

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

**RESERVED ON : 23rd NOVEMBER, 2017
DECIDED ON : 17th JANUARY, 2018**

+ FAO 284/2008, CM 12035/2008 & 1035/2010
RAGHUNATH Appellant
Through : Mr.Gaurav Mitra, Advocate with
Ms.Deepali Dwivedi & Mr.Vaibhav Mishra,
Advocates.

versus

STATE & ORS. Respondents
Through : Ms.Manisha Agrawal Narain,
Advocate for R2.

**CORAM:
HON'BLE MR. JUSTICE S.P.GARG**

S.P.GARG, J.

1. Present appeal has been preferred by Raghunath (hereinafter 'the appellant') under Section 299 of the Indian Succession Act, 1925 (hereinafter 'the Act') to challenge the legality and correctness of a judgment dated 19.05.2008 of learned Addl. District Judge in Probate Case No.95/06/99 whereby the respondent No.2 Bharat Bhushan was granted Letters of Administration regarding the property bearing No.B-107, Subhadra Colony, Delhi, bequeathed to him by his late father Roshan Lal by a Will dated 03.03.1997 (Ex.PW-1/1). The appeal is contested by respondent No.2.

2. I have heard the learned counsel for the parties and have examined the file. Respondent No.2 had filed a petition under Section 276 of the Act on 12.04.1999 for grant of Letters of Administration in respect of the estate of his father Roshan Lal on the basis of Will dated 03.03.1997. The said petition was contested by the present appellant, his brother and Satyawati – his mother; joint objections were filed by both of them. It was claimed that Roshan Lal had executed his last and final Will on 10.11.1997. Will dated 03.03.1997 was not the deceased's last and final Will.

3. To prove their respective case, the respondent No.2 examined PW-1 (Harpal Singh) – attesting witness of the Will dated 03.03.1997 besides examining himself as PW-2. He also examined A.Rehman, UDC from the office of Sub-Registrar, Kashmere Gate, who proved the registration of the Will. Ramesh Chand, Record Clerk proved the registration of the earlier Will dated 23.11.1994. The appellant examined RW-1 (P.D.Gupta), attesting witness of the Will dated 10.11.1997 besides examining himself as RW-2 and producing his mother Satyawati as RW-3.

4. It is relevant to note that Satyawati expired during the pendency of the proceedings and her legal heirs who were already on record were permitted to continue with the petition.

5. After considering the rival contentions of the parties and on appreciation of the evidence, the learned Trial Court dismissed the objections raised by the appellant and granted Letters of Administration to the respondent No.2 vide the impugned judgment.

6. Respondent No.2 placed reliance on the Will dated 03.03.1997 (Ex.PW-1/1) executed by his deceased father Roshan Lal in his favour regarding the suit property. The appellant on the other hand set up another Will dated 10.11.1997 (Ex.DW-1/1); it was claimed that it was the last and final Will of the deceased. The learned Trial Court noted various suspicious surrounding circumstances to conclude that the deceased did not execute the Will dated 10.11.1997. The Trial Court was also of the view that there was no denial to the execution of the Will dated 03.03.1997 (Ex.PW-1/1) by the appellant.

7. During the course of arguments, it emerged that the Will dated 03.03.1997 (Ex.PW-1/1) was signed by PW-1 (Harpal Singh) as an attesting witness. There is no other attesting witness to the Will. It, however, contains signature and stamp of Mr.M.N.Sharma, Advocate who had prepared the Will. PW-1 (Harpal Singh) in his statement testified that he had accompanied the deceased to Kashmere Gate for the execution of the new Will. The Will was drafted by Mr.M.N.Sharma, Advocate at Roshan Lal's instructions. He had put his signatures on the Will as an attesting witness at point 'D' and Mr.M.N.Sharma, Advocate had put his signatures on the Will at point 'E'. It was urged by the appellant's counsel that in the absence of attestation by the second witness, Will dated 03.03.1997 (Ex.PW-1/1) was not a valid Will. Learned counsel for the appellant urged that Mr.M.N.Sharma, scribe of the Will, was another 'attesting' witness and there was sufficient compliance of Section 63 of the Succession Act.

8. Undisputedly, validity of the Will dated 03.03.1997 (Ex.PW-1/1) was under challenge. In the written statement, the appellant had challenged its validity. The Trial Court, however, did not record any findings that the Will (Ex.PW-1/1) was a duly executed Will under Section 63 of the Act. It was not recorded by the learned Trial Court if Mr.M.N.Sharma, the scribe, was to be considered as another 'attesting' witness. It is, thus, clear that this aspect was not considered by the learned Trial Court while rendering the impugned judgment.

9. It is not at issue that one of the requirements of the execution of the Will under Section 63 of the Act is its attestation by two or more witnesses; it is mandatory. Section 68 of the Evidence Act speaks 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.

10. It is also true that Will is one of the documents, which is required to be attested. The word 'attested' is defined under Section 3 of the Transfer of Property Act as under :

““Attested” – “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.”

11. Neither Section 3 of the Transfer of Property Act nor Section 68 of the Evidence Act, stipulate any qualifications or disqualifications, for the persons to figure as attesting witness. The only requirement is that the attesor must have seen the executant of the document, sign or affix his mark on the document, or has seen some other person sign the instrument, in the presence and on the direction of the executant, and thereafter, must have signed the instrument, in the presence of the executant.

12. In the instant case, the Will (Ex.PW-1/1) has only one attesting witness. The controversy is whether Mr.M.N.Sharma, Advocate who had scribe the Will can be considered as the other ‘attesting’ witness. This Court is of the opinion that the scribe can also be an attesting witness to the Will; there is no bar to it. In ‘*Mathew Oommen vs. Suseela Mathew*’, MANU/SC/0212/2006: (2006) 1 SCC 519, the Hon’ble Supreme Court held that scribe of the Will was not ineligible to be an ‘attesting’ witness. It was 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. Relevant portion of the judgment reads :

“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.”

13. In ‘*Peddavandla Narayanamma vs. Peddasani Venkata Reddy and Ors.*’, MANU/AP/1097/2006, the High Court of Andhra Pradesh observed that if a witness had affixed his signature, in the same manner as an attesting witness, the fact that he is a scribe of a document, cannot be a factor, not to treat him as an attester.

14. This Court in FAO 335/2011 titled ‘*Ram Niwas Rana vs. Anil Kumar*’, MANU/DE/1426/2014, held that scribe of the Will can also be an attesting witness.

15. A scribe of the Will can also be an attesting witness; what is required for attestation is an intention to attest. In the cases referred above, the scribe had appeared as a witness and claimed to have put his signatures as an attesting witness. The person claiming Letters of Administration / Probate must show that the scribe put down his signatures for the purpose of attesting the document.

16. In the instant case, no evidence has emerged on record if scribe Mr.M.N.Sharma, Advocate had put his signatures as an

attesting witness. The respondent No.2 did not examine Mr.M.N.Sharma, Advocate to prove if his signatures on the Will (Ex.PW-1/1) appeared as an attesting witness and not as a mere scribe to the Will. As observed above, the learned Trial Court did not record any findings on this aspect if Mr.M.N.Sharma, Advocate could be considered as an attesting witness to the Will. It is a coincidence that Mr.M.N.Sharma, Advocate was an attesting witness to the Will in FAO No.335/2011 titled '*Ram Niwas Rana vs. Anil Kumar*' (supra). However, in that case he had appeared as a witness and claimed himself to be an attesting witness. Mr.M.N.Sharma, Advocate is again a scribe to the Will (Ex.PW-1/1) but he has not been examined in the present proceedings.

17. In the light of above discussion, the impugned order granting Letters of Administration to the respondent No.2 cannot be sustained in the absence of any specific evidence that Mr.M.N.Sharma, Advocate had put signatures as attesting witness. This Court is of the view that evidence of Mr.M.N.Sharma, Advocate is most crucial to ascertain whether he put his signatures on the Will as attesting witness or merely as a scribe.

18. The matter is thus remanded to the Trial Court to record the statement of Mr.M.N.Sharma, Advocate. The parties shall also be given opportunities by the Trial Court to produce their respective evidence (if any) on this limited aspect whether Mr.M.N.Sharma, Advocate was an attesting witness to the Will.

19. The Trial Court after recording the evidence so adduced by the parties and examining Mr.M.N.Sharma, Advocate (if available)

shall decide the matter on merits after considering the submissions of the parties.

20. The parties shall appear before the Trial Court on 5th February, 2018.

21. The appeal stands disposed of in the above terms. Pending applications also stand disposed of.

22. Trial Court record be sent back forthwith with the copy of the order.

JANUARY 17, 2018 / *tr*

**(S.P.GARG)
JUDGE**

