

*Before Anil Kshetarpal, J.*

**PRATIBHA AND ANOTHER**—*Appellants*

*versus*

**NANDI DEVI AND OTHERS**—*Respondents*

**RSA No.1184 of 2016**

November 27, 2018

**(A) *Indian Evidence Act, 1872 – Ss. 62 and 63 – Registered Will – Kept in office of Sub Registrar – Primary evidence – Second copy of registered testament – Has all characteristics of original testament – Primary evidence and not secondary – Two original copies of contract prepared and signed by parties – Each copy would be a primary evidence.***

*Held*, that Chapter V of the Evidence Act, 1872 deals with documentary evidence. Section 62 defines primary evidence whereas Section 63 defines secondary evidence.

(Para 15)

*Further held*, that on careful reading of Section 62, it is apparent that where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Still further, Evidence Act came into force in the year 1872. On careful examination of the definition of primary evidence, it is apparent that primary evidence is the document itself is produced for inspection of the Court. A counter part of the document which has been executed by all the parties shall be primary evidence. The second copy of the registered testament which has all the characteristics of a original testament is primary evidence and not secondary evidence. This matter can be examined from another angle. If the two original copies of the contract are prepared and signed by the parties, each copy would be a primary evidence and one copy cannot be said to be primary and second secondary because both the copies of the contract are complete in themselves and therefore, both the copies are primary evidence.

(Para 16)

**(B) *Succession Act, 1925 – Will – Suspicious circumstances – Once execution of Will proved – Slight deviation by attesting witness in cross-examination would not result in Court ignoring Will – Court***

***can ignore Will/testament on basis of suspicious circumstances – Should be real having some foundation, not based on conjectures and surmises – Courts should not normally declare Will to be surrounded by suspicious circumstances – Once execution is proved.***

*Held*, that as per Succession Act, 1925 with a view to lend more authenticity and avoid any forgery of the Will, the statute provided that the testament shall be attested by two or more witnesses. The testament is not required to be compulsory registered. However, with the advent of technology, administrative instructions have been issued from time to time so as to ensure the correctness of the registered Will including printing of the photographs of the testator and the attesting witnesses as well as the preparation of two copies of the Will, each copy being complete in itself. In the considered view of this Court, the genuineness of the registered Will cannot be left to the mercy and support from the attesting witnesses. Once the execution of the Will is proved, slight deviation by the attesting witness in the cross-examination would not result in Court ignoring the Will.

(Para 18)

*Further held*, that no doubt, a Will/testament can be ignored by the Court on the basis of suspicious circumstances. However, the aforesaid suspicious circumstances should be real having some foundation. The suspicious circumstances cannot be merely based upon conjectures and surmises. The Will is a solemn declaration which a testator has made in writing bequeathing his property to go in a particular manner and the Courts should not normally declare the Will to be surrounded by suspicious circumstances once the execution thereof is proved.

(Para 19)

Shailendra Jain, Sr. Advocate with Anupama, Advocate, *for the appellants.*

Arun Jain, Sr. Advocate with Abhishek Dhull, Advocate for the respondents.

**ANIL KSHETARPAL, J. (ORAL)**

(1) Plaintiffs-appellants are in the regular second appeal against the judgments passed by the Courts below dismissing their suit for declaration with consequential relief of permanent injunction.

(2) In the considered opinion of this Court, the following substantial questions of law arise for consideration:-

1. Whether a registered Will kept in the office of the Sub-Registrar bearing signatures and photographs of the testator and attesting witnesses duly signed by the Sub-Registrar is primary or secondary evidence?
2. Whether succession under the registered Will can be permitted to be hijacked/ defeated at the hands of attesting witnesses.
3. Whether before ignoring a registered Will on the ground of alleged suspicious circumstances, the Court is required to see whether the foundation of the aforesaid suspicious circumstances has been laid in the pleading followed by evidence and the suit alleges suspicious circumstances are substantive and not based upon conjectures and surmises?

(3) Dispute in the present case is with respect of estate of Karam Singh Chauhan who died on 27.09.2002. He left behind a widow, one son- Suresh and four daughters namely Neena, Sunita, Anito and Kanta. Suresh married after the death of his father with plaintiff-appellant No.1-Pratibha on 16.09.2006 and a daughter Reshu was born to the married couple on 10.10.2007. Suresh died on 06.06.2008. Widow of Suresh and her minor daughter from Suresh are the plaintiffs-appellants claiming that Karam Singh Chauhan had executed a registered testament in favour of his son- Suresh on 16.08.2002 and therefore, she is owner of the property detailed in Para 5(i) (ii) and (iii). The plaintiff claims that she previously filed a suit for injunction claiming  $1/6^{\text{th}}$  share but later on she came to know about the Will and hence, she withdrew the suit with permission to file fresh one on 05.09.2008 and the present suit was filed on 09.09.2008. It has further been pleaded that the Will might be in the possession of her mother-in-law i.e. defendant No.1. She also challenged mutation of the property on the basis of natural succession ignoring the Will.

(4) Defendants contested the suit and denied existence of Will dated 16.08.2002.

(5) After framing of the issues, the parties were permitted to lead evidence. She appeared as her own witness and also examined official from the office of the Sub-Registrar who proved certified copy of the registered testament dated 16.08.2002. Official specifically stated that she has brought the summoned record. She also examined Bhopal Singh, attesting witness of the Will who proved the Will. It will be noted that after Bhopal Singh had submitted his affidavit in

examination in chief on 21.12.2010, the cross-examination was deferred on the request of learned counsel for the defendant. Thereafter, Bhopal Singh started avoiding appearance in the Court for cross-examination and he appeared for cross-examination after a period of almost two years and made an attempt to create a doubt about the correctness of the Will. His evidence would be discussed in the later part of the judgment.

(6) The Will is attested by two attesting witness. As per requirement of Section 63 of the Succession Act, 1925 namely Bhopal Singh and Satish Kumar but Satish Kumar has not appeared in evidence.

(7) Both the Courts have dismissed the suit filed by the plaintiffs mainly on the ground that the original Will has not been produced and the attesting witness has stated in cross-examination that Karam Singh Chauhan, the testator wanted to give the property to his son and daughters. The Courts have also taken note of the fact that there is small contradiction in the statement of the plaintiff with regard to the fact as to when she came to know of the registered Will as she filed a suit for injunction which was withdrawn with permission to file fresh one claiming only 1/6<sup>th</sup> share in the property.

(8) During the pendency of the first appeal, the application was filed by the plaintiff for permission to lead secondary evidence by way of additional evidence which was also dismissed by the learned First Appellate Court.

(9) On 14.11.2018, after having heard the arguments at some length, this Court while directing the Sub-Registrar to produce the original register containing entry of the registered Will, had passed the following order:-

“Validity of the registered Will is in dispute. The original Will has not been produced, however, certified copy thereof was produced by the official examined from the office of the Sub- Registrar, Sonapat who certified that the attested copy is correct copy of the original. The Will was registered in the year 2002. In order to decide this controversy effectively, it is considered appropriate to direct Sub-Registrar, Sonapat to produce the register in which registration of the Will has been noted.

Learned State counsel, who is present in Court, is requested to inform the registration authority for deputing an official

who would bring the original bahi i.e. Bahi No.3 registered No.249 dated 16.08.2002, Jild No.18, pages 111 and 112.

List in urgent on 19.11.2018.”

(10) In response to the direction, original register was produced and it was noted that the copy which has been pasted in the register meets with all characteristics of the Will as the testament bears the thumb impression of the executant and signatures and thumb impression of the attesting witness duly endorsed by the Sub-Registrar apart from having photographs of the executant and attesting witnesses. The original register was kept in the custody of the Court and photocopy of the Will was supplied to learned counsel for the parties and the case was adjourned.

(11) As per Section 51 of the Registration Act, in all registration offices book No.3 would be register of Wills and authorities to adopt. Section 52 deals with the duties of the Registering Officers when document is presented for registration and Section 53, 54 and 55 deals with how entries have to be made and index is to be prepared. Section 51 to 55 are extracted as under:-

**“51. Register-books to be kept in the several offices.—**

(1) The following books shall be kept in the several offices hereinafter named, namely:— A—In all registration offices— Book 1, “Register of non-testamentary documents relating to immovable property”. Book 2, “Record of reasons for refusal to register”. Book 3, “Register of wills and authorities to adopt”, and Book 4, “Miscellaneous Register”. B—In the offices of Registrars— Book 5, “Register of deposits of wills”.

(2) In Book 1 shall be entered or filed all documents or memoranda registered under sections 17, 18 and 89 which relate to immovable property, and are not wills.

(3) In Book 4 shall be entered all documents registered under clauses (d) and (f) of section 18 which do not relate to immovable property.

(4) Nothing in this section shall be deemed to require more than one set of books where the office of the Registrar has been amalgamated with the office of a Sub-Registrar.

**52. Duties of registering officers when document presented.—**

(1) (a) The day, hour and place of presentation, <sup>57</sup> [the photographs and finger prints affixed under section 32A,] and the signature of every person presenting a document for registration, shall be endorsed on every such document at the time of presenting it;

(b) a receipt for such document shall be given by the registering officer to the person presenting the same; and

(c) subject to the provisions contained in section 62, every document admitted to registration shall without unnecessary delay be copied in the book appropriated therefor according to the order of its admission.

(2) All such books shall be authenticated at such intervals and in such manner as is from time to time prescribed by the Inspector- General.

**53. Entries to be numbered consecutively.—**All entries in each book shall be numbered in a consecutive series, which shall commence and terminate with the year, a fresh series being commenced at the beginning of each year.

**54. Current indexes and entries therein.—**In every office in which any of the books hereinbefore mentioned are kept, there shall be prepared current indexes of the contents of such books; and every entry in such indexes shall be made, so far as practicable, immediately after the registering officer has copied, or filed a memorandum of, the document to which it relates.

**55. Indexes to be made by registering officers, and their contents.—**

(1) Four such indexes shall be made in all registration offices, and shall be named, respectively, Index No. I, Index No. II, Index No. III and Index No. IV.

(2) Index No. I shall contain the names and additions of all persons executing and of all persons claiming under every document entered or memorandum filed in Book No. 1.

(3) Index No. II shall contain such particulars mentioned in section 21 relating to every such document and

memorandum as the Inspector-General from time to time directs in that behalf.

(4) Index No. III shall contain the names and additions of all persons executing every will and authority entered in Book No. 3, and of the executors and persons respectively appointed thereunder, and after the death of the testator or the donor (but not before) the names and additions of all persons claiming under the same.

(5) Index No. IV shall contain the names and additions of all persons executing and of all persons claiming under every document entered in Book No. 4.

(6) Each Index shall contain such other particulars, and shall be prepared in such form, as the Inspector-General from time to time directs.”

(12)The register which has been produced is book No.3 as maintained by the registration office in accordance with Section 51 of the Registration Act. As noted above, the Will which bears the thumb impressions/signatures and photographs of the testator and the attesting witnesses and the aforesaid Will is duly registered by the Sub-Registrar, Sonapat. Learned counsel for the appellants has explained that at the time when the Will was get registered, two original wills exactly same are produced for registration and both are original. In both the copies, signatures/thumb impressions of executant and attesting witnesses are obtained and photographs are also printed on the Will. After registration, one copy of the Will is pased in book No.3 whereas second copy is handed over to the executant. The Will has been pasted in Jild No.108, serial No.249 in book No.3.

(13)Learned senior counsel appearing for the appellants has submitted that since copy of the Will having all characteristics of the original had been produced before the trial Court as also before this Court, therefore, he does not press his application filed before the learned First Appellate Court for additional evidence by way of secondary evidence.

(14)Now the stage is set for considering the questions of law.

### **Question No.1**

(i) Whether a registered Will kept in the office of the Sub-

Registrar bearing signatures and photographs of the testator and attesting witnesses duly signed by the Sub-Registrar is primary or secondary evidence?

(15) Chapter V of the Evidence Act, 1872 deals with documentary evidence. Section 62 defines primary evidence whereas Section 63 defines secondary evidence. Section 62 and 63 are extracted as under:-

**“62. Primary evidence.-**

Primary evidence means the documents itself produced for the inspection of the Court.

Explanation 1—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2- Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but, where they are all copies of a common original, they are not primary evidence of the contents of the original.

**63. Secondary evidence-** Secondary evidence means and includes—

- (1) certified copies given under the provisions hereinafter contained;
- (2) copies made from the original by mechanical processes which in themselves ensure the accuracy of the copy, and copies compared with such copies.
- (3) copies made from or compared with the original;
- (4) counterparts of documents as against the parties who did not execute them;
- (5) oral accounts of the contents of a documents given by some person who has himself seen it.”

(16) On careful reading of Section 62, it is apparent that where a document is executed in counterpart, each counterpart being executed



by one or some of the parties only, each counterpart is primary evidence as against the parties executing it. Still further, Evidence Act came into force in the year 1872. On careful examination of the definition of primary evidence, it is apparent that primary evidence is the document itself is produced for inspection of the Court. A counterpart of the document which has been executed by all the parties shall be primary evidence. The second copy of the registered testament which has all the characteristics of a original testament is primary evidence and not secondary evidence. This matter can be examined from another angle. If the two original copies of the contract are prepared and signed by the parties, each copy would be a primary evidence and one copy cannot be said to be primary and second secondary because both the copies of the contract are complete in themselves and therefore, both the copies are primary evidence.

(17) Hence, question No.1 is answered in favour of the appellants.

### **Question No.2**

(ii) Whether succession under the registered Will can be permitted to be hijacked/ defeated at the hands of attesting witnesses?

(18) As per Succession Act, 1925 with a view to lend more authenticity and avoid any forgery of the Will, the statute provided that the testament shall be attested by two or more witnesses. The testament is not required to be compulsory registered. However, with the advent of technology, administrative instructions have been issued from time to time so as to ensure the correctness of the registered Will including printing of the photographs of the testator and the attesting witnesses as well as the preparation of two copies of the Will, each copy being complete in itself. In the considered view of this Court, the genuineness of the registered Will cannot be left to the mercy and support from the attesting witnesses. Once the execution of the Will is proved, slight deviation by the attesting witness in the cross-examination would not result in Court ignoring the Will. Accordingly, question No.2 is also answered in favour of the appellants.

### **Question No.3**

(i) Whether before ignoring a registered Will on the ground

of alleged suspicious circumstances, the Court is required to see whether the foundation of the aforesaid suspicious circumstances has been laid in the pleading followed by evidence and the suit alleges suspicious circumstances are substantive and not based upon conjectures and surmises?

(19) No doubt, a Will/testament can be ignored by the Court on the basis of suspicious circumstances. However, the aforesaid suspicious circumstances should be real having some foundation. The suspicious circumstances cannot be merely based upon conjectures and surmises. The Will is a solemn declaration which a testator has made in writing bequeathing his property to go in a particular manner and the Courts should not normally declare the Will to be surrounded by suspicious circumstances once the execution thereof is proved.

(20) Accordingly, question No.3 is also answered in favour of the appellants.

(21) Now let us examine whether in the present case registered testament executed by Karam Singh Chauhan dated 16.08.2002 is proved or not in accordance with law. Section 68 of the Evidence Act provide that examination of one attesting witness is sufficient if the witness has proved the execution of the Will in accordance with Section 63 of the Succession Act, 1925. Section 68 of the Evidence Act is extracted as under:-

**“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].”

(22) In the present case, one attesting witness namely Bhopal Singh has appeared as PW-4. In his affidavit submitted in examination-in-chief, he has stated that the executant was in full senses and could

hear and understand everything. He has stated that Karam Singh, the testator, was read over and explained the contents of Will and thereafter the testator put his thumb impression in their presence including second witness Satish Kumar. He further stated that the testator and both the attesting witnesses thereafter went to the office of the Sub-Registrar where their photographs were clicked through computer and their signatures and thumb impressions were obtained in the presence of the Sub-Registrar. He has further stated that he identified the testator Karam Singh having personal acquaintance. As noted above when he appeared in evidence, he did not dispute the correctness of the execution of the Will but in cross has stated that Karam Singh had told him that he wants to give the property to his son and daughters. He further stated that the Will had been drafted before he arrived and it was not read over in his presence. He has gone to the extent of saying that he signed the Will under the impression that the Will is in favour of son and daughters.

(23) Section 63 of the Succession Act only provide that the Will shall be attested by two or more witnesses. In the present case, the Will is attested by two witnesses. In examination-in-chief, Bhopal Singh fulfills the requirement of Section 68 of the Evidence Act. Although, learned counsel for the respondent has submitted that Bhopal Singh has not stated that other attesting witness had signed the Will in his presence, however, the submission is not correct because other attesting witness Satish Kumar, was present at the time of execution of the Will and Bhopal Singh has specifically stated that before the Tehsildar, thier thumb impressions/signatures have been taken. Only person who has signed the Will is Satish Kumar because others had thumb marked. His photograph is printed on the reverse page of the Will where endorsement by the Sub- Registrar is in existence. Hence, Section 68 stands complied with.

(24) Now let us examine the effect of statement made by Bhopal Singh in cross-examination as noted above. In the considered opinion of this Court, first of all an attesting witness cannot be permitted to defeat the right to the property bequeathed by the testator in favour of the beneficiary by making small variation in the oral evidence. Still further, attesting witness is only required to attest the document and he is not required to know contents of the document. It is not stated by Bhopal Singh that he did not know the document being attested is a testamentary document. In examination-in-chief, he had stated that the Will has been read over and it has been explained to Karam Singh,

therefore, his evidence in cross-examination particularly keeping in view the fact that he appeared for cross-examination after a period of almost two years clearly shows that he had been influenced by the defendants so as to deprive the widow and minor child of the property. The Court should not overlook such facts which have come on record.

(25) Learned counsel for the respondents further submitted that the endorsement on the reverse of the first page of the Will is also making a reference to some payment and therefore, the Will is not proved. The contention is incorrect because the endorsement as printed is common for Will as well as the sale deed, gift, mortgage etc. and that is the reason why the part of endorsement with regard to payment has been left blank whereas the remaining part of the endorsement has been filled in.

(26) Next argument of learned counsel for the respondents is to the effect that the age of the testator has been mentioned in the Will as 60 years whereas his age was 84 to 85 years as admitted by Bhopal Singh. It will be noted that no documentary evidence with regard to age of the testator has been produced. Still further, photograph of the testator has been printed on the Will and he does not appear to be of 80 years of age. His son Suresh at that time was unmarried, therefore, the statement of Bhopal Singh with regard to age would not make the Will doubtful.

(27) Learned counsel for the respondents has further submitted that Pratibha-plaintiff when appeared in evidence has stated that she was shown the Will by her husband, hence, the previous suit filed by her claiming 1/6<sup>th</sup> share clearly proves that the Will is not genuine. He has further submitted that no reason has been given why Karam Singh has ignored the remaining class-I heirs.

(28) This Court has considered the submission. No doubt, Pratibha when appeared in evidence has stated that she was shown the Will by her husband in cross-examination, however, the statement of the witness has to be read in entirety and one line during cross-examination cannot be read in isolation/divorced from the entire statement. She in her plaint as well as in examination-in-chief has specifically stated that she came to know of the existence of the registered testament in favour of her husband during the pendency of the previous suit. Hence, one line in the cross-examination would not result in defeating her claim because knowledge of the Will does not make any difference to the validity of the registered Will.

(29) As regards next argument of learned counsel, it will be noted that the testator Karam Singh has duly referred to his four daughters and the wife. He has stated that all the four daughters have been married and he has given sufficient dowry/gifts at their marriage and they are happily settled in their respective in-laws houses. He has also stated in the Will that his other children would also have no right in his property. Apart from that, he further refers to his wife Smt. Nandi but has stated that she would not get any share in the property. It has been written in the Will that his son late Sh. Suresh is serving him during his illness and being happy with his services he is executing the Will. It is itself written in the Will that contents of the Will have been read over and explained and he admit its correctness.

(30) In view of the aforesaid discussion, the judgments passed by the Courts below are not correct and therefore, set aside. However, the plaintiffs namely widow and minor child of late Sh. Suresh Kumar shall only be entitled to  $2/3^{\text{rd}}$  share in the property left by Suresh Kumar at the time of his death as mother of Suresh Kumar is also class-I heir entitled to share equivalent to the widow and daughter.

(31) Hence, there would be a decree for declaration to the effect that the plaintiffs-appellants are owners to the extent of  $2/3^{\text{rd}}$  share in the property in dispute whereas  $1/3^{\text{rd}}$  would vest with defendant No.1/respondent No.1-Smt. Nandi Devi.

(32) Let a copy of the judgment be circulated in the Subordinate Courts with a direction that the Courts must make a note of the fact whether book No.3 as maintained by the Registering Officers produced before the Court contains a testamentary document having signatures/thumb impressions in original as also the photographs of the testator and the attesting witnesses.

(33) Appeal is partly allowed.

(34) The pending miscellaneous application, if any, shall stand disposed of accordingly.

(35) Court Master is directed to hand over the original register i.e. Book No.3 to the counsel representing State against proper receipt.

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*Shubreet kaur*