

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

% *Judgment Reserved On : February 24, 2015*
Judgment Delivered On : March 03, 2015

+ **FAO (OS) 355/2008**

JAGDISH PRASADAppellant
Represented by: Mr.Rajesh Rai, Advocate

versus

STATERespondent
Represented by: Ms.Rama Arora, Advocate for
Land and Building Department
Mr.Surendra Bharti, Advocate for
Registrar of Societies

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MS. JUSTICE PRATIBHA RANI

PRADEEP NANDRAJOG, J.

1. Having successfully proved ownership of the testatrix (Late Mata Shantanand) through Ex.PW-1/3 in respect of property No.204, Block-7, Jheel Khureji, Geeta Coloney, Delhi and the death of the testatrix on November 13, 1984, the appellant has failed to obtain a probate of the Will Ex.PW-1/2, statedly executed by Late Mata Shantanand. The reasoning of the learned Single Judge is premised on a co-joint reading of Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 and three decisions of the Supreme Court reported as AIR 1955 SC 343 *Girija Datt Singh Vs. Gangotri Datt Singh*, (2003) 2 SCC 91 *Janki Narayan Bhoir Vs. Narayan Namdeo Kadam*, and (2007) 9 SCC 728 *Banga Bihara Vs. Baraja Kishore Nanda*, for the

reason it was the claim of the appellant before the learned Single Judge that the two attesting witnesses of the Will were dead.

2. Pithily put, the learned Single Judge has held that as per Section 63 of the Indian Succession Act, 1925, a Will needs to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will and each of the witnesses has signed the Will with the requisite '*animus attestandi*'. On proof, reliance has been placed on Section 68 of the Indian Evidence Act, 1872, emphasizing that it enjoins, by way of proof, that a document required by law to be attested shall be proved by calling for the purpose of proving its execution, at least one attesting witness.

3. Three passages have been quoted from the three decisions. From the decision reported as AIR 1955 SC 343 Girija Datt Singh Vs. Gangotri Datt Singh, the quoted passage with respect to in what manner the propounder has to discharge the burden to prove the Will is as under:-

“(a) it was signed by the testator in the presence of the two attesting witnesses;

(b) the witnesses should have seen the testator sign the Will, or have been told by him that he had signed it;

(c) The attesting witnesses, or one of them must depose to these facts, in the subsequent probate or other action concerning the Will. In the absence of attesting witnesses, of course, it is open to the propounder to prove the Will like any other document, provided that proof of the facts mentioned in Section 63 and 68 are led.”

4. From the decision reported as (2003) 2 SCC 91 Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, the quoted passage with respect to in what manner the propounder has to discharge the burden to prove the Will is as under:-

“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 proved 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.”

5. From the decision reported as (2007) 9 SCC 728 Banga Bihara Vs. Baraja Kishore Nanda, the quoted passage with respect to in what manner the propounder has to discharge the burden to prove the Will is as under:-

“It is now well settled that requirement of the proof of execution of a Will is the same as in case of certain other documents, for example gift or mortgage. The law requires that the proof of execution of a Will has to be attested at least by two witnesses. At least one attesting witness has to be examined to prove execution and attestation of the Will. Further, it is to be proved that the executant had signed and/or given his thumb impression in presence of at least two attesting witnesses and the attesting witnesses had put their signatures in presence of the executant. (See Madhukar D.Shende Vs. Tarabai Aba Shedage, Janki Narayan Bhoir Vs. Narayan Namdeo Kadam and Bhagat Ram Vs. Suresh.”

6. Section 68 of the Indian Evidence Act, 1872 reads as under:-

“68. Proof of execution of document required by law to be attested –

It 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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

7. Section 63 of the Indian Succession Act, 1925 reads as under:-

“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.”

8. A plain reading of Section 63 of the Indian Succession Act, 1925 makes it clear that it declares the substantive law regarding execution of unprivileged Wills and mandates that the testator has to sign or affix his mark or under his direction some other person has, in his presence, signed the Will, and the signature on the mark of the testator or the signature of the person signing for the testator should appear to reflect the intention to give effect to the writing as a Will and that it should be attested by two or more witnesses, each of whom should have seen the execution of the Will and in token thereof should sign the Will as witnesses in the presence of the testator, it not being necessary that the two witnesses should be simultaneously present to witness the execution of the Will.

9. A perusal of the Section 68 of the Indian Evidence Act, 1872 makes it clear that it relates to the law of evidence i.e. what evidence has to be led to prove the execution of a document required by law to be attested. It mandates that the proof can only be by examining at least one attesting witness. But the words : *'if there be an attesting witness alive'* are relevant. Meaning thereby, if a document which is required by law to be attested requires to be proved, if there be an attesting witness alive, the witness has to be examined as per the mandate of Section 68 of the Evidence Act, 1872. In other words, the Section itself contemplates the attesting witness being alive. The Section would have no application if there is no living attesting witness.

10. The three decisions of the Supreme Court relied upon by the learned Single Judge were expounding Section 68 of the Evidence Act, 1872, keeping in view Section 63 of the Indian Succession Act, 1925, where the attesting witness(es) were examined and the Court was evaluating the testimony of the witnesses, with the focus being whether

the testimony of the witnesses establishes that the claim of the witness to be an attesting witness when the Will in question was executed by the testator was credible or not. For if the testimony of the witness was credible, due execution was proved. If the testimony was shaky, due execution was not proved.

11. Neither decision of the Supreme Court was dealing with a situation, as in hand, when it was the case of the propounder of the Will that both witnesses who had witnessed the execution of the Will and had signed as attesting witnesses thereon were dead.

12. Thus, the principle of law laid down in the three decisions would have no application to a situation where the attesting witnesses are dead. Since a Will is propounded after the testator dies, inherently no law can require the testator to step into the witness box to prove the Will.

13. The legislature was conscious of the fact that a situation may arise where both attesting witnesses have taken the train to the heaven before the testator died or before the beneficiary propounds the Will. The consciousness of the legislature can be found in Section 69 of the Indian Evidence Act, 1872, which reads as under:-

“69. Proof where no attesting witness found –

If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

14. Section 69 of the Indian Evidence Act, 1872, while dealing with a situation where no attesting witness can be found, requires evidence to be led that the signatures on a document which law requires to be attested by

one or more witnesses are that of the executant with further proof that there is attestation in his handwriting by one attesting witness.

15. Law does not envisage that if both attesting witnesses to a Will have died or for some reason are not available, that would be the end of the Will. The way forward has been guided by the legislature under Section 69 of the Indian Evidence Act, 1872.

16. In the decision reported as (2008) 14 SCC 754 Babu Singh & Ors. Vs. Ram Sahay @ Ram Singh, after noting Section 69 of the Indian Evidence Act, 1872, in paragraph 17 and 18, the Supreme Court observed as under:-

“17. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the will may be proved in the manner indicated in Section 69 i.e. by examining witnesses who were able to prove the handwriting of the testator or executants.

18. Whereas, however, a will ordinarily must be proved keeping in view the provisions of Section 63 of the Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.”

17. The learned Single Judge has not considered the testimony of the appellant, one Dinesh Chand and one Brij Kishore Sharma on the anvil of Section 69 of the Indian Evidence Act, 1872.

18. The view taken by the learned Single Judge in the impugned decision dated April 05, 2008, review whereof has been declined vide impugned order dated July 11, 2008 is accordingly overruled.

19. Since the learned Single Judge has not evaluated the evidence of the witnesses keeping in view Section 69 of the Indian Evidence Act, 1872, which evaluation would now be warranted to reach the conclusion of fact, whether credible evidence has been led to prove that Chotte Lal Sharma and Chandrani, the two attesting witnesses to the Will have died or were not available and further whether signatures of the testator and one attesting witness have been proved, while allowing the appeal we restore Testamentary Case No.4/2007 for decision afresh keeping in view the evidence led at the trial.

20. The appeal is allowed. Impugned decision dated April 05, 2008 review whereof has been declined vide decision dated July 11, 2008 is set aside. Testamentary Case No.4/2007 is restored for adjudication afresh on merits and for which the learned Single Judge would keep in view the law declared in the present decision.

21. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(PRATIBHA RANI)
JUDGE

MARCH 03, 2015
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