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High Court Of Punjab And Haryana At Chandigarh

Case No: Regular Second Appeal No. 2725 of 1983

Mehnga and others	APPELLANT
Vs	
Major Singh and another	RESPONDENT

Date of Decision: May 14, 1985

Acts Referred:

- Evidence Act, 1872 - Section 68

Hon'ble Judges: B.S. Yadav, J

Bench: Single Bench

Advocate: R.N. Aggarwal, for the Appellant; H.L. Sarin with Mr. D. Khanna, for the Respondent

Final Decision: Dismissed

Judgement

B.S. Yadav, J.

It is not necessary to narrate the facts of the case in detail, because the only controversy that was urged before me was, whether the will Ex. P-1 (copy Ex. D-7) propounded by Sheru defendant (who died during the pendency of the appeal in the lower appellate Court and whose son Major was brought on the record, as his legal representative) was validly executed by Malan and has been duly proved.

2. Briefly stated, the facts are that the suit land belonged to Bishan Singh who died near about 1944. He left behind his widow, Malan, who too, died on 10th February, 1972. The present appellants filled the suit in January, 1977 for a declaration that they, alongwith defendant No. 2, Durgi (now respondent No. 2), were the owners of the suit land and Sheru, defendant No, 1 had no right or interest therein. As a consequential relief, they prayed for a decree for permanent injunction, restraining defendant No. 1 from interfering with their possession and that of defendant No. 2 over the suit land or in the alternative, they prayed for possession of the suit land. According to the plaintiffs, they were the sons while Smt. Durgi was the daughter of Ralli sister of the aforesaid Bishan Singh and thus, they were the heirs to his estate

after the death of Malan. In defence of the suit, Sheru averred that on 4th October, 1956, Malan had executed a will in his favour and mutation was rightly sanctioned in his favour. He also denied the plaintiffs'' allegation that the will was a forged document or a result of misrepresentation and fraud.

3. The learned trial Court held that the execution of the will by Malan had not been proved in accordance with section 68 of the Evidence Act, Accordingly the suit was decreed. Feeling aggrieved, Sheru defendant filed an appeal which was heard by the learned Additional District Judge, Hoshiarpur. He held that the disputed thumb-impression of the testator on the will Ex. P-1 (copy Ex- D-7) was of Malan and that the will was properly attested. It was further held that it had been proved in accordance with the provisions of section 68 of the Evidence Act. Consequently, he accepted the appeal and dismissed the suit of the plaintiffs. The plaintiffs have now come up to ihis Court in second appeal.

4. Before me the learned counsel for the appellants did not challenge the findings of the lower appellate Court that the will Ex. P-1 (copy Ex. D 7) bears the thumb impression of Malan as executant, as well as under the endorsement of the Sub-Registrar. The main point urged by tbem against the validity of the will Ex. P-1 (copy Ex. D-7) is that it has not been proved to be properly executed in conformity with section 63 of the Indian Succession Act, 1925. That section lays down the formalities required to be observed in the execution and attestation of a will in the following terms:--

63. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a manner 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 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.

5. It was further argued that the will has not been proved in accordance with the provisions of section 68 of the Evidence Act which lays down that if a document is required by law to be attested, it shall not be used as evidence untill 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.

6. To appreciate the above argument, it may be mentioned here that the will Ex. P-1 (copy Ex. D-7) was scribed by Parmanand, deed-writer, who has since died. His handwriting on this will has been proved by DW-2 Jairam Dass. The will was attested by Teja Singh, Lamberdar and Chanan Singh. Vide statement of DW-3 Sheru Teja Singh has since died. Thus, the only attesting witness alive is Chanan Singh who has appeared in the v itness box for the plaintiffs as PW-4. In his examination-in-chief he has stated that Malan did not execute any will in favour of Sheru, nor did he attest any such will. On these facts, the learned counsel for the appellants argued that when the only alive attesting witness denied the execution ofthe will, it could not be said to have been duly executed, as alleged. In support of his argument, he has relied upon Doraiswami Vs. Rathnammal and Others, , The observations made in that case are not applicable to the facts of the present case. In that case the only alive attesting witness had stated that he was not present when the testator was alleged to have executed the will it was, therefore, remarked that the will could not be said to have been proved through any of the testator or the scribe. However, the learned Judges did not discard the will on that account alone and considered the statements of the other witnesses who were examined by the propounded to prove the execution of the will. After considering the evidence and the circumstances of the case, it was remarked:
In these circumstances, it is not possible to accept the version of DW-5 that he can indentify the signature of Annamal in the disputed document Ex. B-1. Even assuming that the signatures found in Ex. B-1 is that of Annamal, it cannot automatically follow that Annamal had executed the will Ex B-1. The identification of the signatures of Annamal in the document will only mean that the document contains the signature of Annamal. That will not amount to proof of the execution of the document, as there is a possibility of Annammal''s signatures having been taken on blank paper or on a misrepresentation that the document represents a differrent transanction. We have to therefore, agree with the view of N. S. Ramaswami, J. that the due execution of the will Exhibit B-1 has not been proved in this case.

As noticed earlier, in the present case, now there is no dispute between the parties over the point that the will Ex. P-1 (copy D-7) bears the thumb-impression of the Malan as executant. Her thumb-impression also appears before the endorsement of the Sub-Registrar.

7. A similar situation had arisen in Ittoop Varghese Vs. Poulose and Others, . There one of the attesting witnesses stated in his testimony that he did not see the testator signing and the testator did not see him attesting it. The other attesting witness stated that he signed without knowing that his signatures were intended as evidence and that he did not see the testator signing the wil It was remarked:

But, as we have pointed out earlier, when the court is satisfied as in this case that the witnesses deliberately and falsely denied that they attested the will, the court is entitled to look into the other circumstances and the regularity of the will on the face of it and come to the conclusion on the question of attestation.

Therefore, the question to be seen in the present case is whether there are circumstances from which the Court may infer that the will was duly executed by Malan.

8. The will Ex-P-1 (copy Ex. D 7) purports to have been attested by two persons, namely Teja Singh and Chanan Singh. Both these persons signed below the word ''Gwah'' (witness). Malan signed below the word ''Alabad'' (i.e. the executant). So, on the face of the will it can be found that the formalities of due execution the will were complied with.

9. Further both the attesting witnesses of the will Ex. P-1 (copy Ex. D-7) had accompanied Malan to the Sub-Registrar''s office, DW-4 Shri Arjan Singh, who during the relevant days, was posted as Sub-Registrar, Garhshankar and had attested the will in question, has appeared in the witness box. On oath he has stated that the will was produced before him for registration by Malan. It was read out to Malan, as well as to the attesting witnesses, Teja Singh and Chanan Singh. He has further stated that after admitting the will as correct, Smt. Malan had placed hei thumb-impression below his endorsement and the witnesses also attested it. He has also stated that he personally knew Teja Singh who had identified Malan before him. According to him the endorsement, copy of which is Ex. D-6, is in his hand. As noticed earlier, their is no dispute about the thumb-impression of Malan on the will, as well as under the endorsement of the Sub-Registrar. For the foregoing reasons, it is held that the circumstances of the case are sufficient for coming to the conclusion that there is suffiient proof of due compliance of the formalities required u/s 63 of the Indian Succession Act.

10. It may ba mentioned here that PW-4 Chanan Singh, in cross-examiiation does not specifically deny his attestation on the will. He has stated in cross-examination that he does not know if Malan got registered any will on October 4, 1956 in favour of Sheru, nor did he know if he and Teja Singh attested any such document. He has also stated that if by fraud his attestation was obtained, then he could not say anything. It shows that Chanan Singh did not dare to take a positive stand that he did not attest the will. The plaintiffs had examined a document expert in the lower appellate Court, namely Shri N. K. Jain (RW-1) to prove that the thumb-impression, purporting to be of Malan on the original will Ex, P-1 (copy Ex. D-7) which was got produced in that Court, did not tally with her standard thumb-impression. Surprising enough, the plaintiff did not examine the expert on the point that the thumb-marks purporting to be of PW Chanan Singh on the will as an attesting witness were of his.

11. The learned counsel for the respondent has also raised the contention that the Sub-Registrar''s signatures at the time of registration amount to attestation within the meaning of section 63 of the Indian Succession Act. In support of his contention, he has cited Gian Chand etc. v. Surinder Kumar (1951) 53 P.L.R. 251, wherein it has been laid down that the Registering Officer and the identifying witness before him can be treated as attesting witnesses to the will if it is proved that they signed the will in the presence of the testator after receiving from him an acknowledgement of his signature on the will. However, in the present case, there is no evidence to show that the Registering Officer, Shri Arjan Singh (PW-4) had the animo attestandi at the time he signed the endorsement made by him. Nor is there evidence to show that he signed the endorsement in presence of the executant. Without such proof, the Registering Officer cannot be regarded as an attes-ing witness In this respect, I may quote here M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, wherein it was remarked :

Section 3 of the Transfer of Property Act gives the definition of the word "attested" and is in these words:--

"Attested", in relation to an instrument, means and shall be deemed 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 acknowledgement of his signature or mark, or of the signature of such other person, and each of them 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.

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 u/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 signatures; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence cf the executant. It is essential that the witness should have put in 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 acknowldgement 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 indentifier or a registering officer, he is not an attesting witness.

In every case the Court must be satisfied that the names were written animo attestandi", see Jarman on Wills, 8th Ed p. 137. Evidence is admissible to show whether the witness had the intention to attest. "The attesting withesses must subscribe with the intention that the subscription made should be complete attestation of the will, and evidence is admissible to show whether such was the

intention or not, "see Theobald cn Wills 12th Ed.p. 129. In Girja Datt Singh Vs. Gangotri Datt Singh, the Court held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not attesting witnesses as their signatures were not put "animo attestaudi". In Abirash Chandra v. Dasrath Malo, ILR. 56 Cal 558 : (AIR. 1927 PC. 123) it was held that a person who had put his name under the word "scribe" was not an attesting witness as he had put his signatures only for the purpose of authenticating that he was a "scribe". In AIR 1927 248 (Privy Council) the Privy Council held that the legatees who had put their signatures on the will in token of their consent to its execution were not attesting withesses and were not disqualified from taking as legatees.

The Indian Registration Act, 1908 lays down a detailed procedure for registration of documents. The registering Officer is under a duty to enquire whether the document is executed by the person by whom it purports to have been executed and to satisfy himself as to the identity of the executant; Section 34(3). He can register the document if he is satisfied about the identity of the person executing the document and if that person admits execution: (Section 35(1). The signatures of the executant and of every person examined with reference to the document are endorsed on the document; (Sec 58). The registering officer is required to affix the date and his signatures to the endorsements: Section 59) Prima facie, the registering officer puts his signatures on the document in discharge of his statutory duty u/s 59 of Registratk n Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgement of his signature".

12. The learned counsel for the respondent tried to distinguish the above authority on the ground that in that case, the word "attested" as defined in section 3 of the Transfer of Property Act was being interpreted. I am unable to accept this contention. Though the word "attested" or "attestation" has not been defined in the Indian Succession Act, but the manner in which the will is to be attested, has been laid down in section 63 (e) of that Act. That provision has already been notified. It may be seen that the said manner of attestation is not different from the definition of the word "attested" as gven in section 3 of the Transfer of Property Act. Therefore, it is nit possible to agree with the learned counsel for the respondent that the observations made in Abdul Jabbar Sahib''s case (supra) do not apply in the case of a will.

13. As it has already bean held that the will Ex.P-1 (copy Ex.D-7) was validly executed by Malan and has been duly proved, the present appeal fails and the same is hereby dismissed with no order as to costs.