

*** IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Decision: February 25th, 2014

+ FAO 335/2011

RAM NIWAS RANA & ORS Appellants

Through : Mr. Sudhanshu Tomar and
Mr. Bharat Sehrawat, Advs.

versus

ANIL KUMAR & ORS Respondents

Through : Mr. Satish Sahai and Mr. Kamal
Garg, Advs.

CORAM:

HON'BLE MS. JUSTICE VEENA BIRBAL

VEENA BIRBAL, J.

1. This is an appeal under Section 299 of The Indian Succession Act, 1925 (hereinafter referred to as 'the Act') against impugned judgment dated 18.04.2011 passed by the court of learned Addl. District Judge (Central) Delhi wherein the petition filed by the respondent No.1 seeking probate of Will Ex.PW1/1 has been allowed.

2. The facts relevant for the disposal of the present appeal are as under:-

The respondent no. 1 herein i.e. Anil Kumar was the petitioner before the learned District Judge, Delhi. He had filed a petition under Section 276 of the Indian Succession Act for the grant of probate of Will dated 05.04.1995 alleged to have been executed by Smt. Manno Devi. The husband of Manno Devi and grandfather of respondent no.1 were brothers.

As per respondent no. 1, Smt. Manno Devi i.e. testatrix had died on 09.02.2004. She had executed a Will during her lifetime on 05.04.1995 which was registered with the office of Sub Registrar, Delhi on that very day itself. It is alleged that in the said Will Smt. Manno Devi had bequeathed her share in a residential house as well as in the agricultural property in favour of respondent no. 1. It was alleged that the aforesaid Will was the only Will of the testatrix. It was her last Will. It was further alleged that the testatrix had not executed any other Will. No other petition under Section 276 of the Act for the grant of probate in respect of aforesaid Will had been filed by the respondent no. 1/petitioner in any other court for adjudication except the present Will. The prayer was made before the learned Addl. District Judge for grant of probate of aforesaid Will having been registered in the office of the Sub Registrar, Delhi on 5.4.1995. The petition also bears the verification by one of the attesting witnesses to the Will, namely, Sh. M.N. Sharma, Advocate.

3. The objections were filed by the appellants i.e. respondents nos. 4 to 6 before the learned Additional District Judge contending therein that the Will in question was false and fabricated one. The testatrix was neither mentally nor physically fit. She was not in a position to execute any Will on the day when the same is alleged to have been executed. They had also taken a stand that the suit for partition bearing No. 415/2003 is pending between the parties before Additional District Judge, Delhi, wherein the respondent no.1 had relied upon two Wills, one executed by Jeet Ram i.e. his grandfather and the other executed by Smt. Manno Devi i.e. Will in question. It is alleged that in the said case the respondent no. 1/petitioner has failed to prove the Will of Sh. Jeet Ram. It is alleged that both the Wills are alleged to have

been executed on the same date and witnessed by same witnesses. It is submitted that as the petitioner has failed to prove the Will of Jeet Ram as such it can't be said that Will in question stands proved. The respondents no. 2 and 3 before the learned Addl. District Judge i.e. respondents no. 2 and 3 herein also raised the similar objections. However, they have not challenged the impugned judgment.

4. On the basis of pleadings of the parties, the following issues were framed on 20.02.2008:-

“1. Whether the deceased Manno Devi has validly executed the Will dated 05.04.1995, while in sound disposing mind? OPP

2. Relief.”

5. Before the Probate Court, the respondent no. 1/petitioner examined himself as PW1, Sh. Rakesh Ranjan as PW2, Sh. Sushil Kumar as PW3 and Sh. M.N. Sharma, Advocate as PW4. The appellants/objectors did not lead any evidence despite opportunity given. On the basis of evidence adduced by the respondent no. 1/petitioner as well as material on record, the learned Additional District Judge vide impugned order held that the testatrix was of sound disposing mind and had executed the Will in question and accordingly ordered that the Will Ex.PW 1/1 (PW 4/1) be probated in favour of respondent no. 1/petitioner on his furnishing stamp duty/administration bond-cum-surety bond.

6. Aggrieved with the same, present appeal is filed.

7. Learned counsel appearing for the appellants has contended that the Will in question has not been attested by two witnesses. It is contended that

the Will is attested by only one witness Sh. Chet Ram and even the said witness has not been produced before the learned Additional District Judge. Only Sh. M.N. Sharma, Advocate has been produced as PW4 who is only a scribe and he cannot be taken as an attesting witness as such the Will in question is not proved in accordance with Section 63 of the Indian Succession Act and accordingly the impugned order is liable to be set aside. Learned counsel for the appellant has also contended that the partition suit i.e. Suit no.415/2003 pending between the parties, the respondent no.1 is relying upon two wills i.e., one alleged to have been executed by his grand father i.e., Jeet Ram and other by Smt. Manno Devi. It is submitted that in the said suit respondent no.1 has failed to prove the Will of Jeet Ram. In these circumstances, it cannot be said that the Will in question stands proved.

8. On the other hand, learned counsel appearing for respondent no. 1/petitioner has contended that Sh. M.N. Sharma, Advocate is a scribe as well as attesting witness to the Will in question. His evidence clearly proves the attestation of the Will by himself as well as the other witness Sh. Chet Ram. It is contended that requirement of Section 63(c) of the Act has been met in the present case.

9. Learned counsel for the respondent no. 1/petitioner has contended that scribe of the Will can also be an attesting witness. It is submitted that what is required for attestation is an intention to attest. Learned counsel has relied upon **Mathew Oommen v. Suseela Mathew; (2006) 1 SCC 519.** Learned counsel has also relied upon judgment of this court in **Sh. Baldev Raj v. Sh. Man Mohan & others; 92 (2001) DLT 274** wherein it is held that scribe could be treated as an attesting witness but it must be shown that scribe put

down his signature for the purpose of attesting the document.

10. It is further submitted that the Will in question is registered with the office of Sub-Registrar, Delhi. The endorsement of the concerned Sub-Registrar on the back portion of the Will shows that it is attested by two witnesses, namely, Sh. Chet Ram and Sh. M.N. Sharma. It is further stated that both the witnesses had appeared before Sub-Registrar. The contents of Will in question had been explained to the testatrix who had understood the same and admitted the same before the Sub Registrar as correct. It is submitted that endorsement on the back portion of Will Ex.PW 1/1 (PW 4/1) proves that the Will has been duly executed.

11. Learned counsel for respondent no.1/petitioner has further contended that before the Probate Court i.e. before learned Additional District Judge no plea was taken that Sh.M.N. Sharma is only a scribe and has not attested the Will Ex.PW 1/1 (PW 4/1). In the objections filed, the only objection raised was that the Will in question is false and fabricated one. It is further contended that no question has been put to Sh. M.N. Sharma PW4 in cross-examination that he had not signed as an attesting witness to the Will. It has come in the evidence that the respondent No.1/petitioner was brought up by the testatrix Manno Devi. There is no cross-examination of the same. It has also come in the evidence that husband of Manno Devi and grand father of respondent no.1 were brothers. It is submitted that evidence of Sh.Sushil Kumar, PW3 shows that in 2003 testatrix had gone to the bank to receive pension. It is contended that the Will in question has been produced in the Civil Court where suit for partition is pending and it has not been rejected by

the said court. It is contended that the Will of Jeet Ram has nothing to do with the present case.

12. The counsel for parties have been heard at length. The submissions made have been considered.

13. For deciding the present matter, it would be appropriate to reproduce the relevant provisions i.e., Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 which reads as under:

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

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal 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 xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx
xxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxxx”

14. To say Will has been duly executed the requirement 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) 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.

15. 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. The above are the statutory requirements to prove a Will. Reference is made to the judgment in Janki

Narayan Bhoir vs. Narayan Namdeo Kadam: MANU/SC/1155/2002 and Seth Beni Chand (since deceased) now by L.Rs vs. Smt.Kamla Kunwar & Ors:AIR 1977 SC 63.

16. In the present case, respondent no.1 has produced Sh.M.N.Sharma, Advocate in the evidence. The contention of petitioner is that he is only a scribe and can't be treated as an attesting witness.

17. It is settled law that scribe can be treated as an attesting witness if it is shown that he had put down his signatures for the purpose of attesting the document.

18. The Supreme Court in **Mathew Oommen v. Suseela Mathew; (2006) 1 SCC 519** has held that scribe of the Will is not ineligible to be an attesting witness. It is held that what is required in attestation is the intention to attest. If intention to attest is there on the part of the scribe then he can also be an attesting witness to the Will. The relevant portion of the judgment of Supreme Court is reproduced as under:-

“8.

.....
In support of this argument it was submitted that one of the alleged attesting witnesses is only scribe of the Will and is not an attesting witness. Regarding this objection we may note that there is no requirement in law that a scribe cannot be an attesting witness. The person concerned has appeared in the witness box as PW1 and has clearly stated that he is a scribe of the Will as well as he is an attesting witness of the Will. For attestation what is required is an intention to attest which is clear from the statement of PW1. He categorically stated that he has signed as an attester and scribe. In our view, the requirement of attestation of the Will by two witnesses is fully

met in the present case.”

19. In **Sh. Baldev Raj v. Sh. Man Mohan & others; 92 (2001) DLT 274** decided by the Division Bench of this court wherein also the question was whether the scribe could be treated as an attesting witness of Will under Section 63 of the Indian Succession Act. It was held that the scribe could be treated as an attesting witness but it must be shown that scribe put down his signatures for the purpose of attesting the document. The relevant portion of the judgment is as under:-

“10.

.....
It is not universal rule that a scribe cannot be treated as an attesting witness. Even in the decision of Himachal Pradesh High Court relied upon by learned counsel for the appellant it has been held that scribe may be an attesting witness of the Will, but it must be shown that the scribe put down his signature for the purposes of attesting the document.”

20. The Supreme Court in **Seth Beni Chand (Since Dead) Now by L.Rs. v. Smt. Kamla Kunwar and Ors.; AIR 1977 SC 63** has held that no particular form of attestation is required and that an attesting witness need not necessarily be labelled as an attesting witness. The relevant portion of the judgment is as under:-

“8.

.....
None of the three is described in the Will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence

showing due execution of the document. By attestation is meant the signing of a document to signify that the attestator is a witness to the execution of the document, and by Section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from, the executants as regards the execution of the document.”

21. The evidence of Sh. M.N. Sharma is examined in the light of case law discussed above.

22. Sh. M.N. Sharma PW4 has deposed that he had seen Will Ex.PW4/1. On 05.04.1995, testatrix had come to him at 10.15 a.m. and requested for getting the Will Ex.PW 4/1 prepared. He got Will Ex.PW4/1 typed as per the instructions. The testatrix was accompanied by Sh. Chet Ram, Sh. Jeet Ram and Sh. Anil Kumar. Sh. Jeet Ram was earlier known to him being his client. The testatrix had put her left thumb impression on Ex.PW4/1 at point X. Sh. Chet Ram signed at point Y. He signed at point Z. He had also deposed that the testatrix had put her thumb impression in the presence of aforesaid witnesses and the witnesses had also signed in her presence. They all went to the office of Sub Registrar where the testatrix as well as the aforesaid witnesses signed in the presence of Sub Registrar. The Will Ex.PW 4/1 was also read over to her. His material deposition as regards attesting the Will by Sh. Chet Ram as well as by the witness himself has not been demolished in cross-examination. He has also stated in the cross-examination that it is true that he is an Advocate and is a scribe of the Will. He has also deposed that he acted as a witness also. Learned counsel for the

appellant stated that this portion that he acted as a witness be not taken into consideration as the same was said by him on being suggested by learned counsel for petitioner. It may be noticed that evidence has to be read as a whole and not in pieces. By reading the evidence as a whole, it cannot be said that he did not sign as an attesting witness to the Will. Even on bare perusal of Will Ex.PW1/4, it is seen that he had signed the Will at two places. The stamp bearing his name is also there at two places on the Will Ex.PW 4/1. He has signed below the heading “witnesses” on Ex.PW 4/1 after the name of Sh. Chet Ram. He has also signed on the right side of the Will below the thumb mark of testatrix as a scribe. Reading his evidence and examining the Will Ex.PW 4/1, it cannot be said that he had no *animus attestandi* to attest the Will Ex.PW 4/1.

Further Sh. M.N. Sharma, Advocate has also verified the probate petition as one of the witnesses to the Will Ex.PW 4/1. No objections have been raised by the appellant that he was not one of the witnesses to the Will, as such verification is not in accordance with law.

The evidence of Shri M.N.Sharma, Advocate proves that the testatrix had affixed the thumb mark in his presence as well as in the presence of Chet Ram, the other attesting witness to the Will. By reading his evidence, it also stands established that both the attesting witnesses i.e., Sh.M.N.Sharma, Advocate and Chet Ram had signed the Will Ex.PW 4/1 in the presence of testatrix. His evidence clearly establishes that provisions of section 63(c) of the Indian Succession Act and Section 68 of the Indian Evidence Act have been complied with in the present case.

23. Before the learned Additional District Judge, respondent no. 1/petitioner himself has also appeared. He has filed his evidence by way of

affidavit Ex.PW/1 wherein he has stated that he is the grandson of testatrix and he lived with her as well as her husband, namely, Sh. Gopal Singh since his childhood. Smt. Manno Devi and her husband had no child of their own and they were treating the respondent No.1 as their grandson and his education, food, clothing expenditure were borne by them. The testatrix was an uneducated woman who used to affix thumb impression. The husband of Smt. Manno Devi was in Haryana Police. The source of income of Smt. Manno Devi was pension granted to her after the death of her husband by Haryana Police as well as income from the sale proceeds of milk in the open market. The pension used to be credited to her bank account and he had accompanied her for withdrawal of the pension a number of times. On 05.04.1995, Smt. Manno Devi had instructed him to come with her at the Sub Registrar office as she wanted to execute the Will and also wanted to get the same registered. Accordingly, he along with Smt. Manno Devi, Sh. Chet Ram and Sh. Jeet Ram visited the Sub Registrar office on 05.04.1995 at 10.15-10.30 a.m. Sh.Jeet Ram had known one Advocate, namely, Sh. M.N. Sharma who was also present at the office of Sub Registrar. The said Advocate was introduced to them by Sh. Jeet Ram. Thereafter, Sh. M.N. Sharma, Advocate has discussed the matter with his grandmother i.e. testatrix in detail and on her instructions he had got typed the Will Ex.PW 4/1. The contents of same were read over to her grandmother. Her grandmother was of sound mind. He has also deposed the manner in which testatrix had affixed her thumb impression on the Will. His grandmother had died on 09.02.2004. He has proved on record her death certificate Ex. PW 1/2. There is no cross-examination of the aforesaid witness by the appellant.

24. Sh. Rakesh Ranjan PW-2 is a Record Clerk from the office of Sub Registrar, Kashmere Gate, Delhi who has deposed that the Will Ex.PW 4/1 was registered in their office as Document No. 15001 Addl. Book No. 3 Vol. 2321 at Pages 31 to 33 dated 05.04.1995.

25. Sh. Sushil Kumar PW3 is a clerk from Syndicate Bank who has deposed about the account of testatrix with their bank. He has deposed that he has brought the original record showing that Smt. Manno Devi had affixed thumb impression in the opening form and she used to withdraw the money by putting thumb impression. He has brought the withdrawal slips Ex. PW3/B and Ex. PW3/C in this regard. Nothing relevant has come on record in his cross-examination.

26. The due execution and attestation of the Will has been proved in this case. The respondent no. 1/petitioner by summoning the bank record shows that the testatrix was going to the bank and was withdrawing money upto 09.8.2003 i.e. she was operating her bank account of her own. There is no cross-examination of the material deposition of respondent no. 1/petitioner wherein he has stated that he was brought up by the testatrix and her husband since his childhood and he was living with them. The same is not denied by the appellants.

27. The rejection of will of one Jeet Ram as is contended has nothing to do with the present case. The appellants have also not led any evidence in the trial court to substantiate their stand that the Will was forged and fabricated one. The evidence on record clearly proves that the testatrix was of sound mind. The same also establishes that the Will Ex.PW 1/1 (PW 4/1)

has been duly and properly executed.

The probate of Will Ex.PW 1/1 (PW 4/4) has been rightly granted by the court below. Accordingly, the appeal stands dismissed.

VEENA BIRBAL, J

FEBRUARY 25th, 2014
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