



\* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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+ **FAO 137/2008 and CM APPL. 3872/2011 (stay)**

BANWARI LAL (DECEASED) THROUGH L.R'S MAYA DEVI

.....Appellant

Through: Mr. Akshit Mago and Mr. Vipul Saini, Advocates.

versus

SHIV CHARAN & ORS

.....Respondents

Through: Mr. Raghunandan Sharma, Advocate for Respondent No.1.

**CORAM:**

**HON'BLE MR. JUSTICE MANOJ KUMAR OHRI**

**JUDGMENT**

1. The present appeal challenges the order dated 30.11.2007 passed by the learned ADJ in PC No. 56/06. *Vide* the impugned order, the Trial Court allowed the underlying petition and granted letters of Administration *qua* the registered Will dated 03.03.1989 executed by late *Sh. Jhullu Mal*.

2. The said petition was filed by the testator's children, namely *Sh. Shiv Charan*, *Smt. Urmila Devi*, and *Smt. Harwati Devi* (hereinafter referred to as the "petitioners"). The same was opposed by the testator's remaining two sons, *Sh. Banwari Lal* and *Sh. Prem Shankar* (hereinafter referred to as the "objectors").



3. The present appeal has been preferred by the legal heirs of the objector/late *Sh. Banwari Lal*. Neither the co-objector/late *Sh. Prem Shankar* nor his legal heirs have joined in challenging the impugned order.

4. Briefly stated, the facts relevant for the adjudication of the present appeal are as follows:

Late *Sh. Jhullu Mal* (hereinafter referred to as the “testator”) passed away at the age of about 90 years on 30.12.1990. A registered Will dated 03.03.1989, of which the petitioners are the beneficiaries, was propounded and the underlying petition under Section 228 of the Indian Succession Act, 1925 (hereinafter the “Act”) was filed regarding the same. The objectors challenged the petition, stating that the aforesaid Will was not the last Will of the testator. They instead produced an unregistered Will dated 28.11.1990, which bequeaths the immovable properties concerned in favour of the three brothers, namely the objectors and the petitioner/*Sh. Shiv Charan*, while bequeathing only certain quantities of gold and silver in favour of the sisters, namely the remaining petitioners, *Smt. Urmila Devi*, and *Smt. Harwati Devi*.

5. Learned counsel appearing for the objector/late *Sh. Banwari Lal*'s heirs, while assailing the impugned order, contends that the unregistered Will dated 28.11.1990 is the last Will and testament of the testator. It is contended that the mode and manner of the execution of the propounded Will dated 03.03.1989 are highly doubtful, pointing to material contradictions in the testimonies of the petitioner/*Sh. Shiv Charan* (PW-2) and the attesting witness/*Sh. Tilak Raj* (PW-3). Learned counsel also calls into question the credibility of the attesting witness, stating that he was an interested witness who had known the family for 35 years and had purchased an adjacent property from the testator. It is further submitted that



the mandatory provisions of Section 63 of the Act and Section 68 of the Indian Evidence Act, 1872 have not been satisfied as the second attesting witness was not even examined. Furthermore, he contends that the testator's signatures in the concerned Will are inconsistent. Learned counsel also argues that the Trial Court erroneously observed that the probate petition filed by the objector *qua* the subsequent unregistered Will dated 28.11.1990 was dismissed on merits, as no such document was placed on record. Lastly, it is contended that the underlying petition failed to comply with the verification requirements under Section 281 of the Act, and was improperly filed and decided under Section 228 of the Act, which provision applies strictly to Wills executed abroad.

6. *Per contra*, learned counsel appearing for the petitioner/*Sh. Shiv Charan*, while supporting the impugned order, submits that the Will dated 03.03.1989 is a registered document which specifically records the testator's dissatisfaction with the objectors. It is submitted that the credibility of the attesting witness/*Sh. Tilak Raj* (PW-3), is not diminished merely because he knew the family or purchased property from the testator, nor is the non-examination of the second attesting witness fatal since the execution and attestation of the registered Will were sufficiently proved through the examined attesting witness. Furthermore, the dismissal of the probate proceedings *qua* the unregistered Will dated 28.11.1990 has attained finality due to the same not being assailed, and as such, the legal heirs of the objector are merely attempting to grab the concerned properties by raising frivolous grounds in the present appeal. Regarding the technical objection concerning Section 228 of the Act, it is submitted that the nomenclature of the provision used in the petition may be ignored as the substantive requirements for the grant of letters of Administration were duly satisfied.



Lastly, in respect of the stipulations under Section 281 of the Act not being met, it is submitted that this plea was not raised before the Trial Court and cannot be introduced belatedly at the present appellate stage.

7. I have heard the learned counsels for the parties and carefully examined the record.

8. The impugned order notes that the registered Will dated 03.03.1989 was attested by two individuals: *Sh. Ramesh Kumar*, who was not examined, and *Sh. Tilak Raj*, who was examined as PW-3. It has been contended that PW-3 was an interested witness, having close professional and financial connections with the petitioner, *Sh. Shiv Charan*. To substantiate this contention, the deposition of PW-3 needs to be referred to.

PW-3 deposed that he was familiar with the family of the testator as he had purchased a property from him and was his neighbour. He stated that the petitioner/*Sh. Shiv Charan*'s son, namely *Sh. Kewal Kishan*, had been working with him for the past 8-9 years. He also stated that at the time of the execution of the concerned Will, the testator had asked him to accompany the testator to the chambers of the scribe of the Will, namely *Sh. S.S. Dhingra*, Advocate, and the witness had obliged. He denied the suggestion that he was deposing at the instance of the petitioner/*Sh. Shiv Charan* as he was having business relations with him and his son. He also denied the suggestion that he was in close contact with the petitioner, being his immediate neighbour. During cross-examination, he denied the suggestion that he was working in partnership with the petitioner's son and was therefore deposing falsely.

In the opinion of this Court, it is but natural to expect a testator to call upon familiar and trusted individuals from his immediate neighbourhood to witness the execution of his Will, rather than relying on complete strangers



for the fear that the former may be deemed 'interested'. On a careful perusal of the testimony of PW-3, nothing has come on record to show that PW-3 is a direct or indirect beneficiary of the propounded Will. On the contrary, the testimony of PW-3 reads as consistent, credible, and natural. Therefore, there appears to be no reason to discard the same.

9. Section 63 of the Act deals with the execution of unprivileged Wills and mandates attestation of the same by two or more witnesses. Section 68 of the Indian Evidence Act, 1872 deals with the proof of execution of a document required by law to be attested and states that such a document shall not be used as evidence until at least one attesting witness has been called for the purpose of proving its execution, subject to certain conditions. In the present case, PW-3 was examined to prove the execution of the Will. PW-3 deposed that, in his presence, the scribe of the Will explained the contents of the Will to the testator and inquired whether he wanted any changes made to the Will, to which the testator replied that it had been drafted as per his instructions. Thereafter, the testator signed the Will in PW-3's presence at point 'A'. The witness then signed the Will at point 'B', whereafter the second attesting witness, *Sh. Ramesh Kumar*, also signed the Will at point 'C'. Subsequently, they went to the Office of the Sub-Registrar to get the Will registered, where the testator signed the document before the Sub-Registrar and also affixed his thumb impression on it. PW-1 proved the Will as Ex. PW-3/1. During cross-examination, he denied the suggestions that the Will was not executed by the testator and that the testator had not signed it in his presence. The Trial Court was correct in holding that the attesting witness had proved the execution of the Will satisfactorily. Having held the testimony of the attesting witness PW-3 to be reliable, this Court is of the opinion that the contention regarding non-compliance with Section 63



of the Act and Section 68 of the Indian Evidence Act, 1872 due to the non-examination of the second attesting witness, is meritless. There is no requirement in law to examine both attesting witnesses if one is available and proves the due execution.

10. A specific contention has been raised that the Trial Court erroneously assumed that the probate petition regarding the subsequent unregistered Will dated 28.11.1990 was dismissed on merits without its judicial record being on file. In this regard, the impugned order notes that both the objectors had admitted that the petition for grant of letters of Administration/probate *qua* the said Will was dismissed after trial, and no review/revision or appeal was preferred against that judgment. The Trial Court further observed that although the concerned judgment was not placed on record by the objectors, the dismissal had attained finality due to the conduct of the parties in not preferring any appeal against the same. Notably, the said judgment has not been placed on record before this Court, either. The Court of Probate is only concerned with the question as to whether the propounded Will of a deceased person was duly executed and attested in accordance with the law and whether at the time of such execution the testator had a sound disposing mind. This Court, while seized of the present appeal, is only concerned with determining whether the Trial Court was justified in granting letters of Administration based on the registered Will dated 03.03.1989 or not.

11. It may also be worthwhile to mention at this stage that one of the two objectors, *Sh. Prem Shankar*, had filed a suit bearing no. 699/2002 seeking cancellation of the testator's Will dated 03.03.1989, and the same was dismissed *vide* judgment dated 08.09.2015. An appeal against the said decision was filed, bearing no. RCA 1152/16, and the same was also



dismissed *vide* judgment dated 13.07.2018. It has been stated that a second appeal has been filed and notice is yet to be issued in the same.

12. Although the issue of the testator's sound disposing mind was argued before the Trial Court and is dealt with in detail in the impugned order, neither have any grounds on this aspect been pleaded in the present appeal, nor have any arguments on this point been included in the short note of contentions that has been filed.

13. It has been contended that the mode and manner of execution of the concerned Will is suspicious due to material contradictions in the testimony of the petitioner/*Sh. Shiv Charan* (PW-2) and the attesting witness/*Sh. Tilak Raj* (PW-3).

14. The first specific allegation in this regard is that the attesting witness stated that the contents of the Will were narrated by the testator, while simultaneously admitting that the testator had lost his voice nearly 2 years prior due to surgery.

In this regard, the scribe of the Will, *Sh. S.S. Dhingra*, Advocate (PW-1) has deposed that the testator had instructed him to draft a Will on his behalf and, accordingly, he did so. After getting the Will typed, he read over the contents of the same to the testator and explained them to him in the vernacular. After understanding the same, the testator signed the Will in the advocate's office in the presence of two attesting witnesses. The attesting witness/*Sh. Tilak Raj* (PW-3) deposed that the Will was prepared prior to him and the testator visiting the advocate's chambers, where the advocate explained the contents of the Will to the testator in the witness' presence. PW-1 inquired from the testator as to whether he wanted any changes made to the Will, to which the testator replied that it was made as per his instructions.



The petitioner/*Sh. Shiv Charan* (PW-2) deposed that the testator was operated upon in 1987 and after the operation, the voice of the testator ‘went down’ but he was still able to ‘perform all jobs’. He denied that the testator was unable to move and was not able to speak and hear. Further, PW-3 deposed that while the testator had undergone surgery in 1987, he had not ‘completely’ lost his voice. Furthermore, the Trial Court has noted that the record shows that despite the surgery in 1987, the testator actively participated in the proceedings of Suit No. 889/1989. He had been appearing in person in that suit on every date until 07.08.1990. His presence is marked in person even on 07.08.1990, whereas he died on 30.12.1990. On 26.11.1990 he did not appear in person, and only on 01.02.1989 a request was made for adjournment on the ground that he was not feeling well. Otherwise, the record shows that after framing of issues he was appearing in the Court on each and every date and the suit abated due to his death and not due to his incapability to lead evidence in that case.

Thus, the contention that he was unable to communicate or make his wishes known *qua* the Will is not supported by the record.

15. The next specific allegation is that the attesting witness gave mutually destructive versions regarding the place of execution, by stating at one stage that the Will was signed at the advocate’s office and at another that it was signed before the Sub-Registrar. I find no merit in this contention. It is very normal and believable that a Will is first signed at the office of the advocate who is the scribe and then signed again at the office of the Sub-Registrar for the purpose of registration. The process of registration involves this sequence of events and there is nothing contradictory about these statements. A perusal of the deposition of the attesting witness clearly shows that he has stated that the testator signed the Will at the office of PW-1, and then ‘also’



signed the said document before the Sub Registrar. PW-1, too, has deposed that the testator first affixed his signature to the Will in PW-1's office, and later in the office of the Sub-Registrar.

16. Regarding the allegation that the signatures of the testator are different from one another, the Trial Court relied on the testimony of the scribe/*Sh. S.S. Dhingra* (PW-1), who identified the signature of the testator at three places at points 'A', put in his chamber, and the signatures at points 'C', put at the time of registration. PW-1 also identified the thumb impression of the testator at point 'D'. This was further corroborated by the attesting witness/*Sh. Tilak Raj* (PW-3), who identified the signature of the testator at point 'A' as having been put in his presence, as well as the signature and thumb impression at points 'C' and 'D' put before the Sub-Registrar. The Trial Court after perusing the testimonies of the scribe and the attesting witness, found the execution of the Will to be duly proved. I find no reason to interfere with this finding, as the minor alleged differences in signatures, especially considering the testator's advanced age at the time, do not override the consistent ocular evidence of the witnesses who were present at both the time of execution and registration.

17. Further, the Trial Court noted that the testator had been residing with the petitioner/*Sh. Shiv Charan* for about 21 years prior to his death, during which period the petitioner served and looked after the testator, whereas relations with the objectors were so strained that they had even filed partition suits against their father during his lifetime. The Trial Court also correctly observed that if the testator had any intention to give any property to the objectors, he would have compromised those suits or partitioned the properties during his lifetime. This strained relationship is explicitly reflected in the registered Will dated 03.03.1989 itself, wherein the testator



recorded his dissatisfaction with the conduct of the objectors as the reason for executing a fresh Will.

18. The Trial Court also rightly emphasized that the Will dated 03.03.1989 was a registered document, which specifically revoked an earlier registered Will of 1981. It noted that while registration by itself does not prove genuineness, it is an additional factor that cannot be ignored, particularly when the subsequent Will dated 28.11.1990 produced by the objectors is unregistered. Furthermore, the scribe/*Sh. S.S. Dhingra*, Advocate, had been representing the testator in his previous litigations against the objectors, and there was no reason to disbelieve his testimony that he drafted the Will on the instructions of his old client. Since the execution of the Will was fully established by the statements of the scribe and the attesting witness, the Trial Court rightly held that there was nothing unnatural in the testator bequeathing his properties to the petitioners.

19. Before parting, the technical objections raised regarding the misapplication of Section 228 and non-compliance with the stipulation in Section 281 need to be dealt with. Regarding the first contention *qua* Section 228 of the Act, this Court is of the opinion that the mere nomenclature of a petition ought not to vitiate the entire proceedings before the Trial Court, considering that the Court otherwise possessed the inherent jurisdiction to grant the relief that was sought. It is also worth mentioning that the underlying petition was filed in the year 1993, i.e., over 30 years ago, and this objection was raised for the first time only before this Court. It is trite law that procedure is the handmaiden of justice and procedural technicalities should not be allowed to defeat the cause of substantive justice. Insofar as the contention regarding Section 281 of the Act is concerned, it is sufficient to note that a bare reading of the provision reveals that it only states that



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where an application is made for probate, the petition shall also be verified by at least one of the witnesses to the Will 'when procurable'. The inclusion of the qualifier 'when procurable' clearly indicates that the requirement is directory in nature and not mandatory. Notably, this plea, too, was never raised by the objectors before the Trial Court. In the opinion of this Court, having failed to agitate this procedural grievance at the initial stage, the plea cannot be permitted to be raised for the first time at the appellate stage. Consequently, both the technical objections raised as above are rejected.

20. Considering all the above, I find no infirmity or illegality in the impugned order and the present appeal is accordingly dismissed.

21. The present appeal, along with pending application(s), is disposed of in the above terms.

**(MANOJ KUMAR OHRI)**  
**JUDGE**

**MAY 14, 2026**

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