
(2004) 09 AHC CK 0097

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 32788 of 1996

Mohd. Yusuf

APPELLANT

Vs

Board of Revenue and Others

RESPONDENT

Date of Decision : 16-09-2004

Acts Referred:

Evidence Act, 1872 — Section 68

Succession Act, 1925 — Section 63

Transfer of Property Act, 1882 — Section 3

Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 — Section 229B

Citation : AIR 2005 All 199 : (2005) 3 AWC 2268 : (2005) 3 RCR(Civil) 690 : (2004) 97 RD 494

Hon'ble Judges : S.N. Srivastava, J

Bench : Single Bench

Advocate : M.A. Qadeer, for the Appellant; Deoraj and S.C., for the Respondent

Final Decision : Dismissed

Judgement

S.N. Srivastava, J.—Petition in hand has been filed assailing the judgment dated 16-7-1996 passed by the Board of Revenue by which it has been held that a Scribe cannot be treated to be attesting witness unless attesting witnesses were dead or were not in a position to be examined.

2. It would appear from the record that one Mohd. Hanif was Bhumidhar of land in suit comprising in plot No. 201, admeasuring 2 Bighas, 7 Biswas. He had three sons who are parties to the present proceedings. Mohd. Yusuf one of the sons instituted a suit u/s 229 B of the U. P. Z. A. and L. R. Act claiming himself to be the exclusive Bhumidhar of the land in question on the basis of a Will dated 13-5-1979 which it was alleged was executed by his father Mohd. Hanif in his favour. In the written statement, the other two sons of Mohd. Hanif i.e. the contesting Opp. parties repudiated the plaint allegations and denied exclusive rights as Bhumidhar of the plaintiff over the property in question and claimed 1/3rd share each to all the three brothers. The contesting parties also denied execution of Will and termed it as forged one. The trial Court by means of

judgment dated 29-6-1993 dismissed the suit on the ground that Will was not proved by attesting witnesses. In appeal, the Commissioner clinched the issue in favour of plaintiff on the ground that though attesting witnesses were not examined but the Scribe proved the Will. In consequence, the suit was decreed in appeal. This decision of the Commissioner led to filing of second appeal by defendant respondents which was allowed by the Board of Revenue recording a finding that there was no explanation in the Will for dis-inheriting the other brothers of the petitioner and further that the Will was not proved by attesting witnesses and a Scribe cannot be treated to be an attesting witnesses unless attesting witnesses were dead or were not in a position to be examined.

3. I have heard learned counsel for the parties and perused the materials on record.

The learned counsel for the petitioner premised his submission by canvassing that the Will dated 13-5-1979 was proved by the Scribe and Board of Revenue erred in law in holding to the contrary. He further submitted that the father of the petitioner was residing in Bombay and he, with his free will and mind, executed the Will in favour of the petitioner. Per contra, learned counsel appearing for the Opp. Parties contended that the Will was not proved to have been executed by Mohd. Hanif and all the brothers succeeded the property in question.

4. Before proceeding to scan the respective submissions on the aspect, it would be apt to acquaint myself with the provisions of the relevant Sections. Section 68 of the Evidence Act being germane to the point involved, it is quoted below.

"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 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."

5. It would thus crystallize from the provisions of the above section that 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.

6. The term "attested" has not been defined in the Evidence Act. In Transfer of property Act, the said term has been defined in Section 3 and being relevant it is quoted below.

" "attested" in relation to an instrument, means (and shall be deemed always to have meant) attested by two or more witnesses each of whom has been the executant sign or affix his mark to the instrument, or has been some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgement of his signature or mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

7. Similarly, Section 63 of the Indian Succession Act lays down the meaning of attestation as under :

"Section 63(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."

8. The question that surfaces in the perspective of above discussion, is whether a Scribe of the Will can be said to be an attesting witness who could prove a document required attestation. The selfsame question cropped up before Apex Court in a case in M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, . In para 8 of the said decision, the Apex Court enunciated the point in question in the following manner.

"Briefly put, the essential conditions of a valid attestation u/s 3 are : (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

The Apex Court regard being had to a decision of the Privy Council reported in AIR 1939 117 (Privy Council) further held that a registering officer cannot be regarded as attesting witness as it is not proved that he signed the document in the presence of executant. A person identifying the witness puts his signatures on document to authenticate the fact that he had identified the executant and the same is not intended that he had put his signatures for the purposes of attesting witnesses. The Apex also placed credence on a decision in *Girja Datt*

Singh Vs. Gangotri Datt Singh, in which it was held that the two persons who had identified testator at the time of registration of document and had appended their signatures at the foot of the endorsement by Sub-Registrar were not the attesting witnesses as their signatures were not *animo attenstandi*. Coming to the present case, it would appear that the attesting witnesses were not examined to prove the Will. There is not an iota of evidence on record to show that the witnesses were dead or were not traceable on the date fixed for evidence. It is borne out from the record that the attesting witnesses were not called by issuing notices to prove Will. The Scribe in his cross-examination, it would appear, has stated that Will was not registered in his presence and he did not go to the office of Sub-Registrar at the time of Registration. No doubt, a scribe can be said to be an attesting witness, provided the two attesting witnesses are dead or incapable to give evidence even after being summoned for giving evidence if the test laid down by the Apex Court is fully satisfied to the effect that the witnesses should have put his signature *animo attestandi* i.e. for the purpose of attesting and he has seen executant sign and has received from him a personal acknowledgement of his signatures at the time of registration. This clearly goes to prove that scribe in the present case does not satisfy the requirements laid down by the Apex Court and cannot be said to be an attesting witness.

9. Yet another aspect to be taken into reckoning is whether the Will spells out any special reasons for disinheriting other two sons by the father. This aspect was reckoned with and the Will was rightly disbelieved by the Board of Revenue. The circumstances in which the Will was scribed and brought into existence do foment doubts whether the Will was at all executed by Mohd. Hanif to the exclusion of the rights of other two sons. No convincing explanation is forthcoming in order to show that the two sons were rightly disinherited by Mohd. Hanif and in the circumstances, the Will was rightly disbelieved. There should be some valid justification on record to show that father nursed any grievance against the remaining two sons whom he actually wanted to disinherit. There being nothing either in the Will or on record, it arouses suspicion that the Will alleged to be executed by Mohd. Hanif was authenticated one.

10. Lastly, I come to grips with the case-laws relied upon by the learned counsel for the Petitioner. The cases relied upon by the learned counsel for the petitioner are Smt. Bhuwan Kumari v. Akbar Ahmad 2002 (93) R D 915, Haripada Maity Vs. Annada Prosad Halder and Others, , Dhruva Sahu (dead) and after him Nalumoni Sahu and Another Vs. Paramananda Sahu, , Madhukar D. Shende Vs. Tarabai Aba Shedage, in vindication of his stand that a scribe could be attesting witness if he has signed just after testator. The learned counsel appearing for the Opp. Parties relied upon a decision in M. Rangasamy Vs. Rengammal and Others, to bring home the point that at least one witness is necessary to prove a document.

11. In view of decision of the Apex Court in M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, , it is amply borne out that if a person puts

his signature on the document for some other purpose e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness. It is not borne out from the record that any of the attesting witnesses were either dead or were not available to prove the Will nor is there anything on the record to show that any notice was issued to any of the attesting witnesses requiring them to prove the Will in question. In the circumstances, the decisions relied upon by the learned counsel for the petitioners are unavailing and the ratio flowing from them cannot be taken aid of to lend cogency to the petitioner's case.

12. As a result of foregoing discussion, the writ petition being devoid of merit is liable to be dismissed and it is accordingly dismissed.