

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No. 97 of 2022

Vijay Kumar Singh, S/o Late Ram Briksh Singh, R/o Durga Ashram Gali,
Sheikhpura, P.O. B.V. College, P.S. Shastri Nagar, Patna-800014.

... .. Petitioner

Versus

1. Ram Chandra Prasad Singh S/o Late Ram Briksh Singh, R/o Durga Ashram Gali, Sheikhpura, P.O. B.V. College, P.S. Shastri Nagar, Patna-800014.
2. Krishna Chandra Singh, S/o Late Ram Briksh Singh, R/o Durga Ashram Gali, Sheikhpura, P.O. B.V. College, P.S. Shastri Nagar, Patna-800014.
3. Ajay Kumar Singh, S/o Late Ram Briksh Singh, R/o Durga Ashram Gali, Sheikhpura, P.O. B.V. College, P.S. Shastri Nagar, Patna-800014.
4. Sanjay Kumar, S/o Late Ram Briksh Singh, R/o 2101, W LEYNA DR, DUNLAP, IL. 61525 PEORIA county Medina, Cihcago, USA through Power of Attorney Holder Sri Pramendra Kumar Dayal, Advocate, Nala Road, Patna 800003.
5. Smt. Sangeeta Singh, W/o Sri Ravi Shekhar Singh, D/o Late Ram Briksh Singh, R/o Durga Ashram Gali, Sheikhpura, P.O. B.V. College, P.S. Shastri Nagar, Patna-800014.
6. Smt. Sarita Singh, W/o Sri Sashi Kant Ajay, D/o Late Ram Briksh Singh, R/o Durga Ashram Gali, Sheikhpura, P.O. B.V. College, P.S. Shastri Nagar, Patna-800014.

... .. Respondents

Appearance :

For the Petitioner : Mr. Siddhartha Prasad, Advocate
For the Respondents : Mr. Md. Harun Quareshi, Advocate

CORAM: HONOURABLE MR. JUSTICE SANDEEP KUMAR
ORAL JUDGMENT
Date : 18-07-2024

The present petition has been filed for the following reliefs:-

"a. For setting aside the order dated 18.01.2022 passed by the learned Additional District and Sessions Judge, XXI, Patna in Title Suit No.39



of 2019, whereby and whereunder Probate Case No.58 of 2018 converted into Title Suit No.39 of 2019 has been dismissed summarily on the basis of preliminary issue without correctly appreciating the law and the facts of the case and without application of judicious mind by the learned court below.

- b. For setting aside the order dated 29.11.2021 passed by learned Additional District and Sessions Judge XXI, Patna in Title Suit No.39 of 2019 whereby and whereunder additional issue no.1(a) has been framed and inserted after original issue no.1 framed on 25.11.2019 and further it has been directed that the said issue no.1(a) be treated as preliminary issue and the parties may come prepared for hearing on the same.*
- c. For issuance of appropriate order directing the court below to properly adjudicate Probate Case No.58 of 2018 converted into title Suit No.39 of 2019 filed by the petitioner after full-fledged trial in consonance with the principles of natural justice."*

2. The facts of this case, as stated in the writ petition, are that the father of the petitioner late Ram Briksh Singh executed a registered Will on 04.03.2015 in favour of his son i.e. the petitioner. The father of the petitioner died on 15.08.2018 leaving behind his five sons and two daughters. As per the Will, the immovable property bequeathed to the



petitioner is the self acquired property of his father, which came in exclusive title and possession of the testator after deed of gift executed in the year 1951 by the grandfather of the petitioner. Earlier, in the year 1951, the grand-father of the petitioner executed a gift deed in favour of his two sons namely Ram Briksh Singh and Ram Sagar Singh in respect to several plots including Plot No.167, Khata No.511, Thana No.14, Tauzi No.1501 situated at Mauza Pahari measuring 3 kattha and 15 dhur but Ram Sagar Singh died issue-less and therefore, the father of the petitioner became the owner of the property of Ram Sagar Singh.

3. The petitioner, after death of his father, filed Probate Case No.57 of 2018 under Section 276 of the Indian Succession Act, 1925 for grant of probate certificate in his favour by impleading all the brothers and sisters of the petitioner as parties. In the said probate case, the elder brother of the petitioner namely, Ram Chandra Prasad Singh filed his objection and sought a month's time to file his written objection. However, two brothers and two sisters of the petitioner supported the case of the petitioner by filing their show-cause and they have stated that the Will was executed well within their knowledge.



4. On 11.06.2019, the Court below directed to convert the probate case into a testamentary case in view of the objection filed by the elder brother of the petitioner. On 28.08.2019, the elder brother of the petitioner filed his written statement in the newly constituted Title Suit No.39 of 2019, in which no objection with regard to non-compliance of section 63(c) of the Indian Succession Act, 1925 was taken. As the defendant no.5 was not appearing in the probate case in spite of repeated notice, the Court below vide order dated 15.11.2019 decided to proceed ex-parte against the non-appearing defendants. Thereafter, the Court below after hearing the parties vide order dated 25.11.2019 framed five issues for consideration, which reads as under:-

1. Whether the suit as framed is maintainable ?
2. Whether the plaintiff has valid cause of action for the Suit ?
3. Whether the plaintiff has paid sufficient court fee or not ?
4. Whether the registered will dated 04.03.2015, executed by the deceased Ram Briksh Singh in favour of the plaintiff is genuine, legal and valid or not ?
5. Whether the plaintiff is entitled to grant probate certificate in his favour on the basis of the Will dated 04.03.2015 executed by



Ram Briksh Singh? "

5. According to the petitioner, no issue with regard to violation of section 63(c) of the Indian Succession Act, 1925 was framed by the Court below. After the issues were framed and after the case was put up for evidence, the elder brother of the petitioner filed an application under Order 14 Rule 2 of the Code of Civil Procedure, 1908 for deciding the Title Suit on the basis of preliminary issue raised in the said application. Thereafter, the petitioner filed his rejoinder to the said application filed by his elder brother on 28.01.2020. In the said rejoinder, the petitioner has pleaded that compliance or non-compliance of Section 63(c) of the Indian Succession Act, 1925 is a mixed question of fact and law, which can only be decided after leading the evidence and therefore the application of the elder brother of the petitioner is wholly misconceived. In the meantime, the defendant no.5, who was living in USA, pressed an application for recalling the ex-parte order dated 15.11.2019, which was allowed by the court below on 06.02.2020. Thereafter, no progress could be achieved in the said title suit on account of COVID-19 pandemic. On 22.02.2021, an application under order 14 Rule-2 of the Civil Procedure Code, 1908 was filed by the defendant no.5 and the



reply of the same was filed by the petitioner on 04.03.2021.

6. However, the defendant no.1 entered into an agreement to sale for the property bequeathed to the petitioner through a Will with one Vijay Kumar and this compelled the petitioner to file an application under Order 39 Rule 1 and 2 of the Code of Civil Procedure (for short "CPC") for grant of status-quo till the disposal of the title suit. On 29.11.2021, the Court below heard the parties on the application filed by the defendant nos. 1 and 5 under Order 14 Rule-2 Code of Civil Procedure and re-framed the issues and added one more issue as issue no.1(a) i.e. *"whether the will dated 04.03.2015 executed by the testator Ram Briksh Singh in favour of Vijay Kumar Singh, son of late Ram Briksh Singh lack the legal compliance of section 63 of the Indian Succession Act, 1925 ? if yes, what is its effect of the present suit?"* and directed that said issue no.1(a) be treated as preliminary issue and the parties may come prepare for hearing on the same. By order dated 18.01.2022, the Court below dismissed the Title Suit No.39 of 2019 which was converted from Probate Case No.58 of 2018 summarily on the basis of preliminary issue no.1(a). Hence, this writ petition.

7. Learned counsel for the petitioner submits that the impugned orders are illegal because the concept of



settlement of issues has been provided in Order-XIV of the Code of Civil Procedure, 1908 and Order XIV Rule 2(1) stipulates that normally the Court should pronounce judgment on all issues but in the present case issues were framed on 25.11.2019 and thereafter it was put up for evidence and subsequently the Court below framed additional issue after two years of framing of earlier issues and decided the said additional issue as preliminary issue but did not bother to decide other issues framed earlier. He also submits that the impugned order is illegal as it is in teeth of Order-XIV Rule-2(2) of the CPC which stipulates that a suit can be decided on the basis of preliminary issue provided that the said issue is an issue of law relates to either jurisdiction of the Court or the suit itself is barred by any law for the time being in force but, in the present case neither the suit has been filed before forum having no jurisdiction nor it is barred by any law.

8. Learned counsel for the petitioner further submits that Order XIV Rule 2 (2) CPC confers no jurisdiction upon the trial court to try a suit on the mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue. In fact, Order XIV Rule 2(2) CPC comes into



operation only when the facts are admitted by both the parties but in the present case, the plaintiff-petitioner has never admitted before the learned trial court that there is only one attesting witness rather plaintiff-petitioner has maintained that there are more than one attesting witness as required under section 63 of the Indian Succession Act, 1925. Therefore, when the issue of law requires examination of the disputed facts, it cannot be decided as a preliminary issue under Order XIV Rule 2 (2) of the Code of Civil Procedure.

9. Learned counsel for the petitioner further submits that the court below miserably failed to appreciate that Will in question is a registered Will executed and registered by the testator three years prior to his death. It is well settled that there is a presumption in law regarding genuineness of a "registered document" and any registered document cannot be dislodged on technicalities. Moreover, in the present case apart from defendant nos.1 and 5 all the other legal heirs of the testator have fully supported the stand of the plaintiff-petitioner knowing well that they will not get any share in the property bequeathed through Will.

10. Learned counsel for the petitioner further submits that the trial court has relied upon the Judgment of



Hon'ble Apex Court in the case of ***Biraji @ Brijraji vs. Surya Pratap & Ors. (Civil Appeal No.4883-3884 of 2017)*** which will not be applicable in the facts and circumstances of the present case as in the plaint twice the expression "witnesses" have been used conveying that there were more than one witness and therefore, it cannot be said that there was no pleading in this regard and further in the Will itself apart from the testator there were signature of five persons i.e. Vinod Kumar Mishra, propounder, scribe, advocate and registering authority.

11. Learned counsel for the petitioners further submits that even the judgment of Hon'ble Apex Court rendered in the case of ***Jagdish Chand Sharma vs. Narain Singh Saini (dead) through LRS and Ors.*** reported in ***(2015) 8 SCC 615*** relied upon by the learned trial court will not apply to the facts of the present case as in the aforesaid case, the learned trial court gave its verdict after full-fledged trial and parties therein adduced evidence to prove their respective case but in the present case, the plaintiff was not given opportunity to prove his case and no trial took place.

12. Learned counsel for the petitioner has relied upon the following decisions:-

- i. ***Nusli Neville Wadia vs. Ivory Properties &***



Ors. reported as ***(2020) 6 SCC 557.***

ii. ***Mathew Oomen vs. Suseela Mathew***
reported in ***(2006) 1 SCC 519.***

iii. ***Ujagar Singh vs. Charan Singh*** reported in
AIR 1986 P&H 230.

iv. ***Sita Ram Vs. R.D. Gupta*** reported in ***AIR***
1981 P&H 83.

v. ***Bimla Devi Vs. Uma Devi*** reported in ***2016***
volume 4 PLJR 741.

vi. ***Chandrama Singh Vs. Registrar Civil Court***
passed in ***C.W.J.C. No. 18694 of 2010.***

vii. ***Ram Niwas Rana Vs. Anil Kumar*** passed in
FAO 335 of 2011 (Delhi High Court).

13. Sri Nasrul Hooda Khan and Sri Abdul Mannan Khand, learned counsel for the respondent nos. 1 and 4 have supported the impugned order and have submitted that the order passed by the Court below is perfectly justified. It has further been submitted by the learned counsel for the respondent no. 1 and 4 that after passing of the order dated 29.11.2021, the petitioner has not challenged the framing of preliminary issue regarding the validity of deed of Will upon which the suit is based on and now the petitioner is challenging the trial of the



Suit on preliminary issue after losing the suit.

14. It has further been submitted by the learned counsel for the respondent nos.1 and 4 that the deed of Will is forged and fabricated as the father of the petitioner had never executed a Will in his favour and the same is against the mandatory provision of Section 63 of the Indian Succession Act and therefore, the Title Suit in respect of the Will is barred. It has further been submitted that the mandate required under the law for execution of a Will is that there should be at least two attesting witnesses but, in the present case the same has not been done. The Will in question has been drafted by a lawyer and typed by a typist but neither of them has been shown to be attesting witnesses and hence, it is clear that there is only one attesting witness of the Will in question and as per the provision of section 63(c) of the Indian Succession Act, the Will is invalid and the Court below has rightly dismissed the suit after deciding the same on the preliminary issue of law.

15. Learned counsels for the respondent nos. 1 and 4 have also relied upon various judgments in support of their arguments, which are mentioned below:-

- i. ***Sathyanath and others vs. Sarojamani***
reported as ***2022 LiveLaw (SC) 458.***



- ii. ***Jagdish Chandra Sharma vs. Narain Singh Saini (dead) through his Lrs and Ors.***
reported as ***(2015) 8 SCC 615.***
- iii. ***Raj Kumari and Others vs. Surendra Pal Sharma*** reported as ***2019 SCC Online SC 1747.***
- iv. ***Most. Samrathi Devi vs. Parasuram Pandey and Others*** reported as ***AIR 1975 Pat 40.***
- v. ***Biraji @ Brijraji and Anr. vs. Surya Pratap and Others (Civil Appeal No.4883-4884 of 2017)***
- vi. ***Dharam Singh vs. ASO and Anr.*** reported as ***AIR 1990 SC 1888.***
- vii. ***Janki Narayan Bhoir Vs. Narayan Namdeo Kadam*** passed in ***Appeal (Civil) No.11194 of 1995.***

16. The respondent nos. 2, 3, 5 and 6 have also filed their counter affidavit and have supported the case of the petitioner.

17. I have considered the submissions of the parties and perused the materials on record.

18. The only question involved in the present



writ petition is as to whether the registered Will dated 04.03.2015 executed by the deceased Ram Briksh Singh in favour of the petitioner is genuine, legal and valid or not and whether the suit can be decided under Order 14 Rule 2 of the C.P.C. on the basis of preliminary issue raised in the application of the elder brother of the petitioner, who has pleaded that there is non-compliance of section 63(2) of the Indian Succession Act and therefore, the suit be dismissed on this preliminary objection. The case of the respondents is based on the fact that there is only one attesting witness and therefore, the suit has to be thrown out at the threshold in view of section 63(2) of the Indian Succession Act.

19. The Hon'ble Supreme Court in the case of *Nusli Neville Wadia (supra)*, which has been relied upon by learned counsel for the petitioner, has held in paragraph nos. 11, 12, 13, 51 and 52 as under:-

"11. The provisions contained in Order 14 Rule 2 CPC also deals with the framing of issues and the questions which can be tried as a preliminary issue before the amendment made in the year 1977 in CPC provisions. Rule 2 Order 14 reads thus:-

"2.(2). Where issues both of law and of fact arise in the same suit, and the Court is of the opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit,



postpone the settlement of the issues of fact until after the issues of law have been determined."

It is apparent from the pre-amended provisions of Order 14 Rule 2 that only a question of law could have been tried as a preliminary issue, not the question of facts or a mixed question of law and facts, that too, when the case of part may be disposed of by a decision on the issue of law.

- 12.** *The amendment in 1976 in CPC came into force on 1-2-1977, the amended Rule 2 of Order 14 is extracted hereunder:*

"2. Court to pronounce judgment on all issues-(1) *Notwithstanding that a case may be disposed of on a preliminary issue, the court shall, subject to the provisions of sub-rule (2), pronounce judgment on all issues.*

(2) Where issues both of law and of fact arise in the same suit, and the court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to-

- (a) the jurisdiction of the court, or*
- (b) a bar to the suit created by any law for the time being in force, and for that purpose may, if it thinks fit, postpone the settlement of the other issues until after that issue has been determined, and may deal with the suit in accordance with the decision on that issue."*

- 13.** *A significant departure has been made in the amended provisions contained in Order 14 Rule 2. Now it mandates the court to pronounce judgment on all issues notwithstanding that a case may be disposed of on a preliminary issue. The intendment is to avoid remand in the*



appealable case for deciding the other issues. In case the necessity arises, Order 14 Rule 2(2) enables the court to decide the issue of law as a preliminary issue in case the same relates to (1) the jurisdiction of the court, or (2) a bar to the suit created by any law for the time being in force. After the amendment made in CPC in the year 1977, it contains two-fold provision, the question of jurisdiction to entertain the suit has been separated under Rule 2(2)(a) from the expression in Rule 2(2)(b) "a bar to the suit created by any law for the time being in force".

- 51.** *The provision has been carved out under Section 9-A CPC to decide, question of jurisdiction to entertain, at the stage of deciding the interim application for injunction and the very purpose of enactment of the same was that the suits were being instituted without serving a notice under Section 80, which at the time of initial incorporation of provisions could not have been instituted without serving a notice of two months. There was a bar to institute a suit. It became a practice that after obtaining injunction, suit was allowed to be withdrawn with liberty to file fresh suit after serving the notice. To take care of misuse of the provisions, Section 9-A was introduced in the year 1970 and had been re-introduced again in 1977 to consider question of jurisdiction to entertain at the stage of granting injunction or setting aside. The provision has been inserted having the narrow meaning as at the stage of granting ex parte injunction; the question can be considered. The written statement, set-off and counterclaim are not filed, discovery, inspection, admission, production and summoning of the documents stage has not reached and after the stages described above, framing of issues takes place under Order XIV. As per Order XIV Rule 1, issues arise when a material proposition of fact or law is affirmed by the one party and denied by the other. The issues are framed on*



the material proposition, denied by another party. There are issues of facts and issues of law. In case specific facts are admitted, and if the question of law arises which is dependent upon the outcome of admitted facts, it is open to the Court to pronounce the judgment based on admitted facts and the preliminary question of law under the provisions of Order XIV Rule 2. In Order XIV Rule 2(1), the Court may decide the case on a preliminary issue. It has to pronounce the judgment on all issues. Order XIV Rule 2(2) makes a departure and Court may decide the question of law as to jurisdiction of the Court or a bar created to the suit by any law for the time being in force, such as under the Limitation Act.

- 52.** *In a case, question of limitation can be decided based on admitted facts, it can be decided as a preliminary issue under Order 14 Rule 2(2)(b). Once facts are disputed about limitation, the determination of the question of limitation also cannot be made under Order 14 Rule 2(2) as a preliminary issue or any other such issue of law which requires examination of the disputed facts. In case of dispute as to facts, is necessary to be determined to give a finding on a question of law. Such question cannot be decided as a preliminary issue. In a case, the question of jurisdiction also depends upon the proof of facts which are disputed. It cannot be decided as a preliminary issue if the facts are disputed and the question of law is dependent upon the outcome of the investigation of facts, such question of law cannot be decided as a preliminary issue, is settled proposition of law either before the amendment of CPC and post amendment in the year 1976.”*

20. Paragraph nos. 2, 6 and 7 of the decision rendered in the case of ***Mathew Oomen vs. Suseela Mathew*** (*supra*) relied upon by learned counsel for the petitioner, read as



under:-

- "2. *The Will Exhibit A-1 is handwritten and is on a letterhead of the testator. It is in the handwriting of his junior named George Vallakalil. It bears the signature of the testator as well as of one Oommen who has signed as a witness. Both the witnesses to the will are distant relations of the testator.*
6. *We find nothing abnormal or unnatural in the above document. There is nothing unnatural in a senior advocate of advanced age to ask his junior advocate to write down something which he would like to be written. This must have happened in the present case. Regarding the other question that there was no need to make a Will in view of the Travancore Christian Succession Act, 1917, we are of the view that it was all the more important for the testator to make the Will because as a senior advocate he knew that the validity of the Act had been questioned in this Court and in the event of the Act being declared invalid, the course of inheritance would change and the daughters would get a share in his estate, which he did not want.*
7. *Learned counsel for the respondent argued that the last few words in the body of the Will appear to have been squeezed in. We are unable to accept this submission. A bare perusal of the Will is sufficient to reject this plea. The signatures of the testator on the Will are not disputed. The statements of PW 1 and PW 2 as attesting witnesses of the Will are quite natural and trustworthy. One of the attesting witnesses was the junior advocate working with the testator in his office. He has also scribed the Will. He has appeared as PW 1 to support the execution of the Will. He states that he is an attesting witness to the Will as well as scribe of the Will. The other attesting witness has also appeared as PW 2. He is a distant relation of the testator. From all this we find the execution of the Will quite natural and normal. We are unable to accept the contention of the learned counsel for the respondent that a senior lawyer will not discuss about the Will with his junior. It was also suggested that nothing prevented the*



testator from writing the Will himself. This is no ground to reject a Will which is otherwise perfect."

21. In a similar situation, the Delhi High Court in the case of **Ram Niwas Rana and Ors. vs. Anil Kumar & Ors. (supra)** has held in paragraph nos. 7, 14 to 20 as under:-

“7. Learned counsel appearing for the appellants has contended that the Will in question has not been attested by two witnesses. It is contended that the Will is attested by only one witness Sh. Chet Ram and even the said witness has not been produced before the learned Additional District Judge. Only Sh. M.N. Sharma, Advocate has been produced as PW-4 who is only a scribe and he cannot be taken as an attesting witness as such the Will in question is not proved in accordance with Section 63 of the Indian Succession Act and accordingly the impugned order is liable to be set aside. Learned counsel for th“7. Learned counsel appearing for the appellants has contended that the Will in question has not been attested by two witnesses. It is contended that the Will is attested by only one witness Sh. Chet Ram and even the said witness has not been produced before the learned Additional District Judge. Only Sh. M.N. Sharma, Advocate has been produced as PW-4 who is only a scribe and he cannot be taken as an attesting witness as such the Will in question is not proved in accordance with Section 63 of the Indian Succession Act and accordingly the impugned order is liable to be set aside. Learned counsel for the appellant has also contended that the partition suit i.e. Suit no.415/2003 pending between the parties, the respondent no.1 is relying upon two wills i.e., one alleged to have been executed by his grand father i.e., Jeet Ram and other by Smt. Manno Devi. It is submitted that in the said suit



respondent no.1 has failed to prove the Will of Jeet Ram. In these circumstances, it cannot be said that the Will in question stands proved.

- 14. To say Will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the Will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a Will; (c) that the Will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgment of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.*
- 15. It is thus clear that one of the requirements of due execution of Will is its attestation by two or more witnesses which is mandatory. 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. 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 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. The above are the statutory requirements to prove a Will. Reference is made to the judgment in Janki Narayan Bhoir vs. Narayan Namdeo Kadam: MANU/SC/1155/2002 and Seth Beni Chand (since deceased) now by L.Rs vs. Smt. Kamla Kunwar & Ors : AIR 1977 SC 63.

- 16. In the present case, respondent no.1 has produced Sh. M.N.Sharma, Advocate in the evidence. The contention of petitioner is that he is only a scribe and cannot be treated as an attesting witness.*
- 17. It is settled law that scribe can be treated as an attesting witness if it is shown that he had put down his signatures for the purpose of attesting the document.*
- 18. The Supreme Court in Mathew Oommen v. Suseela Mathew; (2006) 1 SCC 519 has held that scribe of the Will is not ineligible to be an attesting witness. It is 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. The relevant portion of the judgment*



of Supreme Court is reproduced as under:-

"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 attestor and scribe. In our view, the requirement of attestation of the Will by two witnesses is fully met in the present case."

19. *In Sh. Baldev Raj v. Sh. Man Mohan & others; 92 (2001) DLT 274 decided by the Division Bench of this court wherein also the question was whether the scribe could be treated as an attesting witness of Will under Section 63 of the Indian Succession Act. It was held that the scribe could be treated as an attesting witness but it must be shown that scribe put down his signatures for the purpose of attesting the document. The relevant portion of the judgment is as under:-*

"10.It is not universal rule that a scribe cannot be treated as an attesting witness. Even in the decision of Himachal Pradesh High Court relied upon by learned counsel for the appellant it has been held that scribe may be an attesting witness of the Will, but it must be shown that the scribe put down his signature for the purposes of attesting the document."

20. *The Supreme Court in Seth Beni Chand (Since Dead) Now by L.Rs. v. Smt. Kamla Kunwar and*



Ors.; AIR 1977 SC 63 has held that no particular form of attestation is required and that an attesting witness need not necessarily be labelled as an attesting witness. The relevant portion of the judgment is as under:-

"8. ...None of the three is described in the Will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take the place of evidence showing due execution of the document. By attestation is meant the signing of a document to signify that the attestator is a witness to the execution of the document, and by Section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from, the executants as regards the execution of the document."

22. The Hon'ble Supreme Court in the case of ***Raj Kumari and others Vs. Surendra Pal Sharma (supra)***, relied upon by learned counsel for the respondent nos. 1 and 4, has held in paragraph nos. 8, 12, 21 and 22 as under:-

"8. The trial court vide judgment dated 17.01.2018 passed a preliminary decree of partition inter alia holding that the four siblings were entitled to 1/4th share each in the tenement after recording that Surinder Pal Sharma had failed to prove the purported registered Will of Suhagwanti dated 02.01.1992. The judgment held that Surinder Pal Sharma had failed to examine any of the attesting



witnesses to the Will as required vide Section 68 of the Evidence Act and therefore, could not prove that Suhagwanti had signed the Will at her free will in a sound disposing state of mind after having understood its contents. It was also held that as per the testimony of Surinder Pal Sharma the Will marked Exhibit DW-1/2 was attested by one witness only and therefore, mandatory requirement of clause (c) to Section 63 of the Indian Succession Act was not satisfied. The trial court having perused the Will held that Mr. M.N. Sharma, Advocate had signed as a draftsman and counsel and not as an attesting witness. It was observed that mere registration of the Will, as proved by Parveen Kumar Rana, UDC working in the office of Sub-Registrar, Kashmere Gate, who has deposed as DW-3, would not prove the Will.

12. We would first expound the law relating to the execution and proof of Wills under the Indian Succession Act and the Evidence Act. Clause (c) of Section 63 of the Indian Succession Act reads as follows:

“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) - (b) * * *

- (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.”

As per the mandate of clause (c), a Will is required to be attested by two or more witnesses each of whom should have seen the testator sign or put his mark on the Will or should have seen some other person sign the Will in his presence and by the direction of the testator or should have received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person. The Will must be signed by the witness in the presence of the testator, but it is not necessary that more than one witness should be present at the same time. No particular form of attestation is necessary. Thus, there is no prescription in the statute that the testator must necessarily sign the Will in the presence of the attesting witnesses only or that the attesting witnesses must put their signatures on the Will simultaneously, that is, at the same time, in the presence of each other and the testator.

21. Majority of earlier judgments like Vishnu Ramkrishna (supra) follow the ratio in Dhira Singh (supra), with a few exceptions like Mt. Manki Kaur v.



Hansraj Singh and Others. The issue was resolved beyond controversy and debate in Janki Narayan Bhoir (supra) wherein it has been held that clause (c) of Section 63 of the Indian Succession Act requires and mandates attestation of a Will by two or more persons as witnesses, albeit Section 68 of the Evidence Act gives concession to those who want to prove and establish a Will in the court of law by examining at least one attesting witness who could prove the execution of the Will viz., attestation by the two witnesses and its execution in the manner contemplated by clause (c) to Section 63 of the Indian Succession Act. However, where one attesting witness examined fails to prove due execution of the Will, then the other available attesting witness must be called to supplement his evidence to make it complete in all respects to comply with the requirement of proof as mandated by Section 68 of the Evidence Act. It was held:

“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."

This judgment overruled the judgment of Manki Kaur (supra) and approved the ratio of Vishnu Ramakrishna (supra) to the effect that Section 71 of the Evidence Act can be requisitioned when the attesting witnesses who were being called



have failed to prove the execution of the Will by reason of either denying their own signatures, denying the signature of the testator or due to bad recollection as to the execution of the document. Section 71 has no application when only one attesting witness who was called and examined has failed to prove the execution of the Will and the other available attesting witness was not summoned.

22. *The ratio in Janki was reiterated in Benga Behera and Another v. Braja Kishore Nanda and Others. This judgment also examines the issue and question whether a Sub-Registrar in the matter of registration of documents under the provisions of Indian Registration Act, 1908 can possibly be treated as a witness. Reference was made to Sections 52 and 58 of the Registration Act to observe that the duty of the Registering Officer is to endorse the signature of every person presenting the document for registration and to make an endorsement to that effect, that is, to endorse only the admission or execution by the person who presented the document for registration. The Registering Officer can also endorse and certify the payment of money or delivery of goods made in the presence of the Registering Officer in reference to the execution of the document. The expression 'attesting witness' within the meaning of Section 3 of the Transfer of Property Act and Section 63 of the Indian Succession Act means "bearing witness to a fact". The two valid conditions of attestation of documents are – (i) two or more attesting witnesses have seen the executant sign the instrument; (ii) each of them has*



signed the instrument in the presence of the executant. Further and importantly, attestation requires animus attestandi, that is, a person puts his signature on a document with the intent to attest it as a witness. If a person puts his signature on a document only in discharge of a statutory duty, he may not be considered as an attesting witness as was held in Dharam Singh v. ASO and another. Similarly, a scribe or an advocate who has drafted the document may not be the attesting witness as was held by this Court in Jagdish Chand Sharma (supra), for attestation requires that the witness should have put his signature animus attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature.”

23. Paragraph no.11 of the decision rendered in the case of **Most. Samarthi Devi (supra)**, relied upon by the respondent no.1 and 4, reads as under :-

“11. With respect to the question of due attestation of the document in question, according to Section 123 of the Transfer of Property Act "for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses. The word "attested" has again been defined in Section 3 of the said Act, which, in relation to an instrument, means "attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrumentand each of whom has signed the instrument in the presence of the executant” There are only two witnesses in this document (Ext. D); one is Chandradeo Chaubey and the other, one



Ramchandra Singh. Chandradeo Chaubey had also signed this document on behalf of defendant No.1 as well as identified her before the Registrar. The endorsements made by this witness, however, may be sufficient to make him an attesting witness, but the other witness Ramchandra Singh has merely put his signature as an ordinary witness. The learned Subordinate Judge has committed an error of record in holding that this Ramchandra Singh was examined as D.W. 5 to prove the deed as an attesting witness who was not even cross-examined on behalf of the plaintiff. D.W.5, however, is also named Ramchandra Singh, but he is a different man and was not a witness regarding this document. It must, therefore, be held that the deed (Ext. D) was not attested by at least two witnesses and, accordingly, does not satisfy the conditions of a valid deed of gift, as laid down by Section 123 of the Transfer of Property Act.”

24. Paragraph nos. 17, 20, 24 and 25 of the decision rendered in the case of ***Sumitra Devi (supra)*** relied upon by learned counsel for the respondent no.1 and 4 read as under:-

“17. The Petitioner has brought to the notice of this Court the decisions reported as T.V.S. Rao and Anr. v. T. Kamakshiamma AIR 1978 Orr 145 and has sought to distinguish the same. In T.V.S. Rao (Supra), the court observed:

Proof of attestation of the document by only one witness would not satisfy the statutory requirement of attestation of a will, and so long it is not proved that the document was attested by two witnesses it cannot have the legal sanctity of a will. So, though under Section 68 of the



Evidence Act only one attesting witness, if alive and subject to the process of the court and capable of giving evidence, has to be called to prove the execution of the document, it would be incumbent on the propounder or the person claiming under the will to prove that the said document was executed as required under Section 63(c) of the Indian Succession Act, 1925, and then only that document can be given effect to as a will."

- 20.** *The definition of the expression 'Will' contained in Section 2(h) of the Act itself suggests that for a document to be even claimed to be a 'Will', it has to be attested in terms of Section 63(c) of the Act. A 'Will' is defined as "the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death." For it to be a 'legal' declaration, the declaration should, of necessity, comply with the requirements of law. The requirements of law for the declaration of an unprivileged 'Will' to be legal are those contained in Section 63(c) of the Act. Thus, in my view, a document not attested in accordance with Section 63(c) of the Act, cannot even be called a 'Will'. Therefore, there is no question of it being probated.*
- 24.** *The decisions cited by the petitioner at the bar do not further the case of the petitioner, in view of my finding that the document in question does not fall within the definition of a 'Will'. Satya Pal (Supra) in fact supports the view that I am inclined to take that the non-compliance of Section 63(c) is fatal to the claim that the document is a 'Will'.*
- 25.** *No doubt, a 'Will' may not be executed in public interest. However, the legal requirements for the due execution of the 'Will' are prescribed in public interest. It is wrong to contend that the requirement of attestation under Section 63(c) of*



the Act is for the benefit of the heirs of the testator. This requirement, to my mind, is for the benefit of the Public at large, because a grant of probate operates as a declaration in rem. Therefore the test laid down in Satya Pal (supra) cannot be applied to conclude that the requirement of attestation in terms of Section 63(c) is directory. Rajendera Singh (supra) and the Gujarat Assembly Election Matter (supra) also do not support the petitioners contentions for the same reason.”

25. Paragraph no.3 of the decision rendered in the case of ***Dharam Singh vs. ASO and Anr. (supra)*** reads as under:-

“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.”*

26. The respondents relying upon the judgment of the Hon'ble Supreme Court rendered in the case of ***Benga Bahera and Anr. Vs. Braja Kishore Nanda and Ors.*** reported in ***(2007) 9 SCC 728*** has submitted that if there is only one attesting witness and there is no second witness then the execution or attestation of the Will cannot be proved. In that case, the Hon'ble Supreme Court was hearing a Civil Appeal filed against the judgment and order of the First Appeal. It also appears that the Will was contested and the decision was made, the District Court had held a full fledged trial, the case was



committed in the High Court and thereafter the Hon'ble Supreme Court came to a finding that if there is only one attesting witness and there is no second witness then the execution or attestation of the Will cannot be proved. However, the facts of the aforesaid case will not apply in the present case on the ground that the application of the defendant nos. 1 and 5 under Order XIV Rule 2 has been allowed on the preliminary stage itself.

27. From the judgments cited at Bar, it is clear that the question raised of non-compliance of Section 63(1) of the Indian Succession Act, 1925 is a mixed question of law and the fact and the same can only be decided after leading the evidence. Order 14 Rule-2 CPC comes into play only when the facts are admitted by both the parties. In the present case, the plaintiff/petitioner had never admitted before the Court below that there is only one attesting witness and the case of the plaintiff/petitioner is that there is more than one attesting witness. The typist who typed the Will and the advocate can also be held to be an attesting witness and they can play dual role i.e. that of a scribe, advocate and a witness. Just because an advocate has signed the Will as an advocate, it will not disqualify him to be an attesting witness. Similarly, the typist



also can be an attesting witness and these require a full fledged trial and therefore, the application under Order 14 Rule-2 CPC filed by the elder brother of the petitioner cannot be allowed as a preliminary issue.

28. In view of the aforesaid, this petition is allowed.

29. Accordingly, the order dated 18.01.2022 passed by the learned Additional District and Sessions Judge, XXI, Patna in Title Suit No. 39 of 2019 and the order dated 29.11.2021 passed by learned Additional District and Sessions Judge XXI, Patna in Title Suit No.39 of 2019 are hereby set aside. The Title Suit No. 39 of 2019 is directed to be restored/revived. The Court below shall proceed with the Title Suit No.39 of 2019 in accordance with law.

(Sandeep Kumar, J)

Vikas/Pawan/-

AFR/NAFR	N.A.F.R.
CAV DATE	N/A.
Uploading Date	24.07.2024
Transmission Date	N.A.

