

Arun Kumar Sharma Vs. Ashok Kumar Sharma and ors.

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Court : Delhi

Decided On : Mar-08-2007

Reported in : 2007(95)DRJ314

Judge : J.M. Malik, J.

Acts : [Indian Succession Act, 1925](#) - Sections 8 and 63; Evidence Act - Sections 68 and 71

Appeal No. : FAO 185/2005

Appellant : Arun Kumar Sharma

Respondent : Ashok Kumar Sharma and ors.

Advocate for Def. : Lalit Bhardwaj, Adv. for Respondent No. 4

Advocate for Pet/Ap. : Rajat Aneja, Adv

Disposition : Appeal dismissed

Judgement :

J.M. Malik, J.

1. Learned Trial Court declined to grant probate/Letter of Administration in respect of unregistered Will dated 25.5.1983 on the following ground. The Will was attested by Mr. S.L. Dutta, who is the only attesting witness. The Will did not fulfill

the mandatory requirement of Sections 63 Clause (c) of the [Indian Succession Act, 1925](#). The petition filed by the appellant was dismissed on 5.4.2005. Thereafter, the appellant/petitioner filed a review petition which was decided on 18.5.2005. As a matter of fact, the Will was also attested by one notary public. It was prayed that attestation by the notary public on the Will be taken as attestation by the second witness. Learned Counsel for the appellant also cited an authority reported in Labh Singh and Ors. v. Piara Singh and Anr. . In this case the facts were these. The Sub-Registrar testified that he had read over the Will to the testator who admitted having executed the same. The endorsement was then thumb- marked by the testator and signed by the Sub-Registrar. It was held that it would be reasonable to gather from these circumstances that the Sub-Registrar had not merely registered the Will formally but had appended his attestation for the purpose of attesting the fact that the testator had personally acknowledged his thumb impression on the document. Since the testator affirmed the contents of the Will and put his thumb impression on the endorsement in the presence of Sub-Registrar, the Sub-Registrar could also be considered to be an attesting witness of the Will. However this fact alone did not prove the compliance of Clause (c) of Section 63. The testimony of the Sub-Registrar may be sufficient to prove attestation of the Will by one witness but it does not establish the attestation of the second witness and it certainly cannot be taken to satisfy the mandatory provision of Section 63(c).

2. The Trial Court held that the above said judgment has no application to the facts of the present case. It was also pointed out that Mr. S.L. Dutta, who was examined as PW-1 did not state that deceased testator has executed his Will in his presence and in presence of the notary public. The Court opined that it cannot be said that the notary public had signed the Will in the capacity of attesting witness.

3. I have heard counsel for the parties. Learned Counsel for the appellant has drawn my attention towards Section 63(c) of the [Indian Succession Act, 1925](#):

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 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.

Learned Counsel for the appellant also placed reliance upon the above said authority cited before the Trial Court. He vehemently argued that Section 63(c) cited above neatly dovetails with the facts of this case. In this case, too, both the attesting witness and notary public signed the Will separately and on different dates. He opined that under these circumstances, the requirement of Section 63(c) stands fulfilled.

4. On the other hand, learned Counsel for respondent No. 4 has cited two authorities, first is reported in *Abdul Jabbar Sahib v. H. Venkata Sastri and sons and Ors. etc.* : [1969]3SCR513 , where it was held:

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 8 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 *animo 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. 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.

5. In *Janki Narayan Bhoir v. Narayan Namdeo Kadam* : [2002]SUPP5SCR175 , it was held:

12. Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the Will inasmuch as he did not prove the attestation of the Will by the other attesting witness Wagle who though available was not examined. The scribe

examined in the case was not an attesting witness, which is clear from the evidence on record and as rightly conceded so by learned Counsel for the respondent before us. Hence, it is unnecessary to go into the question whether the scribe in this case could or could not be an attesting witness. The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of Section 68 of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of respondent and the scribe could be considered under Section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the Will and other attesting witness though available has not been examined. When the document is not proved as mandatory required under Section 68 of the Evidence Act, the provision of Section 71 of the Evidence Act, which is permissive, and enabling in certain circumstances as discussed above does not help the respondent. In Vishnu Ramkrishna and Ors. v. Nathu Vithal and Ors. Chagla, C.J. speaking for the division bench in similar circumstances has stated that although Section 63 of the Succession Act requires that a Will has to be attested by two witnesses, Section 68 of the Evidence Act permits the execution of the Will to be proved by only one attesting witness being called. Where the attesting witness, who is called to prove the execution, is not in a position to prove the attestation of the Will by the second witness, the evidence of the witness called falls short to the mandatory requirements of Section 68. Section 71 of the Evidence Act can only be requisitioned when the attesting witnesses who have been called failed to prove the execution of the Will by reason of either denying their own signatures or denying the signature of the testator or having no recollection as to the execution of the document. This section has no application when one attesting witness has failed to prove the execution of the Will and other attesting witnesses were available who could prove the execution if they were called.

6. A meticulous perusal of the Will in question Ex.PW1/1 unravels, firstly, that the Will was executed on 25.5.1983 and notary attested it on 27.05.1983. Secondly, at the foot of the Will, there is endorsement and underneath on one side there is space for the attesting signatures by the witnesses, which are reproduced as follows:

Signed by the said Hari Chand as his LAST Will and Testament in our presence all being present at the same time. Thereafter at his request and in his presence we subscribe over respective signatures as attesting witnesses all being present at the same time.

Witnesses

1. (It is signed by Mr. S.L. Dutta) Attested

2. (is lying blank) Notary Delhi 27.05.1983

On the other side of the Will, the same is attested by notary public on 27.5.1983. It is notable that he did not sign it as a witness to the above said Will. Notary public attested it after two days. It is, therefore, crystal clear that notary public did not sign it as an attesting witness. The above said endorsement appearing above the word 'witnesses' is ajar with the case of the appellant. Filling up lacunas after the announcement of judgment cannot be permitted. Shri S.L. Dutta clearly, specifically and unequivocally stated that nobody else had signed the Will in his presence and contradicted the Will itself. There is no evidence on record that both the alleged witnesses signed the Will in presence of each other, at the same time. Arun Kumar Sharma, propounder of the Will, PW-2, stated that the Will was signed by Shri S.L. Dutta, Advocate. He identified his signatures. He did not mention the name of second witness. He did not identify the signatures of second witness. There is no inkling about mention of names of any witness in the Will itself. The learned Judge noted:

Arguments in this case were first heard on 11.03.2005 and on that day case was adjourned at the request of petitioner's Id. counsel to enable him to satisfy this Court regarding admissibility of the will in question for want of attestation by minimum of two attesting witnesses as required in Section 63(c) of the [Indian Succession Act, 1925](#). The petitioner's Id. counsel has today submitted that he has searched the case law and has also gone through the statutory provisions on the subject but he could not find anything to sustain the Will for grant of probate/letter of administration in respect thereof. 'It is very easy to cull out the intention of the testator from the Will itself. The testator or the Will itself never intended that notary

public was to be treated as an attesting witness. I also came across few authorities. In a recent authority reported in Mathew Oommen v. Sushila Mathew : AIR 2006 SC786 , Scribe was adjudged to be an attesting witness because from the very word go he was treated as an attesting witness. He acted as scribe cum attesting witness.

7. In Bhagat Ram and Anr. v. Suresh and Ors. : AIR 2004 SC436 , it was held:

The Registrar of Deeds who has registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duties relating to the registration of a document. Registration of any Will, and the endorsements made by the Registrar of Deeds in discharge of his statutory duties, do not elevate him to the status of a 'statutory attesting witness'. However, a Registrar can be treated as having attested to a Will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator sign or affix his mark to the Will or codicil or has received from the testator a personal acknowledgment of his signature or mark and he had also signed in presence of the testator. In other words, to be an attesting witness, the registrar should have attested the signature of the testator in the manner contemplated by Clause(c) of Section 63 of the Succession Act. No particular form of attestation is provided. It will all depend on the facts and circumstances of a case by reference to which it will have to be answered if the registrar of deeds fulfills the character of an attesting witness also by looking at the manner in which the events have actually taken place at the time of registration and the part played therein by the Registrar. Registrar of Deeds before he be termed as an attesting witness shall have to be called in the witness box. The Court must feel satisfied by his testimony that what he did satisfies the requirement of being an attested witness.

8. In N. Kamalam(dead) and Anr. v. Ayyaswamy and Anr. : AIR 2001 SC2802 , it was held:

Effect of subscribing a signature on the part of the scribe cannot be identified to be of the same status as that of the attesting witnesses. Signature of the attesting witness as on a document, required attestation (admittedly in the case of a Will the

same is required), is a requirement of the statute thus, cannot be equated with that of the scribe. In such a case, it could not be said that in the event of there being an intent to attest, that itself should be sufficient compliance of the requirement of law. The animus to attest, is not available, so far as the scribe is concerned; he is not a witness to the Will but a mere writer of the Will. The statutory requirement as noticed above cannot thus be transposed in favor of the writer and it could go against the propounder where both the witnesses were named in Will with detailed address and no attempt was made to bring them before the Court as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be proof of the due attestation unless the situation is so expressed in the document itself.

9. I see no infirmity in the order passed by learned Trial Court. The learned trial Judge has made a perspicacious judgment. The Appeal is without any merit and is dismissed at admission stage.

Copy of this order and TCR be sent back forthwith.

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