

RSA-2954-2011 (O&M)

and connected case

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

1.RSA-2954-2011 (O&M)

Gadhori Devi and others

....Appellants

Versus

Naraini Devi and others

..Respondents

2.CWP-17971-2021 (O&M)

Narayani Devi

....Petitioner

Versus

State of Haryana and others

..Respondents

Date of decision: 20.04.2022

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present: Mr. J.S.Brar, Advocate for the appellants

Mr. R.N.Lohan, Advocate for respondent no.1
in RSA-2954-2011 and
for the petitioner in CWP-17971-2021

Mr. Samarth Sagar, Addl. AG, Haryana

ANIL KSHETARPAL, J

1. By this order, two cases i.e RSA-2954-2011 and CWP-17971-2021 shall stand disposed of.

2. While assailing the concurrent findings of facts arrived at by the courts below, the plaintiff no.1 has filed this Regular Second Appeal. The suit filed by the plaintiffs for grant of declaration that the plaintiffs, defendants and proforma defendants are joint owners in

possession of the land left behind by Sh. Shish Ram s/o Devitia s/o Sheo Ram, resident of Bhagwan Khera and the registered Will no.1 dated 01.04.1992 is null and void, has been dismissed. In order to understand the relationship between the parties, it will be appropriate to copy the pedigree table drawn by the plaintiffs, which is extracted as under:-

Devitya					
Shish Ram (now deceased)					

1. Smt. Piari (now deceased) No.2)	2. Ram Rati (Pro. Deft. No.3)	3. Shanti (Pro. Deft. (Pltff No.1)	4. Gadhori	5. Naraini Devi (Deft. No.1)	6. (Smt. Chhoti (now deceased)
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1. Rajbala	2. Bimla	3. Balwan,	1.Smt. Sheela Devi,		
4. Baljit	5. Satywan	6. Birban	Rampal &Satpal		
(Plaintiffs No.2 to 7)			(Plaintiffs No.8 to 10)		

3. The correctness of the aforesaid pedigree table is not in dispute.

4. Smt. Gadhori, Smt. Raj Bala, Smt. Bimla and Ram Piyari alongwith the children of Smt. Choti and Ram Piyari filed a suit, for the relief which has been noted above. Smt. Niranjani Devi was the contesting defendant. The plaintiffs claim that the registered Will no.1 dated 01.04.1992 was never executed by their father Shish Ram. Sh. Shish Ram is stated to have died on 18.05.2002. The plaintiffs claim that mutation entered by the revenue authorities on the basis of the registered Will is wrong and late Sh. Shish Ram was more than 80 years of age, besides being infirm and of unsound mind. The Will was executed by playing undue influence and pressure and Sh. Shish Ram had no reason to disinherit the plaintiffs and the proforma defendants.

The suit was contested by defendant no.1 asserting that Sh. Shish Ram

had executed the Will with his free will and volition and he was a vigilant person, who made efforts to protect his property. It was also asserted that defendant no.1 alongwith her children used to reside with Sh. Shish Ram at Village Bhag Khera and it is confirmed by the fact that the ration card, vote etc. of defendant no.1 is in the village Bhag Khera. Sh. Shish Ram executed the Will in her favour as she and her children served Sh. Shish Ram for quite sometime and she alongwith her children is in the cultivating possession of the land.

5. The trial court, after appreciating the evidence, culled out the following issues:-

- “1. Whether the plaintiffs are entitled to the declaration as prayed? OPP
2. Whether the plaintiffs are entitled to injunction as alleged? OPP
3. Whether the suit of the plaintiffs is not maintainable in the present form? OPD
4. Whether the plaintiffs have no cause of action and locus standi to file the present suit? OPD
5. Whether no proper court fees have been affixed by the plaintiffs? OPD
6. Whether civil court has no jurisdiction? OPD
7. Relief.”

6. In order to prove the registered Will, defendant no.1 examined DW1 Bhagwan Dass, scribe of the Will and DW 2 Ram Kishan, Nambardar, attesting witness of the Will. The original Will is Ex.R1 on the record. It is attested by two attesting witnesses Ram Kishan, Nambardar of Village Bhag Khera and Palu Ram s/o Chander resident of Bhag Khera. Sh. Shish Ram was also resident of Village Bhag Khera. The original Will, in order to be secured, has been

laminated. A perusal thereof shows that on the first page Sh. Shish Ram has put his thumb impression alongwith Ram Kishan, Nambardar. On the second page, Sh. Shish Ram as well as Palu Ram have put their thumb impression. At the time of registration, Sh. Shish Ram has put his left thumb impression whereas both the witnesses have put their thumb impressions respectively.

7. Heard learned counsel representing the parties and with their able assistance perused the paperbook as well as the record of the courts below, which was requisitioned. Learned counsel representing the parties have also filed a written synopsis alongwith gist of their arguments. Sh.G.S.Brar, learned counsel representing the appellants contends that the only one of the attesting witness of the alleged Will has been examined and he has failed to prove the execution and attestation of the Will in accordance with Section 63 (C) of the Indian Succession Act, 1925 (hereinafter referred to as 'the 1925 Act'). While elaborating, he submits that there is no doubt that Section 68 permits the propounder to examine one attesting witness out of more than one but he is required to prove not only the execution of the Will but also attestation of the Will in terms of Section 63 (C) of the 1925 Act, failing which the propounder fails to prove the Will, in accordance with the law. He relies upon the judgment passed by the Supreme Court in **Pentakota Satyanarayana and others vs. Pentakota Seetharatnam and others 2005 (8) SCC 67, Janki Narayan Bhoir vs. Narayan Namdeo Kadam 2003 (2) SCC 91 and Lalitaben Jayantilal Popat vs. Pragnaben Jamnadas Kataria and others 2008 (15)SCC 365**. Per contra,

learned counsel representing respondent no.1- Narayani Devi contends that Ram Kishan, one of the attesting witness, while deposing in court has fulfilled the requirement of Section 63 (C) of the 1925 Act. He submits that the executant as well as both the attesting witnesses were present at the time of execution and registration of the Will and they signed the Will in the presence of each other. He submits that therefore, a hyper technical view should not be taken.

8. At this stage, it becomes important to carefully read and analyze the deposition of Ram Kishan, Nambardar of Village Bhag Khara. He has stated that the Will was scribed by Bhagwan Dass. It was scribed on the instructions of Sh.Shish Ram. The scribe, after scribing the Will had read over the Will clearly and made everyone understand the Will. After admitting its contents to be correct, Sh.Shish Ram had put his thumb impression and he and Baru also put their respective thumb impressions. He further emphasized that all the witnesses had put their thumb impression then and there. He further states that at the time of registration the Tehsildar had read over the Will and they thumb marked the Will in the presence of the Registrar. He goes on to depose that there were only three persons at the time of the execution of the Will apart from the scribe and all three were present at the spot i.e before the Registrar. He has further stated that he thumb marked the Will twice over, namely once in the presence of the scribe and second before the Registrar, at the time of its registration. Similarly, Baru, the other attesting witness, also thumb marked the Will in the similar manner.

9. At this stage, it would be appropriate to extract Section 63 of the 1925 Act:-

“63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, ¹² [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.

10. It is evident that Section 63(c) of the 1925 Act requires that the unprivileged shall be attested by two or more witnesses, each of whom has seen the testator affix his sign or mark to the Will or has received from the testator personal acknowledgement of his signatures or

mark. Each of the witnesses shall sign or thumb mark the Will in the presence of testator but it shall not be necessary that more than one witness be present at the same time. It is also provided that no particular form of attestation shall be necessary. Hon'ble Supreme Court while interpreting Section 63(c) in **Pentakota (supra)** has held that the attesting witness must state that each of the two witnesses has seen the executor sign or affix his mark to the instrument or has received acknowledgement of the executor to that effect. The witness should further state that each of the attesting witnesses signed the instrument in the presence of the executant. In **Janaki Narayan (supra)**, the Supreme Court after interpreting Section 63 (c) of the 1925 Act has held 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 an evidence flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed.

That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of section 63 of the Succession Act. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63. Although section 63 of the Succession Act requires that a Will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that 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. Similarly, in **Lailtaben Jayanti Lal Popat’s case (supra)**, the Supreme Court, after examining the case law has approved the view taken in **Janaki Naryan’s case**.

12. The judgment passed by the Supreme Court is binding on this Court under Article 141 of the Constitution of India. However, in the considered view of the Court, a registered Will executed by the testator is a solemn document. The registered document has the presumption of correctness. It has come in evidence that out of the six daughters, Shish Ram has only given the property to Narayani Devi, the beneficiary of the Will, alongwith her children, who used to stay with

Shish Ram. The Will was executed and registered on 01.04.1992 and Shish Ram remained alive for a period more than 10 years. No evidence has been produced to prove that the Will has not been thumb marked by Shish Ram. There is also no evidence to prove that the Will was result of undue influence or pressure. In such circumstances, the Court is required to examine the registered Will. In the present case, no doubt, only one attesting witness, namely Ram Kishan, Nambardar has been examined. On repeated reading of deposition of Ram Kishan, Nambardar, this Court is of the opinion that he has fulfilled the requirements of not only Section 63 (C) of the 1925 Act but has also proved the Will in accordance with Section 68 of the Indian Evidence Act, 1872. Section 68 of the 1872 Act is extracted 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: 1[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.]

13. It is evident from a careful reading of Section 68 of the 1872 Act that it is not only required to prove the execution of the

document but also its attestation. The last part of Section 63 clearly provides that the Will shall not be required to be attested in any particular form of attestation. In ordinary parlance, the attestation of a document by a witness means that he has either seen the testator sign or thumb mark the Will or has received his personal acknowledgment and he himself signs or thumb marked the Will, in the presence of the testator. Section 63 (c) of the 1925 Act recognizes that both the attesting witnesses are not required to be present at the same time. In the present case, it is proved that the executant as well as both the attesting witnesses were present not only at the time of execution of the Will by the scribe but they were also present at the time of its registration. Sh. Ram Kishan, Nambardar, while appearing as DW2 has specifically stated that Sh. Shish Ram, the testator, put his thumb impression after the scribe read over the Will in their presence. Thereafter, they put their respective thumb impressions. In cross examination, he clarified that at the time of execution and registration of the Will, all the three, namely the executant and both the attesting witnesses alongwith the scribe, were present at the time of registration. Obviously, they have thumb marked the Will in the presence of each other. In such circumstances, the Court cannot be expected to be oblivious of the fact that once all the three are present at one point of time and had thumb marked the Will in the presence of each other, then each of them, has seen the other to thumb mark the Will. In the cross examination, no suggestion was put to Sh. Ram Kishan, Nambardar, that they were not present at one point of time. Once they were present at one point of time and had thumb marked the

Will in the presence of each other, then the attestation of the Will by both the witnesses is proved, particularly, when no particular form of attestation is required.

14. This Court must place on record its appreciation for valuable assistance rendered by the learned counsel representing the respective parties. Finding no merit, the Regular Second Appeal is dismissed.

15. A connected writ petition has been attached with this appeal as some part of the land is stated to have been compulsorily acquired by the Union of India in exercise of the powers under the National Highways Act, 1956. It has been pointed out that the compensation has not been disbursed on account of the pendency of the Regular Second Appeal. As the Regular Second Appeal has been decided, the writ petition is also disposed of because the reason for withholding the payment ceases to exist.

16. All the pending miscellaneous applications, if any, are also disposed of.

20.04.2022

rekha

Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE