary to those in the said complaint filed within the ten months after the date of this affidavit. The petitioner failed to get the attestors and did not even summon them in the Lower Court. Even if they had failed to appear on summons, coersive steps could have been taken as mentioned in the judgment of the Lower Court. On the contrary, the petitioners were content with explaining the non-examination of the attestors. Therefore, there is no justification to grant the petitioner the relief prayed for by them now. The insufficiency of evidence is no ground for allowing additional evidence in appeal and that the appellant should not be permitted to remove lacunae or fill up gaps in evidence to better his case. The appeal was filed in 1983 and 10 years after that only C.M.P. No.14253/93 is filed. Apparently the petitioner have influenced the witness to speak for them. There is no justification to grant either of the reliefs after the long lapse of time.

The learned Single Judge, however, found some justification for allowing the application and thus permitted the party to let in oral evidence and in that perspective directed the learned Subordinate Judge, Coimbatore to examine the attestor and to submit his evidence before this Court before the end of April, 1994.

It appears that against the order of the learned Single Judge dated 29.3.1994, the appeal preferred, was allowed by the Division Bench and the order was set aside with further direction that C.M.P.No.14253/93 be heard alongwith the main appeal No.330 of 1983. The Bench of High Court directed that the appeal be posted for hearing on 20.7.94 at the top of the list. Subsequently, both the appeal and the application for additional evidence were taken up for hearing in July, 1994 wherein

though the judgment was reserved for the main appeal, but the application for additional evidence was dismissed and the judgment in the main appeal was pronounced on 5.9.94 wherein the Appellate Bench negatived the contention of the plaintiffs, as regards execution of the will and hence the Special Leave Petition and the subsequent grant of leave before this Court.

In the appeal on the basis of the evidence above therefor, two issues ought to be considered viz., the availability of additional evidence and on the second count as to the validity of the will. Admittedly, the two attesting witnesses to the will being Exhibit A-I have not been examined in proof of due execution thereof. The learned Trial Judge in a very detail and exhaustive judgment held that while the sale deed in their favour from Kamalam has been obtained but the plaintiffs have miserably failed to prove due execution of the will and consequently the sale deed, though may be a fact but cannot be termed to be otherwise as a legal and valid document since the vendor has no right, title and interest therein to execute the sale deed and as such the suit for partition thus failed.

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

27. [S.598].(1) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court, But if-

(a) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or (aa) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence such evidence was not within the knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

(2) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission.

Incidentally, the provisions of Order 41 Rule 27 has not been engrafted in the Code so as to patch up the weak points in the case and to fill up the omission in the Court of Appeal - It does not authorise any lacunae or gaps in evidence to be filled up. The authority and jurisdiction as conferred on to the Appellate Court to let in fresh evidence is restricted to the purpose of pronouncement of judgment in a particular way. This Court in The Municipal Corporation of Greater Bombay v. Lala Pancham

and others (AIR 1965 SC 1008) has been candid enough to record that the requirement of the high Court must be limited to those cases where it found it necessary to obtain such evidence for enabling it to pronounce judgment. In paragraph 9 of the judgment, this Court observed:

> .This provision does not entitle the High Court to let in fresh evidence at the appellate stage where even without such evidence it can pronounce judgment in a case. It does not entitle the appellate Court to let in fresh evidence only for the purpose of pronouncing judgment in a particular way. In other words, it is only for removing a lacuna in the evidence that the appellate court is empowered to admit additional evidence. The High Court does not say that there is any such lacuna in this case. On the other hand what it says is that certain documentary evidence on record supports in a large measure the plaintiffs contention about fraud and mala fides. We shall deal with these documents presently but before that we must point out that the power under cl. (b) of sub-r.(1) of r.27 cannot be exercised for adding to the evidence already on record except upon one of the ground specified in the provision.

> Further in Smt. Pramod Kumari Bhatia v. Om Parkash Bhatia and Others (AIR 1980 SC 446) this Court also in more or less in an identical situation laid down that since an application to the High Court has been made very many years after the filing of the suit and also quite some years after the appeal had been filed before the High Court, question of interfering with the discretion exercised by the High Court in refusing to receive an additional evidence at that stage would not arise. The time lag in the matter under consideration is also enormous and the additional evidence sought to be produced was as a matter of fact after a period of 10 years after the filing of the appeal. Presently, the suit was instituted in the year 1981 and the decree therein was passed in 1983. The first appeal was filed before the High Court in April, 1983 but the application for permission to adduce additional evidence came to be made only in August, 1993. Needless to record that the courts shall have to be cautious and must always act with great circumspection in dealing with the claims for letting in additional evidence particularly, in the form of oral evidence at the appellate stage and that too, after a long lapse of time: In our view, a plain reading of Order 41 Rule 27 would depict that the rejection of the claim for production of additional evidence after a period of 10 years from the date of filing of the appeal, as noticed above, cannot be termed to be erroneous or an illegal exercise of discretion. The three limbs of Rule 27 do not stand attracted. The learned Trial Judge while dealing with the matter has, as a matter of fact, very strongly commented upon the lapse and failure on the part of the plaintiffs even to summon the attestors to the will and in our view contextually, the justice of the situation does not warrant any interference. The attempt, the High Court ascribed it, to be a stage managed affair in order somehow to defeat the claim of the respondents - and having had the privilege of perusal of record we lend our concurrence thereto and the finding of the High Court can not be found fault with for rejecting the prayer of the appellant for additional evidence made in the belated application. In that view of the matter, the first issue is answered in the negative and thus against the plaintiffs being the appellant herein.

Turning attention on to the second count on which very great emphasis has been placed viz., the scribe also can discharge the function of attesting witness and since the scribe has subscribed his signatures on to the will, the lacuna if any, of not having the evidence of the attesting witnesses stands rectified and both learned trial Judge and High Court was in error in not placing reliance thereon. Section 63 of the Indian Succession Act as noticed hereinbefore read with Section 68 of the Evidence Act and Section 3 of the Transfer of Property Act makes a mandatory obligation to have the document attested and evidence of such attestation be made available before the Court at the time of the trial.

The factual score depicts that the will in question has been written by one Arunachalam who was examined as PW 5. The will stands attested by one D. Subbayya and the second attestor being P. Govindaraju, two signatures said to have been subscribed by the above named two persons and the same appear in the body of the will as attestors but no attempt has been made to examine either of the persons. Incidentally, no summon was even taken out for the purpose of such an examination of the attesting witnesses. Section 68 of the Evidence Act as noticed above, requiring a document to be attested must be proved by calling at least one of the attesting witnesses. While it is true that there are existing certain exceptions to wit: failure to find after honest and diligent search but there is no evidence whatsoever on record so as to justify such a conclusion presently. Significantly, the English law though seems to be at variance with the principles of law prevalent in this country, but a perusal of Section 9 of the Wills Act, as amended by the Administration of Justice Act, 1982 does not depict a contra rule or law. Section 9 of the Wills Act, 1837 (As amended) provides as below:

> No will shall be valid unless
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> (a) it is in writing, and signed by the testator, or by some other person in his presence and by his direction; and
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> (b) it appears that the testator intended by his signature to give effect to the will; and
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> (c) the signature is made or acknowledged by the testator in the presence of two or more witnesses present at the same time; and
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> (d) each witness either-
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> (i) attests and signs the will; or
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> (ii) acknowledges his signature, in the presence of the testator (but not necessarily in the presence of any other witness), but no form of attestation shall be necessary.

As regards the requirement of attestation, Halsburys Laws of England has the following to state:

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

complete signature must be made or acknowledged when both the attesting witnesses are actually present at the same time and each witness must attest and sign, or acknowledge, his signature after the testators signature has been so made or acknowledged. Although it is not essential for the attesting witnesses to sign in the presence of each other, it is usual for them to do so. Each witness should be able to say with truth that he knew that the testator had signed the document but it is not necessary that the witness should know that it is the testators will. There is, however, no sufficient acknowledgment unless the witnesses either saw or had the opportunity of seeing the signature, even though the testator expressly states that the paper to be attested is his will or that his signature is inside the will. (Halsburys Laws of England: 4th Edn. Vol.50 para: 312) It is in this context reference may be made to Williams on Wills wherein it has been stated viz.-a-viz. position of attestation in Will as below:

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

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

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

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

The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, required attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe. The full Bench judgment of the Madras High Court in H. Venkata Sastri and Sons and others v. Rahilna Bi and others (AIR 1962 Madras

111) wherein Ramachandra Iyer, J. speaking for the full bench in his inimitable style and upon reliance on Lord Cambells observation in Burdett v. Spilsbury has the following to state pertaining to the meaning to be attributed to the word attestation:

The definition of the term attested which is almost identical with that contained in S.63 (c) of the Indian Succession Act, has been the result of an amendment introduced by Act 27 of 1926. Prior to that amendment it was held by this court that the word attested was used only in the narrow sense of the attesting witness being present at the time of execution. In Shamu Pattar v. Abdul Kadir ILR 35 Mad 607 (PC), the Privy Council accepted the view of this court that attestation of a mortgage deed must be made by the witnesses signing his name after seeing the actual execution of the deed and that a mere acknowledgement of his signature by the executant to the attesting witness would not be sufficient. The amending Act 27 of 1926 modified the definition of the term in the Transfer of property Act so as to make a person who merely obtains an acknowledgment of execution and affixed his signature to the document as a witness, an attestor. It will be noticed that although S.3 purports to define the word attested it has not really done so. The effect of the definition is only to give an extended meaning of the term for the purpose of the Act; the word attest is used as a part of the definition itself. It is, therefore, necessary first to ascertain the meaning of the word attest independent of the statute and adopt it in the light of the extended or qualified meaning given therein. The word attest means, according to the Shorter Oxford Dictionary to bear witness to, to affirm the truth or genuineness of, testify, certify. In Burdet v. Spilsbury, (1842-43) 10 Cl and F 340, Lord Cambell observed at page 417, What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness.

The Lord Chancellor stated, the party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness.

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

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

(4) After the amendment of S.3 by Act 27 of 1926, a person can be said to have validly attested an instrument, if he has actually seen the executant sign, and in a case where he had not personally witnessed execution, if he has received from the executant a personal, acknowledgment of his signature, mark etc. Thus of the two significant requirements of the term attest, namely (1) that the attestor should witness the execution, which implies his presence, then, and (2) that he should certify or vouch for the execution by subscribing his name as a witness; which implies a consciousness and an intention to attest, the Amending Act modified only the first; the result is that a person can be an attesting witness, even if he had not witnessed the actual execution, by merely receiving personal acknowledgment from the executant of having executed the document and putting his signature. But the amendment did not affect in any way the necessity for the latter requirement, namely, certifying execution which implies that the attesting witness had the animus to attest.

It was next contended that in the event of there being an intent to attest, that itself should be sufficient compliance of the requirement of law. While the introduction of the concept of animus to attest cannot be doubted in any way whatsoever and also do feel it relevant in the matter of proof of a document requiring attestation by relevant statutes but the same is dependant on the fact situation. The learned Judge as noticed above has himself recorded that two significant requirements of the term attest viz., that the attestor should witness the execution thereby thus implying his presence on the occasion and secondly that he should certify for execution by subscribing his name as a witness which implies consciousness and intention to attest. Unfortunately, however, the factual score presently available does not but depict otherwise. The scribes presence cannot be doubted but the issue is not what it is being said to be in support of the appeal that the scribe having subscribed his signature, question of further attestation would not arise this issue unfortunately we are not in a position to lend concurrence with. The will as produced, records the following at page 4 thereof: (page 106 of the P.Book) Witnesses L.T.I. of Masanae Gowder

1. (sd/-(T.subbiya) S/oVeerai Gowder 25/298 Thomas Street Coimbatore.

2. (sd/-) B. Govindaraju s/o S. Balagurumurthy Chettiar 25/250 Rangai Gowder Street, Coimbatore.

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

It is on this count that the learned advocate in support of the appeal very strongly contended that there is existing a responsibility on to the law courts to deal with the matter having due regard to the concept of justice. Technicalities, it has been contended there may be many but would that sub-serve the ends of justice: one needs to ponder over the same. Justice oriented approach cannot be decried in the present day society as opposed to strict rigours of law: Law courts existence is dependant upon the present day social approach and thus cannot and ought not to be administered on share technicalities. The discussion of the law as above, definitely make us ponder over the legal aspects once more since the tenor of the observations contained therein obviously looked into being in favour of the technicality rather a justice oriented approach and in that perspective let us now have a review of the whole situation on the factual context. Masaney Gowder executed a will said to have been written by one Arunachalam and attested by Subayya and Govindaraju. The two attesting witnesses were not called to give evidence neither there was even any attempt to issue the process against them why it has not been done? The explanation has been that both the attesting witnesses were inimical towards appellant and as such there was a refusal on their part to come to court and prove the document how far however the same is an acceptable evidence! We will have to examine, but before so doing the factum of non- availability of the attesting witnesses cannot be discarded and if so, what would be its consequences. The application for additional evidence as dealt with hereinbefore, was made after a lapse of about 10 years after the appeal was filed and the learned judges thought it fit to reject such a prayer and we also do lend our concurrence thereof without taking any exception but then what is the effect? we have thus existing on record a document said to be a will of one Masaney Gowder whose signatures stand accepted and two attesting witnesses though named in the body of the document were not made available but the writer of the will or the scribe came forward and deposed as to the state of affairs on the date of signing of the will. It would be convenient thus to note the evidence of the scribe and see for ourselves as to whether even a justice oriented approach would be able to save the will in the absence of the attesting witnesses. Arunachalam stated in his examination in Chief as below:

> I have written Ex.A1. THE WILL. I have written the WILL EX.AI. for the sake of Masane Gowder. The said Masane gowder has been introduced to me by the Advocate G.M.Nathan who was formerly have. During the execution of the WILL, Advocate G.M.Nathan was residing at Thomas Street. At that time Masane Gowder was residing at the same place after one house of Advocates home. Before the

preparation of the WILL I had been to his house and discussed with him about the details and he has stated the details. At that time Masane Gowder Mental and Physical status were found good. After writing the Ex.A1. the Will, I have read out the same to him, and he had stated that all were correct. Then in my presence Masane gowder had affixed his thumb impression in each page. The affixing of Thumb impression by Masane Gowder in Ex.A.I WILL had been witnessed by attestor Subbaiah, Govindaraju and myself. The signing of signature for witness by us, was eyewitnessed by Masane Gowder. After the Ex.A1. will had been prepared and signed I had handed over the WILL to Masane Gowder.

In cross examination, the scribe Arunachalam stated as below:

I am engaged in profession of DOCUMENT WRITING from 1966 onwards. I do not know Masane Gowder before the introduction by Advocate G.M. Nathan. I have not seen or verified any TITLE DEEDS before writing the Ex.A1 WILL. The said Masane Gowder had stated all the details for Ex.A.I before two days and I have drafted the will and showed to him. Formerly I have worked as Advocates Clerk under G.M. Natha. In that regard he was familiar to me. I have handed over the draft to Masane Gowder. After two days sent for me to prepare the WILL, and accordingly I went wrote the Ex.AI the will. Masane Gowder told me to come back after two days and meanwhile he would go through and verify the same. I do not remember whether Amsaveni and Attiammal were present during the preparation of the draft. When I first visited Masane Gowders house no males were there. The Ex.AI WILL (Original will) has been written at Masane Gowders home itself. Who else were present at that time, I do not remember. (Emphasis supplied) I have not gone to G.M. Nathan to show the WILL Masane Gowder did not tell me that any correction has been made. I do not know while writing this WILL whether Masane Gowder has been under any kind of disease. While writing the WILL MASANE GOWDER was an aged person. If it is said that at that time he was running 93 years, I dont remember the same. Masane Gowder was not in a poor health condition. He talked with me in perfect manner. In Ex.a-I WILL I have subscribed as written by: Written by means prepared by: I used written and attested by. It means prepared witnessed by. The witnesses accompanying with the person used to sign as witnesses. If it is said that those who are eye witnessed the preparation of the document are witness, regarding that I do not know. (Emphasis supplied) On reading the same Masane Gowder said that it was correct. In Ex.AI it was not mentioned as aforesaid and written. I do not know the attestors who signed in Ex.a.I WILL before that. It is not correct if it is said that at the time, Masane Gowder was in a sickly state without knowing what he was doing.

It is not correct if it is said that I was not aware of the Thumb Impression affixed in Ex.A.I. will. I know that who are witnessing the preparation of the document are witnesses. I have not went for the registration of the EX.AI will. Usually for the purpose of REGISTRATION THE DOCUMENT Writers are engaged. It is not correct if it is said that I am giving false evidence on behalf of plaintiffs.

> On the basis of the aforesaid, strong reliance was placed on an earlier judgment of the Calcutta High Court in the case of Jagannath Khan and others v. Bajrang Das Agarwala and others (AIR 1921 Calcutta 208) wherein a Bench decision of the Calcutta High Court was pleased to record as below:
>
> According to the plaintiffs case, there were two attesting witnesses Hawai Bashunia and Kali Nath Sircar. As to Hawai Bashunia, there is no dispute. He was present when the document was executed and signed as an attesting witness. Kali Nath Sircar was the writer of the bond. He signed the bond in two places but not in the place set apart for the signature of witnesses. It is found by the lower appellate Court that he wrote his name as a writer and not as an attesting witness but that he was present at the time of the execution of the deed and actually saw it. Whether this amounted to attestation within the meaning of Section 59 of the Transfer of Property Act, is a point on which different High Courts have held differently.
>
> There are decisions of the Allahabad High Court and the Patna High Court in favour of the appellant in Badri Prasad v. Abdul Karim(1913 (35) All.254) and Ram Bahadur Singh v. Ajodhya Singh (1916 (20) C.W.N. 699). But this Court has held in the case of Raj Narain Ghose v. Abdur Rahim (1901 (5) C.W.N.454, that a person who is present and witnesses the execution of a deed and whose name appears on the document, though he is therein described merely as the writer of the deed, is a competent witness to prove the execution of the deed. This case was followed in Dinamoyee Debi v. Ban Behari Kupur (1902 (7) C.W.N.160).

It is contended on behalf of the appellant that these cases of the Calcutta High Court have in effect been over-ruled by the decision of the Privy Council in Shamu Patter v. Abdul Kadir Ravuthan (1912 (35) Mad. 607).

But in that case the present question did not arise. The Privy Council case turns on the question whether a person could attest a document on an acknowledgment by the executant that the signature on the document was his.

It is also contended that the Calcutta cases can be distinguished because they turn on the interpretation of section 68 of the Evidence Act and not on the interpretation of Section 59 of the Transfer of Property Act.

But the attesting witness referred to in Section 68 of the Evidence Act when the question is, as to proof of a mortgage, must have the same meaning as an attesting witness in Section 59 of the Transfer of Property Act. If he be not an attesting witness in accordance with the provisions of Section 59 of the Transfer of Property Act, he cannot be a competent witness under Section 68 of the Evidence Act. We can find nothing in the present case to make this case distinguishable from the Calcutta cases cited above and we follow that decision.

The result is that this appeal fails and is dismissed with costs.

In P.A. Alagappa Chettyar v. Ko Kala Pai and another (AIR 1940 Rangoon 134) Dunkley, J. however, upon reference to the Calcutta High Court judgment noticed hereinbefore observed that the correct view should be that when a man places his signature upon a document and at the same time describes himself as the writer thereof, the inference is that he signs as writer and nothing else but as a matter of fact, it can be shown that he signed not only as the writer but also as a witness of the fact that he saw the document executed or received a personal acknowledgment from the executant that they had executed it. In Rangoon case, Dunkley, J. thereafter observed:

> In this case Po Tauk has given evidence, and he has definitely stated that he wrote this document, that after it had been written it was read over to the executants, that as they were illiterate they held the pen while he put their cross marks on the document and wrote their names opposite their respective cross marks, and that after all this had been done he wrote his name and the description writer on the left-hand side of the document. In cross-examination he stated that he could not give this evidence in reference to this particular document but that he gave his evidence as part of his invariable practice, his profession in life being the profession of a petition writer. He says that invariably, when he drew up documents which were to be executed by illiterate persons, he adopted this very procedure. The learned District Judge has discarded his evidence upon the ground that his evidence was not really relevant because it was not evidence in regard to the execution of this particular document but evidence in regard to his practice in the writing and executing of documents. But, to my mind, this makes his evidence of more value in this particular case, because it is to the effect that his invariable practice was to sign documents not merely as the writer but by way of testimony of the fact that he had seen the documents executed; and so far as this particular case is concerned, the fact that he cannot, out of the very large number of documents written by him, remember this particular document becomes of no importance in view of the evidence of Mutu Raman who has deposed that he was present when this document was written and executed and when Po Tauk signed it, and he has been able to state that in this particular case Po Tauk wrote the document, read it over to the executants, then caused them to hold the pen while he made their cross marks, and after all this had been done put his signature in the left-hand margin as the writer. Therefore to my mind, it has been established as a fact in this case that Po Tauk signed his name upon this document not merely as the writer but also as testimony that he had actually seen the executants execute the document. That being so, he was an attesting witness within the meaning of the definition in S.3, T.P. Act.

> While it is true that Arunachalam, in the facts of the matter under consideration did write the will and has also signed it but it is of utmost requirement that the document ought to be signed by the witnesses in order to have the statutory requirement fulfilled. Arunachalam has signed the document as a scribe not as a witness, if there were no signatures available as witness, probably we would have to specifically deal with such a situation and consider that aspect of the matter but presently in the facts situation of the matter under consideration, we have the advantage of two attesting

witnesses, none of whom have been examined and the factum of their non availability also does not satisfactorily been proved. The evidence of one person namely Arunachalam, cannot displace the requirement of the statute when Arunachalam himself has specifically identified himself as Writer and not as a witness though in his evidence, he tried to improve the situation, but this improvement however, cannot said to be accepted: The Will thus fails to have its full impact and its effect stands out to be nonest.

On the wake of the aforesaid, we do not find any reason to interfere with the order of the High Court. The Appeal, therefore, fails and is dismissed. No order however as to costs. The judgment pronounced as above, also cover Civil Appeal Nos.3165 and 3166 of 1997. All I.A.s stand disposed of without any further order thereon.

.J. ( A.P. Misra) .J. (Umesh C. Banerjee) August 3, 2001