Bhagat Ram And Anr vs Suresh And Ors on 25 November, 2003

Equivalent citations: AIR 2004 SUPREME COURT 436, 2003 AIR SCW 6518, 2003 (10) SRJ 554, (2004) 13 ALLINDCAS 711 (SC), (2004) 1 CLR 355 (SC), (2004) 54 ALL LR 594, (2004) 2 JCR 150 (SC), 2003 (10) SCALE 131, 2003 (12) SCC 35, 2003 (7) SLT 376, 2004 (1) CLR 355, (2004) 1 HINDULR 159, (2003) 10 SCALE 131, (2004) 1 CIVILCOURTC 297, (2004) 1 LANDLR 606, (2004) 2 MAD LW 355, (2004) 97 REVDEC 47, (2004) 1 SUPREME 451, (2004) 1 RECCIVR 285, (2004) 1 ICC 695, (2004) 1 WLC(SC)CVL 541, (2004) 13 INDLD 1048, (2004) 2 ALL WC 1179, (2004) 1 CAL HN 144, (2004) 1 CIVLJ 870, (2004) 1 CURCC 328, (2004) 98 CUT LT 114

Author: R.C. Lahoti

Bench: Ashok Bhan, R.C. Lahoti

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           CASE NO.:
Appeal (civil)  13711 of 1996

PETITIONER:
BHAGAT RAM AND ANR.

RESPONDENT:
SURESH AND ORS.

DATE OF JUDGMENT: 25/11/2003

BENCH:
R.C. LAHOT1 & ASHOK BHAN

JUDGMENT:
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JUDGMENT 2003 Supp(6) SCR 216 The Judgment of the Court was delivered by R.C. LAHOTI, J. Bhagat Ram and Chhaju Ram , the appellants, are the sons of late Mast Ram. Muni Devi, respondent No. 3, is the widow of late Mast Ram. It is not clear whether the two appellants were born to Mast Ram from Muni Devi or he had another wife too, but that is not very material for the present case. Suresh and Tilak Raj respondents No. l and 2, are the purchasers of the suit property from Muni Devi.

On 16.5.1973, late Mast Ram executed a Will in favour of Muni Devi appointing her the sold heir of his property. The Will also states that the appellants have been living separately from Mast Ram for a period of 26-27 years prior to the date of the Will and they have been given other property propor_ionate with their share and as Muni Devi was residing with him and also serving him in his old age, he was appointing her the sole heir and successor of his property. The Will, as executed on

16.5.1973, bears the signature of Mast Ram and is attested by two witnesses namely Sanya Brahman and Kewal Ram Brahman who have respectively thumb marked and signed the Will by way of attestation.

The Will was presented for registration on 21.5.1973. It appears that the registration of the Will was done on commission as the endorsement made by the Registrar of Deeds on The Will indicates that the Will was presented by the executant at 4.30 p.m. at his residence. Now commences the controversy.

Vijay Singh Negi, the Registrar of Deeds, read but and explained the contents of the Will to the executant Mast Ram who admitted the execution of the Will but made an oral statement to the Registrar which is in departure from the contents of the Will. Just below the endorsement relating to presentation of the Will, the Registrar has recorded the statement made by Mast Ram. This statement is signed by Mast Ram and attested by one witness namely Ram Dutt. Vijay Singh Negi, the Registrar of Deeds, has also put his signature below the endorsement which incorporates the statement made by Mastram. Translated into English, the endorsement made by the Registrar incorporating the statement of Mast Ram reads as under :

> "The contents of the Will was read over and explained to Shri Mast Ram and he admitted the contents of the same as correct. But he stated that the land shall remain in the name of the executrix during her life time Bhagat Ram and Chajju Ram will serve her. After her death it shall go to the share of Bhagat Ram and Chajju Ram and till that time they shall have no right in the property mentioned in this Registered document. Identification of executor of this will was made by Shri Ram Dutt resident of Nehnar in may presence.
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> Sd/- Mast Ram Sd/- and Seal
>
> Sd/- Ram Dutt Sub-Registrar
>
> Jubal,
>
> Dated 21.5.1973"

(N.B. Translation is as furnished by the appellant and not disputed by the respondents) Thereafter the Will was registered.

Mast Ram died. The Will came into effect. Muni Devi got her name mutated over the agricultural land left by late Mast Ram in the revenue papers. Muni Devi, claiming the vesting of late Mast Ram's property exclusively in herself and thereby having acquired sole and exclusive ownership in the property of late Mast Ram, transferred the land by a registered Deed of Sale in favour of respondents No. l and 2. The Sale Deed was executed and registered on 29/31.5.1975. The appellants filed a civil suit for declaration of title, and for issuance of preventive injunction by way of consequential relief, against the respondents No. l and 2, also impleading the respondent No. 3 as a

party to the suit. According to the plaintiffs, the Will dated 16.5.1973. registered on 21.5.1973, has to be read alongwith the statement made by late Mast Ram and recorded by the Registrar of Deeds. The two formed part of one document and have to be read together and if so read Muni Devi succeeded only to a life estate without any right to alienation and the reversion vested in the appellants. Muni Devi could not have sold away the land and, therefore, no right and title in the property accrues to the respondents No. l and 2. Obviously, the defendants defended the Will and submitted that the Will was only that part of the document which was executed on 16.5.1973 while the statement made before the Registrar on 21.5.1973 was liable to be ignored so far as the efficacy of the Will dated 16.5.1973 is concerned.

The suit filed by the plaintiffs has been dismissed by the trial Court. The decree of the trial Court has been upheld by the first appellate Court as also by the High Court. The plaintiffs have filed this appeal by special leave.

We have heard Shri E.C. Agrawala, the learned counsel for the appellants and Shri B.B. Sawhney, the learned senior counsel for the respondents No. l and 2. It was conceded at the Bar that the document executed by late Mast Ram and attested by two witnesses on 16.5.1973 is a Will. There is no controversy raised at any stage of the proceedings that the said document was a Will duly executed by the testator and attested by the witnesses. The controversy centers around the proof and effect of the statement made by Mast Ram before the Registrar of Deeds on 21.5.1973 and incorporated by the Registrar in his endorsement made on the will. It was also conceded to at the Bar that the statement of Mast Ram dated 21.5.1973 recorded by the Registrar and attested by the witness Ram Dutt may amount, in the eye of law, to a codicil. In the submission of the learned counsel for the appellants, the Will has been registered alongwith the codicil forming an integral part thereof and it is not necessary for a codicil to be attested by two witnesses. Assuming that a codicil is required to be attested by two witnesses in the same manner as a Will is required to be made then the signature of Mast Ram placed alongwith the signature of Ram Dutt, the attesting witness, and the signature of Registrar of Deeds side by side, amounts to attestation of codicil and inasmuch as Ram Dutt and Vijay Singh Negi, the Registrar of Deeds, have both attested the codicil, the codicil has to be given effect to as duly executed.

Ram Dutt and Vijay Singh Negi. the Registrar of Deeds, none has been examined in the Court in proof of attestation of the codicil. It was submitted by the learned counsel for the appellants that the registration of the document dispenses with the necessity of examining the attesting witnesses and the endorsement made by the Registrar on the Will and codicil, incorporating the admission of the testator on the point of execution of the Will and as to which presumption of regularity and correctness attaches dispenses with the need of formally proving the Will and the codicil which must be read together as parts of one one the same document.

Three questions arise for consideration in this appeal :

(1) Whether the formalities attaching with the execution of Will need to be carried out in relation to a codicil also, and if so, whether a codicil is also required to be proved in the same manner as a Will?

(2) Whether a Registrar of Deeds can also be an attesting witness?

(3) Whether registration of a Will or codicil dispenses with the need of proving the execution and attestation of Will in the manner required by Section 68 of the Evidence Act?

Question - l :

'Will' and 'codicil' are defined respectively in clauses (h) and (b) of Section 2 of the Indian Succession Act, 1925 as under :

"(h)'Will' means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death;

(b) 'codicil' means an instrument made in relation to a will, and explaining, altering or adding to its depositions, and shall be deemed to form part of the will;"

Section 63 provides, by enacting the rules, for the manner in which an unprivileged will (the class to which the Will in question belongs) shall be executed. The rules are as under :

Succession Act. 1925

63. Execution of unprivileged wills. Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules :-

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that ii shall appear that it was intended thereby to give effect to the writing as a will.

(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 acknowledgement 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."

It is also relevant to refer to Section 70 which provides that no unprivileged will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged will is hereinbefore required to be executed, or by the burning, tearing. or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same. (emphasis supplied) In Section 64 of the Succession Act also we find a reference to due attestation of a Will or codicil both. It is provided that if a testator, in a will or codicil duly attested, refers to any other document then actually written as expressing any part of his intentions, such document shall be deemed to form a part of the will or codicil in which it is referred to. (emphasis supplied) According to Section 68 of the Evidence Act, 1872 a document required by law to be attested, which a will is, shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if available to depose and amenable to the process of the Court. The proviso inserted in Section 69 by Act No. 31 of 1926 dispenses with the mandatory requirement of calling an attesting witness in proof of the execution of any document to which Section 68 applies if it has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied. However, a Will is excepted from the operation of the proviso. A Will has to be proved as required by the main part of Section 68. It is true that Section 68 of Succession Act does not specifically speak of codicil and that omission has prompted the learned counsel for the appellants to urge that the applicability of Section 68 abovesaid should be treated as confined to the execution of Wills only. A codicil need not necessarily be attested and, therefore, a codicil need not be proved in the manner contemplated by the main part of Section 68 of the Evidence Act; a codicil will attract applicability of the proviso, submitted the learned counsel for the appellants. In our opinion, such a submission cannot be countenanced. Williams states in The Law of Wills, Vol. l (1987 Edn.) "Codicils which in form and execution are similar to a will are useful for the purpose of making slight alterations to a will, such as a change of executors or deleting some specific gift. Codicils may be used for making any alteration in a will, but it is so easy to fail to see that a substantial alteration so made will affect parts of the will other than that intended to be affected, that it is a wise practical rule to execute a .new will whenever any substantial alteration is intended, it may, in cases of urgency, be more practical to execute a codicil than to prepare a new will.....the codicil is executed and attested in the same way as a will. (at p. 161) Execution of codicil. The same rules apply as in the case of wills. (at p.

165)"

> Mantha Ramamurthi's Law of Wills (Sixth Edition) also states (at page 322) that a codicil for its validity, must be executed and attested in the same manner as a Will.
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> Any Indian decision or authority taking a view. contrary to the one taken by the abovesaid learned authors. has not been brought to our notice. Codicil, as defined, is an instrument made in relation to a Will. It has the effect of explaining, altering or

adding to the dispositions made by a Will. By fiction of law. the codicil, though it may have been executed separately and at a place or time different from the Will, forms part of the related Will. That being the nature and character of codicil, flowing from the definition itself. it would be anomalous to accept the contention that though a Will is required to be executed and proved as per the rules contained in the Succession Act and the Evidence Act but a document explaining, altering or adding to the will and forming part of the will is not required to be executed or proved in the same manner. Section 70 of the Succession Act re-enforces this proposition inasmuch as revocation of an unprivileged Will or codicil is placed at per in the matter of manner of execution.

We hold that the same rules of execution are applicable to a codicil which apply to a will to which the codicil relates. So also, the evidence adduced in proof of execution of a codicil must satisfy the same requirements as apply to proof of execution of a will.

Question 2 :

The learned counsel for the appellants submitted that there is nothing in law to debar a Registrar of Deeds from acting as an attesting witness also. He submitted that a Registrar of Deeds, is also a person competent to be a witness, and can act in two capacities. He can be an attesting witness and while attesting a document he would not be deemed to be acting in his official capacity. While registering the document, he would be discharging his official duty as a Registrar. In his personal capacity he can be an attesting witness and that is what he did when he signed below the statement made by Mast Ram on 21.5.1973 and after recording the same attested the statement having seen Mast Ram sign the document in the presence of Ram Dutt. the other attesting witness and himself. Reliance was placed on a series of decisions by the High Court of Punjab and Haryana namely Gumam Singh v. Smt. Ass Kaur & Ors., AIR (1977) Punjab & Haryana 103, 106, Lal Singh & Anr. v. Bant Singh & Ors., AIR (1983) Punjab & Haryana 384, 385, Labh Singh & Ors. v. Piara Singh (deceased by L. Rs.) & Anr., AIR (1984) Punjab & Haryana, 270, 273, Gurdev Singh & Ors. v. Smt. Shanti & Ors.. AIR (1989) NOC 110 (Punjab & Haryana) and Mehnga & Ors. v. Major Singh & Anr.. (1985) 2 Vol. 88 Pun. L.R. 24. The learned senior counsel for the respondents No. l and 2 disputed the correctness of the submission and placing reliance on a decision of this Court in Dharam Singh v. Aso & Anr., [1990] Supp. SCC 684 submitted that a Registrar of Deeds can never be an attesting witness.

We nave carefully perused the submissions so made. In the case of Dharam Singh (supra), the two witnesses did not support the execution of the Will. The trial Court had relied upon the statement of the registering authority. The decision of the trial Court was reversed by the first appellate Court and the decision by latter was upheld by the High Court. In a short judgment this Court held that the appellate Court and High Court were right in their conclusion that the Registrar could not be a statutory attesting witness. There is no further discussion. Presumably what was sought to be

contended before this Court was that the Registrar having discharged his statutory duty ought to be treated as a statutory attesting witness; for the Registrar would not register the document unless execution of the document was admitted by the executant and acknowledged to the Registrar. In Dharam Singh's case the Court has relied on two earlier decisions of this Court in M.L. Abdul Jabhar Sahib v. H. V. Venkata Sastri & Sons, [1969] 3 SCR 513 and Beni Chand (since dead) now by Lrs. v. Smt. Kamla Kumar, [1977] l SCR 578. In Abdul Jabhar's case this Court has held by reference to the definition of 'attested' as given in Section 3 of the Transfer of property Act, 1882 that to be an attesting witness it is essential that the witness should have put his signature animo attestandi, i.e. for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement 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. Prima fade the registering officer puts his signature on the document in discharging of his statutory duty under Section 59 of the Registration Act and not for the purpose of attesting it or certifying that he has received from the executant a personal acknowledgement of his signature. The evidence adduced in the case did not show the registering officer having signed the document with the intention of attesting it nor was it shown that the registering officer signed it in the presence of the executant. In these circumstances, the Court concluded that the registering officer was not an attesting witness. Beni Chand's case (supra) deals with general principles relating to execution of the Will and does not deal with the question whether a registering officer can be an attesting witness or not. The ratio of the several decisions by the High Court of Punjab and Haryana cited at the Bar is that, in the facts and circumstances of a given case, the Registrar may also fulfill the character of an attesting witness as required by law and if, on entering into witness box as required by. Section 68 of the Evidence Act, he proves by his testimony the execution of document by deposing to having witnessed himself the proceedings as contemplated by Section 63 of the Succession Act, he can be an attesting witness. The certificate of registration under Section 60 of the Registration Act, 1908 raises a presumption under Section 114 illustration (e) of the Evidence Act that he had regularly performed his duty and therefore the facts spelled out by the endorsements made under Sections 58 and 59 of the Registration Act may be presumed to be correct without formal proof thereof. The duties discharged by the registering officer do not include attestation or verification of attestation of will as required by the rules enacted by Section 63 of the Succession Act. An endorsement by registering officer is not by itself a proof of the will having been duly executed and attested.

However, facts of the present case are distinguishable from the facts of the Supreme Court decisions referred to by the learned senior counsel for the respondents No. l and 2. So far as the codicil is concerned , it can said to have been dictated by Mast Ram in the presence of Ram Dutt, the witness and Vijay Singh Negi, the Registrar of Deeds. The statement having been recorded, Mast Ram signed the same in the presence of Ram Dutt and Vijay Singh Negi, Ram Dutt and Vijay Singh having seen

Mast Ram signing the document, both of them put their signatures on the document obviously with a view to attesting the signatures of Mast Ram. This is what appears to have taken place by a look at the contents of the codicil below the Will. But the codicil cannot be held to be proved merely by drawing upon imagination. It was necessary on the part of the appellants to have examined Ram Dutt and/or Vijay Singh Negi so as to prove the execution and attestation of the codicil in the manner required by Section 63 of the Succession Act read with Section 68 of the Evidence Act. None of the two were produced in the witness box. The codicil cannot be said to have been proved.

The Registrar of Deeds who has registered a document in discharge of his statutory duty, does not become an attesting witness to the deed solely on account of his having discharged the statutory duties relating to the registration of a document. Registration of any will, and the endorsements made by the Registrar of Deeds in discharge of his statutory duties, do not elevate him to the status of a 'statutory/ attesting witness'. However, a registrar can be treated as having attested to a will if his signature or mark appears on the document akin to the one placed by an attesting witness and he has seen the testator sign or affix his mark to the will or codicil or has received from the testator a personal acknowledgement of his signature or mark and he has also signed in the presence of the testator. In other words, to be an attesting witness, the registrar should have attested the signature of the testator in the manner contemplated by clause

(c) of Section 63 of the Succession Act. No particular form of attestation is provided. It will all depend on the facts and circumstances of a case by reference to which it will have to be answered if the registrar of deeds fulfils the character of an attesting witness also by looking at the manner in which the events have actually taken place at the time of registration and the part played therein by the Registrar.

A Registrar of Deeds before he be termed an attesting witness, shall have to be called in the witness box. The court must feel satisfied by his testimony that what he did satisfies the requirement of being an attesting witness. This is the view taken by the High Court of Punjab in the several decisions cited by the learned counsel for the appellants and also in the Division Bench Decisions of the High Court of Calcutta in Earnest Bento Souza v. Johan Francis Souza & Ors., AIR [1958] Calcutta 440, and of the Orissa High Court in Kotni R.N. Subudhi v. V.R. L. Murthy Raju, AIR [1961] Orissa 180.

Question-3 :

Registration of a document does not dispense with the need of proving the execution and attestation of a document which is required by law to be proved in the manner as provided in Section 68 of the Evidence Act. Under Section 58 of the registration Act the Registrar shall endorse the following particulars on every document admitted to registration :

(l) the date, hour and place of presentation of the document for registration :

(2) the signature and addition of every person admitting the execution of the document, and, if such execution has been admitted by the representative, assign or agent of any person, the signature and addition of such representative, assign or agent;

(3) the signature and addition of every person examined in reference to such document under any or the provisions of this Act, and (4) any payment of money or delivery of goods made in the presence of the registering officer in reference to the execution of the document, and any admission of receipt of consideration, in whole or in part, made in his presence in reference to such execution.

Such particulars as are referred to in Sections 52 and 58 of the Registration Act are required to be endorsed by Registrar alongwith his signature and date on document under Section 59 and then certified under Section 60. A presumption by reference to Section 114 [Illustration (e)] of the Evidence Act shall arise to the effect that the events contained in the endorsement of registration, were regularly and duly performed and are correctly recorded. None of the endorsements, require to be made by the Registrar of Deeds under the Registration Act, contemplates the factum of attestation within the meaning of Section 63(c) of the Succession Act or Section 68 of the Evidence Act being endorsed or certified by the Registrar of Deeds. The endorsements made at the time of registration are relevant to the matters of the registration only [See : Kunwar Surendra Bahadur Singh & Ors. v. Thakur Behari Singh & Ors., A.I.R. (1989) Privy Council 117]. On account of registration of a document, including a will or codicil, a presumption as to correctness or regularity of attestation cannot be drawn. Where in the facts and circumstances of a given case the Registrar of Deeds satisfies the requirement of an attesting witness, he must be called in the witness box to depose to the attestation. His evidence would be liable to be appreciated and evaluated like the testimony of any other attesting witness.

Conclusion :

So far as the Will dated 16.5.1973 is concerned. its execution is neither denied nor disputed. The factum of the Will dated 16.5.1973 having been duly executed and attested was an admitted fact. The disputed fact was the execution and attestation of the codicil dated 21.5.1973. The codicil is not proved. The codicil cannot have the effect of explaining altering or adding to the depositions made by the Will dated 16.5.1973.

The appeal is held devoid of any merit and is dismissed.