

(2022-2)206 PLR 782
 PUNJAB AND HARYANA HIGH COURT
Before: Mr. Justice Anil Kshetarpal.
 JAGDISH SINGH (SINCE DECEASED) THROUGH HIS LRS and Others - Appellants,
 Versus
 JAGJIT SINGH and another - Respondents.
 Regular Second Appeal No. 75 and 76 of 2017(O&M)

(i) Indian Succession Act, 1925, (39 of 1925) Section 69 - Three requirements i) if no attesting witness can be found; ii) the attestation of one of the attesting witness atleast is in his handwriting; and iii) the signatures of the person executing the document is in the handwriting of that person - It is evident that no evidence has been produced which proves that the attestation of one of the attesting witness was in his handwriting - It is a peculiar case where neither any photocopy nor the certified copy bearing the signatures of the executor of the Will has been produced - Will not proved - Evidence Act, 1872 (1 of 1872) Section 69. [Para 14]

(ii) Evidence Act, 1872 (1 of 1872) Section 69 - Registered Will has been produced - Signatures and thumb impressions proved - On facts Will proved. [Para 18]

Held, that Sh. Chanda Singh appeared in evidence and stated that he attested the Will. However, he died before he could be put to cross-examination. Thereafter, his brother Tara Singh appeared, who also identified the signatures of Sh.Chanda Singh. Unfortunately, he also died before he could be cross-examined. Thereafter, Sh.M.P.Vasudeva, Advocate, appeared as PW.5. He is the grandson of Sh.Sain Ditta, who was the second attesting witness to the aforesaid Will. He has identified the signatures of his maternal grandfather Sh.Sain Ditta. PW.11 Sh.Sewa Singh appeared and identified the handwriting of his father Sh.Udho Ram, who had scribed the Will dated 30.07.1963. Both the Courts below have concurrently found that the Will dated 30.07.1963 has been proved in accordance with Section 69 of the 1872 Act.

[Para 18]

Cases referred to:-

1. (2015)5 SCC 578, *Ved Mitra Verma v. Dharam Deo Verma*.
2. 2007 AIR (Supreme Court) 1975, *Benga Behera v. Braja Kishore Nanda*.
3. (2003)2 SCC 911, *Janki Narayan Bhoir v. Narayan Namdeo Kadam*.
4. (1993-3)105 PLR 153, *Mohinder Singh v. Nagina*.

Mr. Avnish Mittal and Ms. Aparna Singhal, for the appellant(s). *Mr. Akshay Bhan, Senior Advocate with Mr. Santosh Sharma*, for the respondent No.1.

Anil Kshetarpal, J. - (31st March, 2022) -

**CM-153-C-2017 IN RSA-75-2017 AND
 CM-155-C-2017 IN RSA-76-2017**

1. In view of the prayer made in the application, which is supported by an affidavit, the same is allowed, subject to all just exceptions. The persons, named in para 2 of the application, are brought on the record as legal heirs of appellant No.1-Jagdish Singh, who has already been declared civilly dead before the institution of the suit and appellant No.2-Mohinder Kaur, who is stated to have died on 17.02.2015. The amended memo of parties is taken on record.

CM-1855-C-2022 IN RSA-75-2017

2. In view of the prayer made in the application(s), which is supported by an affidavit, the same is allowed, subject to all just exceptions. The persons, named in para 2 of the application, are brought on the record as legal heirs of Smt. Surinder Kaur, who is impleaded as appellant No.1(iii), 2(iii) and 8 in the appeal(s) and is stated to have died on 25.11.2019. Amended memo of parties is taken on record.

CM-1845-C-2022 IN RSA-76-2017

3. In view of the prayer made in the application(s), which is supported by an affidavit, the same is allowed, subject to all just exceptions. The persons, named in para 2 of the application, are brought on the record as legal heirs of appellant No.7, namely Surinder Kaur, who is stated to have died on 25.11.2019. Amended memo of parties is taken on record.

RSA-75-2017 AND RSA-76-2017

4. By this judgment, two Regular Second Appeals bearing No. 75 and 76 of 2017 shall stand

disposed of.

5. The judgments, passed by the trial Court as well as the Appellate Court, while disposing of the two connected suits, are common. The parties as well as their learned counsel are also common. The learned counsel for the parties are ad idem that these two appeals can be disposed of by the same judgment.

6. In substance, the dispute is with regard to the succession of the property of Smt. Basant Kaur, widow of Sh. Gian Singh. Sh.Jagjit Singh (the plaintiff) is the son of late Smt. Basant Kaur. He claims to have inherited the property to the exclusion of the other Class-I heirs on the basis of the registered Will dated 30.07.1963.

7. Late Smt. Basant Kaur had two sons, namely Sh.Jagjit Singh and Sh.Jagdish Singh and two daughters, namely Smt.Narinder Kaur and Smt.Jagdeep Kaur. The first suit was filed by Sh. Jagdish Singh, whereas the second suit was filed by Sh.Ranjodh Singh, husband of late Smt. Jagdeep Kaur. It is the case of the defendants that late Smt. Basant Kaur had executed the last registered Will on 02.11.1976. The trial Court decreed the suit by returning the finding that the Will dated 02.11.1976 has been proved by leading secondary evidence. The trial Court, as a matter of fact, found that late Smt. Basant Kaur did execute the registered Will dated 30.07.1963. However, since the last Will is to prevail, therefore, the suit was decided on the basis of the Will dated 02.11.1976.

8. The two appeals were preferred before the First Appellate Court. The First Appellate Court, on re-appreciation of evidence, has found that the Will dated 02.11.1976 has neither been produced in evidence nor proved in accordance with Section 68 and 69 of the Indian Evidence Act, 1872 (hereinafter referred to as "the 1872 Act"). On 30.03.2022, the arguments, advanced by the learned counsel representing the parties, were heard at length and the following question was framed:-

"Whether a sub-Registrar performing the functions of a Registrar is entitled to prove the Will in accordance with Section 69 of the Indian Evidence Act, 1872, particularly when neither any attesting witness has been examined nor any person who is well versed with the signatures of the executant and the attesting witness has entered the witness box?"

9. This Court has once again heard the learned counsel for the parties, at length and with their able assistance, perused the paper-books and the judgments passed by both the Courts below as well as photocopies of the record.

10. There is no dispute between the parties that the Will dated 02.11.1976 has not been produced. Both the attesting witnesses of the will dated 02.11.1976, namely Sh.Sher Singh, Advocate and Sh.Kesar Singh are stated to have expired and therefore, are not examined in evidence. Even the Scribe, namely Sh.Om Parkash Puri has died. Sh.Ranjodh Singh tried to prove the Will dated 02.11.1976 by examining certain officials of the office of the Sub-Registrar as well as Mrs. P. Ahluwalia, the Sub-Registrar. She admitted that the copy available in the office of the Sub-Registrar is not signed either by the testator or the attesting witnesses. In other words, the copy available in the office of the Sub-Registrar neither bears the signatures of the testator nor of the attesting witnesses nor their photos. It only has an endorsement of the Sub Registrar to the effect that it is a correct copy. Mrs. P.Ahluwalia, the Sub Registrar, further admitted that she did not personally know late Smt.Basant Kur. However, she knew Sh.Sher Singh, Advocate, one of the attesting witnesses. Although, certain other officials from the office of the Sub Registrar have stated that the copy of the Will produced is a true copy of the document available in the office of the Sub-Registrar, however, the question is whether the Will has been proved in accordance with Section 69 of the 1872 Act or not. The learned counsel representing the appellant, with all vehemence, contends that the deposition of Mrs.P.Ahluwalia, the Sub Registrar, is sufficient to prove the Will in accordance with Section 69 of the 1872 Act. He submits that since both the attesting witnesses of the Will have died, therefore, the only way to prove the will was to examine the Sub Registrar. In support of his argument, he relies upon the judgment passed by the Supreme Court in *Ved Mitra Verma v. Dharam Deo Verma*¹ (2015) 5 SCC 578.

11. *Per contra*, the learned counsel representing the respondents contends that there is non-compliance of Section 69 of the 1872 Act as neither the attestation of one attesting witness nor the signatures of the person executing the document has been proved in their handwriting. He submits that there is no evidence to prove that the alleged Will dated 02.11.1976 was executed in accordance with the requirements of Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as "the 1925 Act"). He relies upon the judgment passed by the Supreme Court in *Benga*

*Behera and Another v. Braja Kishore Nanda and Others*² 2007 AIR SC 1975. He also relies upon the judgment in *Janki Narayan Bhoir v. Narayan Namdeo Kadam*³ (2003) 2 SCC 911.

12. Before the Bench proceeds further, it would be appropriate to extract Section 69 of the 1872 Act, which reads as under:-

"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 document is in the hand writing of that person".

13. It is evident that Section 69 of the 1872 Act is in the nature of exception to Section 68 of the 1872 Act. Under Section 68 of the 1872 Act, if a document is required by law to be attested, then the document can only be proved in evidence by examining atleast one attesting witness to the said document, in accordance with law. However, Section 69 of the 1872 Act creates an exception. It provides that 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 by proving that the attestation of one of the attesting witness, atleast, is in his handwriting and that the signatures of the person executing the document is in his handwriting. In simple language, there are three requirements of Section 69 of the 1925 Act:-

- i) if no attesting witness can be found;
- ii) the attestation of one of the attesting witness atleast is in his handwriting; and
- iii) the signatures of the person executing the document is in the handwriting of that person.

14. It is evident that no evidence has been produced which proves that the attestation of one of the attesting witness was in his handwriting. It is a peculiar case where neither any photocopy nor the certified copy bearing the signatures of the executor of the Will has been produced. Mrs.P.Ahluwalia has admitted that she did not personally know late Smt. Basant Kaur.

15. Furthermore, the execution of the Will and its subsequent registration are two independent events. The Will dated 02.11.1976 is stated to have been scribed by Sh. Om Parkash Puri. In normal circumstances, after signing the Will, the executor along with the witnesses would go to the office of the Sub Registrar to get it registered. Before the Sub Registrar, the testator and the attesting witness will be required to sign on the endorsement put the office of the Sub-Registrar. In such circumstances, Mrs. P.Ahluwalia was incapable of making a statement with regard to the execution of the Will. This distinction has been noticed by the Division Bench of this Court in *Mohinder Singh v. Nagina*⁴ (1993-3)105 PLR 153.

16. Keeping in view the aforesaid discussion, the findings of the first Appellate Court with regard to the last Will dated 02.11.1976, does not suffer from any error. Hence, the same is upheld.

17. Now let us shift our focus to the registered Will dated 30.07.1963. This Will has been produced as Ex.P1. Apart from the signatures and thumb impressions of late Smt. Basant Kaur, it bears the signatures of Sh.Chanda Singh and Sh.Sain Ditta.

18. Sh.Chanda Singh appeared in evidence and stated that he attested the Will. However, he died before he could be put to cross-examination. Thereafter, his brother Tara Singh appeared, who also identified the signatures of Sh.Chanda Singh. Unfortunately, he also died before he could be cross-examined. Thereafter, Sh.M.P.Vasudeva, Advocate, appeared as PW.5. He is the grandson of Sh.Sain Ditta, who was the second attesting witness to the aforesaid Will. He has identified the signatures of his maternal grandfather Sh.Sain Ditta. PW.11 Sh.Sewa Singh appeared and identified the handwriting of his father Sh.Udho Ram, who had scribed the Will dated 30.07.1963. Both the Courts below have concurrently found that the Will dated 30.07.1963 has been proved in accordance with Section 69 of the 1872 Act. Through this Will, Smt.Basant Kaur bequeathed the entire suit property in favour of his son Sh.Jagjit Singh.

19. The learned counsel representing the appellant, although made sincere efforts to persuade the Court to hold that the registered Will dated 30.07.1963 has not been proved, however, in view of the overwhelming evidence, particularly the evidence of Sh.Chanda Singh, Sh.Tara Singh, Sh.M.P.Vasudeva and Sh.Sewa Ram, the Will dated 30.07.1963 has been duly proved, in accordance with law.

20. In view of the above, both the appeals are dismissed.

21. The miscellaneous application(s) pending, if any, in both the appeals, shall stand disposed of. R.M.S. - *Appeal dismissed.*