2025:DHC:2862

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Judgment reserved on : 24 March 2025**
Judgment pronounced on: 24 April 2025

\+ FAO 21/2009 & CM APPL. 13585/2010, CM APPL. 33941/2017

SMT. PARMESHWARI DEVI (DECEASED) THROUGH LRs
.....Appellant
Through: Mr. Shailender Dahiya, Adv.

versus

THE STATE & ORS. .....Respondents
Through: Mr. B.S. Yadav, Adv. for LRs of R-2 and R-3.

CORAM:
HON'BLE MR. JUSTICE DHARMESH SHARMA

J U D G M E N T

1. The appellant (now deceased) had preferred this appeal under Section 299 of the Indian Succession Act, 1925 [**hereinafter "the Act"**] against the order dated 01.12.2008 passed by learned Additional District Judge-05, West District, Tis Hazari Courts, Delhi ["**Probate Court**"] refusing to grant probate of the Will dated 04.10.2004.

FACTUAL BACKGROUND

2. Shorn of unnecessary details, appellant, Smt. Parmeshwari Devi, was the widow of the deceased, Shri Sube Singh. Shri Sube Singh was previously married to Smt. Angrej Kaur, who passed away, leaving behind two children, Satbir (respondent No.2) and Smt. Azad Kaur. After her demise, Shri Sube Singh married the appellant, and

they had three sons—Jagbir, Raj Singh, and Ranbir Singh and one daughter, Miss Kaushalya Devi.

3. During his lifetime, Shri Sube Singh was the sole and exclusive owner of the agricultural land measuring 12 Bighas and 11 Biswas in khasra No.44/9 (3-12), 12 (4-16), 19 (4-3), *khata Khatauni* No. 584, situated in the revenue Estate of village Alipur, Delhi. He had also applied for compensation under an award and maintained a savings account with Allahabad Bank, Alipur. On 04.10.2004, Shri Sube Singh executed a registered Will, bequeathing his land to the appellant. The Will also stated that the appellant would be responsible for solemnizing the marriage of their daughter, Miss Kaushalya Devi. Shri Sube Singh passed away on 23.12.2004, leaving behind the appellant and his children from both marriages.

4. Eventually, the appellant filed for probate of the Will, asserting that it was executed voluntarily while the testator was of sound mind. A key witness, PW-3/Zile Singh, testified as to the execution of the Will, however, the probate petition was dismissed on the ground that the second attesting witness was not examined. The appellant contends that as per settled law and Section 68 of the Indian Evidence Act, 1872, the examination of a single attesting witness was sufficient to prove the attestation of a Will.

PROCEEDINGS BEFORE THE LEARNED PROBATE COURT:

5. The learned Probate Court based on the pleadings of the parties, framed the following issues:

> "1. Whether late Sube Singh executed a valid and enforceable Will dated 4-10-2004 as claimed by the petitioner? OPP

2. Whether the petitioner is entitled for grant of Probate/Letters of Administration in respect of aforesaid Will? OPP
3. Whether the petition is liable to be rejected for the objections raised by the respondents? OPR
4. Relief.

6. Firstly, issue No. (3) was considered, and the learned Probate Court held that in probate proceedings the only material issue is whether the Will in question is genuine and validly executed or not, and whether the dispute about the right, share, ownership and title of the property are alien to the probate proceedings and not to be considered at all. Reliance for the same was placed on the decision in the case of **Chiranjilal Shrilal Goanka v. Jasjit Singh**[1], whereby it was held that the Probate Court has not to decide the question of title or ownership and even the existence of the property is not to be looked into. The respondents are alleging that the immovable properties in question are ancestral properties but this controversy is to be sorted out by the civil court and cannot be dealt with in this probate proceeding. Therefore, the said issue was decided in favour of the petitioner.

7. Further, as far as issues No. (1) & (2) are concerned, the learned Probate Court examined the validity of a Will dated 04.10.2004, allegedly executed by the deceased Sh. Sube Singh, which was typed in English language, but a registered document bearing his thumb impression and signatures in Urdu. The respondents challenged the Will on grounds of the testator's physical and mental incapacity, but the learned Probate Court found no *iota* of medical evidence to

[1] (1993) 2 SCC 507

substantiate their objections, holding that mere old age or general uneasiness, as alleged by the respondents, did not establish mental incapacity. Additionally, the Will's execution occurred nearly one and a half months before the testator's death, and hospitalization shortly before death did not automatically imply incapacity at the time of execution.

8. The learned Probate Court, however, observed that while registration of a Will creates a presumption of due execution, this presumption is rebuttable, and it was held that significant doubts had arisen regarding the registration process since the concerned Sub-Registrar was not examined as a witness, and the attesting witness viz., PW-3 Zile Singh denied that the Sub-Registrar had read the Will to the testator. The learned Probate Court found that the brief time spent in the office of the Sub-Registrar was insufficient for the proper completion of registration formalities, leading to the conclusion that the execution of the Will could not benefit from the presumption of validity due to registration.

9. Regarding execution under Section 63 of the Act, the learned Probate Court emphasized that a Will must be attested by at least two witnesses. Although Section 68 of the Indian Evidence Act, 1872 permits proof by one attesting witness, the witness examined must establish that both witnesses signed in the presence of the testator; and in the instant case, PW-3/Zile Singh attested only his own signature but did not confirm the attestation by the second witness, Mr. R.S. Beniwal, Advocate. Since the second witness was neither examined nor his signature verified, the Will's execution remained unproven.

The probate court relied on the Supreme Court's ruling in **Janki Narayan Bhoir v. Narayan Namdeo Kadam**[2] to hold that the Will was not properly executed.

10. Additionally, the appellant/petitioner failed to establish that the Will was drafted on the testator's instructions. There was no evidence regarding its preparation, and PW-3/Zile Singh admitted that the document was already typed when he arrived at the Sub-Registrar's office. Furthermore, there was no proof that the testator, who signed in Urdu, understood the contents of the Will written in English language. The absence of reasons for excluding close family members from inheritance further raised suspicion about its authenticity.

11. Given these findings, the court concluded that the Will was not duly executed as per law and could not be enforced. The petitioner failed to establish its validity and merely highlighting weaknesses in the respondents' defense did not justify granting relief. Consequently, both issues were decided against the petitioner.

12. Consequently, the said petition was dismissed.

SUBMISSIONS ON BEHALF OF THE PARTIES: -

13. Learned counsel for the appellant submitted that the learned Probate Court has erred in refusing to grant probate of the will as it is against the procedures of statute and settled law. It was emphasized that Section 68 of the Indian Evidence Act, 1872 clearly provides that examination of one attesting in court itself is sufficient to prove the execution of the Will if the said witness, through his deposition proves the attestation of the Will. In the present case the attesting witness,

[2] (2003) 2 SCC 91

Zile Singh through his deposition proved the attestation of the Will, and therefore, the non-examining second witness Sr. R.S. Beniwal is not fatal.

14. Learned counsel for the appellant further urged that the learned Probate Court is wrong in holding that there was nothing in the statement of PW-3/Zile Singh that contents of the Will were read over and explained to the deceased and to him, he denied the suggestion in his cross-examination that the Will (Ex.PW-2/1) was not read over to Sh. Sube Singh or to him. The learned counsel for the appellant has placed reliance on the decision of **M.B. Ramesh (D) by LRs v. K.M. Veeraje Urs (D) by LRs & Ors.[3],** whereby the Supreme Court held that:

> "25. As stated by this Court also in *H. Venkatachala Iyengar* [*H. Venkatachala Iyengar* v. *B.N. Thimmajamma*, AIR 1959 SC 443 : 1959 Supp (1) SCR 426] and *Jaswant Kaur* [*Jaswant Kaur* v. *Amrit Kaur*, (1977) 1 SCC 369 : AIR 1977 SC 74], while arriving at the finding as to whether the will was duly executed, the Court must satisfy its conscience having regard to the totality of circumstances. The Court's role in matters concerning wills is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator, and whether it is the product of the free and sound disposing mind [as observed by this Court in para 77 of *Gurdev Kaur* v. *Kaki* [(2007) 1 SCC 546]. In the present matter, there is no dispute about these factors. The issue raised in the present matter was with respect to the due execution of the will, and what we find is that the same was decided by the trial court, as well as by the first appellate court on the basis of an erroneous interpretation of the evidence on record regarding the circumstances attendant to the execution of the will. The property mentioned in the will is admittedly ancestral property of Smt Nagammanni. She had to face a litigation, initiated by her husband, to retain her title and possession over this property. Besides, she could get the amounts for her maintenance from her husband only after a court battle, and thereafter also she had to

[3] AIR 2013 SC 2088

> enter into a correspondence with the appellant to get those amounts from time to time. The appellant is her stepson whereas the respondents are sons of her cousin. She would definitely desire that her ancestral property protected by her in a litigation with her husband does not go to a stepson, but would rather go to the relatives on her side. We cannot ignore this context while examining the validity of the will."

15. *Per Contra,* learned counsel for the respondents submitted that proving a Will requires more than just verifying the testator's signature, and all formalities under Section 63 of the Act must be met. It was urged that the key witness PW-3 failed to establish that the Will was signed by the testator in the presence of both attesting witnesses. He could not recall the date when the testator signed the Will and admitted that no other witness was present during the execution and also acknowledged that he and the testator were at the Sub-Registrar's office for only 10 minutes, which is insufficient time for completing the execution and registration process. Also, the Will was already typed before they arrived, raising concerns about its authenticity.

16. Furthermore, respondents submitted that the Will was neither read over to the testator by the Sub-Registrar nor was it proved that the testator understood its contents, and the testator signed in Urdu, suggesting he might not have comprehended the document, which places an additional burden on the appellant to establish the Will's validity.

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17. It is in the aforesaid backdrop, that these applications have been filed on behalf of the appellant to bring certain additional evidence on the record.

18. It is submitted that the applicant/appellant had submitted a list of witnesses before the learned Probate Court including Mr. R.S. Baniwal, Advocate and an application dated 10.09.2007 was filed to summon him, and the diet money of Rs. 200/- was deposited. However, the witness was not served and did not appear for evidence; and upon visiting Sh. R.S. Baniwal's office at Sub-Registrar Complex, Pitampura, Delhi, the applicant/appellant discovered that he was unavailable due to illness and had undergone two major surgeries at Sir Ganga Ram Hospital. Consequently, no further attempts were made to summon him during that period.

19. It is stated that after filing the appeal, the applicant/appellant came to know that Mr. R.S. Baniwal, Advocate had recovered and was now available for examination as a witness. It is, thus, stated that since Mr. R.S. Baniwal, Advocate is an attesting witness to the impugned will, his non-examination during the trial has adversely affected the applicant's material rights, and thus may allowed to be summoned and examined to set at rest all the dust over the execution of the will. Reliance is placed on the case of **Shalimar Chemical Works Ltd. v. Surendra Oil & Dal Mills (Refineries) & Ors**.[4], the relevant paragraph is extracted below:

> "8…In support of his submission he relied upon the decision of this Court in K. Venkataramiah vs. A. Seetharama Reddy & Ors., 1964 (2) SCR 35 (at page 46).
> "... Apart from this, it is well to remember that the appellate court has the power to allow additional evidence not only if it requires such evidence "to enable it to pronounce judgment" but also for "any other substantial cause". There may well be cases where even though the court finds that it is able to pronounce judgment on the

[4] (2010) 8 SCC 423

> state of the record as it is, and so, it cannot strictly say that it requires additional evidence "to enable it to pronounce judgment," it still considers that in the interest of justice something which remains obscure should be filled up so that it can pronounce its judgment in a more satisfactory manner. Such a case will be one for allowing additional evidence "for any other substantial cause" under Rule 27(1)(b) of the Code."

20. The learned counsel for the respondents has objected to the said request and placed reliance on the judgment of **State Bank of India v. Pawanveer Singh.**[5]

ANALYSIS AND DECISION

21. I have given my thoughtful consideration to the submissions advanced by the learned counsel for the parties at the bar and I have also perused the relevant record of the case.

22. **First things first,** insofar as the CM APPL. 13585/2010 & 33941/2017 are concerned, it would be apposite to reproduce provisions of Order XLI Rule 27 of the CPC which provides as under:

> **"Order XLI Rule 27**
> 27. Production of additional evidence in Appellate Court.—(*1*) The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the Appellate Court. But if —
> (*a*) the Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or
> 1[(*aa*) the party seeking to produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within his knowledge or could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or]
> (*b*) the Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate Court may allow such evidence or document to be produced, or witness to be examined.

[5] 2015 (4) CLJ 482 Del.

(*2*) Wherever additional evidence is allowed to be produced by an Appellate Court, the Court shall record the reason for its admission."

23. A bare perusal of the aforesaid provision would show that the additional evidence cannot be allowed to be produced at appellate stage except where the Court whose decree is challenged in the appeal refused to admit the evidence although it ought to have been admitted, or additional evidence was not available despite exercise of due diligence or the party wishing to produce it had no knowledge of such evidence, or lastly where the appellate Court requires the document to produce or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause.

24. In the instant case, the other alleged attesting witness, namely Mr. R.S. Baniwal, Advocate was very much available but it appears that the appellant did not take any diligent steps to summon the said witness and examine him in the matter. Though, summons were once issued thereafter further attempts were aborted. That being the case, none of the conditions which are specified under Order XLI Rule 27 of the CPC for the production of additional evidence at the appellate stage comes into play.

25. In the cited case of ***State Bank of India v. Pawanveer Singh (supra)***, the appellant/judgment debtor challenged the decree passed by the District Court not only for ejectment but also towards grant of *mesne* profits claiming the same to be exorbitant. At the appellate stage, an application was moved under Order XLI Rule 27 of the CPC for leading evidence with regard to the market value of the property as

also market rental value besides other commercial aspects, which application was declined by this Court, holding as under:

> **"8.** Mr Relan's contention that the appellant/ defendant should be allowed to lead evidence at this stage cannot be accepted, as the evidence, now sought to be produced, **was surely accessible to it at the relevant stage**. **The law recognizes three circumstances, for invocation of the provisions of Order 41 Rule 27 of the CPC: First, where the trial court has refused to admit evidence, though it ought to have been admitted. Second, when, evidence was not available to the party concerned, despite exercise of due diligence. Lastly, when the appellate court requires additional evidence to be produced to enable it to pronounce judgement or for any other substantial cause.**
>
> **8.1** Surely, the appellant's/ defendant's case does not fall within the ambit of the first two circumstances. In so far as the third circumstance is concerned, according to me, having regard to the fact that the appellant/defendant (which is, an entity with enormous wherewithal available at its disposal) chose not to present the necessary evidence, at its own peril, cannot, at this late stage, be shown any indulgence. **If, the appellant's/defendant's request is admitted, it will set back the decision in this case by several years. Conduct of trial involves usage of public money and time. Such like situations do not, to my mind, fall under the third circumstance."**
>
> **{Bold portions emphasized}**

26. Reliance placed by the learned counsel for the appellant on the decision in the case of ***Shalimar Chemical Works Ltd (supra)*** is misplaced as it was the case where the trial Court in a suit for permanent injunction based on allegations of infringement of its trademark, did not allow the plaintiff to place on record original registration certificate under the Trademarks Act, 1999. The same was allowed to be placed at the appellate stage as the photocopies of the same had already been proven during the course of the trial.

27. The plea by the learned counsel for the appellant that additional evidence can also be allowed for any substantial cause is also not sustainable as the appellant cannot be allowed to fill up the lacunae in

his evidence at a belated stage. If the request of the appellant is allowed, it would set the clock back in time and would result in a *de novo* trial at great public costs.

28. In view of the foregoing discussion, the instant applications merit rejection and the same are accordingly rejected.

DECISION ON APPEAL:

29. **First things first,** it would be apposite to reproduce the reasons that prevailed in the mind of the learned Probate Court in deciding the issues No. 1 and 2 against the present appellant, that go as under:

> "Registration of the Will is not mandatory. However registered document draws a presumption of its due execution but this presumption rebuttable. In case, even it is established that Will was not properly registered then also, if it is otherwise proved as per law, it can be relied upon. Will in question Ex. PW2/1 was not registered either in presence of PW-2 or RW-1 who have come from same office of Sub-Registrar and they had no personal knowledge about the same. Petitioner has not examined the concerned Sub-Registrar who got it registered. That Sub-Registrar could have been the best witness to prove that procedure of registration adopted by him was not suffering from any defect or lacunas. The endorsement of Sub-Registrar in the shape of stamp impression on the back side first page of the Will that contents of the Will were read over to the parties are falsified by PW-3 who denied that the Will was read over by Sub-Registrar either to him or to the testator. PW-3 stated that he remained in office of Sub-Registrar only for about 10 minutes. This short time is highly improbable to complete the necessary formalities and due registration of the document in the office of Sub-Registrar. Hence these grounds are sufficient to rebut the presumption of due execution to be raised due to registration of the Will. In such situation the Will in question has to be treated as unregistered document. Otherwise also registration of the Will itself is not sufficient to prove that it was duly executed as per requirements of section 63 of the Act. Even if for the sake of arguments, it is presumed that the Will was duly registered before Sub-Registrar, then also simple registration is not sufficient to treat the Will as valid one. If the procedure and manner prescribed under section 63 of Indian Succession Act is not followed, then such Will cannot be

enforced, even if it is registered. Registration of the Will and due execution of the Will is two different things. Accordingly simple proving of registration of the Will cannot be treated as due execution also.

The Will Ex. PW2/1 is described as forged and fabricated by the respondents but they have not examined any handwriting or finger print expert to show that signatures or thumb impressions on it were not of deceased Sh. Sube Singh. There is no dispute that deceased was maintaining a bank account where signatures and thumb impressions of him could be easily available but no steps were taken to get the same compared with the Will in question so it cannot be said that signatures and thumb impressions on the Will are not genuine or does not belong to the deceased. However simple existence of genuine signatures or thumb impression on Will itself is not sufficient to treat it having been executed in the manner as prescribed under section 63 of Indian Succession Act.

Respondents are taking contradictory stand. In their objections, they describe the Will as forged and fabricated but in the cross examination of witnesses of the petitioner, contradictory suggestions about getting Will prepared under coercion, deception, fraud and undue influence etc. has been put. RW-2 in his statement took another contradictory ground that signatures of his father were obtained on the Will forcibly by giving threats to throw away him from the house and the petitioner used to pressurize him from time to time. The evidence of RW-3 is also not of much help to the respondents to prove that signatures and thumb impressions of deceased were obtained forcibly on the Will. Respondents did not take any firm ground to challenge the correctness of the Will and appears to have taken all types of defenses including contradictory one. However the weakness of defence itself is not a ground to presume the due execution of the Will which fact is required to be established by the petitioner by leading evidence.

The manner of execution of the Will is defined in section 63 of Indian Succession Act. Will is required to be attested atleast by two attesting witnesses. Though as per section 68 of Indian Evidence Act, examination of one attesting witness in court itself is sufficient to prove the Will but that witness must also through his deposition prove the attestation of the Will by himself as well as by the second witness. A person propounding the Will is also under an obligation to show how and in which manner both witnesses attested and signed the Will. Examination of both attesting witness in court is not required but the manner of attestation by both must come on record. Where an attesting witness simply proves attestation of Will only on his part and does not speak about the attestation by second witness, then necessity arises to examine

second witness also. Here in the present case, Will Ex. PW2/1 was not executed or registered in presence of PW-1. Attesting witness PW-3 has not spoken any word about the attestation of the Will in question by second witness Sh. R.S. Beniwal, advocate. PW-3 deposed only about his own attestation of the Will. Infact the second witness advocate Sh. R.S. Beniwal was not present when PW-3 signed on the Will. This advocate as per admission made by PW-3 even had not signed on the Will in his presence. PW-3 even did not know when and where the second witness signed on it. The existence of alleged signatures of an advocate Sh. R.S. Beniwal being second attesting witness on the Will itself is not sufficient to prove the due execution of the Will because it is not established when and in which manner this attesting witness also signed on it. Signatures of this attesting witness Sh. R.S. Beniwal is not proved by anyone, even by PW-3. At the most from the statement of PW-3, it can be said that attestation of Will by one witness is established by the petitioner but she has failed to prove how and in which manner, the second witness signed on it whether in presence of testator or by getting his personal acknowledgment. The manner of attestation of the Will by two witnesses as described in clause (c) of Section 53 of Indian Succession Act is not proved by the petitioner. Non examination of second attesting witness Sh. R.S. Beniwal is thus fatal to the case of the petitioner in the present circumstances and it can be said that petitioner has failed to prove the due execution of the Will in question. In this regard reliance can be placed upon decision of Supreme Court given in case Janki Narayan Bhoir vs. Narayan Namdeo Kadam (2003) 2 see 91. Accordingly, it is hereby held that due execution of the Will as per requirement of section 63 (c) of Indian Succession Act is not established and thus this Will Ex. PW2/1 cannot be enforced.

Further more, no evidence has been led by the petitioner that Will was drafted or prepared at the instructions of the deceased. It is not disclosed when, where and who had prepared the Will and at whose instructions. PW-3 stated in his cross examination that it was already typed when he reached in the office of Sub-Registrar. It was necessary for the petitioner to prove that Will was got prepared by testator himself or at his instructions. There is nothing in the statement of PW-3 to point out that contents of the Will were read over and explained to the deceased by any one before putting their signatures/thumb impressions on it. PW-3 admitted in his eross examination that Will was neither read over to him nor to the deceased by the Sub-Registrar. It appears that deceased was not knowing English language as he had put signatures in Urdu. Petitioner was required to show that testator executed the Will after understanding the contents but she failed to

prove this fact. This makes an additional ground not to grant any relief to the petitioner as prayed for.

Counsel for the respondents had cited case law **Smt. Devku vs. Smt. Sunari AIR 2008 HP 15**. When the relations between deceased and respondents were cordial and not strained, then non giving of any reasons of excluding them from the benefit of estate also create a suspicion which is not sufficiently removed by the petitioner.

Hence in view of the above discussions, Will Ex. PW2/1 cannot be held as duly executed Will being not proved as per law. Failure of the respondents to establish their defence itself is not a ground to grant the relief claimed by the petitioner automatically. Petitioner is not entitled to any relief on basis of this Will. Both these issues are thus decided against the petitioner and in favour of respondents."

30. On a careful perusal of the aforesaid reasons, although there was no evidence to suggest that the deceased-testator was suffering from any kind of mental disability or any unsoundness of mind, however, there are certain doubtful aspects that came out in the testimony of PW-3/Mr. Zile Singh besides other attendant circumstances, create grounds for raising justifiable suspicion about the genuineness of the Will purportedly executed by the deceased-testator.

31. At this juncture, it would be apposite to reproduce Section 63 of the Act, 1925 which provides as follows:

"63. Execution of unprivileged wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1[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 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."

32. It would also be appropriate to reproduce Section 68 of the Indian Evidence Act, 1872, which provides as follows:

> **"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.]

33. It is well ordained in law that although Section 68 of the Indian Evidence Act, 1872, postulates the mode and manner of proof of execution of the document, which is required by law to be attested stating that the execution must be proved by at least one of the attesting witness if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. However, compliance with such statutory requirement by itself is not sufficient since the mandate of Section 63 of the Act must also be credibly established.

34. Reference can be invited to the decision in the case of **Smt. Jaswant Kaur v. Smt. Amrit Kaur[6],** wherein the Supreme Court had an occasion to lay down the proposition of law in the following manner:

> **"10.** There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *R. Venkatachala Iyengar* v. *B.N. Thimmajamma* [AIR 1959 SC 443 : 1959 Supp 1 SCR 426]. The Court, speaking through Gajendragadkar, J., laid down in that case the following propositions :
> 1. Stated generally, 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 in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
> 2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, 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.
> 3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.
> 4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and

[6] (1977) 1 SCC 369

> memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.
> 5. It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.
> 6. If a caveator alleges fraud, undue influence, coercion etc. 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 raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

35. In light of the said proposition of law, reverting to the instant matter, it is evident that the deceased only used to sign in Urdu whereas the Will was typed in English. The scribe or writer of the Will was not produced. Further, PW-3/Mr. Zile Singh testified that the Will (Ex.PW-2/1) had been signed by the deceased-testator at point 'A' in his presence and he had also signed at point 'B', but at the same time he testified that no one else signed the Will except him. In other words, although the signing of the Will was proven by PW-3/Mr. Zile Singh, he failed to prove the attestation of the Will in the manner as provided by Section 63(c) of the Act.

36. Without further ado, the facts of the present matter appear to be squarely covered by the decision in the case of **Jagdish Chand Sharma vs Narain Singh Saini (Dead) Thr. Lrs.**[7]**,** wherein it was held as under:

> **"51.** *Janki Narayan Bhoir* [(2003) 2 SCC 91] witnessed a fact situation where one of the attesting witnesses of the will, though both were alive at the relevant time, was produced to prove the execution thereof. The scribe of the document was also examined. The attesting witness deposed that he had not seen the other witness present at the time of execution of the will and further he did not remember as to whether he along with the latter were present either when the testator had put his signature on the will or that he had identified the person who had put the thumb impression on the document. **The issue raised before this Court was that the evidence of the said attesting witness had failed to establish the attestation of the will by the other attesting witness who though available had not been examined and thus the will was not proved.** The contrary plea was that though Section 63 of the Act required attestation of a will by at least two witnesses, it could be proved by examining one attesting witness as per Section 68 of the 1872 Act and by furnishing other evidence as per Section 71 thereof.
>
> 52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of the 1872 Act vis-à-vis a document required by law to be compulsorily attested, it was held in *Janki Narayan Bhoir case* [(2003) 2 SCC 91] that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the will was not sufficient and that attestation thereof was also to be proved as required by Section 63(*c*) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a will, in terms of Section 63(*c*) of the Act viz. attestation by two attesting witnesses in the manner as contemplated therein. **It was exposited that if the attesting**

[7] (2015) 8 SCC 615

> **witness examined besides his attestation does not prove the requirement of the attestation of the will by the other witness, his testimony would fall short of attestation of the will by at least two witnesses for the simple reason that the execution of the will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required under Section 63 of the Act.** It was held that where the attesting witness examined to prove the will under Section 68 of the 1872 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." **{bold portions emphasized}**

37. In view of the foregoing discussion, this Court finds that the impugned judgment passed by the learned Probate Court does not suffer from any illegality, perversity or any incorrect approach in law. Learned Probate Court has rightly held that although PW-3 has proven his own attestation of the Will in the manner provided under Section 68 of the Indian Evidence Act, 1872, however, the conditions laid down in clause (c) of Section 63 of the Act were not proven as there was no evidence as to when did the second witness sign or whether he signed in the presence of the deceased-testator after getting his personal acknowledgment.

38. In view of the above discussion, the present appeal fails and the same is hereby dismissed.

DHARMESH SHARMA, J.

APRIL 24, 2025
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