

Court No. - 29

Case :- FIRST APPEAL FROM ORDER No. - 699 of 2013

Appellant :- Smt. Uma Shashi Verma Memorial Charitable Trust Faizabad

Respondent :- State Of U.P.Through Collector Faizabad

Counsel for Appellant :- R.K.Srivastava,Vinod Pandey

Counsel for Respondent :- Pankaj Kumar Tiwari,Pradeep Kumar Shukla,Ravi Kishore Joshi

Hon'ble Arun Kumar Singh Deshwal,J.

1. Heard Sri Rakesh Kr. Srivastava, learned counsel for the appellant and Sri Pradeep Kumar Shukla, learned counsel for respondent No.7. No one has appeared on behalf of the other respondents, despite service of notice.

2. The present appeal was filed against the order dated 22.5.2013 passed by Additional District Judge-I, Court No. 1, Faizabad in Misc. Non Related Case No. 17 of 2000.

3. The crux of the matter is that one Dr. Ram Nath Verma, after death of his wife Smt. Uma Shashi Verma, executed a trust deed dated 19.12.1995, creating a trust in the name of his wife viz. Smt. Uma Shashi Verma Memorial Charitable Trust, Faizabad. In the said trust deed, it was also mentioned that he would execute a Will for the administration regarding the trust. The above Dr. Ram Nath Verma died on 18.10.1999. Thereafter, an application u/s 276 of Indian Succession Act, 1925 was filed by the appellant-trust through its Chairman, Dr. Brijendra Kumar Saxena @ Basantji for grant of probate of Will dated 9.9.1999 claimed to be executed by Dr. Ram Nath Verma. That application was contested by respondents No. 2, 3, 4 and 5, who filed objections regarding the Will dated 9.9.1999. Therefore, that being a contentious case, the proceeding was continued u/s 295 of Indian Succession Act, in the form of regular suit in accordance with the provisions of the C.P.C. During that proceeding, respondent No.6, being the nephew of Dr. Ram Nath, also filed an application, mentioning therein that the Will dated 9.9.1999 was forged and the correct Will is already lying in the locker of Late Dr. Ram Nath Verma. Therefore, learned District Judge by order dated 9.8.2002 directed the bank to open the locker of Late Dr. Ram Nath Verma and produce the Will, lying therein. In pursuance of the order dated 9.8.2002, the Will dated 1.1.1996 was produced before the court. As the Will dated 1.1.1996 was not disputed by any of the parties, therefore, an amendment was made in the probate application, by the appellant and in place of Will dated 9.9.1999, the probate was sought regarding the Will dated 1.1.1996.

4. Except respondent No.1, no one filed any objection to the Will dated 1.1.1996. However, respondent No.2 filed an application (Paper No. 38-Ga) wherein though he did not dispute the Will dated 1.1.1996, he contended that the Will dated 9.9.1999, giving certain benefit to him, is subsequent to the Will dated 1.1.1996. Therefore, the probate of the Will dated 9.9.1999 should be

granted. In support of his case, the appellant had produced three witnesses of the Will dated 1.1.1996, namely, Ram Kishore Jaiswal (PW-2), Khushi Ram Verma (PW-3) and R.K. Shukla (PW-4). One Indrasen, who was power of attorney holder of the Chairman of the appellant trust, was examined as PW-1 and Ram Ratan Verma, who was a family member of Late Dr. Ram Nath Verma was also produced as PW-5. None of the contesting parties have produced any witness in support of their respective Wills. After considering the evidence on record, the learned District Judge, by order dated 22.5.2013, rejected the probate petition of the appellant. Feeling aggrieved by the said order, the present appeal has been filed.

5. Contention of learned counsel for the appellant is that the court below rejected his probate application merely on the ground that there is minor contradiction in the statement of attesting witness Ram Kishore Jaiswal (one of the attesting witnesses) who initially filed the probate petition on behalf of appellant as his counsel. It is further submitted that other witnesses, namely, Khushi Ram Verma and R.K. Shukla, duly proved the Will dated 1.1.1996 as per Section 63 of the Indian Succession Act and Section 68 of the Evidence Act. It is also submitted that the Will dated 1.1.1996, being a hand written Will of Late Dr. Ram Nath Verma, which is termed as Holographic Will, has more evidentiary value if there is no dispute about the signature and writing of the executor. In the present case, none of the parties has disputed the aforesaid facts. In support of his contention, learned counsel for the appellant has also relied upon the judgement of the Apex Court in the case of ***Joyce Primrose Prestor (Mrs.) (Nee Vas) vs. Vera Marie Vas (Ms) and others; (1996) 9 SCC 324***. In that judgement the Apex Court observed that the Holograph Will presumption is of more value than the ordinary Will, if the writing of the Will and the signature of the testator are admitted. It is further submitted that the Will dated 1.1.1996 was produced before the court in pursuance of the order of the District Judge from the locker of Late Dr. Ram Nath Verma and that Will was also having reference in the trust deed itself, therefore, that Will cannot be disputed and there is apparent error in the impugned order.

6. Per contra, though the learned counsel for respondent No.7 has not opposed the Will and actually admitted the Will dated 1.1.1996, but submitted that as per the trust deed as well as the Will dated 1.1.1996, there is specific condition that the present Chairman of the appellant trust Will induct any of the family members of Late Dr. Ram Nath Verma as trustee, therefore, even if a probate is granted that should be for the limited purpose as required u/s 248 of Indian Succession Act; for the purpose specified in the Will itself.

7. After hearing the parties and on perusal of record, this fact is clear that none of the parties has disputed the writing and signature of Late Dr. Ram Nath Verma over the Will dated 1.1.1996. However, during the proceeding before the District Judge, Faizabad, the statement of one of the attesting witnesses of the Will, namely, Ram Kishore Jaiswal, has some minor contradictions. So far as other witnesses of the Will, namely, Khushi Ram Verma and R.K. Shukla, are concerned, they clearly stated that the above Will was written and signed by Late Dr. Ram Nath Verma and this fact was acknowledged by Late Dr. Ram

Nath Verma in their presence and also in presence of Late Dr. Ram Nath Verma they also witnessed the Will. In the impugned judgement, learned District Judge also observed that the witness of the Will dated 1.1.1996 Sri Ram Kishore Jaiswal had admitted that other witnesses had not signed before him. The main thrust of the District Judge while rejecting the probate application of the appellant, is the contradiction in the statement of Ram Kishore Jaiswal, one of the witnesses of the Will. From the perusal of the statement of attesting witness Ram Kishore Jaiswal, it appears that contradictions are not such which could create suspicious circumstances which are required to be removed by the propounder.

8. Section 63 of the Indian Succession Act provides the execution of unprivileged Wills requires that the testator shall sign or shall affix his mark on the Will so as to give effect to the writing in the Will, and the Will shall be attested by two or more witnesses. However, it is also provided in Section 63(c) of the Indian Succession Act that it shall not be necessary that more than one witness Will be present at the same time. For reference, Section 63 of the Indian Succession Act, 1925 is being quoted below:-

"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 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."

9. Therefore, from the perusal of Section 63 of the Indian Succession Act, it is clear that for the signing of the Will by the witnesses, it is not necessary that all the witnesses should be present at the same time. Therefore, view of the District Judge that one of the witnesses Ram Kishore Jaiswal admitted that the other persons had not signed before him, is not a legal requirement of Section 63 of Indian Succession Act. Even Section 68 of the Evidence Act provides that even if the Will is attested by two or more witnesses, it is not necessary for all the attesting witnesses to prove the execution of the Will and same can be proved by calling only one attesting witness. For reference Section 68 of Evidence Act is quoted as under:-

"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 its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence :

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (XVI of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied."

10. From the reading of Section 63 of the Indian Succession Act and Section 68 of the Evidence Act, it is clear that requirement of the law is that at least one attesting witness to come before the court to prove due execution and attestation of Will. It is also clear from Section 63 of the Indian Succession Act that even if the attesting witness has not seen the testator signing the Will, but if he received the personal acknowledgement from the testator about his signature on the Will, then it Will be sufficient for attesting witness to sign the Will in the presence of the testator.

11. Hon'ble Apex Court in the case of **Janki Narayan Bhoir vs. Narayan Namdeo Kadam; AIR 2003 SC 761**, while laying down guidelines for proof of execution of the Will, in paragraphs No. 10 and 11, observed as under:-

"10. 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 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 the 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 the 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 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 the 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 the 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.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of the Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of the Indian Evidence Act. Section 71 is permissive and an enabling section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to the proof of execution of a will."

12. Similarly, in the case of **Yumnam Ongbi Tampha Ibema Devi vs. Uumnam Joykumar Singh and others; (2009) 4 SCC 780**, Hon'ble Apex Court observed that attesting witness should speak not only about testator's signature to the Will

but also that each of the witnesses had signed the Will in presence of testator. Paragraphs No. 12 and 13 of the aforesaid judgement are being quoted as under:-

"12. The attestation of the will in the manner stated above is not an empty formality. It means signing a document for the purpose of testifying of the signatures of the executant. The attested (sic attesting) witness should put his signature on the will animo attestandi. It is not necessary that more than one witness be present at the same time and no particular form of attestation is necessary. Since a will is required by law to be attested, its execution has to be proved in the manner laid down in the section and the Evidence Act which requires that at least one attesting witness has to be examined for the purpose of proving the execution of such a document.

13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator."

13. In the present case out of four attesting witnesses of the Will dated 1.1.1996, two witnesses, namely, R.K. Shukla and Khushi Ram Verma, clearly stated that the Will had been signed by the testator Late Dr. Ram Nath Verma in their presence and the Will was read over to them and thereafter they have also signed. Therefore, execution of the Will dated 1.1.1996 was duly proved by the witnesses and issuance of probate cannot be denied only on the ground that the third witness, namely, Ram Kishore Jaiswal, had some contradiction in his statement.

14. Once, it is undisputed that the Will was written and signed by the testator Late Dr. Ram Nath Verma and two attesting witnesses very clearly proved that the Will dated 1.1.1996 was signed in their presence and subsequently, they had also signed the same as attesting witnesses, is sufficient to prove the execution of the Will dated 1.1.1996. Hon'ble Apex Court in ***Joyce Primrose Prestor (supra)*** has observed that once writing and signature of testator in holograph Will is admitted then it Will be deemed to be properly executed. Paragraphs No. 15 & 16 of the judgement is quoted as under:-

"15. While the presumption in the case of ordinary Wills is as stated above, in the case of "holograph Wills", the presumption is all the more — a greater presumption. Ex. P-1 is a "holograph Will". It is one which is wholly in the handwriting of the testator. The Calcutta High Court in Ajit Chandra Majumdar v. Akhil Chandra Majumdar [AIR 1960 Cal 551 : 64 CWN 576] (AIR Cal at p. 552) stated about such a Will, thus:

"The whole of this Will was written in the hand by the testator himself in English. The handwriting is clear and firm. The law makes a great presumption in favour of the genuineness of a holograph Will for the very good reason that the mind of the testator in physically writing out his own Will is more apparent in a holograph Will than where his signature alone appears to either a typed script or to a script written by somebody else."

(emphasis supplied)

The writing of the Will and signature of the testator are admitted. There is also due and proper attestation in accordance with the relevant statutory provisions. No suspicious circumstance appears on the face of the document, Ex. P-1. The Will appears to be moderate and rational. Viewed from the above angle, there is a great presumption — even bordering on actual proof of the due execution and attestation of the Will.

16. Defendants have urged a few suspicious circumstances and have alleged that the Will was executed by the undue influence exercised by the plaintiff. Notwithstanding the high degree of presumption available in the case of a holograph Will, which on the face of it, appears to be properly and duly executed and attested, have the defendants let in cogent evidence to offset the said presumption and/or have succeeded in proving the special plea set up by them, falls for our consideration. In our considered view, the answer can be only in the negative."

15. So far as the right to receive probate of the Will dated 1.1.1996 is concerned, it is not disputed that in the trust deed dated 19.12.1995, Basantji was appointed as Chairman/Caretaker Trustee and even in the Will dated 1.1.1996, it was clearly mentioned that Basantji, being the Caretaker Trustee would enforce the Will by appointing the trustee from the family of Late Dr. Ram Nath Verma. Therefore, Basantji being Caretaker Trustee as well as Chairman of the trust, has right to seek probate of the Will dated 1.1.1996 for the purpose, specified in the Will dated 1.1.1996 as per Section 248 read with Section 222 of the Indian Succession Act.

16. In view of the above, this Court is of the view that the order dated 22.5.2013 passed by Additional District Judge-I, Court No. 1, Faizabad in Misc. Non-related Case No. 17 of 2000 is erroneous and, therefore, deserves to be set aside.

17. Accordingly, the impugned order dated 22.5.2013 is set aside with further direction to Additional District Judge-I, Court No. 1, Faizabad to issue probate in favour of the appellant as per Sections 248 read with Section 222 of the Indian Succession Act for the purpose specified in the Will dated 1.1.1996.

18. With the aforesaid observation, the appeal is **allowed**.

19. The office is directed to remit the record of the court below.

Order Date :- 28.2.2024

Vandana

(Arun Kumar Singh Deshwal,J.)