

IN THE HIGH COURT OF JUDICATURE AT PATNA

FIRST APPEAL No.128 of 2002

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1. Dhurub Sah
 2. Prabhu Sah
Both sons of Late Nathuni Sah, Resident of Village- Chhota Bariarpur, P.S. Chhatauni, P.O. Bariarpur, District- East Champaran.
 3. Mira Devi alias Mina Devi Gupta, wife of Anand Jee, Daughter of Late Nathuni Sah, resident of Mohalla- Adarsh Nagar, P.S. Birganj, Nepal at present Chhota Bariarpur, P.S. Chhatauni, P.O. Bariarpur, District- East Champaran.
 4. Hira Devi daughter of Late Nathuni Sah, wife of Sri Yoginder Sah, resident of Village and P.O. Basawariya, P.S. Bettiah, District- West Champaran.
 5. Ramawati Devi daughter of Late Nathuni Sah, wife of Umesh Sah, resident of Bettiah Tin Lalteen Chowk, P.S. and P.O. Bettiah, District- Est Champaran.
 6. Gita Devi wife of Sri Suresh Sah, daughter of Late Nathuni Sah, resident of Raxaul, P.O. & P.S. Raxaul, District- East Champaran.
 7. Sita Devi wife of Anil Kumar daughter of Late Nathuni Sah, resident of Village- Kaleya P.S. and P.O. Kaleya (Nepal) at present Chhota Bariarpur, P.S. Chhatauni, P.O. Bariarpur, District- East Champaran.

.... Objector/O.P. No. 2 to 8..

... .. Appellants

Versus

1. Ramesh Kumar son of Ram Ashray Sah, resident of Village Chhota Bariarpur, P.S. Chhatauni, P.O. Bariarpur, District- East Champaran.

(Petitioner) Respondent Ist Party

2. Ram Ashray Sah son of Late Nathuni Sah (Died)

Legal heirs of deceased Respondent No. 2 are :

- (a) Munna Kumar (son)
- (b) Sandhya Devi @ Babita Devi (daughter) wife of Gopalji Pd. @ Gopal Sah
- (c) Deep Mala Devi @ Subhadra Devi (daughter) wife of Ghanshyam Sah @ Ghanshyam Pd.
- (d) Rekha Devi @ Sujata Devi (daughter) wife of Binay Pd. Gupta
All resident of Village Chhota Bariarpur, P.S. Chhatauni, P.O. Bariarpur, District- East Champaran

.... Objector/O.P. No. 1 Respondent 2nd Party
..... Respondents.



Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Advocate

For the Respondent/s : Mr. Abhinav Srivastava, Advocate

CORAM: HONOURABLE MR. JUSTICE RAJESH KUMAR VERMA
CAV JUDGMENT

Date : 29-05-2025

Heard Mr. Binod Kumar Singh, learned counsel appearing for the appellants and Mr. Abhinav Srivastava, learned counsel appearing on behalf of the respondents.

2. The present appeal is directed against the judgment dated 14.03.2002 passed by learned 3rd Additional District Judge, Motihari, East Champaran in Probate Case No. 01 of 1996, whereby the learned 3rd Additional District Judge has been pleased to grant probate of will dated 14.01.1995 in favour of the respondent first party.

3. Learned counsel for the appellants submits that one Mahaveer Sah was common ancestor of the parties. He died leaving behind two sons, namely, Nathuni Sah and Ram Swaroop Sah. Ram Swaroop Sah died in the year 1942 leaving behind his widow, namely, Samarjeet Kaur. The second son, namely, Nathuni Sah has married twice. The wife of Ram Swaroop Sah, namely, Most. Samarjeet Kaur who is testatrix has executed a Will on 14.01.1995 in favour of grandson of Nathuni Sah namely, Ramesh



Kumar. The Will was witnessed by Ram Chaudhary and Raman Prasad Srivastava.

4. Learned counsel for the appellants submits that the Will in question dated 14.01.1995 was unregistered Will. The house of the testatrix namely Most. Samarjeet Kaur is very near to registry office, Motihari but the respondent first party (Ramesh Kumar) has not preferred the registered Will on the ground that the testatrix was not mentally and physically fit. She does not possessed sound health and sound mind since July, 1994 till her death. He further submits that the testatrix had herself filed a partition suit bearing Partition Suit No. 271 of 1978 in the court of Sub-Judge, Mohitari against Nathuni Sah and others. The said partition suit had decree and compromise on the basis and land measuring an area of 17 katthas 19 dhurs was given to Most. Samarjeet Kaur on the basis of the compromise decree dated 18.01.1981. He further submits that after compromise the decree has been passed, the textatrix Most. Samarjeet Kaur had transferred her all lands and after transferring her land she had no property to transfer or to execute the Will. He further submits that the main ingredient of the execution Will is that the property should be possessed by the testatrix but after transferring of the entire property which she has received in the partition suit no. 271



of 1978 she has no property and hence, she cannot execute the Will in question.

5. Signature of attesting witnesses, namely, Ram Chaudhary and Ramesh Prasad Shrivastava are not mentioned on the last page of the Will, so the Will in question is forged. Apart from that, learned Court below had not considered the mandate of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act. He also relied upon the judgment of this Court in the case of **Smt. Radhika Devi & Anr. Vs. Ajay Kumar Sharma & Ors. reported in 2011(1) PLJR 845**, paragraph nos. 29, 30 and 32 of the said judgment which are as follows:-

“29. According to Section 59 also, the testator may dispose of his property by Will. Section 273 of the Indian Succession Act also speaks that probate or letters of administration shall have effect over all the property and estate movable or immovable of the deceased. Therefore, from all these provisions of Indian Succession Act, it is clear that the testator can dispose of his property by Will and the probate or letters of administration shall have effect over his property only. In the present case in the Will, it is not mentioned about which are the properties of the deceased, Fateh Bahadur Singh. In other words description of properties is absent in the Will. It is only mentioned that the properties movable or immovable in the name of Fateh Bahadur Singh or in the benami name shall go to respondent, Ajay Kumar Sharma. In the probate application, Ajay Kumar Sharma has given the lists of properties and



it is submitted by the learned counsel that all these properties belong to Fateh Bahadur Singh exclusively. From perusal of the objection of the appellant in paras 8, 9, 10, it appears that it is clearly mentioned that all these properties are joint family properties. D.W.1, Radhika Devi in paragraph 9, D.W. 2, Dr. Virendra Prasad Sharma in his evidence at paragraphs 9 and 10 and D.W.1 examined on behalf of Virendra Prasad Sharma in his evidence, all have stated that the properties mentioned in the probate application are joint family properties. The learned counsel for the respondent submitted that the appellant cannot dispute the title of the testator and the probate Court cannot decide this dispute. So far this submission is concerned, it is true that the probate Court cannot decide the title of the testator with respect to the property bequeathed by him but on this pretext the petitioner/plaintiff cannot be allowed to include the properties of others also, particularly when there is no description of the property in the Will. As discussed above from perusal of Ext.-1, it appears that the wording of Section 263 of the Indian Succession Act has been mentioned without giving the details of this property. When there is no description of property in the Will, there can be no presumption that the description of property given by the respondent in the probate application are the property of the testator. In this present case, admittedly Partition Suit No. 123 of 1993 filed by Dr. use o Virendra Prasad Sharma is pending between the parties. In the evidences, the witnesses have stated that the properties are joint family properties. According to the learned counsel for the respondent, title cannot be decided in a probate



case. This submission is applicable against the respondent also because the respondent is mentioning the details of the properties in the probate application which is absent in Will. Therefore, the respondent is estopped from giving the details of property of his own and say that the testator was the owner of the property mentioned by him in the probate application. There is no evidence that there has been partition between the parties and moreover had there been partition between the parties, the testator would have mentioned his property in details in Will itself. In a joint family, a coparcener has no power to dispose of coparcenary property by Will. The Will operate only on the property of the testator. So far this questions are concerned in the case of Vikas Singh (supra) at paragraph 6, it has been held that as regards the use of the words "His Property, it is clear and implicit that a person can execute a Will like any transfer deed only with respect of someone else property. For better appreciation, paragraph 6 may be quoted here:

"6. Whether a person was incapable of executing a Will by reason of any physical and/or mental incapacity is certainly a relevant point and city fact, the most relevant point which is to be decided in Probate/Letters high is ministration proceeding and in this case also I would deal with this aspect later in this judgment. As regards the use of the words 'his property', it is clear and, if I may say so, implicit that a person can execute a Will, like any transfer deed, only with respect of his own property and not someone else's property and, therefore, nothing much turns on use of those words in Section 59 as to confer jurisdiction on the probate Court to decide



any dispute relating to title, ownership etc. of the testator/testatrix in the property which is the subject matter of the Will. It is settled legal position that it is not the duty of the probate Court to consider any issue as to title of the testator to the property with which the Will propounded purports to deal or to the disposing power the testator may have possessed over such property or as to the validity of the bequeaths made. See, for example, the case of Kashi Nath vs. Dulhin, AIR 1941 Patna 475. Proceeding for grant of probate or letters of administration is not suit in the real sense, it only takes the 'form' of a regular suit according to the provisions of the Code of Civil Procedure, "as early as may be"-vide Section 295 of the Act. Reference may be made to a Division Bench decision of this Court in Sidhnath Bharti vs. Jai Narayan Bharti, 1994(1) PLJR 644, a Full Bench decision of the Allahabad High Court in Panzy Ferondes vs. M.F. Queoros, AIR 1963 Allahabad 153, and a Division Bench decision of the Calcutta High Court in Batai Lall Banerjee vs. Debaki Kumar Ganguly, AIR 1984 Calcutta 16. The grant of probate or letters of administration is decisive only of the Will propounded and not of the title etc. of the testator to the property. As the issues relating to title, owner- ship etc. are not to be gone into in such proceeding, it follows that even a favourable decision in favour of the petitioner/plaintiff granting probate or letters of administration in his favour does not operate as res judicata in any future suit which the Objector is at liberty to bring seeking declaration of his right, title, interest etc. in the property. In the above premises the objection of the Objector as to disposing capacity i.e. ownership of the testatrix is rejected."



30. In view of the above settled principles, the plaintiff-respondent is not entitled for letters of administration with respect to joint family property. Although the Will is genuine one. It may be mentioned here that the property in the probate case are subject matter of Partition Suit No. 123 of 1993. In that suit, it will be decided which property belonged to Fateh Bahadur Singh and what will be his share. Therefore, according to the learned counsel for the respondent himself the right, title or interest of Fateh Bahadur Singh is yet to be decided which cannot be decided in the present probate case. According to the respondent, Ajay Kumar Sharma, the property mentioned in Schedule of probate application belong to Fateh Bahadur Singh. The learned counsel for the respondent submitted that the gift deed decided in favour of Fateh Bahadur Singh have been filed. As stated above, this issue cannot be decided in the probate case. Unless this question is decided by appropriate forum of competent jurisdiction, letters of administration cannot be granted because letters of administration is to be granted with respect to the property of the testator only. Here, the testator himself as not mentioned his property. The respondent is giving the details of the property which according to the objectors is joint family property. The learned counsel for the appellant submitted that whole of the joint family property has been mentioned in the probate application and nothing is left.

32. In view of my above discussion, I come to the conclusion that no letters of administration can be granted with respect to the property mentioned by the respondent. The finding of the Court below on this point is, thereof, reversed.”



6. Learned counsel for the appellants has also relied upon the judgment of this Court in the case of **Shivakumar & Ors. Vs. Sharanabasappa & Ors., reported in (2020) 2 PLJR 469**, paragraph no. 11 of the said judgment which is as follows:-

“11. For what has been noticed hereinabove, the relevant principles governing the adjudicatory process concerning proof of a Will could be broadly summarised as follows:-

“1. Ordinarily, a Will has to be proved like any other document; the test to be applied being the usual test of the satisfaction of the prudent mind. Alike the principles governing the proof of other documents, in the case of Will too, the proof with mathematical accuracy is not to be insisted upon.

2. Since as per Section 63 of the Succession Act, a Will is required to be attested, it cannot be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, if there be an attesting witness alive and capable of giving evidence.

3. The unique feature of a Will is that it speaks from the death of the testator and, therefore, the maker thereof is not available for deposing about the circumstances in which the same was executed. This introduces an element of solemnity in the decision of the question as to whether the document propounded is the last Will of the testator. The initial onus, naturally, lies on the propounder but the same can be taken to have been primarily discharged on proof of the essential facts which go into the making of a Will.



4. *The case in which the execution of the Will is surrounded by suspicious circumstances stands on a different footing. The presence of suspicious circumstances makes the onus heavier on the propounder and, therefore, in cases where the circumstances attendant upon the execution of the document give rise to suspicion, the propounder must remove all legitimate suspicions before the document can be accepted as the last Will of the testator.*

5. *If a person challenging the Will alleges fabrication or alleges fraud, undue influence, coercion et cetera in regard to the execution of the Will, such pleas have to be proved by him but even in the absence of such pleas the very circumstances surrounding the execution of the Will may give rise to the doubt or as to whether the Will had indeed been executed by the testator and/or as to whether the testator was acting of his own free will. In such eventuality, it is again a part of the initial onus of the propounder to remove all reasonable doubts in the matter.*

6. *A circumstance is "suspicious" when it is not normal or is 'not normally expected in a normal situation or is not expected of a normal person'. As put by this Court, the suspicious features must be 'real, germane and valid' and not merely the 'fantasy of the doubting mind'.*

7. *As to whether any particular feature or a set of features qualify as "suspicious" would depend on the facts and circumstances of each case. A shaky or doubtful signature; a feeble or uncertain mind of the testator; an unfair disposition of property; an unjust exclusion of the legal heirs and particularly the dependants; an active or leading part in making of*



the Will by the beneficiary thereunder et cetera are some of the circumstances which may give rise to suspicion. The circumstances above-noted are only illustrative and by no means exhaustive because there could be any circumstance or set of circumstances which may give rise to legitimate suspicion about the execution of the Will. On the other hand, any of the circumstance qualifying as being suspicious could be legitimately explained by the propounder. However, such suspicion or suspicions cannot be removed by mere proof of sound and disposing state of mind of the testator and his signature coupled with the proof of attestation.

8. The test of satisfaction of the judicial conscience comes into operation when a document propounded as the Will of the testator is surrounded by suspicious circumstance/s. While applying such test, the Court would address itself to the solemn questions as to whether the testator had signed the Will while being aware of its contents and after understanding the nature and effect of the dispositions in the Will?

9. In the ultimate analysis, where the execution of a Will is shrouded in suspicion, it is a matter essentially of the judicial conscience of the Court and the party which sets up the Will has to offer cogent and convincing explanation of the suspicious circumstances surrounding the Will”.

7. Learned counsel for the appellants has also relied upon the judgment of this Court in the case of **Smt. Bimla Devi**



vs. Uma Devi, reported in (2016) 4 PLJR 741, paragraph nos.

16, 18 to 24 of the said judgment which are as follows:-

“16. For deciding the issue of genuineness of the Will first it has to be seen as to whether the Will has been testamentary in terms of Section 63 of the Indian Succession Act as well as Section 68 of the Evidence Act. Onus probandi and animo attestandi are two basic features for deciding the issue of valid testamentation of the Will. Onus probandi lies in every case upon the propounder the Will and animo attestandi is the principle implies animus to attest. The attesting witness must subscribe with the intent that the subscription of the signature made stands by way of a complete attestation of the Will. The evidence is admissible to show the intention for attestation of the document. For analysis of different facet of attestation of the Will. It will be relevant to quote Section 63 of the Indian Succession Act and Section 68 of the Evidence Act:

“63. Execution of unprivileged Wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules : -

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign



or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

Section 68 of the Indian Evidence Act:

“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.]

17. A attestation plays a very important role in execution of a document it will be relevant to quote Section 3 of the Transfer of Property Act which runs as follows:

"It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the



instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature amino attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

18. *In the case of Girja Datt Singh (supra) in paragraph 15 the Hon'ble Supreme Court has held that mere signature of witnesses at the foot of the endorsement of registration cannot be treated as attesting witnesses as Section 68 of the Indian evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the Will. So the test is whoever has put over his signature must show animo attestandi to attest the testament. A person who had put his name under the word "scribe" or identifier cannot be attesting witness as he has put his signature only for the purposes, the bequeath that he has scribed or identified the document. The scribe or identifier can be a scribe or identifier as well as can be an attesting witness subject to the condition that it must appear from the testament that he has scribed the document as well as he has attested the document as an attesting witness, meaning thereby it must appear that he has intention to attest the document.*

19. *As per definition of Law Lexicon "attested" means where an instrument is required to*



be attested, the meaning is, that a witness shall be present at its execution and shall testify on it that it has been executed by the proper person.

20. The issue of attestation has been dealt with in the case of M.L. Abdul Jabbar Sahib (supra). While dealing with Section 3 of the Transfer of Property Act which defines the attestation, the Hon'ble Supreme Court has said as follows:

“.....It is to be noticed that the word “attested”, the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under s.3 are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature amino attestandi, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

For proper appreciation of the view of Hon'ble Supreme Court in Venkata Sastri's case (supra), Section 3 of the Transfer of Property Act, in particular, the meaning attributed to the word “attested” ought to be noticed and the same reads as below:

“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the



executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary.”

21. The requirement of law for the attestation is the Will shall be attested by two or more witnesses each of whom has seen the testifier sign or affix the mark to the Will or has seen some other person sign the Will in the presence and on the direction of the testifier or has received from the testifier a personal acknowledgment of his signature or mark or the marks or signature of such other person. It further requires that each of the witnesses shall sign the Will in presence of testifier and witnesses have also on the direction of testifier has put their signature in presence of testifier.

22. The question of attestation has come for consideration before this Court in the case of Ram Avadh Upadhaya v. Jamuna Pandey, reported in AIR 1954 Patna 360 where the Court has considered old judgments on the issue, what are essential ingredients for proving the attestation of the document or the Will. The Court was of the view that the person shall be present and see what passes, and shall, when required bear witnesses to the facts is treated to have been “attested”. The attested means that the witnesses should be present as witnesses and see it signed by the testator. The party who sees



the Will executed is in fact a witness to it; if the subscribes as a witness, he is then attesting witness. The Court has held that if any persons who was present and witnessed the execution and whose name appears on the document is to be regarded as a witness competent for proving the execution. The attesting witness should either have seen the signing or the affixing of the mark by the testator or some other person signing the will on his behalf, if the execution is complete as soon as the testator has signed or affixed his mark, the person who claims to have witnessed such execution of the deed by the testator has to be regarded as a competent attesting witness. If the scribe of a deed authenticates the mark made by the executant and thus vouches the execution by him he is to be regard as a competent attesting witness. In case of illiterate executant his mark was his signature and that it was independent of any writing by which the mark might be explained. Section 3, Clause 52 of General Clauses Act explains the word "sign" with reference to a person who is unable to write his own name and it is no where laid down as essential that an attesting witness must be formally described as such on the face of the document. When the scribe or identifier signed his own name under the description of the mark, his object in so doing presumably was to authenticate the mark that is to say to vouch the execution. The last signature made by the scribe not in the capacity of scribe but in the capacity of attesting witness. It will be relevant to quote paragraph nos. 5, 6 and 7 of the aforesaid judgment:

"5. The first contention is, no doubt, a bit more substantial. The learned Counsel has



submitted that because Ramnagina has signed the will on behalf of the executant Jhagru, he cannot be regarded as a competent attesting witness under the law. The requirement of the law is that 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. It is further required that each of the witnesses shall sign the will in the presence of the testator, and, according to my finding, it must be deemed to have been established that if Ramnagina is to be regarded as an attesting witness, he had signed the will in the presence of the testator.

The real question, therefore, is whether Ramnagina, who is no other person than the person who had signed the will on behalf of the testator, can be regarded as a competent attesting witness, and Mr. Tarkeshwar Nath has relied on the words “or has seen ‘some other person’ sign the Will” in S. 63(C), Succession Act. Undoubtedly, Ramnagina is the same person who had signed the will on behalf of the executant or the testator, and because he is no other person than the man who has signed the will on behalf of the testator, the learned counsel has submitted that an attestation by him or the affixing of a signature by him will not make him a competent attesting witness.

6. The word “attest” has been the subject matter of discussion and construction in several decisions, and in- ‘Bryan v. White’, (1850) 163 ER 1330 (B), Dr. Lushington had said that “attest”



means that the persons shall be present and see what passes, and shall, when required, bear witness to the facts. This decision was referred to with approval by the Judicial Committee in- 'Shamu Patter v. Abdul Kadir', 35 Mad 607 (C). I should like to quote the following passage from the judgment of Ameer Ali J. in this case:

"The later cases are still more direct in the interpretation of the words "attestation" and "attested". IN- "(1850) 163 ER 1330 (B)", Dr. Lushington in 1850 laid down that "attest" means the persons shall be present and see what passes, and shall, when required, bear witness to the facts. In 1855, Lord Campbell, C.J., in- "Roberts v. Phillips", (1855) 4 El & Bl 450 (D), enunciated the same rule as regards the word "attested", that the witnesses should be present as witnesses and see it signed by the testator. And the principle was given effect to in the House of Lords in- "Burdett v. Spilsbury" (1842-43) 10 Cl & F 340 (E). The Lord Chancellor summed up the conclusion in these words : The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then attesting witness". The meaning of the words "attest" and "attestation" has also been before the Courts under the Bills of Sale Act of 1878 (41 & 42 Vict. C.31, Ss. 8 & 14) and the interpretation put on them in- '(1855) 4 El & Bl 450 (D)' and- '1950 163 ER 1330 (B)' has invariably been followed."

7. I say with respect that if the Courts in India have on the basis of this dictum laid down that any person who was present and witnessed the execution and whose name appears on the document is to be regarded as a witness competent for proving the execution, that view should be regarded as sound.



Though the language of S.63(C) shows that the attesting witnesses should either have seen the signing or the affixing of the mark by the testator or some other person signing the will on his behalf, if the execution is complete as soon as the testator has signed or affixed his mark, the person who claims to have witnessed such execution of the deed by the testator has to be regarded as a competent attesting witness.

It was ruled in-‘Govind Bhikaji v. Bhau Gopal’, AIR 1916 Bom 123 (F), that if the scribe of a deed authenticates the mark made by the executant and thus vouches the execution by him he is to be regarded as a competent attesting witness. Though in the particular deeds which were the subject of consideration by their Lordships there might have been, on the face of the documents, certain more attesting witnesses at the trial the deeds were sought to be proved by the testimony of one of the witnesses and the scribe. The executant of these documents had made the mark of a dagger which was being represented as his signature, and this mark had been described by the scribe of the deed. What the scribe had actually written was as follows:

“The mark of a dagger representing the signature of Gopal Bapu Lad made by him with his own hands. The handwriting of Keshav Chintaman Vaishampayan.”

This Keshav Chintaman was the scribe, and he had deposed in the case that he had witnessed the execution of the bond by Gopal, inasmuch as he had seen the affixing of the mark by Gopal. The Court below had taken the view that the mere making of the mark was not the signature of the executant and that it was the description given by the scribe which



had completed the signature or the execution by the executant. This view was held by their Lordships to be erroneous and they pointed out that in the case of an illiterate executant his mark was his signature and that it was independent of any writing by which the mark might be explained. Their Lordships referred to S. 3, Cl 52 General Clauses Act, which explains the word “sign” with reference to a person who is unable to write his own name. And their Lordship further observed that it is no where laid down as essential that an attesting witness must be formally described as such on the face of the document. While discussion the nature of the signature made by the scribe their Lordships pointed out that when the scribe or identifier signed his own name under the description of the mark, his object is so doing presumably was to authenticate the mark that is to say to vouch the execution. In other words, the last signature made by the scribe was taken to be a signature made by the scribe not in the capacity of a scribe but in the capacity of an attesting witness.”

23. This Court had again occasion to consider, when an instrument to be treated to have been executed legally and properly in Dulhin Ful Kueri v. Moti Jharo Kuer, AIR 1972 Pat, 214 and this Court was of the view that signature of attesting witness at the end or some where on the instrument are sufficient to show that they had seen the document executed, not required to recite with regard to attestation and also recite that they had put their signature in presence of testator. It will be relevant to quote the relevant portion of the aforesaid judgment:

“....Dealing with attestation of a mortgage in Abinash Chandra Bidyanidhi Bhattacharjee v.



Dasarath Malo, AIR 1929 Cal 123, Rankin, C.J., said:

“Now, the word “attested” is the word to be defined because that word when it is used in the Statute with reference to an instrument is really a shorthand expression and the meaning of it is given at length in this Act-Act 27 of 1926. The word “attested” occurs not merely as the thing to be defined but as a part of the definition or explanation and it remains, therefore, to enquire in cases such as the present., what is meant by saying that a document has been attested or that its execution has been attested. In my judgment, the matter is reasonably clear. A person may be a witness to the execution of a mortgage or a will ‘and’ yet may not have written his name at the time by way of saying that he was a witness., it is quite clear that in India no formal attestation clause is necessary. Ordinarily a string of signatures towards the end of an instrument or somewhere on the instrument without any explanation will be quite sufficient to show that the persons put their signatures by way of saying that they had seen the document executed or has received an acknowledgment.”

Both Section 63(C) of the Indian Succession act and Section 3 of the Transfer of Property Act say that no particular form of attestation is necessary. If I may say so with respect, Rankin, C.J. is right in observing that mere signature towards the end of an instrument or somewhere on an instrument without any explanation are quite sufficient to show that the persons put their signature by way of saying that they had seen the document being executed or had received an acknowledgement. Such signatures, in my opinion, are also sufficient to show that they



were put in the presence of the testator. However, as required by Section 68 of the Indian Evidence Act, at least one of the attesting witnesses should be examined in proof of the execution of the will. What is required is that in order to prove the due attestation of the will, the propounder of the will has to prove that two witnesses saw the testator signing the will and they themselves signed the will in presence of the testator. In the instant case, one of the attesting witnesses Siujag Tewari has proved it. The appeal, accordingly, fails and is dismissed but in the circumstances, without costs.”

24. In view of the aforesaid discussion, it is very much clear, a person who puts his signature either at the end of instrument or some where on the instrument, itself would suggest that he is witness to the execution of the document and there is no necessity to make such statement in the document”.

8. Learned counsel for the appellants also relied upon several judgments which are as follows:

(i) *In the case of Madadeo Rai & Ors. Vs. Bhagwan Roy & Anr., reported in (2013) 4 PLJR 703.*

(ii) *In the case of Smt. Punni vs. Sumer Chand & Ors. reported in AIR 1995 HP 74.*

(iii) *In the case of G.M, Bharat Coking Coal Ltd., vs. Shib Kumar Dushad & Ors. reported in AIR 2001 SC 74.*

(iv) *In the case of Abhoy Charan Nath Mazumdar vs. Smt. Raimya Devi & Ors. reported in AIR 1982 Gau 94.*



(v) *In the case of Earnesh Bento Souza vs. John Francis Sourza & Ors., reported in AIR 1958 Calcutta 440.*

(vi) *In the case of Janki Narayn Bhoir vs. Narayan Namdeo Kadam, reported in (2003) 2 SCC 91.*

(vii) *In the case of Parasnath Giri vs. Durga Giri, reported in (2016) 2 PLJR 26.*

(viii) *In the case of Kamleshwari Devi (Deceased) & Ors. vs. Devesh Pratap Singh, reported in AIR 2002 Pat 24.*

(ix) *In the case of Bachwanbai vs. Ramkalibai, reported in AIR 1966 MP 251.*

(x) *In the case of N. Kamalam (Dead) & Ors. vs. Ayyasamy & Ors., reported in AIR 2001 SC 2802.*

(xi) *In the case of Smt. Sandhia Devi & Anr. vs. Tara Chand (dead) & Ors., reported in AIR 2014 HP 12.*

(xii) *In the case of Mohan Singh & Ors. vs. Ishar Singh (dead), reported in AIR 2005 P&H 79.*

(xiii) *In the case of Murthy & Ors. Vs. C. Saradambal & Ors., reported in (2022) 2 PLJR SC 299.*

(xiv) *In the case Janki Narayan Bhoir vs. Narayan Namdeo Kadam, reported in AIR 2003 SC 761.*

9. Learned counsel for the appellants submits that one of the attesting witness, namely, Ram Chaudhary had deposed and his



deposition before the Court below clearly states in his cross examination that the testatrix did not spoke any word at the time of execution of the Will. Testatrix sat silently at the time of execution of the Will. He further submits that in view of the deposition of the attesting witness, namely, Ram Chaudhary, it appears that the Will in question was not executed properly and without knowledge of the testatrix a type copy of the Will was presented before the testatrix and the respondent first party had fraudulently procured thumb impression of the testatrix on the Will dated 14.01.1995.

10. Mr. Abhinav Srivastava, learned counsel for the respondents submits that as per Section 63 of the Indian Succession Act, laying down rules for execution of the will it must bear sign/mark of the testator and two or more attesting witness who have either seen the testator sign affix mark on the will or have receive personal acknowledgment of the same from the testator. Section 68 of the Indian Evidence Act prescribe manner of proof of such documents required to be attested by law as per which, it is to be proved by at least one attesting witness and in the present case, AW3 Ram Chaudhary who was one of the attesting witness of the will has supported the factum of affixing of marks of the testator and the signature of the AW2 there on her behalf on the will in the presence and he has further proved his signature of



attestation made in presence of testator. As per Section 63 of the Act, the attesting witness can also depose on the basis of the personal acknowledgment having informed testator regarding affixing of her marks and thus presence of such witnesses at such time is not necessary.

11. The will in question has been executed by the testator in a sound state of mind with full understanding of the matter with free consent and with regard to the same the testimony of AW1 (scribe), AW2 (Lal Babu) and AW3 (Ram Chaudhary/attesting witnesses) are impeachable and lends credence to one another and also to the case of the respondents that the scribe after having prepared the Will as per the basis of the testator, read over and explain it to her which was understood by her and thereafter only she affix her marks on the Will in question. The AW2 and AW3 have also supported the factum of the signature by the other on the Will in question and also by the testator. With regard to the objection regarding illness and capacity of understanding of the testator has not been accepted as the same did not fit with the pleading and further no objectors could name the doctor who have visited the testator during her illness, neither the evidence regarding fracture of leg could reasonably lead to the conclusion of loss of understanding.



12. Learned counsel for the respondents relied upon the judgment in the case of **Chiranjilal Shrilal Goenka vs. Jasjit Singh and others, reported in (1993) 2 SCC 507**, paragraph nos. 15 and 16 of the said judgment which are quoted as follows :-

“15. In Ishwardeo Narain Singh v. Smt Kamta Devi [(1953) 1 SCC 295 : AIR 1954 SC 280] this Court held that the court of probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate court. Therefore the only issue in a probate proceedings relates to the genuineness and due execution of the will and the court itself is under duty to determine it and preserve the original will in its custody. The Succession Act is a self-contained code insofar as the question of making an application for probate, grant or refusal of probate or an appeal carried against the decision of the probate court. This is clearly manifested in the fascicule of the provisions of the Act. The probate proceedings shall be conducted by the probate court in the manner prescribed in the Act and in no other ways. The grant of probate with a copy of the will annexed establishes conclusively as to the appointment of the executor and the valid execution of the will. Thus it does no more than establish the factum of the will and the legal character of the executor. Probate court does not decide any question of title or of the existence of the property itself.



16. The grant of a probate by court of competent jurisdiction is in the nature of a proceeding in rem. So long as the order remains in force it is conclusive as to the due execution and validity of the will unless it is duly revoked as per law. It binds not only upon all the parties made before the court but also upon all other persons in all proceedings arising out of the will or claims under or connected therewith. The decision of the probate court, therefore, is the judgment in rem. The probate granted by the competent court is conclusive of the validity of the will until it is revoked and no evidence can be admitted to impeach it except in a proceeding taken for revoking the probate. In Sheoparsan Singh v. Ramnandan Prasad Narayan Singh [ILR (1916) 43 Cal 694 : AIR 1916 PC 78 : 43 IA 91] the Judicial Committee was to consider whether the will which had been affirmed by a court of competent jurisdiction, would not be impugned in a court exercising original jurisdiction (civil court) in suit to declare the grant of probate illegal etc. The Privy Council held that the civil court has no jurisdiction to impugn the grant of probate by the court of competent jurisdiction. In that case the subordinate court of Muzafarbad was held to have had no jurisdiction to question the validity of the probate granted by the Calcutta High Court. In Narbheram Jivram Purohit v. Jevallabh Harjivan [AIR 1933 Bom 469 : 35 BLR 998 : 147 IC 362] probate was granted by the High Court exercising probate jurisdiction. A civil suit on the original side was filed seeking apart from questioning the probate, also other reliefs. The High Court held that when a probate was granted, it operates upon the whole estate and establishes the will from the death of the



testator. Probate is conclusive evidence not only of the factum, but also of the validity of the will and after the probate has been granted, it is incumbent of a person who wants to have the will declared null and void, to have the probate revoked before proceeding further. That could be done only before the probate court and not on the original side of the High Court. When a request was made to transfer the suit to the probate court, the learned Judge declined to grant the relief and stayed the proceeding on the original side. Thus it is conclusive that the court of probate alone had jurisdiction and is competent to grant probate to the will annexed to the petition in the manner prescribed under the Succession Act. That court alone is competent to deal with the probate proceedings and to grant or refuse probate of the annexed will. It should keep the original will in its custody. The probate thus granted is conclusive unless it is revoked. It is a judgment in rem”.

13. Having heard learned counsel for the parties, this Court has held that the Court of probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution, the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within a purview of Probate court. Therefore, the only issue in a probate proceeding less to the genuineness and due execution of the Will and the Court itself under duty to determine it and



preserve the original Will in its custody. Apart from that on the consideration of evidence adduced on behalf of the respective parties, this Court has held that the Will dated 14.01.1995 executed by testator (Most. Samarjeet Kaur) in favour of Ramesh Kumar, the Will in question was written at her instruction was duly executed by her in her sound state of mind and apart from that no objectors could name the Doctor who have visited the testator during her illness, neither the evidence regarding fracture of leg could reasonably lead to the conclusion of loss of understanding before the Probate Court. The Will in question dated 14.01.1995 is valid and genuine document and (Ramesh Kumar) is entitled to get probate on the basis of said Will and to inherit property of testator.

14. In view of the aforesaid findings, the present appeal is dismissed.

(Rajesh Kumar Verma, J)

Vanisha/-

AFR/NAFR	NAFR
CAV DATE	13.11.2024
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