THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

DATED : 19th MAY, 2023

SINGLE BENCH : THE HON'BLE MRS. JUSTICE MEENAKSHI MADAN RAI, JUDGE

RFA No.06 of 2018

Appellant : Eric Pazo

versus

Respondents : Jorgay Namka and Others

Appeal under Section 384 of the Indian Succession Act, 1925

Appearance

Mr. A. K. Upadhyaya, Senior Advocate (Legal Aid Counsel) with Ms. Gita Bista, Advocate (Legal Aid Counsel) and Ms. Rachhitta Rai, Advocate for the Appellant.

Mr. Hissay Gyaltsen, Ms. Tashi Doma Sherpa and Ms. Nisha Biswarkarma, Advocates for Respondent No.1.

Mr. A. Moulik, Senior Advocate with Ms. K. D. Bhutia and Mr. Ranjit Prasad, Advocates for Respondents No.2 to 5.

J U D G M E N T

Meenakshi Madan Rai, J.

1. The Respondent No.2 sought Probate of Will by filing a petition before the Court of the Learned District Judge, East and North Sikkim, at Gangtok, which was registered as Civil Misc. Case No.67 of 2011. Notice thereupon was issued to the General Public. The Will executed by Late Passang Obed Pazo Lepcha (hereinafter, the "testator"), was received by the Court, under sealed cover, from the Office of the Sub-Registrar, East District, Gangtok, as evident from the Order dated 10-06-2011, of the Learned Trial Court. On 09-10-2012, Civil Misc. Case *supra* was withdrawn by the Respondent No.2 on grounds of her ill-health. On 27-05-2015, a Petition was filed by Jorgay Namka (the Respondent No.1 herein), Executor of the Will of the deceased testator, registered as

Probate of Will No.2 of 2015, before the same Court and Notice issued to the General Public/Opposite Parties. The Opposite Party No.5 (the Appellant herein), viz., Eric Pazo, opposed the Will, Exhibit 2, *inter alia* on grounds of mental and physical infirmity of the testator, suspicious circumstances of the execution of the Will and customary laws which prevented the testator from bequeathing the properties. In view of the opposition, the Learned Trial Court vide its Order dated 19-11-2015, observed that the application would be dealt with as a Regular Civil Suit between the parties, with opportunity afforded to the parties to lead evidence in view of Section 295 of the Indian Succession Act, 1925 ("Succession Act", for short).

2. Before proceeding further with the matter, to bring clarity with regard to the parties, their order of appearance before the Learned Trial Court in Probate of Will No.02 of 2015 and before this Court are being delineated hereunder;

(i) Respondent No.1 herein (Advocate Jorgay Namka, the executor of the Will of the deceased testator), was the Petitioner before the Learned Trial Court.

(ii) Respondent No.2 herein (second wife of the testator), was the OP No.1 before the Learned Trial Court.

(iii) Respondent No.3 herein (son of the deceased testator and Respondent No.2), was the OP No.2 before the Learned Trial Court.

(iv) Respondent No.4 herein (son of the deceased testator and Respondent No.2), was the OP No.3 before the Learned Trial Court, who passed away in the interim and was represented by his mother, Respondent No.2.

(v) Respondent No.5 herein (son of the deceased testator and Respondent No.2), was the OP No.4 before the Learned Trial Court.

(vi) Appellant herein (grandson of testator and son of Arthur Pemba Pazo from testator's first wife), was the OP No.5 before the Learned Trial Court.

(vii) OP No.6 was the General Public before the Learned Trial Court and is not a party herein.

3. Raising his objection to the Will before the Learned Trial Court through his mother, his constituted attorney, the Appellant in his averments *inter alia* gave a brief history of the properties listed in the Will, which according to him, were ancestral properties and incapable of being bequeathed by Will, as per the customary laws of the Lepchas. That, the testator was not only visually challenged at the time of execution of the Will, but was also suffering from numerous other diseases which incapacitated him mentally. The testator was confined by his second wife, Respondent No.2, who stood to inherit the properties in the absence of her son and daughter, provided, she did not remarry. Denying the execution of the Will, it was averred that the testator's deteriorated physical and mental condition is apparent from a bare perusal of the application, dated 13-08-2008, purported to have been made by him, where he sought deputation of an official to his house for registering the Will, as he was physically incapable of appearing before the concerned official. The petition not being tenable therefore be dismissed.

4. The parties shall be referred to in their order of appearance before this Court.

5. The Learned Trial Court settled the following four issues for determination;

1) Whether the Deed of Will dated 14.08.2008 is valid? (Onus on the Petitioner)

2) *Whether the testator was in a mentally and physically fit condition to make a Will during the relevant time? (Onus on the Petitioner)*

3) *Whether the properties mentioned in the Deed of Will are the self-acquired properties of the testator? (Onus on the Petitioner)*

4) *Whether the testator was entitled to make Will in respect of the properties mentioned in the Deed of Will? (Onus on the Petitioner)*

6. Taking up issues no.1 and 2 together, the Learned Trial Court relied on the evidence of P.W.2 and P.W.3 and concluded that the Will, Exhibit 2, was registered on the basis of Exhibit 3, letter issued by the testator. The Court further observed that it is well-settled law that apart from proving due execution of a Will, the propounder of the Will is under an obligation to dispel all suspicious circumstances, in which it may be shrouded, which burden was discharged in the case at hand. The testator was found to be mentally and physically fit, at the relevant time, to prepare a Will, hence Exhibit 2 was found to be a valid document.

(i) In issue No. 3, the Learned Trial Court entered into the intricacies of the customary laws of the Lepchas (the community to which the parties belong), and concluded that it was not applicable to them as they were Christians. Relying on the decision of ***Pappoo*** vs. ***Kuruvilla***[1] it was observed that, the Probate Court is not to embark on disputed questions of title and possession, the only consideration before the Court being whether the testator had a sound disposing mind at the time of execution of the Will. Nevertheless, the Trial Court embarked on prolix discussions on whether the properties in Exhibit 2 were ancestral or self-acquired,

[1] 1994 (2) KLT 278 : 1994 SCC OnLine Ker 385

but ultimately in view of ***Pappoo*** (*supra*) issue no.3 was decided in accordance with the ratio.

(ii) In issue no.4, in spite of being aware of the scope and ambit of the Probate Court as discussed in ***Pappoo*** (*supra*), the Learned Trial Court concluded that the properties being his self-acquired properties, the testator was entitled to make a Will in respect of those properties mentioned therein.

(iii) The matter accordingly stood decided in favour of the OP Nos.1, 2, 3 and 4.

7. In Appeal, Learned Senior Counsel for the Appellant advancing his arguments submitted *inter alia* that, although the property was ancestral property, having been acquired by Pastor C. T. Pazo (the Appellant's great-grandfather), the Appellant's father being the grandson of Pastor C. T. Pazo and the son of the testator, he was however denied a share in the property by the testator. As per the Appellant, firstly, the Testator was infirm, mentally and physically and, therefore, incapable of preparing the Will. Secondly, the provisions of Section 63(c) of the Succession Act have not been complied in its letter and spirit as there was only one attesting witness to Exhibit 2, the Will.

(i) Elaborating on the first point of his argument, it was contended that Dr. Akithla Nadikpa, P.W.2, who allegedly examined the testator, admitted that she was neither a Diabetologist nor an Eye Specialist and she did not remember whether Exhibit 2, the Deed of Will, was executed on 14-08-2008 or on 06-08-2008. She was unable to explain as to who had inserted the handwritten numerical "14" and handwritten numerical and letters; "*14th day of August*" on Exhibit 2. The said insertions

were admittedly not made in her presence. It is her categorical statement that she was unaware of the contents of Exhibit 2 and that she had signed on it only as a Doctor and not as a witness to the document. She admitted that she did not examine the eyes of the testator on the relevant day and thus could not say whether he was visually impaired in 2008, neither did she examine his mental health, as she was not an Expert in the field. It was urged that despite P.W.2 admitting to not being a Mental Health Expert, she had certified on Exhibit 2 that the testator was in a sound disposing mind. She admitted to not having seen the testator prior to the date of the purported execution of Exhibit 2, hence the testator's identity is itself suspect. As per P.W.2, she had come to help Respondent No. 3, who had been her work associate some years prior to the execution of Exhibit 2, thereby making her an interested witness.

(ii) Learned Senior Counsel further contended that, the disposition of property by Exhibit 2 is unfair as the Appellant's father, being the son of the testator, from his first wife was not given a farthing. The testator lived with his second wife and his children borne by her, who were exerting undue influence on the testator at the time of execution of Exhibit 2, if at all it was executed by him. The signatures purported to be that of the testator on Exhibit 2 are tremulous and cannot be identified as his signatures, it is thus evident that the disposition was not the result of the testator's freewill and exercise of independent mind as all the children from his second wife were given their respective shares while ignoring the Appellant's father. Reliance was placed

on ***Bharpur Singh and Others*** vs. ***Shamsher Singh***[2] to draw the attention of the Court to the aforementioned suspicious circumstances which shrouded the execution of the Will, which thus could not be held to be valid. Inviting the attention of this Court to ***M. L. Abdul Jabbar Sahib*** vs. ***M. V. Venkata Sastri & Sons and Others***[3] it was argued that the attesting witnesses must subscribe with the intention that the subscription made should be complete attestation of the Will, and evidence is admissible to show whether such was the intention or not. The evidence of P.W.2 draws no such conviction, consequently she cannot be considered to be an attesting witness. Considering the fact that the properties were ancestral, that the testator was weak and infirm at the time of execution of Exhibit 2 and neither his physical nor mental condition were certified by any Doctor and as he was unknown to P.W.2, these circumstances lend suspicion to the execution of Exhibit 2. Hence, the impugned Judgment be set aside.

8. Contradicting strenuously the arguments advanced *supra*, Learned Senior Counsel for the Respondents No.2 to 5 submitted that the Will which was executed on 06-08-2008, was acceptable to the other Respondents, except the Appellant, who at the relevant time was not even living with the testator. That, the Appellant did not depose in the Learned Trial Court, instead, his mother appeared as his Constituted Attorney, who deposed that the Will is false when this was not the averment made in his objection. That, from the averments made in the evidence-on-affidavit of the Appellant, it is apparent that the Appellant is confused about whether Exhibit 2 was executed at all or whether

[2] (2009) 3 SCC 687
[3] (1969) 1 SCC 573

the testator was not entitled to make a Will bequeathing ancestral properties. That, the constituted attorney, sans medical or documentary proof, has asserted that the testator was incapacitated both physically and mentally and as such Exhibit 2 could not have been prepared by him. That, the power of attorney holder was not empowered to depose in place of and instead of the Appellant, principal, for which reliance was placed on ***Man Kaur (Dead) by Lrs.*** vs. ***Hartar Singh Sangha***[4], where the Supreme Court propounded that if the power of attorney holder has rendered some acts in pursuance of power of attorney he may depose for the principal in respect of such acts, but he cannot depose for the principal for the acts done by the principal and not by him.

(i) Turning thereafter to the evidence of Respondent No.1 it was urged that the sound mental and physical capabilities of the testator at the time of execution of Exhibit 2 could not be demolished as he had visited the Office of the Respondent No.1 and specifically stated that he wanted to dispose of his self-acquired properties, through a testamentary disposition. Besides P.W.3, there were other witnesses to the execution of Exhibit 2, i.e., Respondent No.1 and Advocate Zola Megi, both having signed on the reverse side of Exhibit 2, thus duly complying with the requirements of Section 63 of the Succession Act. Secondly, in light of the old laws of Sikkim, viz., Sikkim State Rules Registration of Document 1930 (for short, the "Registration Rules"), a person or persons executing the deed or his or their authorised representatives are required to be present with one or more

[4] (2010) 10 SCC 512

witnesses to prove execution of the deed. Hence, even one witness under the Registration Rules suffices to establish execution of Exhibit 2.

(ii) That, the Respondent No.1 has also categorically deposed that not only did P.W.2 examine the health of the testator, but she was also a witness to the execution of the Will on 06-08-2008 on which the testator and P.W.3 also affixed their signatures. That, the intention of the testator and the persons signing on the Will are to be considered by the Court and the above-named persons clearly had the intention of being witnesses to the execution of Exhibit 2. That, the cross-examination of Respondent No.1 reveals that the property is self-acquired, besides clearly mentioning that the testator was in sound mind and his indifferent health was not an obstacle to him in executing the Will. The error pertaining to the dates on Exhibit 2 has also been clarified by Respondent No.1. The witness Respondent No.1, admitted that he had erroneously inserted "14-08-2008" as the date of execution, when in fact it was on 06-08-2008. That, no doubts can be entertained pertaining to the execution of Exhibit 2 as Exhibit 3 is proof of such execution, besides the testator has signed on every page of the Will, after fully understanding the contents and intent of the Will, in the presence of Respondent No.1, Advocate Zola Megi, P.W.2 and P.W.3. The witness has also clarified that the signature was affixed by the testator after P.W.2 found him to be physically and mentally fit and the testator personally acknowledged the signature of the witnesses, all of them having signed in his presence. Relying on ***K. M. Varghese and Others*** vs. ***K.***

M. Oommen and Others[5], Learned Senior Advocate for the Respondents No.2 to 5 contended that under probate or letters of administration, the Court is not called upon to adjudicate the title of the property dealt with in the Will. That, there were four witnesses to the execution of Exhibit 2 and in ***Mathew Oommen*** vs. ***Suseela Mathew***[6], the Supreme Court observed that there is no requirement in law that a scribe cannot be an attesting witness. That, P.W.2 has not only identified the signature of the testator on the Will, her cross-examination could not demolish the identity or the sound health of the testator. That, all conditions of a valid Will are fulfilled and hence, the Appeal deserves a dismissal.

9. Having heard Learned Counsel for the parties, I have also considered the averments and examined all documents on record.

10. The question that falls for consideration before this Court is; Whether the Probate granted by the Learned Trial Court was correct, the last Will and testament of the testator being compliant with all legal requirements?

11. In the first instance, the question of the applicability of the provisions of the Succession Act to the State of Sikkim is to be addressed. In this context, apposite reference is made to the Division Bench decision of this Court in ***Sonam Topgyal Bhutia*** vs. ***Gompu Bhutia***[7]. The High Court deemed it essential to consider the question as to whether Buddhists in Sikkim can legally make testamentary disposition, although the point was not specifically averred by any of the parties in their pleadings or otherwise, it

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[5] AIR 1994 Kerala 85
[6] (2006) 1 SCC 519
[7] AIR 1980 Sikk 33

came up during the hearing of the appeal and it was observed that the question would go to the root of the matter. Concluding the discussions, the High Court observed as follows;

> **"27.** But though there is no legislation in Sikkim relating to Wills, the Courts in Sikkim have followed and applied the provisions of the Indian Succession Act, 1925 in all matters relating to Wills including granting of Probates and Letters of Administration. The question, therefore, is whether the provisions relating to Wills in the Indian Succession Act, 1925, which have never been formally adopted in or extended to Sikkim by any formal legislative authority are to be regarded as laws in force in Sikkim? Salmond has defined law as a body of principles recognised and applied by the State in the administration of Justice and as to consist of "of the rules recognised and acted on by Courts of justice". Holland has defined law as "a rule of external human action enforced by a Sovereign political authority." Therefore, the provisions relating to Wills in the Indian Succession Act, 1925, having so long been "recognised" "applied" and "acted on" by the Courts of justice in Sikkim in the administration of justice in matters relating to Wills, are also to be regarded as Laws in force in Sikkim.
>
> …….
>
> **29.** Following this decision, I would hold that not only the provisions relating to the execution, interpretation or effect of Wills in the Indian Succession Act, 1925, but all the provisions therein relating to Wills including the provisions relating to grants of Probate and Letters of Administration and also appeals and other proceedings therefrom have become the laws of Sikkim. As held by the Sikkim High Court in Jas Bahadur Rai v. Putra Dhan Rai "if this is characterised as making of laws by Courts, it may be pointed out that the very same thing was done by the Courts in India during the early British period when legislative laws in India were scanty and the Courts in India freely followed and adopted the principles of the English law in deciding points not covered by the provisions of the Indian Laws in force", and that India being then a country almost empty of legislative laws, "the void was to a great extent filled by the Courts through their decisions by importing the principles of English Law, both common and statutory". It has been further held in Jas Bahadur Rai's case that the Courts in Sikkim will have to continue to do that amount of law-making until such time when direct legislative laws will begin to hold and occupy the field.**"**

(i) Hence, the Court held that all provisions regarding execution of Wills, interpretation or effect of Wills, including the provisions relating to grant of probate, Letter of administration,

appeals and other proceedings in the Succession Act have becomes laws of Sikkim.

(ii) The argument of Learned Senior Counsel for the Respondents No.2 to 5 that the Registration Rules (*supra*) gains precedence over the Succession Act being an old protected law, cannot be countenanced for the reason that the two Statutes operate in completely different fields. Section 63(c) of the Succession Act deals with the execution of unprivileged Wills, while the Registration Rules is confined to the registration of Deeds executed.

(iii) Now, in light of the pronouncement of this Court in ***Sonam Topgyal Bhutia*** (*supra*) it is essential to turn to the provisions of Section 63(c) of the Indian Succession Act, 1925, which provides as follows;

> "**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 it 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 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.**
>
> [emphasis supplied]"

Thus, the Will is required to be mandatorily attested by two witnesses who ought to have seen the testator sign on the Will.

(iv) The word 'attest' has been considered and dealt with in ***N. Kamalam (Dead) and Another*** vs. ***Ayyasamy and Another***[8] where the Supreme Court observed that;

> **"26.** ……
> ……. It is, therefore, necessary first to ascertain the meaning of the word 'attest' independent of the statute and adopt it in the light of the extended or qualified meaning given herein. The word 'attest' means, according to the *Shorter Oxford Dictionary* 'to bear witness to, to affirm the truth of genuineness of, testify, certify'. In *Burdett* v. *Spilsbury* [(1842-43) 10 Cl & F 340 : 8 ER 772] Lord Campbell observed at p. 417:
>
> > 'What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness.'
>
> The Lord Chancellor stated,
>
> > 'the party who sees the will executed is in fact a witness to it, if he subscribes as a witness, he is then an attesting witness'.
>
> The ordinary meaning of the word would show that an attesting witness should be present and see the document signed by the executant, as he could then alone vouch for the execution of the document. In other words, the attesting witness must see the execution and sign. Further, attestation being an act of a witness, i.e., to testify to the genuineness of the signature of the executant, it is obvious that he should have the necessary intention to vouch it. The ordinary meaning of the word is thus in conformity with the definition thereof under the Transfer of Property Act before it was amended by Act 27 of 1926. Before that amendment, admission of execution by the executant to a witness who thereupon puts his signature cannot make him an attestor properly so called, as he not being present at the execution, cannot bear witness to it; a mere mental satisfaction that the deed was executed cannot mean that he bore witness to execution.
> ……..**"**

(v) Despite the insistence of Learned Senior Counsel for the Respondents No.2 to 5 that P.W.2 was also an attesting witness to Exhibit 2, a perusal of Exhibit 2 indicates that there is

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[8] (2001) 7 SCC 503

only one attesting witness to the execution of the Will, being P.W.3. The relevant portion of the Will is extracted hereinbelow for quick reference;

> **"DEED OF WILL**
>
> ……..
>
> 1. Witness Sd/-
> (T. R. BARFUNGPA)
> R/o Nam Nang, Gangtok, East Sikkim
>
> I have examined the testator and found him in sound disposing mind and as having fully understood the contents of the Will.
>
> Sd/-
> **(DOCTOR)**
> (Dr Akithla Nadikpa)**"**

(vi) P.W.2 has thus not signed as an attesting witness nor did she have such intention as is evident from her deposition discussed below. P.W.2 has in her evidence admitted that the testator was not previously known to her and she was informed by his son, her former work associate, that the elderly man was his father, the testator, P.O. Pazo. There was no other identification of the testator by P.W.2. She further went on to admit in cross-examination that she was unaware whether the person who signed on Exhibit 2 was P.O. Pazo or somebody else. As pointed out by Learned Senior Counsel for the Appellant, the identity of the testator becomes suspect. In the teeth of such admission, Learned Senior Counsel insists that P.W.2 is also an attesting witness which is indeed astounding. Besides, the evidence of P.W.2 being vacillating, reliance on it would lead to a travesty of justice. In this context, it is relevant to notice that in her evidence-on-affidavit, she stated that on the request of P.O. Pazo she visited his residence at Nam Nang on 06-08-2008. Contrarily, under cross-examination by Counsel for the Appellant, she admitted that prior

to the relevant day she had not met P.O. Pazo and did not know him. That, the testator was identified by Palden Pazo as his father and she also admitted that Palden Pazo had asked her to come to the Court and depose. That, she had come to the Court to help Palden Pazo. She did not know the date of execution of the Exhibit 2, neither did she remember the contents of Exhibit 2 although she stated that it was a Will. It was her further admission that she did not examine the eyes of the testator on the relevant day, neither did she examine him in respect of his mental health as according to her she was not an expert in that field. She was not able to enlighten the Court as to whether the testator was visually challenged in the year 2008 as she stated that she did not know about it. Learned Senior Counsel had relied on the decision of the Supreme Court in ***Mathew Oommen*** (*supra*), however it is relevant to notice that the Court held therein that for attestation what is required is an 'intention' to attest, which in the case (*supra*) was clear from the statement of P.W.1, who was the scribe of the Will and had categorically stated that he had signed both as an attestor and scribe. The Supreme Court was therefore of the view that the requirement of attestation of Will by two witnesses was fully met in the said case.

(vii) In direct contradiction to the above position, P.W.2 has categorically stated that she had not signed on Exhibit 2 as a witness, neither did she sign on it as an attesting witness, but she affixed her signature merely as a Doctor. The evidence of P.W.2 thus reveals that she had no intention of attesting the document or its execution. The Deed of Will where she has affixed her signature after the witness T. R. Barfungpa P.W.3, indicates that, she had

examined the testator and found him in sound disposing mind as well as having understood the contents of the Will. The statement above however is in contradiction to her cross-examination, where she has stated that she did not examine the mental health of P.O. Pazo as she was not an expert in that field. P.W.2 thus is not only an unreliable witness which can be concluded from the contradictory statements made by her evidence in her deposition, but she is by no stretch of the imagination an attesting witness, as she had no such intention as admitted by her.

(viii) It is an undisputed fact that the testator was an octogenarian, but his mental faculties or physical abilities went untested by any Doctor to allay the apprehensions raised by the Appellant, which was the duty of the propounder, the onus being cast on him. Apart from which the mandatory requirements of Section 63(c) of the Succession Act are lacking as already discussed. In ***Janki Narayan Bhoir*** vs. ***Narayan Namdeo Kadam***[9] the Supreme Court held;

> **"10.** …… On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (*c*) of Section 63 of the Succession Act. ……. In a way, Section 68 gives a concession to those who want to prove and establish a will in a court of law by examining at least one attesting witness **even though the will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act**. ……**"** [Emphasis supplied]

(ix) Although claims of registration of document have been made on perusal of Exhibit 2, this too is not in terms of Rule 7 of the Registration Rules as the attesting witness to Exhibit 2 was not

[9] (2003) 2 SCC 91

before the Registering Authority to vouch for the veracity of the Will. For convenience, the Rule is extracted hereinbelow;

> **"PROCEDURE TO BE OBSERVED IN THE REGISTRY OF DEEDS**
>
> 7. The person or persons executing the deed or his or their authorised representative with one or more witnesses to the execution of it, shall attend at the Registrar's office and prove by solemn affirmation before the Registrar the due execution of deeds upon which the Registrar shall cause an exact copy of the deed to be entered in the proper register and after having caused it to be carefully compared with the original shall attest the copy with his signature and shall also cause the parties or their authorised representative in attendance to subscribe their signatures to the copy and shall then return the original with a certificate under his signature endorsed thereon specifying the date on which such deed was so registered with REFERENCE to the book containing the registry thereof and the page and number under which the same shall have been entered therein.**"**

P.W.3 who was witness to the execution of Exhibit 2 was not even present when the document was said to have been registered.

(x) The argument of Learned Senior Counsel for the Respondents No.2 to 5 pertaining to the role of the power of attorney holder relying on the ratio of ***Man Kaur*** (*supra*) merits no discussion considering that, P.W.2 has only stated what was averred in her evidence-on-affidavit with no new facts inserted neither was the Respondents able to establish that she was unaware or that she did not have personal knowledge of the matter.

(xi) It may be true that Respondent No.1 and P.W.3 have nothing to gain from Exhibit 2, nevertheless when the mandatory legal requirements are not complied with, it casts a shadow of doubt on the veracity of the document. In addition to the above shortcomings even if a broad view is to be taken of the term 'attested', then too, the evidence of P.W.2 reveals that she was unaware of the contents of Exhibit 2, by virtue of which she cannot

therefore be considered a witness to the execution of the document or an attesting witness. The doubts pertaining to the mental faculties and physical abilities of the testator have already been discussed above.

12. Taking into consideration the entirety of the facts and circumstances of the case and the discussions that have consequently ensued, this Court is of the opinion that execution of the Will Exhibit 2, fails to comply with the legal mandate, augmented by the fact that the doubts and apprehensions raised by the Appellant have not been addressed by the propounder.

13. In ***Shivakumar and Others*** vs. ***Sharanabasappa and Others***[10] the Supreme Court held that;

> **"11.11.** We may also usefully refer to the principles enunciated in *Jaswant Kaur* [*Jaswant Kaur* v. *Amrit Kaur*, (1977) 1 SCC 369] for dealing with a will shrouded in suspicion, which were duly taken note of by the High Court in its impugned judgment [*Surjitinder Singh* v. *Jaswant Kaur*, 1975 SCC OnLine P&H 48 : AIR 1975 P&H 377], as follows : (*Jaswant Kaur case* [*Jaswant Kaur* v. *Amrit Kaur*, (1977) 1 SCC 369], SCC p. 373, para 9)
>
> > "9. *In cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant*. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then *the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator*. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will." (emphasis supplied)

14. In that view of the matter, the impugned Judgment and Order is not sustainable in law and the same is accordingly set aside.

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[10] (2021) 11 SCC 277

15. Consequently, Probate granted in respect of the Will, Exhibit 2, in favour of the Respondent No.1 is also hereby set aside.

16. No order as to costs.

17. Copy of this Judgment be sent to the Learned Trial Court for information, along with its records.

(Meenakshi Madan Rai)
Judge
19-05-2023

Approved for reporting : **Yes**

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