A BABU SINGH & ORS.

v.

RAM SAHAI @ RAM SINGH

(Civil Appeal No. 3124 of 2008)

APRIL 30, 2008

B

[S.B. SINHA AND V.S. SIRPURKAR, JJ.]

Evidence Act, 1872:

ss.68 and 69 – Proof of execution and attestation – Held: C *Will is required to be attested by two witnesses – Ordinarily both must be examined to prove execution of Will but if one of them is not available, then it is imperative to examine the other – It is the duty of the person seeking declaration about validity of Will to dispel the surrounding circumstances – Indian* D *Succession Act, 1925 – s.63(1)(c).*

s.69 – Applicability of – Held: Applicable where attesting witness is either dead or out of jurisdiction of Court or is kept out of way by adverse party or cannot be traced despite diligent search – On facts, propounder did not make any attempt to E *serve summons upon the sole surviving attesting witness – Statement by counsel or respondent that he had been won over by opposite party cannot be taken to consideration for applying s.69 of the Act.*

F **A Will was executed in favour of respondent bequeathing right, title and interest in the suit property. Appellant claimed themselves to be owner and in possession of the suit property.**

The trial Court held that Will was not proved in terms G **of s.68 of Evidence Act as plaintiff-respondent was bound to examine at least one attesting witnesses to prove the execution of the Will. One of the attesting witnesses expired before he could be examined as a witness and other attesting witness 'H' was alive and was given up by**

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plaintiff on the plea that he was won over by the other party. First Appellate Court and High Court however held in favour of respondent by relying upon the evidence of the deed writer who was also known to the testator. A

In appeal to this court, appellant contended that in the facts and circumstances of the case, s.69 of the Evidence Act cannot be said to have any application. B

Allowing the appeal, the Court

HELD : 1. Indisputably a Will is to be attested by two witnesses in terms of s.68 of the Evidence Act. The requirement of s.63(1)(c) of the Indian Succession Act is to be complied with for proving a Will. S.68 of the Act mandates proof by attesting witnesses of not merely of execution but also attestation by two witnesses. Thus, not only the execution of Will must be proved but actually execution must be attested by at least two witnesses. Attestation of execution of Will must be in conformity with the provisions of s.3 of the Transfer of Property Act. 'Attestation' and 'execution' connote two different meanings. [Para 10] [257-C-E] C D E

1.2. In terms of s. 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a Will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. S.68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation as the words 'at least' have been used therein. When genuineness of a Will is in question, apart from execution and attestation of Will, it is also the duty of a person seeking declaration about the validity of the Will to dispel the surrounding suspicious circumstances existing if any. Thus, in addition to proving the execution of the Will by examining the attesting witnesses, the propounder is also required to lead F G H

A evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the Will would, depend thereupon. The Court, while granting probate of the Will, must take into consideration all relevant factors. It must be found that the Will was product of a free will. B The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. Where, however, a plea of undue influence was taken, the onus wherefor would be on the objector and not on the offender. C [Paras 11,12] [257-F-H; 258-A-C]

Savithri & Ors. v. Karthyayani Amma & Ors. JT (2007) 12 SC 248 – relied on.

1.3. S.69 would apply, in a case where the attesting witness is either dead or out of the jurisdiction of the court D or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in s.69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of E proof then may be shifted to others. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of s.63 of the Indian Succession Act and s. 68 of the Act, in the event the ingredients thereof, are brought on record, strict proof of execution and F attestation stands relaxed. However, signature and handwriting, as contemplated in s.69, must be proved. [Paras 14, 15] [258-E-H]

1.4. Indisputably, one of the attesting witnesses was dead. The summons were taken out against the said 'H'. G Admittedly, it was not served. There is nothing on record to show that any step was taken to compel his appearance as a witness. Respondent in his deposition did not make any statement that the said 'H' had been won over by the appellant. He did not say that despite service H of summons, 'H' did not appear as a witness. In his cross-

examination, he alleged that he and 'H' were enimically disposed of towards each other even prior to 1991 and in fact "since the time of his ancestors". that they are not on speaking terms. A suggestion was given to him that in fact 'H'had come to Court on that day to which he denied his knowledge. It is only in answer to a question in cross-examination, he stated that he did not intend to examine the said 'H'. 'H' may be a person who had been won over by the appellant but there must be some evidence brought on records in that behalf. The Trial Court rightly rejected the bare statement made by the respondent that the other attesting witness had gone out of the country. Respondent himself did not say so on oath. He did not examine any other witness. He did not make any attempt to serve another summons upon him. No process was asked for to be served by the court. A statement was made by a counsel before the appellate court. That statement is said to have been made before the appellate court by the respondent himself on 29.10.1999. Such a statement by a counsel or by the respondent himself cannot be taken into consideration for the purpose of invoking s.69 of the Evidence Act. A purported statement, not as a witness but through the counsel, cannot be said to be an evidence. Trial Judge did not accept such a statement. In that view of the matter, the first appellate Court committed a serious legal error. [Para 16] [259-A-H; 260-A]

Amal Sankar Sen & Ors. v. The Dacca Co-operative Housing Society Ltd. (in liquidation) by Inspector Liquidator, Co- operative Society, Dacca **AIR 32 (1945) Calcutta 350;** *Hare Krishna Panigrahi v. Jogneswar Panda and Ors.* **AIR 1939 Cal. 688;** *Doraiswami v. Rathnammal and Ors.* **AIR 1978 Mad. 78;** *Apoline D' Souza v. John D' Souza* **(2007) 7 SCC 225; B.** *Venkatamuni v. C.J. Ayodhya Ram Singh & Ors.* **(2006) 13 SCC 449 – referred to.**

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3124 of 2008.

A From the Order dated 11.11.2005 of the High Court of Punjab and Haryana at Chandigarh in R.S.A. No. 3595/2002.

Viraj Dattar, Vineet Jhanji and Jyoti Mendiratta for the Appellants.

B N. Shoba, Sri Ram J. Thalapathy and V. Adhimoolam for the Respondent.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

C 2. Interpretation of Section 69 of the Evidence Act, 1872 is in question in this appeal which arises out of a judgment and order dated 11.11.2005 passed by the High Court of Punjab & Haryana.

D 3. One Ram Bux executed a Will dated 25.9.1981 in favour of the respondent herein bequeathing his right, title and interest in the property in question.

Appellants claimed themselves to be the owner and in possession of the suit property which is a shop, as a co-sharer E to the extent of 6 marlas out of the land measuring 3 kanal and one marla appertaining to Khasra No.53 situated in the area of Chhoti Haveli, Tehsil and District Ropar.

4. Learned Trial Court, inter alia, raised the following issues :

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"1. Whether the plaintiff is owner of the suit property? OPP

2. Whether the Plaintiffs are entitled to the possession of the shop in question? OPP

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XXX XXX XXX

6. Whether the defendants are entitled to the counter claim to the effect that they are owner of the shop in question and co-sharer to the extent of 0-6 marlas of

H the land fully detailed in the counter claim? OPD"

We need not go into other issues between the parties. A

5. The learned Trial Judge, although opined that the suit was bad for non-impleading Karam Kaur and Dalwinder Kaur, daughters of the testator as parties to the suit, proceeded to consider the validity of the Will in order to avoid any possibility of remand by the Trial Court, stating : B

> "The plaintiff was duty bound to examine at least one attesting witnesses to prove the execution of the Will Ex.P/2. It has come in evidence that Lambardar Mohan Singh expired before he could be examined as a witness. Other C attesting witnesses House was alive and had been given up by the plaintiff on the plea that he had been won over by the other party. Thus, Will Ex.P/2 has not been proved according to Section 68 of the Indian Evidence Act."

6. The learned Judge, however, noticed that one of the D attesting witnesses, namely, Harnek Singh @ House, according to the learned counsel for the plaintiff, had gone outside India and another attesting witness, namely, Lambardar Mohan Singh being dead, the Will must be held to have been duly proved. It was held : E

> "Though there is no plausible and cogent evidence on record to show that House had gone to foreign country. But even if for argument sake the plea of the Plaintiff is taken to be correct. Even in that eventuality the Sub-Registrar has only identified the signatures on the will to F be that of Mohan Singh as attesting witness. Though the Plaintiff also examined PW-9 Davinder Parshad Handwriting expert who examined the signatures of the executant on the Will Ex.P/2 and the sale deed but he took all these signatures as standard signatures. The sale G deeds, however, have not been proved by the Plaintiff to contain the signatures of Ram Bux. Expert compared these standard signatures with the questioned signatures on the family settlement. Therefore, there is nothing on record to suggest that Handwriting expert took the signatures of H

A will as questioned and compared the same with admitted or proved signatures of Ram Bux. Therefore, the Plaintiff miserably failed to show that the Will Ex.P/2 contained the signatures of Ram Bux. Consequently, the Plaintiff failed to prove the due execution of the Will Ex.P/2, as per the
B requirement of Section 69 of the Indian Evidence Act.

In result, the Plaintiff failed to show that deceased Ram Bux executed legal and valid will dated 25.9.1981 in his favour. In view of this finding I need not dilate on the argument of the learned counsel for the defendants that
C the Will Ex.P/2 was surrounded by suspicious circumstanced."

7. An appeal was preferred thereagainst.

The First Appellate Court, however, on the said issue
D held :

"Now so far as the Will Ex.P/2 is concerned, it was allegedly executed by Ram Bux Singh son of Daya Ram on 25.9.1981 and was duly got registered in the office of the Sub-Registrar, Ropar, on the same date. It is evident that
E this Will was attested by two witnesses, namely, Harnek Singh son of Ram Prakash and Mohan Singh, Lamberdar. So far as Mohan Singh Lamberdar is concerned, he had since died on 4.7.1983 vide death Certificate Ex.P3 and for this reason he could not be brought in the witness box.
F However, Harnek Singh son of Ram Parkash is alive but it is stated by Shri A.L. Verma, counsel for the Plaintiff as well as Plaintiff himself on 29.10.1999 that Harnek Singh witness has joined hands with the opposite party and moreover, he has intentionally left to a foreign country. For
G this reason, Harnek Singh son of Ram Parkash also could not be examined by him. Now the question arises whether the statement of the deed-writer who also knew Ram Bux Singh can be relied upon or not and whether he can be treated as an attesting witness or not."

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8. The High Court by reason of the impugned judgment dismissed the Second Appeal preferred by the appellant herein opining that no substantial question of law arose for its consideration. A

9. Mr. Viraj Datar, learned counsel appearing on behalf of the appellant, submitted that in the facts and circumstances of this case, Section 69 of the Evidence Act cannot be said to have any application whatsoever and, thus, the High Court committed a serious error in passing the impugned judgment. B

10. Indisputably a Will is to be attested by two witnesses in terms of Section 68 of the Indian Evidence Act (Act). Indisputably, the requirement of Section 63(1)(c) of the Indian Succession Act is required for to be complied with for proving a will. Section 68 of the Act mandates proof by attesting witnesses of not merely of execution but also attestation by two witnesses. That is to say, not only the execution of Will must be proved but actually execution must be attested by at least two witnesses. Attestation must of execution of Will be in conformity with the provisions of Section 3 of the Transfer of Property Act. C D

'Attestation' and 'execution' connote two different meanings. Some documents do not require attestation. Some documents are required by law to be attested. E

11. In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a Will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation as the words 'at least' have been used therein. When genuineness of a Will is in question, apart from execution and attestation of Will, it is also the duty of a person seeking declaration about the validity of the Will to dispel the surrounding suspicious circumstances existing if any. Thus, in addition to proving the execution of the Will by examining the attesting F G H

witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the Will would, inter alia, depend thereupon.

12. The Court, while granting probate of the will, must take into consideration all relevant factors. It must be found that the will was product of a free will. The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. Where, however, a plea of undue influence was taken, the onus wherefor would be on the objector and not on the offender. {See *Savithri & Ors. v. Karthyayani Amma & Ors.* [JT (2007) 12 SC 248]}

13. Section 69 of the Act reads, thus :

> "**Section 69—Proof where no attesting witness found**—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person."

14. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in Section 69, i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

15. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved.

16. Indisputably, one of the attesting witnesses was dead. Our attention, however, has been drawn to the fact that a purported summons were taken out against the said Harnek Singh. Admittedly, it was not served. There is nothing on record to show that any step was taken to compel his appearance as a witness. Ram Sahai in his deposition did not make any statement that the said Harnek Singh had been won over by the appellant. He did not say that despite service of summons, Harnek Singh did not appear as a witness. In his cross-examination, he alleged that he and Harnek Singh were enimically disposed of towards each other even prior to 1991 and in fact "since the time of his ancestors". It was furthermore alleged that they are not on speaking terms. A suggestion was given to him that in fact Harnek Singh had come to Court on that day to which he denied his knowledge. It is only in answer to a question in cross-examination, he stated that he did not intend to examine the said Harnek Singh.

Harnek Singh may be a person who had been won over by the appellant but there must be some evidence brought on records in that behalf. The learned Trial Judge, in our opinion, rightly rejected the bare statement made by the learned counsel for the plaintiff that the other attesting witness had gone out of the country. Respondent himself did not say so on oath. He did not examine any other witness.

He did not make any attempt to serve another summons upon him. No process was asked for to be served by the court. Interestingly, a statement was made by a counsel before the appellate court. That statement is said to have been made before the appellate court by the plaintiff himself on 29.10.1999. We are at a loss to understand how such a statement by a counsel or by the respondent himself was taken into consideration for the purpose of invoking Section 69 of the Indian Evidence Act. A purported statement, not as a witness but through the counsel, cannot be said to be an evidence. We have noticed hereinbefore that learned Trial Judge did not accept such a statement. In that view of the matter, the first appellate

A Court, in our opinion, committed a serious legal error.

17. In *Hare Krishna Panigrahi Vs. Jogneswar Panda and Others* [AIR 1939 Cal. 688], B.K. Mukherjea, J. referring to Section 71 stated the law thus :

B "This presupposes in my opinion that the witness is actually produced before the Court and then if he denies execution or his memory fails or if he refuses to prove or turns hostile, other evidence can be admitted to prove execution. In the case referred to above the witness was actually before C the Court and afterwards turned hostile. In this case however, the witness was not before the Court at all and no question of denying or failing to recollect the execution of the document did at all arise. The plaintiff simply took out a summons as against this witness and nothing further was done later on. In a case like this where the attesting D witnesses are not before the Court, S. 71, Evidence Act, has in my opinion, got no application. In such cases it is the duty of the plaintiff to exhaust all the processes of the Court in order to compel the attendance of any one of the attesting witnesses and when the production of such E witnesses is not possible either legally or physically, the plaintiff can avail himself of the provisions of S. 69, Evidence Act."

18. In *Amal Sankar Sen & Ors. v. The Dacca Co-operative* F *Housing Society Ltd. (in liquidation) by Inspector Liquidator, Co-operative Society, Dacca* [(A.I.R (32) 1945 Calcutta 350], it was held :

"As we have already stated, that proposition of law cannot be challenged at this date. In order that S.69, Evidence G Act, may be applied, mere taking out of the summons or the service of summons upon an attesting witness or the mere taking out of warrant against him is not sufficient. It is only when the witness does not appear even after all the process under Order 16 Rule 10, which the Court H considered to be fit and proper had been exhausted that

the foundation will be laid for the application of Section 69, Evidence Act. The party, namely, the plaintiff, must move the Court for process under Order 16, Rule 10, Civil P.C., when a witness summoned by him has failed to obey the summons but when the plaintiff does move the Court but the Court refuses the process asked for we do not see why Section 69, Evidence Act, cannot be invoked. The other view would place the plaintiff in an impossible position when the witness is an attesting witness to the document on which he has brought the suit, and the Court refuses coercive processes contemplated in Order 16 Rule 10 Civil P.C." A B C

19. In *Doraiswami Vs. Rathnammal and others* [(AIR 1978 Mad. 78], the same principle was reiterated, stating :

"11. D. 2. 2 merely identifies the signature of Palani Navithan found in Ex. B-1 as that of his father. The mere fact that the signature of Palani Navithan is proved, in our opinion, is not sufficient to prove the due execution of the will. The evidence of this witness is relied on for proving the signature of one of the attesting witnesses and thus enable the third defendant to adduce secondary evidence regarding the due execution of the will. The evidence of D.W. 2 will be relevant only for the purposes of S. 69 of the Evidence Act. Section 69 will come into play only when no attesting witness can be found. In this case, as already stated, an attesting witness D.W. 4 has been examined and he has denied his attestation of the document. Therefore S. 69 can have no application. The evidence of D.W. 2, therefore, even if accepted, will not help the third defendant." D E F

20. We may notice that in *Apoline D' Souza v. John D' Souza* [(2007) 7 SCC 225], this Court held that the question as to whether due attestation has been established or not will depend on the fact situation obtaining in each case. Therein, it was held : G H

A "**13.** Section 68 of the Evidence Act, 1872 provides for the mode and manner in which execution of the will is to be proved. Proof of attestation of the will is a mandatory requirement. Attestation is sought to be proved by PW 2 only. Both the daughters of the testatrix were nuns. No
B property, therefore, could be bequeathed in their favour. In fact one of them had expired long back. Relation of the testatrix with the respondent admittedly was very cordial. The appellant before us has not been able to prove that she had been staying with the testatrix since 1986 and
C only on that account she was made a beneficiary thereof. The will was full of suspicious circumstances. PW 2 categorically stated that the will was drafted before her coming to the residence of the testatrix and she had only proved her signature as a witness to the execution of the
D will but the document was a handwritten one. The original will is typed in Kannada, although the blanks were filled up with English letters. There is no evidence to show that the contents of the will were read over and explained to the testatrix. PW 2 was not known to her. Why was she called and who called her to attest the will is shrouded in mystery.
E Her evidence is not at all satisfactory in regard to the proper frame of mind of the testatrix. There were several cuttings and overwritings also in the will."

In the aforementioned situation, the Will was said to have
F not been proved.

This Court therein noticed, inter alia, the decision of *B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors.* [(2006) 13 SCC 449] wherein the law has been laid down in the following terms :

G "25. The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would sub-serve the purpose and the suspicious circumstances surrounding the execution thereof is not of
H

much significance."

21. We generally agree with the aforementioned view of the Calcutta High Court. Assuming, however, that even taking the course of Order XVI of the Code of Civil Procedure might not be necessary, what was imperative was a statement on oath made by the plaintiff. A deposition of the plaintiff is a witness before the Court and not the statement through a counsel across the Bar. Such a statement across the Bar cannot be a substitute for evidence warranting invocation of Section 69 of the Evidence Act.

22. For the reasons, aforementioned, the impugned judgment of the High Court as also the First Court of Appeal cannot be sustained. They are set aside accordingly. Appeal is allowed with no order as to costs.

D.G. Appeal allowed.