APPELLATE CIVIL

*Before Khosla, J.*

MST. GAURI AND OTHERS,—*Plaintiffs-Appellants.*

*versus*

MUNSHI RAM AND OTHERS,—*Defendants-Respondents.*

**Regular Second Appeal No. 923 of 1951**

1955

November, 4th

*Code of Civil Procedure (V of 1908)—Section 100—Execution of will—Finding as to, finding of fact and cannot be challenged in Second Appeal.*

*Indian Succession Act (XXXIX of 1925)—Section 63—Execution of will—Proof of—Attesting witnesses not saying in explicit terms that the testator signed the will in their presence and that they affixed their attesting signatures in the presence of the testator—Effect of—Requirements of section 63, when fulfilled—Rule stated.*

*Held*, that the question of the execution of the will is a question purely of fact and on this point the lower appellate Court has given a clear finding. This finding cannot be challenged in second appeal.

*Held further*, that the law requires that the provisions of section 63 of the Indian Succession Act, should be complied with. This compliance can be proved either by means of oral evidence or in any other manner. Section 63 does not lay down how the fact of compliance is to be proved. The question of proof is a wholly different matter. Where a witness comes before the Court and narrates his story the Court must satisfy itself what that story proves and even if a witness does not in explicit terms say that he signed the will in the testator's presence and that the testator signed in his presence, the Court may come to the conclusion that this is what the witness meant. The question of whether a certain fact has or has not been proved depends not upon the exact words used by a witness but upon the evidence given by the witnesses as a whole and the impression this evidence leaves on the mind of a prudent man.

*Rura Ram* v. *Munshi Ram and others* (1), *Onkar Pershad* v. *Jagdish Pershad, etc.* (2), *Gian Chand, etc* v. *Surrindar Kumar, etc.* (3), distinguished from and *Naresh Charan* v. *Paresh Charan* (4) followed.

(1) 1950 P.L.R. 411
(2) 1951 P.L.R. 81
(3) 1951 P.L.R. 251
(4) A.I.R. 1955 S.C. 363

*Second Appeal from the decree of the Court of Shri Bhagat Singh, District Judge, Hoshiarpur, Camp Dharamsala, dated the 16th day of August, 1951, reversing that of Shri G. K. Bhatnagar, Sub-Judge, 1st Class, Kangra, dated the 31st January, 1950, and dismissing the declaratory suit with costs throughout.*

P. C. PANDIT, for Appellants.

D. K. MAHAJAN, for Respondents.

JUDGMENT

Khosla, J.

KHOSLA, J. The dispute in this second appeal relates to the property left by one Sukh Dial. Sukh Dial had a wife, Daromati, and two daughters, Bhagwati and Gauri. Each daughter had two sons. The dispute is between the sons of the two daughters and the facts giving rise to this dispute are briefly as follows. Sukh Dial died on 21st March, 1942 and after his death his land was mutated in the name of his widow, Daromati. Daromati made a gift of the land to the sons of one daughter, Bhagwati. Daromati claimed to rely upon a will alleged to have been executed by Sukh Dial on 17th January, 1942, i.e., a little more than two months before his death. Pohlo and Munshi, sons of Bhagwati, defendants, are in possession of the land. The plantiffs are the second daughter of Sukh Dial and her two sons, Agya Ram and Onkar Chand. They filed the present suit for a declaration that the will was a fictitious document and the gift by Daromati, in favour of her two grandsons, Pohlo and Munshi, was invalid and illegal. The suit was decreed by the trial Court on the finding that the will was a forged document and the widow could not make a gift of property inherited by her from her husband. On appeal the learned District Judge dismissed the plaintiffs' suit holding that the will was a genuine document.

The main question for my decision is whether will is or is not a genuine document and was executed by Sukh Dial in the circumstances alleged by the defendants. The will was attacked on several grounds and Mr. Pandit on behalf of the plaintiffs appellants contended that the signature upon the will was not that of Sukh Dial, the will had not been executed in accordance with the requirements of section 63 of the Indian Succession Act, the will offended the rule against perpetuity and, finally, Sukh Dial could not have made a will in respect of his ancestral property.

With regard to the first point the Handwriting Expert was examined and he gave his opinion that the signature was not that of Sukh Dial. The Expert compared the signature on the will with some writing which Sukh Dial had made about fifty years earlier. The learned District Judge took the view that Sukh Dial's handwriting had somewhat changed after the lapse of half a century, his hand had become unsteady and infirm and therefore a comparison of the latest signature with his earlier writing could not be considered a reliable way of determining the genuineness of the will. He relied upon the testimony of the scribe and the attesting witnesses and came to the conclusion that the will was in fact executed by Sukh Dial. The question of the execution of the will is a question purely of fact and on this point the lower appellate Court has given a clear finding. This finding cannot be challenged in second appeal but I have been led through the entire evidence in the case and after examining it I am satisfied that the lower appellate Court came to a correct decision on this point. The witnesses who have deposed to the execution of the will have not been shown to be interested to any degree in the defendants or to have any animus against the plaintiffs. They are

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natural witnesses because they live in the vicinity of Sukh Dial's house. As the learned District Judge has observed, Sukh Dial did not want to travel a distance of five miles to go to Palampur and have the will drawn up by a regular petition-writer. The circumstances in which the will was executed lend support to the hypothesis of its being genuine. Sukh Dial had four grandsons and he chose to prefer two of them because they had rendered greater service to them. He observed in the will that they had looked after him and his wife. There was therefore nothing unnatural in giving the property to his wife for life and thereafter to his two grandsons by one daughter. I, therefore, hold that the will was executed by Sukh Dial.

On the question of whether the requirements of section 63 of the Indian Succession Act were complied with Mr. Pandit cited three rulings of this Court, *Onkar Pershad* v. *Jagdish Pershad, etc.* (1), *Gian Chand, etc.* v. *Surrinder Kumar etc.* (2) and *Rura Ram* v. *Munshi Ram and others* (3). In all these cases the view taken was that if the attesting witness of a will does not in explicit terms say that the testator signed the will in his presence and that he affixed his attesting signatures in the presence of the testator, then the evidence of the witness is worthless in so far as the proof of the will is concerned. This, with great respect to the Honourable Judges, is a wholly erroneous view. The law requires that the provisions of section 63 of the Indian Succession Act should be complied with. This compliance can be proved either by means of oral evidence or in any other manner. Section 63 does not lay down how the fact of compliance is to be proved. The question of proof is a wholly different matter. Where a witness comes

(1) 1951 P.L.R. 81
(2) 1951 P.L.R. 251
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before the Court and narrates his story the Court must satisfy itself what that story proves and even if a witness does not in explicit terms say that he signed the will in the testator's presence and that the testator signed in his presence, the Court may come to the conclusion that this is what the witness meant. The question of proof is dealt with in section 3 of the Indian Evidence Act. A fact may be proved by direct evidence or by secondary evidence, by oral evidence or by documentary evidence or merely by circumstantial evidence. A witness may owing to inadvertence omit to say that the testator signed in his presence although this fact may be clearly discernible from the story which he has narrated on oath. I am constrained to say, though not without a great deal of reluctance, that the learned Judges appear to have confused the factum of compliance with the provisions of section 63 with the proof of such factum. I do not think it can be laid down that a witness must use certain words before his evidence can be accepted as proof of a certain fact. The witnesses in the present case say that the will was drawn up and executed in their presence and they signed the will as attesting witnesses. There was no cross-examination to show that the attestation took place at a different time and place and, therefore, it cannot be held that the evidence of the witnesses does not prove the factum of compliance. The question of whether a certain fact has or has not been proved depends not upon the exact words used by a witness but upon the evidence given by the witnesses as a whole and the impression this evidence leaves on the mind of a prudent man. Upon going through the evidence of these witnesses, I have no doubt whatsoever in my mind that these witnesses were present when the testator executed the will and they attested the will in his presence. The entire transaction took

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place at one time and place and there was no question of the witnesses being absent when the testator signed it or the testator being absent when the witnesses signed it. The circumstances clearly indicate that the proceedings lasted a short time and took place in the presence of everyone concerned.

A recent decision of their Lordships of the Supreme Court places this matter beyond all doubt. It was held in *Naresh Charan* v. *Paresh Charan* (1)—

> "It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence."

Certain remarks in Williams on Wills, Volume I, page 66, based upon a number of English decisions, would appear to go even further although in point of fact, these remarks merely amount to this that the due execution of a will must be proved like any other fact and in some cases presumptions may be made where such presumptions arise in law. Williams observes—

> "If a will, on the face of it, appears to be duly executed, the presumption is in favour of due execution, applying the principle *omnia praesumuntur rite esse acta*. If the witnesses are entirely ignorant of the details of the execution the presumption is the same."

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I would therefore hold that there was full compliance with the provisions of section 63, Indian Succession Act.

The next point raised by Mr. Pandit was that the will created an estate in perpetuity, but it is not susceptible of such an interpretation. According to the will Sukh Dial's property was to go to his widow for life and after her death to two of his grandsons. This is a perfectly legitimate manner of testamentary disposition. Sukh Dial's widow could gift the property to her next two heirs who were the two grandsons. Pohlo and Munshi, because this gift was no more than acceleration of succession and there is therefore nothing illegal or irregular about the gift.

With regard to the last objection it has been held that the property was the self-acquired property of Sukh Dial.

This appeal therefore fails and I dismiss it with costs.