

RSA-168 of 1993 (O&M) and connected case

**IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH**

1. RSA-168 of 1993 (O&M)
Pronounced on : December 20, 2022
Smt. Anguri ... Appellant
Versus

**Smt. Khazani (since deceased) represented
by her legal heirs and another ...Respondents**

2. RSA-169-1993 (O&M)
Smt. Anguri ... Appellant
Versus

**Smt. Khazani (since deceased) represented
by her legal heirs and another ...Respondents**

CORAM: HON'BLE MR. JUSTICE DEEPAK GUPTA

Present:- Mr. R.K. Sharma, Advocate with
Mr. Santosh Sharma, Advocate for the appellant.

Mr. Dhruv Mittal, Advocate for
Mr. Amit Jain, Sr. Advocate for the respondents.

DEEPAK GUPTA, J.

This judgment shall dispose of two appeals – RSA No.168 of 1993 {arising out of Civil Suit No. 140 of 1984 titled as “***Khazani Devi and another vs Smt. Sarti and others***” (hereinafter referred as 'first suit') and Civil Appeal No.238 of 1991 titled as “***Smt. Khazani and another vs Smt. Sarti and others***”}; and RSA No.169 of 1993 {arising out of Civil Suit No. 414/1 of 1984 titled as “***Sarti vs Smt. Khajani and others***” (hereinafter referred as 'second suit') and Civil Appeal No.187 of 1991 titled as “***Smt. Khazani and another vs Sarti and another***”}, as facts of both the cases are intertwined and both the cases are with respect to the same subject matter of dispute between the same parties.

RSA-168 of 1993 (O&M) and connected case

2. Some admitted facts may be noticed first. One Chhotu son of Sukh Lal, resident of village Hassangarh, was owner of the suit property detailed and described in head note of Civil Suit No.140 of 1984. Said Chhotu expired on 18.06.1978 leaving behind his widow Smt. Sarti; and three daughters, namely Khazani, Dhanpat & Anguri. The parties are Hindus. Mutation No.975 dated 16.06.1979 was sanctioned on the basis of natural succession in favour of said four legal heirs i.e. Smt. Sarti, Khazani, Dhanpati and Anguri to the extent of 1/4th share each.

First Suit:

3. Two daughters, namely Khazani and Dhanpati brought the first suit in respect of the immovable properties mentioned in head note 'A' to 'D' of the plaint; and National Saving Certificates detailed in head note 'E' of the plaint, against their mother Smt. Sarti and sister Anguri. Tan Singh, husband of Anguri was also impleaded as one of the defendants. It was pleaded that after the death of Chhotu, his widow and three daughters became joint owner in possession of the suit properties to the extent of 1/4th share each on the basis of mutation No.975 sanctioned on 16.06.1979. However, plaintiffs had come to know that defendant No.1 Smt. Sarti had got entered mutation No.4521 dated 24.04.1983 in respect of the property mentioned at head note 'A' of the plaint on the basis of a WILL dated 18.11.1977 alleged to have been executed by Chhotu. Said WILL was challenged by the plaintiffs to be null & void on the grounds that it was not a genuine document; that it was obtained by fraud; that as per information, Chhotu was asked to put his thumb impression on the pretext of obtaining *Mukhtiarnama*; that Chhotu had not executed the WILL in his sound disposing state of mind; and that Chhotu was not in good health and proper state of mind as besides being 75 years of age, he was sick and infirm prior to this death and so, was not capable of executing the WILL. It was pleaded further that otherwise also, the WILL was shrouded by various suspicious circumstances. It was alleged that mutation on the basis of alleged WILL has been sanctioned without any notice to the plaintiffs.

4. Plaintiffs pleaded further that during his life time, Chhotu had

RSA-168 of 1993 (O&M) and connected case

sold 9 kanals 8 marlas of land detailed in para No.7 of the plaint in favour of one Sube Singh for consideration of ₹16,500/-. Said amount was deposited by Chhotu in the name of his wife-defendant No.1 Smt. Sarti in Sub Post Office, Gohana Mandi on 28.04.1978 in the form of six National Saving Certificates for seven years for a total sum of ₹14,000/-. Defendant No.1 later on got these Certificates changed into three National Saving Certificates of six years duration each of ₹5,000/- total amount of ₹15,000/-; and six other National Saving Certificates of ₹500/- each total amount of ₹3,000/- i.e. totaling ₹18,000/- on 31.09.1981, wherein plaintiffs and proforma defendant Anguri were made the nominees. Thereafter, defendant Tan Singh in collusion with Smt. Sarti in order to deprive the plaintiffs and proforma defendant of their share, got transferred these National Saving Certificates in his name by taking three National Saving Certificates of ₹5,000/- each and six National Saving Certificates of ₹500/- each i.e. totaling ₹18,000/- issued from Sub Post Office, Gohana. Plaintiffs claimed that they and defendants Sarti and Anguri are entitled to get transferred the amount of these NSCs to the extent of 1/4th share each.

5. Plaintiffs pleaded that they came to know about the existence of the WILL and consequent mutation and also regarding the National Saving Certificates about two months back. During pendency of the suit, plaintiffs further came to know that defendant No.1 had already suffered a consent decree in Civil Suit No.485 of 1983 titled as **“Anguri vs Sarti”** and got sanctioned mutation No.4679 dated 25.02.1984, which are alleged to null and void and not binding on the rights of the plaintiffs.

6. With aforesaid averments, plaintiffs prayed for decree of declaration that they, defendant No.1 Sarti and proforma defendant No.3 Anguri are owner in possession of the suit land in equal share; that WILL dated 18.11.1977 and consequent mutation are null and void being not binding on their rights; that they and defendant No.3 are entitled to encash and transfer the amount of National Saving Certificates mentioned at Sr. No.'E' of the Head Note of the plaint. They further prayed to declare judgment

RSA-168 of 1993 (O&M) and connected case

and decree passed in Civil Suit No.485 of 1983 titled as “**Anguri vs Sarti**” and consequent mutation to be null and void and not binding on the rights of the plaintiffs.

7. Defendants filed joint written statement along with the counter claim. Relationship amongst the parties is admitted and also the facts the parties are Hindus, agriculturists and governed by customs. Defendants denied that sale consideration of any agriculture land was invested in any National Saving Certificates as alleged. It is claimed that these National Saving Certificates were purchased by Tan Singh in the name of Smt. Sarti by investing his own money. According to them, sale consideration of land sold by Chhotu was invested by him for constructing *Dharamshala* and *kui* (well) in village Hassangarh.

8. Defendants further defended the WILL dated 18.11.1977 by pleading that it is a registered document executed by Chhotu in favour of Smt. Sarti and that after the death of Chhotu on 18.06.1978, Sarti became absolute owner of the disputed property of the deceased, in which plaintiffs and defendant No.3 have no right. They alleged the mutation No.975 dated 16.06.1979 sanctioned on the basis of natural succession to be wrong and illegal, having been sanctioned at the back of the defendants, without conducting any inquiry and submitted that mutation No.4521 dated 24.04.1983 was correctly sanctioned on the basis of WILL in favour of Sarti. The defendants further defended the decree passed in Civil Suit No.485 of 1983 to be valid, having been voluntarily suffered by Smt. Sarti in favour of Anguri in respect of land comprised in Khewat No.2831 (13 kanals) situated in the revenue estate of village Gohana; and Khewat No.131 with respect to land measuring 6 kanals 8 marlas, situated in revenue estate of village Khandrai.

9. With the above stand and controverting other averments of the plaint, defendants prayed for dismissal of the suit. These defendants in their counter claim prayed to declare mutation No.975 sanctioned on 16.06.1979 to

RSA-168 of 1993 (O&M) and connected case

be null and void and not binding on the rights of defendant No.1-Sarti.

10. In rejoinder, plaintiffs reiterated their case and controverted the stand of the defendants. They also opposed the counter claim.

11. Following issues were framed in the first suit:

“1. Whether the defendant's amount invested in national saving certificates in the name of Smt. Sarti was in the sale consideration of sale deed dated 27.04.1978 as alleged, if so its effect? OPP.

2. Whether the Will dated 18.11.1977 was validly executed by deceased Chhotu in favour of defendant No.1 as alleged? If so its effect? OPD.

3. Whether the mutation No.975 dated 16.6.1979 is null and void and has no effect on the rights of the parties as alleged? OPD.

4. Whether the parties are governed by custom in matters of alienation and succession? If so what that custom is ? OPD

5. Whether the suit is bad for mis-joinder of parties, if so its effect? OPD.

6. Whether the suit of the plaintiff is time barred as alleged? OPD.

7. Whether the suit has not been properly valued for the purposes of court fee and jurisdiction? OPD.

8. Whether the suit of the plaintiff is false, frivolous and vexatious as alleged and the defendants are entitled to special costs under section 35-A CPC? OPD.

8-A. Whether the judgment and decree in civil suit No.485 of 1983 titled Angoori Vs. Sarti and mutation No.4679 dated 25.2.1984 are illegal, null and void and not binding on the plaintiffs?OPP

9. Relief.”

RSA-168 of 1993 (O&M) and connected case

12. After taking evidence led by both the parties, learned Trial Court heard the matter and came to the conclusion that amount invested in the National Saving Certificates was in fact the sale consideration received by Chhotu on selling his 9 kanals 8 marlas of land to Sube Singh. However, since the National Saving Certificates were purchased by Chhotu in the name of his wife Smt. Sarti, therefore, said Sarti became full owner of the amount of the National Saving Certificates and had right to alienate the same in any manner, she liked. As she had transferred the National Saving Certificates in the name of defendant No.2 Tan Singh, who withdrew the amount and appropriated the same to his own use, so the plaintiffs did not have any right to claim any share in the said amount. Issue No.1 was accordingly disposed of. Under issue No.2, WILL dated 18.11.1977 was found to have been validly executed and so, issue was decided against the plaintiffs and in favour of the defendants. As a result of the finding on issue No.2, mutation No.975 dated 16.06.1979, sanctioned on the basis of natural succession was held to be not valid and so, the issue N: 3 was decided in favour of defendant No.1. Issue Nos.4, 5 and 8 were disposed of as not pressed for. Issue No.6 was decided against the plaintiffs by holding that suit was barred by limitation. Under issue No.7, it was held that as plaintiffs had claimed share in the money spent for purchasing the National Saving Certificates mentioned in head note 'E' of the plaint, so they were required to affix ad valorem court fees thereon, which they failed to do so and so, issue was decided in favour of the defendants. Issue No.8-A was decided against the plaintiffs by holding that as Sarti had become full owner of the estate left by Chhotu by dint of Will dated 18.11.1977, so she was fully competent to suffer the decree in favour of Anguri in Civil Suit No.485 of 1983 and so, mutation on the basis of that decree was also legal and binding on the parties. With all these findings, the suit was dismissed.

Second suit:

13. Second suit was filed by Smt. Sarti against her three daughters, namely, Khazani, Dhanpati and Anguri, wherein she challenged mutation

RSA-168 of 1993 (O&M) and connected case

No.975 dated 16.06.1979 to be illegal and void, having no effect on her rights in view of the WILL dated 18.11.1977 executed by Chhotu in her favour. She prayed for decree of declaration that she is the absolute & exclusive owner of the land measuring 45 kanals 3 marlas of Khewat No.129; and 6 kanals of Khewat No.130, total measuring 51 kanals 3 marlas, situated in village Khandrai; and that mutation No.975 sanctioned on 16.06.1979 is not binding on the rights being null & void.

14. Defendant Nos.1 and 2 Khazani and Dhanpati (*plaintiffs of the first suit*) opposed the suit on the basis of natural succession in their favour and prayed for dismissal thereof.

15. Defendant No.3 Anguri (*proforma defendant in the first suit*) in her separate written statement supported the claim of plaintiff-Sarti and prayed for decreeing the same.

16. Following issues were framed in the second suit:-

“1. Whether Shri Chhotu deceased executed a valid will dated 18.11.1977, in favour of, the plaintiff, if so to what effect? OPP.

2. Whether the plaintiff is in exclusive possession over the suit land as alleged? OPP.

3. Whether mutation No.975 dated 16.6.1979 is null and void as alleged? OPP.

4. Whether the suit is liable to be stayed under Section 10 CPC as alleged? OPD.

5. Whether the suit is barred by limitation? OPD.

6. Whether the suit is bad for non-joinder of necessary parties? OPD.

7. Whether the suit is no maintainable in the present form? OPD.

8. Whether the suit has not been properly valued for the

RSA-168 of 1993 (O&M) and connected case

purposes of court fees and jurisdiction? OPD.

9. Relief.”

17. Evidence led by both sides was taken and the matter was heard by the same Presiding Officer of the Trial Court, who had decided the first suit. By observing that WILL dated 18.11.1977 in favour of Sarti as executed by Chhotu had already been decided to be true and valid Will in suit No.140 of 1984 decided on that day itself and so, the issue N: 1 was decided in favour of plaintiff - Sarti. Plaintiff-Sarti was held to be in possession of the land in dispute and so, issue N: 2 was decided in her favour. Mutation No.975 dated 16.06.1979 was held to be null and void under issue No.3 and so, finding went in favour of the plaintiff. Other issues were disposed of as not pressed and consequently, said suit filed by Sarti was decreed, whereby she was declared owner in possession of the suit property and that mutation No.975 dated 16.06.1979 had no effect on her rights. Defendants of the case were restrained from interfering in the possession of the plaintiff over the suit land.

Appeals of both the suits before first appellate court:

18. Plaintiffs of the first suit, namely, Khazani and Dhanpati filed the appeal (CA No.238 of 1991) before first appellate court. They, as defendant Nos.1 and 2 of the second suit, filed separate appeal (CA No.187 of 1991) against the judgment of the trial court arising out of the second suit. Both these appeals were heard together by the same Presiding Officer of the First Appellate Court, who reversed the finding regarding WILL.

19. In the first appeal, it was held that WILL purported to have been executed by Chhotu was not proved to be legal and valid. Regarding the National Saving Certificates in dispute, it was held that as the same were purchased from the sale proceeds received by Chhotu in the name of Sarti; and Sarti had transferred the amount to Tan Singh and had appointed three daughters of Sarti, namely, Khazani, Dhanpati and Anguri to be her nominees, so Sarti was not within her rights to transfer the National Saving Certificates to Tan Singh and so, after the death of Sarti, the three daughters

RSA-168 of 1993 (O&M) and connected case

were entitled to the amount of the National Saving Certificates in equal shares. The finding on issue No.1 was accordingly reversed. As regard issue No.2, the WILL was held to be not proved and so, the findings on issue No.2 as well as issue No.3 were reversed. Issue Nos.4 to 8 were stated to be not pressed during arguments. Finding on issue No.8-A was retained by holding that there was no evidence to prove that decree suffered by Sarti in favour of Anguri in civil suit N: 485 of 1983 was not binding. Consequently, appeal was accepted except to the extent of decree suffered by Sarti in favour of Anguri. Appeal was dismissed qua issue No.8-A.

20. In the second appeal arising out of judgment of second suit, mutation No.975 dated 16.06.1979 was held to be correctly sanctioned. The subsequent mutation on the basis of WILL was held to be null and void, as it was held that Chhotu had never executed any WILL and so, suit filed by plaintiff-Sarti was dismissed and the appeal of the defendants, namely, Khazani and Dhanpati, was accepted.

Present RSAs:

21. Anguri (*one of the defendants in both the suits*) is in both these appeals against her two sisters Khazani & Dhanpati, assailing judgments and decree passed by the First Appellate Court. Sarti had expired during pendency of first appeals.

22. Submissions made by learned counsel for both the parties in both the appeals have been heard together. The entire record including LCR has been perused with the able assistance provided by counsel of both the sides.

23. By reading the evidence recorded in the first suit, contention of learned counsel for the appellant is that one of the attesting witnesses to the WILL, namely Mange Ram did not support the WILL; whereas another attesting witness Siri Kishan Lambardar had already expired. It is because of this reason that Sub Registrar, who registered the WILL was examined as

RSA-168 of 1993 (O&M) and connected case

PW6, who proved the valid execution of the WILL by Chhotu in favour of Smt. Sarti. Apart from this, DW1 Rajinder Lal identified the handwriting of his father Chaman Lal, who had scribed the WILL. All this evidence was duly appreciated by the Trial Court by holding the WILL to have been validly executed by Chhotu. It is contended that in the circumstance, when one of the attesting witness of the WILL does not support and other could not be examined due to death, the statement of the Sub Registrar was rightly considered to be that of the attesting witness. It is further urged that finding of learned Trial Court in first suit that suit was time barred, has not been reversed by the First Appellate Court and therefore, the appeal should not have been accepted as the suit itself was barred by limitation. Still further, it is contended that as the consent decree passed in Civil Suit No.485 of 1983 suffered by Sarti in favour of Anguri has been held to be legal and valid even by the First Appellate Court and therefore, the finding with regard to the WILL cannot be sustained, as it is by virtue of the WILL that Sarti had become owner of the suit property regarding which she suffered decree in favour of Anguri.

24. Refuting the aforesaid contentions, it is contended by Ld. Counsel for the respondents that as per Section 68 of the Indian Evidence Act, WILL is required to be proved by examining at least one of the attesting witnesses. In this case, Mange Ram, one of the attesting witnesses to the WILL as examined by the plaintiff, did not support the WILL and testified that Chhotu wanted to get a *Mukhtiarnama* executed. It is urged that other attesting witness Siri Kishan Lambardar was very much alive at the time, when defendants were leading their evidence and therefore, they cannot take benefit of subsequent death of Siri Kishan Lambardar. In case, Mange Ram had not proved the due execution of the WILL, defendants could have examined the other attesting witness Siri Kishan Lambardar but they did not take any step to examine him. It is contended that without having a recourse to this procedure, Section 71 of the Indian Evidence Act cannot be made applicable so as to prove the WILL by way of other evidence. Therefore, the statement of Sub Registrar cannot be considered to that of an attesting

RSA-168 of 1993 (O&M) and connected case

witness, who was merely performing his statutory duty by registering the WILL as per law. Learned counsel further submits that as the plaintiffs Khazani and Dhanpati were claiming their rights in the suit property on the basis of inheritance, so there was no limitation to file the suit and as such, the findings of the Trial Court regarding the suit being time barred, is not sustainable. This issue was duly raised before the First Appellate Court and it has been wrongly mentioned by the First Appellate Court that it was not pressed. Learned counsel contended further that once the WILL has been held to be not a legal and valid document by the First Appellate Court, so the decree suffered by Sarti in favour of Anguri could not be sustained, as Sarti derived her title in view of the WILL and once WILL goes, she could not have suffered the decree.

25. Having considered the submissions of both the sides, I find merit in these appeals only to some extent.

26. Although the issue pertaining to the amount of the National Saving Certificates as referred in head note 'E' of the plaint of the first suit has not been raised before this Court but this Court would like to mention that finding on issue No.1 as rendered by the Trial Court was correct. It is duly proved as per evidence available on record that Chhotu invested the sale proceeds of the land sold by him during his life time in National Saving Certificates taken by him in the name of his wife Sarti. Once National Saving Certificates were taken in the name of Sarti, she became absolute owner thereof and so, she was entitled to utilize the proceeds thereof in the manner she liked. Smt. Sarti transferred the amount of National Saving Certificates in the name of her son-in-law Tan Singh by making the three daughters as nominees. In case, three daughters survived Tan Singh, so obviously they were entitled to the amount of National Saving Certificates being nominees. However, Tan Singh appropriated the amount during his life time, therefore, none of the three daughters of Sarti are entitled to that amount because the National Saving Certificates had been transferred by Sarti in favour of said Tan Singh well within her rights to do so. As such, finding on issue No.1 as

RSA-168 of 1993 (O&M) and connected case

rendered by learned First Appellate Court in first suit deserve to be reversed and that of Trial Court to be restored.

27. The main controversy is regarding the WILL. Mark X is the certified copy and Ex.D1 is the original WILL available on record, which reveals that it is purported to be executed by Chhotu in favour of his wife Smt. Sarti. This WILL dated 18.11.1977 is purported to be scribed Chaman Lal, Deed Writer and it is witnessed by Mange Ram, Panch of village Khandrai and Siri Kishan Lambardar of village of Khandrai. This is a registered document.

28. Before discussing the evidence regarding the WILL, it would be relevant to notice the legal position as to how a WILL is to be proved.

29. The mode of proving a WILL does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a WILL by Section 63 of the Indian Succession Act, which runs 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 acknowledgment 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.”

RSA-168 of 1993 (O&M) and connected case

30. Apart from above, Section 68 of the Evidence Act is quite relevant regarding proving the execution of a WILL. This reads 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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

31. The conjoint reading of above provisions makes it quite clear that at least one out of the two attesting witnesses must be called to prove due execution of the WILL. Further, it is required for the attesting witness to prove that he had seen the testator sign or affix his mark to the WILL in his presence or that he received from the testator a personal acknowledgment of his signature or mark of the signature of such other person and each of the witnesses shall sign the WILL in the presence of testator. Reliance can be placed on **Pentakota Satyanarayana Vs. Pentakota Seetharatnam 2006(1) C.C.C.563**, wherein it has been reiterated by Hon'ble Supreme Court that to prove due execution of Will, attesting witness must state that each of the two witnesses has seen the executor sign or affix his mark to the instrument or has seen some other person sign the instrument in his presence and by the direction of the execution. Witness should further state that each of the attesting witness signed the instrument in the presence of the executant. Hon'ble Supreme Court held that these are the ingredients of attestation and they have to be proved by the witnesses.

32. Further, it is the settled proposition of law that it is the propounder of the Will, who has to prove its due execution. Besides, mere proving the signatures of the testator on the Will is not sufficient. Reference in this regard can be made to **Ganpat Vs. Siri Chand 1992(1) LJR 252** and **Janki Narayan**

RSA-168 of 1993 (O&M) and connected case

Bhoir Vs. Narayan Namdeo Kadam 2003(2) LJR 646, wherein it has been held that due and valid execution of the Will cannot be proved by simply proving that the signatures on the Will was that of the testator. It must be proved that attestations were also made properly as required by clause (c) of Section 63 of the Succession Act, 1925.

33. Apart from above, the mere fact that the WILL is registered, cannot be a reason to uphold its validity, if it is not found to be proved in accordance with the provisions of Section 68 of the Indian Evidence Act or the other provisions, if applicable.

34. In the present case, defendant Sarti, who propounded WILL did not produce any of the attesting witnesses so as to prove its validity. Rather, she examined Shri Rajinder Lal, Document Writer as DW1, who identified the signature of his father Shri Chaman Lal on the WILL Ex.D1, who deposed that entry regarding this WILL was made at serial No.638 dated 18.11.1977 in the Vasika register of his father. In the said register, names of Siri Kishan Lambardar and Mange Ram as witnesses were also mentioned. DW2 Jai Bhagwan is the registration Clerk, who on the basis of record brought by him proved 'Mark X' to be the certified copy of the original WILL but disclosed during cross-examination that the original WILL as maintained in their office did not bear either the thumb impression of Chhotu or the signature of any of the attesting witnesses. He also disclosed that it is not mentioned in the record as to who had brought the original WILL for the purpose of registration.

35. It is the plaintiffs of the first suit, who produced one of the attesting witness to the WILL, namely Mange Ram as PW4, who disclosed that he was called by a Document Writer at his seat and asked to sign on some stamp papers by stating that *Mukhtiarnama* was to be signed by him. He specifically stated that nobody else signed in his presence and so, he is not aware, as to which document i.e. *Mukhtiarnama* or the WILL was executed. During his lengthy cross-examination, he pleaded loss of memory as to whether Chhotu had appeared before the Sub Registrar or not but specifically

RSA-168 of 1993 (O&M) and connected case

stated that Siri Kishan Lambardar was not present there. He pleaded ignorance as to whether the contents of the document were read over to Chhotu or not.

36. As noticed earlier that other attesting witness Siri Kishan Lambardar has not been examined. It finds mention in the judgment of learned First Appellate Court as was stated during arguments and which fact is not even disputed before this court that Siri Kishan Lambardar i.e. another attesting witness to the WILL was alive, when the defendants Sarti etc. were leading their evidence but was not examined by them, despite the fact that Mange Ram had not supported the WILL. Rather, defendants preferred to examine Shri V.P. Chauhan as DW6, who was Sub Registrar at the relevant time and who deposed that before registration, he had read over the contents of the WILL to Chhotu, who had signed in his presence and in the presence of both the attesting witnesses after understanding the contents thereof.

37. One of the attesting witnesses Mange Ram having not proved the WILL to be executed by Chhotu, it was incumbent upon the defendant Sarti, the propounder of the WILL, to examine the other attesting witness, namely Siri Kishan Lambardar. Despite the fact that said Siri Kishan Lambardar was alive and available during the evidence of defendants, said recourse was not taken. In these circumstance, when defendants failed to examine at least one of the attesting witnesses to prove the WILL, there can be no doubt in holding that the validity of the WILL is not proved.

38. The contention of learned counsel for the appellant that the WILL is proved by the testimony of Sub Registrar and the same is admissible under Section 71 of the Indian Evidence Act, has no merit. It is only in case, where propounder of a WILL is unable to prove the WILL as per Section 68 of the Evidence Act, then recourse to Section 71 can be taken, which reads as under:

“71. Proof where attesting witness denies the execution. - If the executing witness denies or does not recollect the execution of the document, its execution may

RSA-168 of 1993 (O&M) and connected case

be proved by other evidence.”

39. Section 71 is in the nature of a safeguard to the mandatory provisions of Section 68 to meet a situation, only where it is not possible for propounder of the WILL to prove the execution of the WILL by calling attesting witnesses, though alive. In **“Janki Narayan Bhoir vs Narayan Namdeo Kadam”** reported as 2003(1) R.C.R.(Civil) 409, it has been held by Hon'ble Apex Court as under:

“10..... 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.

11. [Section 71](#) of the Evidence Act is in the nature of a safeguard to the mandatory provisions of [Section 68](#), Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling attesting witnesses.

RSA-168 of 1993 (O&M) and connected case

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 the 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 [Evidence Act](#). Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of [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 bye to the mandate of law relating to proof of execution of a will."

[underlined portion emphasised by this court]

40. It is, thus, clear that Section 71 of the Indian Evidence Act cannot be resorted without exhausting Section 68 of the Indian Evidence Act i.e. by examining at least one attesting witness so to prove the Will. At least one attesting witness should prove the Will. Mere appearance of at least one

RSA-168 of 1993 (O&M) and connected case

attesting witness in the witness box does not suffice. If one of the attesting witness has not supported the Will, other is to be examined, if alive and available. It is only after exhausting this recourse, Section 71 of the Indian Evidence Act would become applicable.

41. In the present case, when one of the attesting witnesses Mange Ram produced by plaintiffs did not support the WILL to be executed by Chhotu, it was incumbent upon the defendant Sarti, the propounder of the WILL, to examine the other attesting witness, namely Siri Kishan Lambardar. Despite the fact that said Siri Kishan Lambardar was alive and available during the evidence of defendants, said recourse was not taken and therefore, adverse inference is to be drawn that had said Siri Kishan Lambardar was produced in the witness box, he would not have supported the WILL.

42. As far as the Sub Registrar is concerned, he merely performs statutory duty and can not be regarded as statutory attesting witness to the WILL, as has been held by the Hon'ble Supreme Court in **“Benga Behera & Anr. vs Braja Kishore Nanda & Ors”**, reported as 2007(3) R.C.R. (Civil) 240, wherein it has been held as under:-

“35. If an authority in performance of a statutory duty signs a document, he does not become an attesting witness within the meaning of [Section 3](#) of the Transfer of Property Act and [Section 63](#) of the Succession Act. The term ‘attestation’ means:

“to ‘attest’ is to bear witness to a fact. The essential conditions of valid attestation are (i) two or more witnesses have seen the executant sign the instrument (ii) each of them has signed the instrument in presence of the executant.

36. “Animus attestandi” is a necessary ingredient for proving the attestation. If a person puts his signature in a document only in discharge of his statutory duty, he may not be treated to be an attesting witness.

38. In [Dharam Singh v. Aso and Another](#) [1990 (Supp) SCC 684], this Court held:

“2. The two attesting witnesses did not support the execution of the will. The trial court relied upon the statement of the registering authority and on the basis of decisions of the Lahore and Punjab and

RSA-168 of 1993 (O&M) and connected case

Haryana High Courts found that the will had been proved. The lower appellate court reversed the decision by relying upon two decisions of this Court in [M.L. Abdul Jabbar Sahib v. H.V. Venkata Sastri & Sons](#) and [Seth Beni Chand v. Kamla Kunwar](#).

3. We have examined the record and are satisfied that the appellate court and the High Court were right in their conclusion that the Registrar could not be a statutory attesting witness. Therefore, the conclusion that the will had not been duly proved cannot be disturbed."

43. In view of the legal position as above, it is held that learned First Appellate Court rightly came to the conclusion that WILL dated 18.11.1977 was not proved in accordance with law. Said WILL and consequent mutation No.4521 of 24.04.1983 based on this WILL have been rightly held to be null, illegal and void and not binding on the rights of the plaintiffs Khazani etc. As WILL is not proved, so obviously the mutation No.975 dated 16.06.1979 sanctioned on the basis of natural succession of Chhotu is held to be legal and valid.

44. As plaintiffs stake their claim in suit property on the basis of inheritance based on natural succession, so there was no limitation to file the suit and as such the suit was within limitation. Apart from above, mutation No.975 on the basis of natural succession was sanctioned on 16.06.1979 in *Jalsa-e-aam* in presence of Sarti after the death of Chhotu on 18.06.1978. The proceedings as recorded on this mutation reveal that it was sanctioned in the presence of Smt. Sarti, who was identified by Sardari Lal Lambardar. Had there been a WILL in favour of Sarti at that time, she would have immediately protested to the sanctioning of the WILL on the basis of natural succession. The WILL saw light of the day for the first time on 24.04.1983, when impugned mutation No.4521 was sanctioned in favour of Sarti.

45. It is also worth noting that Sarti did not enter in the witness box to deny her presence at the time of sanctioning of the mutation on the basis of natural succession. The statement of her attorney Tan Singh examined as DW9 to the effect that he had accompanied Sarti, who had produced the

RSA-168 of 1993 (O&M) and connected case

WILL and that they were told that mutation shall be sanctioned as per WILL, is not at all believable because presence of Tan Singh at the time of mutation is not mentioned. Besides, it was within the personal knowledge of Sarti as to what transpired at the time of sanctioning of the mutation in *Jalsa-e-aam*. So, adverse inference is to drawn against her. For this reason also, the suit filed in 1984 is held to be well within limitation and as such, finding of learned Trial Court on the issue No.6 relating to limitation is set aside. The suit is held to be within limitation.

46. Coming to the finding on issue No.8-A, Ex.PX is the decree dated 07.09.1983 passed in Civil Suit No.485 of 1983 titled as "*Anguri vs Sarti*". Said decree has been suffered by Sarti in favour of one of her daughters Anguri in respect of two parcels of land - 6 kanals 8 marlas of Khewat No.131, situated in village Khandrai; and 13 kanals of Khewat No.2831, situated in village Gohana, total measuring 19 kanals 8 marlas.

47. As far as the land measuring 6 kanals 8 marlas comprised in Khewat No.131 of village Khandrai is concerned, it is not the subject matter of any of the present suits and since decree has been voluntarily suffered by Sarti in favour of Anguri, therefore, said decree is held to be valid qua 6 kanals 8 marlas of the land of Khewat No.131, situated in village Khandrai.

48. However, the land measuring 13 kanals as comprised in Khewat No.2831 situated in village Gohana is part of the suit land as mentioned at 'A' of the head note of the plaint of the first suit. Since the WILL in favour of Sarti has been found to be null and void and having not been validly executed, therefore, Sarti did not derive any right or title in respect of said land comprising Khewat No.2831 and as such, she could not suffer any decree in favour of Anguri regarding the said land except to the extent of her own share. Therefore, decree dated 07.09.1983 passed in Civil Suit No.485 of 1983 titled as "*Anguri vs Sarti*" to the extent of land measuring 13 kanals comprised in Khewat No.2831 (para A of the head note) is held to be null and void and not binding on the rights of the plaintiffs Khazani and Dhanpati.

RSA-168 of 1993 (O&M) and connected case

49. However, the effect of natural succession is to be seen. After the death of Chhotu, his estate was inherited by his widow Sarti and three daughters Khazani, Dhanpati and Anguri to the extent of 1/4th share each, in natural succession. As WILL relied by Sarti has not been proved, so Sarti had become co-owner to the extent of 1/4th share. As such, she could have transferred her own share i.e. 1/4th share in the land of Khewat No.2831 as mentioned in Para A of the plaint of first suit by any mode in favour of Anguri and so, the decree dated 07.09.1983 as suffered by Sarti in favour of Anguri is held to be legal and valid only to the extent of her share i.e. 1/4th share. This way, appellant-defendant Anguri becomes owner of ½ share (1/4th as suffered by Sarti and 1/4th her own share) in the land measuring 13 kanals comprised in Khewat No.2831, mentioned in head note A of the plaint of first suit; whereas respondents Khazani and Dhanpati will get 1/4th share each in the said land. However, in rest of the suit property (except at head note E of the plaint) three daughters Khazani, Dhanpati and Anguri will have 1/3rd share each, as Sarti has already expired.

50. Both the appeals are allowed to the only extent as indicated above. Parties are left to bear their own costs.

December 20, 2022

sarita

(DEEPAK GUPTA)
JUDGE

Whether reasoned/speaking:	Yes/No
Whether reportable:	Yes/No