

**Jose Vs. Ouseph**

**Jose Vs. Ouseph**

**SooperKanoon Citation :** [sooperkanoon.com/729575](http://sooperkanoon.com/729575)

**Court :** Kerala

**Decided On :** Nov-08-2006

**Reported in :** AIR2007Ker77; 2006(4)KLT991

**Judge :** K.S. Radhakrishnan and; V. Ramkumar, JJ.

**Acts :** [Indian Succession Act, 1925](#) - Sections 57 and 67

**Appeal No. :** M.F.A. No. 34 of 1996

**Appellant :** Jose

**Respondent :** Ouseph

**Advocate for Def. :** T.M. Raman Kartha and; C.D. Jose, Adv.

**Advocate for Pet/Ap. :** P. Vijay Bhanu, Adv.

**Disposition :** Appeal dismissed

**Judgement :**

**K.S. Radhakrishnan, J.**

1. Can the presumption that a legacy to an attesting witness is void under Section 67 of the Indian Succession Act be rebutted by the legatee establishing that he had signed the will not as an attesting witness but acknowledging the obligations he has to discharge under the will, is the question that has come up for

consideration in this case.

2. O.P.No. 40 of 1991 was filed by one of the legatees seeking Letters of Administration of a Will executed by his mother late Kathreena. In response to the notice, first respondent alone entered appearance and contested and the O.P was then numbered as a suit O.S 5/1993 and was tried by the District Court, Thrissur. Kathreena is the mother of plaintiff and defendants 2 to 6. First defendant is the grandson of Kathreena and the son of Antony. Kathreena had executed a Will on 29.08.1957 and got it registered as document number 53 of 1957 of the Sub Registry Office, Thrissur on 30.8.1957. She had signed the document in the presence of attesting witnesses and the witnesses signed in her presence. Plaintiff and fifth defendant had also put their signatures in the Will along with the attesting witnesses. Enasu, the first attesting witness is no more. Kathreena died on 19.1.1989 and her husband predeceased her on 12.7.1957. Claiming that the above mentioned Will is the last testamentary disposition, plaintiff the son of the testatrix and a legatee claimed Letters of Administration. Claim was not opposed by any of the defendants except the first defendant, son of Anthony, grandson of Kathreena.

3. The first defendant in the written statement pointed out that Kathreena had executed the Will not out of her own free will and volition but as a result of undue influence and coercion. Further it was stated that the bequest is void so far as the plaintiff is concerned under Section 67 of the Indian Succession Act since he had also attested the bequest. It was contended that the testatrix was physically and mentally weak at the time of the alleged execution of the Will and had no sound disposing state of mind. First defendant therefore prayed for dismissal of the suit. During the pendency of the suit, third defendant died and the plaintiff filed an application, I.A. No. 2437 of 1993 seeking exemption from impleading the legal heirs of the deceased third defendant and that prayer was granted. Sixth defendant has filed a statement supporting the claim of the plaintiff. Other defendants remained exparte. Plaintiff got himself examined as P.W.1 and one of the attesting witnesses was examined as P.W.2. Ext. A2 is the Will executed by Kathreena. First defendant got himself examined as D.W.1.

4. The court below after considering the oral and documentary evidence came to the conclusion that Ext. A2 is the duly executed Will of late Kathreena and that she had sound disposing state of mind at the time of execution of the Will. It was also found that the mere fact that one of the legatees has signed the will does not mean that he has signed it as an attesting witness. It was also held that Ext. A2 is the last testamentary disposition of late Kathreena and the plaintiff is entitled to get Letters of Administration. The court below negated the contention of the first defendant that the plaintiff has not been able to remove the suspicious circumstance surrounding the execution of the Will. First defendant's plea that the bequest of the properties in favour of the plaintiff should fail under Section 67 of the Indian Succession Act since he is one of the attesting witnesses was rejected by the court below on the ground that no such plea was raised in the written statement but was urged for the first time only at the time of arguments. Contention that the question raised was a pure question of law was negated by the court below holding that it is a mixed question of law and facts. The court took the view that the mere fact that one of the legatees had signed the Will does not mean that he was signing the testamentary disposition as an attesting witness. The court below placed reliance on the decision of the Privy Council in *Shiam Sunder Singh v. Jagannath Singh* AIR 1927 PC 248 and the decision of the Apex Court in *M.L Abdul Jabbar Sahib v. H. Vpnkata Sastri and Sons* AIR 1969 SC 1147. The court below therefore allowed the application and held that the plaintiff is entitled to get Letters of Administration, against which this appeal has been preferred by the first defendant.

5. Heard counsel for the appellant and the respondents. Sri Sathish based his argument mainly on Section 67 of the Indian Succession Act submitted that the court below has not properly appreciated the scope of Section 67 of the Act. Counsel submitted that since propounder is also one of the legatees under the Will and an attesting witness, the legacy is void as against the attesting witnesses. Counsel submitted that it is trite law that a legacy to an attesting witness to a Will is void under Section 67 of the Indian Succession Act. Counsel placed reliance on the decision of the Madras High Court in the *Administrator General of Madras v. Lazar Stephen Lazar* ILR 4 Madras 244. Counsel also placed reliance on the decision of the Apex Court in *Smt. Indu Bala Bose v. Mahindra Chandra Bose* :

[1982]1SCR1188 and submitted that if the propounder himself takes a prominent part in the execution of the Will which confers a substantial benefit on him, the propounder is required to remove that suspicious circumstance. Reference was also made to the decision of the Apex Court in Smt. Malkani v. Jamadar and Ors. : AIR 1987 SC767 .

6. Counsel for the respondent on the other hand contended that the propounder had signed the Will not as an attesting witness but as a witness acknowledging execution of the registered Will. Counsel therefore submitted that the Will was properly proved and that two attesting witnesses had signed the Will in the presence of the testatrix and the testator had also signed in the presence of the attesting witnesses. Counsel also submitted that there are no suspicious circumstances surrounding the execution of the Will. The Will was also registered in the Sub Registry Office, Thrissur, as document No. 53/57 on 30.08.1957. Counsel submitted that in any view of the matter, first defendant had no case in the written statement that the plaintiff had signed the Will as an attesting witness. If he had taken such a contention, counsel submitted that the plaintiff would have got an opportunity to rebut that presumption.

7. Section 67 of the [Indian Succession Act, 1925](#) deals with the effect of gift to attesting witness. This section is not applicable to Wills of Hindus by virtue of Section 57 read with Schedule III of the Indian Succession Act and as such legatees under the Will of such persons do not forfeit their legacy on becoming attesting witnesses. But in the case on hand the parties are Christian and Section 67, if attracted, will be applicable to them. Legacy to the attesting witness of a Will is void under Section 67. Section 67 is extracted below for easy reference.

67. Effect of gifts to attesting witness - A will shall not be deemed to be insufficiently attested by reason of any benefit thereby given either by way of bequest or by way of appointment to any person attesting it, or to his or her wife or husband; but the bequest or appointment shall be void so far as concerns the person so attesting or the wife or husband of such person, or any person claiming under either of them.

Explanation: -- A legatee under will does not lose his legacy by attesting a codicil which confirms the will.

The object is evidently to avoid chances of possible collusion. However, Explanation to Section 67 states that a legatee under a Will does not lose his legacy by attesting a codicil which confirms the Will and a gift by Will to the attesting witness of a codicil is good. In Lazar Stephen's case, *supra* the court held that the extension of the prohibition to the wife seems to rest on the unity of interest or temptation between the husband and the wife. It is trite law that in order to prove execution of Will it is absolutely necessary that testator must have signed the Will in the presence of attestors..The Will shall be attested by two or more witnesses. But if there are more than two witnesses and one is a beneficiary, the gift will fail so far as that attestor is concerned, though, the Will may be duly executed even without his attesting the deed. Law is therefore clear that all such persons signed as attestors and consequently the legacies to them or their spouses by the Will, would be void. Presumption is that all such persons signed as witnesses and consequently legacies given to them or their spouses by the Will are void; if more than two persons appeared to be attesting witnesses, some of them being legatees, all the names would be included in the probate, so that the question whether the legatees did or did not sign as witnesses might be decided. Law is therefore clear that attesting witnesses would forfeit the benefit given by the instrument. But question may arise whether a person has signed the Will as an attesting witness or not. Reference may be made to the decision in *Shiam Sunder Singh's case, supra*, where the Will was executed by the Talukdar with the consent of all sons and have got them to sign it as witnesses so that the Will could be acted upon fully and they may not quarrel after the death of the testator. Since all the sons of the testator had put their signatures to the Will each signature being put under the word 'witness' the question arose as to whether the bequest in their favour is void or not. The High Court took the view that it was open to the party to rebut the presumption arising from the face of the document that person who purported to be attesting witnesses were really not such. Judgment of the High Court was affirmed by the Privy Council in *Shiam Sundara Singh's case, supra* which was followed by the Apex Court in *M.L Abdul Jabbar Sahib's case, supra* AIR 1969 SC 1147. Referring to a passage in the book, *Jarman on Wills*, at page

147 the Apex Court endorsed the view of the High Court. The Apex Court took the view that it is essential that the witness should have put his signature *animo attestandi* and that 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. Reference may also be made to the decision of the Apex Court in *Girja Datt v. Gangotri* : AIR 1955 SC346 where the court held that the two persons who had identified the 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*'

8. Question that arises for consideration in this case is whether the propounder of the Will, a legatee had put his signature as an attesting witness with the '*animo attestandi*'. If he has signed the Will as an attesting witness the legacy will fail as per Section 67 of the Act. As to the genuineness of the Will no serious dispute has been raised by the counsel; so also with regard to the signatures of the attesting witnesses. The second attesting witness was examined as P.W.2. Besides him there are two witnesses. The plaintiff/legatee is the fourth signatory. Further in the written statement filed by the first defendant there is no plea that the propounder of the Will had signed the Will as an attesting witness. No issue was also framed in that regard. The written statement was also not amended so as to incorporate a plea based on Section 67. In the absence of any pleading it cannot be said that he had signed the Will as an attesting witness but was only acknowledging the fact of execution of the Will. It is trite law that where the testamentary capacity of the executor or the genuineness of the Will cannot be doubted the mere fact that the beneficiary under the Will took active part in its execution is not sufficient to question the validity of the Will. But when the propounder of the Will is a beneficiary under it the court has to scrutinise the evidence with care and caution so as to satisfy its conscience that the document does represent a true Will of the testator and the testator was a person with competent understanding and free agent while executing the Will. But when the Will has been executed in the presence of two attesting witnesses and signature of a legatee also appears at the foot of the Will the court will scrutinise the evidence to know why such signature is written and if it is satisfied that it is not attesting the signature of the deceased

such signature shall be omitted for the probate and the legacy will be valid. Further in a given case such a testator bestows various obligations on the legatee who in token of expressing his willingness to comply with those directions has put his signature in the Will it cannot be said that the bequest is invalid due to the mere fact that the legatee had put his signature in token of acceptance of his obligations under the Will.

9. We have gone through the terms of the Will in extenso. We notice that the testator has cast various obligations on the propounder of the Will who is also a legatee and that he has to discharge those obligations under the Will. Testatrix had three sons and four daughters by name Anthoni, Varappan, Ouseph, Mary, Eliakutty, Kathirukutty and Rosy. Anthony, Mary, Varappan and Eliakutty were married away. Further Anthony and Varappan were also staying separately. All the legatees under the Will have supported the Will except the son of Anthony. The Will specifically imposes various obligations on the propounder who is the youngest son of testatrix. We may extract some of the obligations to be discharged by the legatee who has put the signature on the Will.

The underlined portions noted above would show that the propounder of the Will has to discharge various obligations under the Will and therefore the possibility of his signing the Will in token of his acceptance of those obligations cannot be ruled out. The propounder who is also a legatee, under the Will might have put his signature not with *animo attestandi*, but acknowledging the obligations he has to discharge under the Will as desired by his mother. No plea was raised in the written statement that the propounder has signed the Will as an attesting witness and therefore the bequest was void under Section 67. Had such a contention been raised the propounder could have explained away the circumstances under which he had signed the Will and could have rebutted the presumption that the Will is void due to the participation of the beneficiary under the Will. Facts would dearly indicate that the plaintiff legatee had put the signature in the Will not with *animo attestandi* but only in token of his consent to discharge the obligations under the Will and in such a situation, in our view, the presumption that the legacy is void cannot be drawn.

10. We may hasten to add that the Will was executed and registered in the year 1957 and the testator died on 19.1.1989. Suit was filed in the year 1993 after several years. Almost half a century is over since the execution of the Will and the parties have settled down in their life and to unsettle the Will at this distance of time would cause considerable injustice to the parties; especially when all the parties have accepted the Will except the first defendant. Propounder of the Will might have also discharged all his obligations under the Will. Considering the facts and circumstances of the case, we find no reason to take a different view from that of the court below. Appeal therefore lacks merits and the same would stand dismissed.

C.M.P. No. 127 of 1996 is also dismissed.

**SooperKanoon - India's Premier Online Legal Search - [sooperkanoon.com](http://sooperkanoon.com)**