



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

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+ **FAO 348/2008**

GYAN ANAND

.....Appellant

Through: Mr. Ashutosh Dubey, Ms. Rajshri Ashutosh Dubey, Mr. Abhishek Chauhan, Mr. Amit P. Shahi, and Mr. Rishabh Bhardwaj, Advocates.

versus

STATE OF N.C.T. OF DELHI & ORS.

.....Respondents

Through: Mr. Sarojanand Jha, Mr. Suraj Malik, Ms. Rajreeta Ghosh, Mr. Rahul Kumar, and Ms. Muskan Saxena, Advocates.

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

JUDGMENT

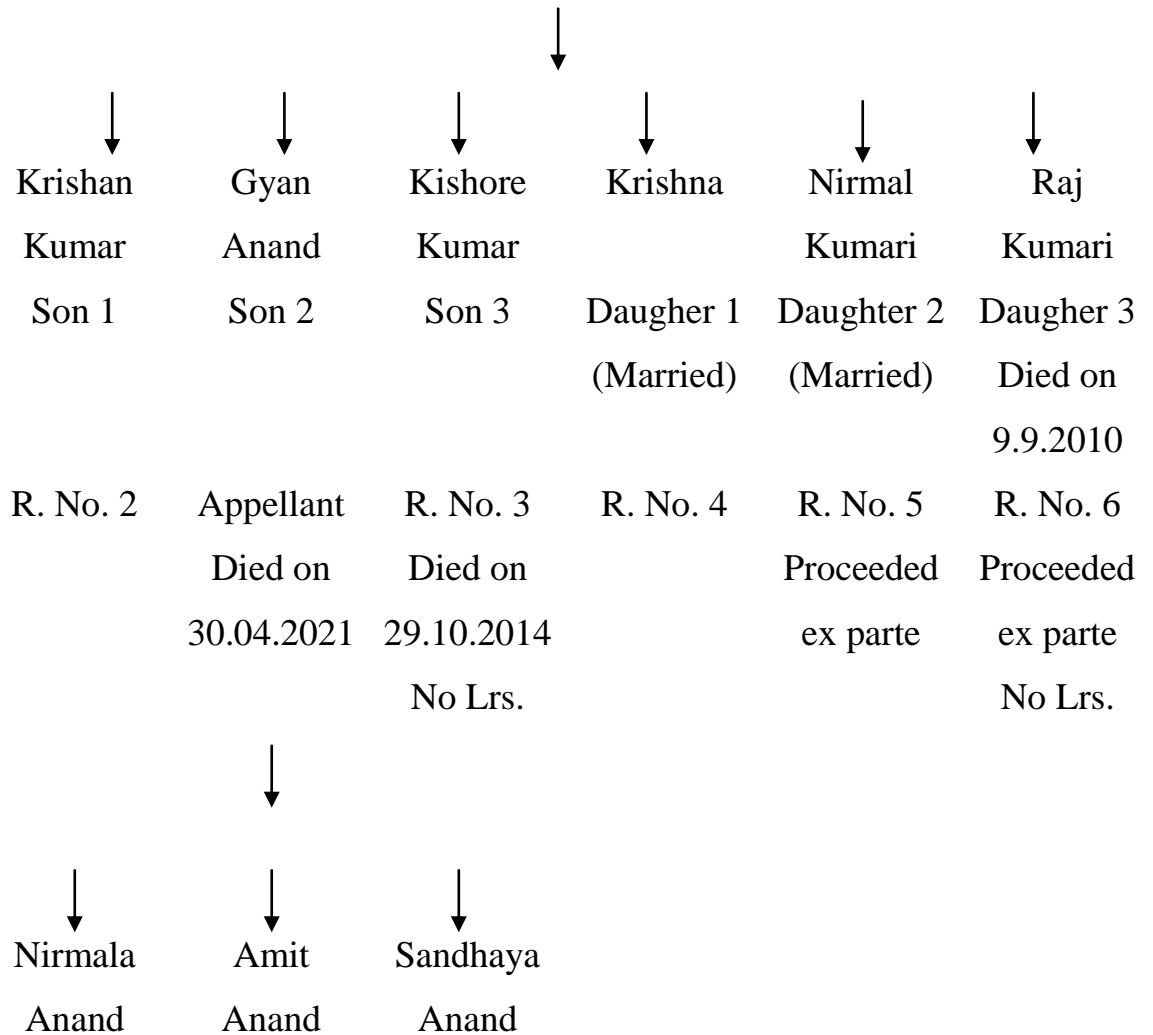
1. The issue involved in the present appeal is the validity of the Will dated 10/20.09.2004 (hereinafter referred to as the "Will") stated to be executed by the late *Ved Ram Anand*. The appellant propounded the said Will by filing the underlying petition under Section 276 of the Indian Succession Act, 1925 (hereinafter referred to as "ISA"), claiming himself to be the beneficiary. *Vide* the impugned judgment, however, the Trial Court dismissed the said petition by observing that the said Will was shrouded by suspicious circumstances and that the petitioner had failed to prove that it



was duly executed as the last and final Will of the testator.

2. Before proceeding further and for the sake of convenience, the genealogical table of the testator is extracted hereunder:

FAMILY TREE
VED RAM ANAND
(Father)
Died on 28.11.2004





(Wife) (Son) (Daughter)

3. *Vide* the Will, the testator bequeathed his sole property, i.e., property bearing no. 109, *Gagan Vihar, Delhi – 110051*, in favour of the appellant, with a right of residence to the testator's other son, i.e., *Kishore Kumar @ Raju*, in half portion of the ground floor of the said property. It was stated that *Kishore Kumar @ Raju* would be entitled to use the same for residential purposes and would not be entitled to sell or rent out the same. The testator's moveable properties in the form of cash, bank account balance, receivables, paintings, works of art, books, were also bequeathed to the appellant. It was directed that the expenses to be incurred on the marriages of the testator's two daughters, namely *Nirmal Kumari* and *Raj Kumari*, were to be met from the funds realised from the sale of the terrace rights of the aforementioned property. There is no mention of the testator's other children in the Will other than the direction that his daughters and sons-in-law will not have any right in any of his assets and the aforesaid property.

4. Pertinently, the Will was preceded by another Will dated 12.07.1993, wherein the testator's sole property was bequeathed to the appellant and *Kishore Kumar @ Raju* in equal shares. The testator had specifically excluded his eldest son, i.e., *Krishan Kumar*, and eldest daughter, *Krishna Kumari*, from his estate.

5. Respondent nos. 2 and 4, i.e., *Krishan Kumar* and *Krishna Kumari*, are the only contesting respondents, the others having not filed any objection either before the Trial Court or in the present appeal.

6. The impugned judgment is contested by the appellant, who contends



that the Trial Court failed to appreciate that the Will was the testator's last and final testament and was attested by two witnesses, i.e., *Mahendra Pal Rastogi* and *Dr. K.K. Rathi*. The former of the two also appeared and testified to its execution.

7. As per the case of the appellant, the testator, after executing the first Will whereby respondent nos. 2 and 4 were excluded from his estate, took further steps towards expressing his intent by disowning respondent no. 2 *vide* a declaration executed on 05.07.1993. Another declaration was made on 20.04.2004 whereby the testator, in fact, reiterated his desire to disown respondent no. 2 on account of misbehaviour and the ill-treatment meted out to him. In fact, a public notice dated 17.07.2004 was also published in the newspaper, namely *Rashtriya Sahara*, disowning respondent no. 2 as well as his wife and two children from all of the testator's moveable and immovable assets. On being excluded from the bequeathment, respondent no. 2 filed a suit for partition bearing CS No. 480 of 2004, wherein a preliminary decree of partition was passed on 11.08.2006. The appellant, on his part, sought propounding of the Will by filing the underlying probate petition as well as by challenging the preliminary decree for partition by way of RFA 569-71/2006. The impugned judgment having been passed in the probate petition, the RFAs also came to be disposed of by observing that the preliminary decree of partition would remain subject to outcome of the present appeal.

8. Learned counsel for the appellant contends that the Trial Court failed to appreciate that the Will in question was duly proved, having regard to Section 63 of the ISA read with Section 68 of the Indian Evidence Act, 1872



(hereinafter referred to as the “Evidence Act”), as the execution of the Will was proved by one of the attesting witnesses, namely *Mahendra Pal Rastogi*. Although the second witness initially could not appear, an application filed seeking his examination through Local Commissioner was dismissed by the Trial Court on 06.08.2007 without assigning any cogent reason. It is also contended that the exclusion of respondent nos. 2 and 4 from the bequeathment is justified and sufficiently explained. In this regard, learned counsel has referred to the earlier Will dated 12.07.1993, the disownment declarations dated 05.07.1993 and 20.04.2004, as well as public notice dated 17.07.2004 published in *Rashtriya Sahara* newspaper. The testator has not only mentioned about the ill-treatment meted out to him at the hands of respondent no. 2, but also went on to bar respondent no. 2 from conducting the testator’s final rites.

9. *Per contra*, learned counsel for the respondents contended that, firstly, Dr. *K.K. Rathi* has been wrongly mentioned as an attesting witness. In fact, he had only certified, and could only be considered to have certified, that the testator was in good health and mind. Secondly, even the attestation by *Mahendra Pal Rastogi* does not establish the due execution of the Will in question. Section 63 of the ISA requires attestation of a Will by at least two witnesses. Further, Section 68 of the Evidence Act, which provides the mode of proof for the execution of a document required by law to be attested, stipulates that the document cannot be used as evidence unless one of the attesting witnesses is called to prove its execution. In terms of Section 71 of the Evidence Act, in case the attesting witness denies or does not recollect the execution of the document, its execution would need to be



proved by other evidence.

10. To say that a Will has been duly executed, the requirements mentioned in clauses (a), (b), and (c) of Section 63 of the ISA are to be complied with, i.e., (a) the testator has to sign or affix his mark to the Will, or it has to 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 at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a Will; and (c) the most important point with which we are presently concerned in this appeal, the Will has to be attested by two or more witnesses, and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have 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 has to sign the Will in the presence of the testator. (Ref: Janki Narayan Bhoir Vs. Narayan Namdeo Kadam¹).

11. From the above, it is crystal clear that one of the requirements to establish the due execution of a Will is its attestation by at least two more witnesses. In Janki Narayan (*supra*), the Supreme Court further explained how a document required by law to be attested can be proved. The relevant paras are extracted hereunder:

“10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said section, a document required by law to be attested shall not be used as

¹ (2003) 2 SCC 91



evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. It flows from this section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. 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. It is true that Section 68 of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63. Although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. 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 will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of the other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in



meeting the mandatory requirements of Section 68 of the Evidence Act.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of Section 68 of the Evidence Act, to meet a situation where it is not possible to prove the execution of the will by calling the attesting witnesses, though alive. This section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. Section 71 has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for the reasons best known, have not been summoned before the court. It is clear from the language of Section 71 that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of Section 63 of the Succession Act, it cannot be said that the will is proved as per Section 68 of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the will is to avert the claim of drawing adverse inference under Section 114 Illustration (g) of Evidence Act. Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of Indian Evidence Act. Section 71 is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But Section 68 is not merely an enabling section. It lays down the necessary requirements, which the court has to observe before holding that a document is proved. Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility, cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time Section 71 cannot be read so as to absolve a party of his obligation under Section 68 read with Section 63 of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go-by to the mandate of law relating to proof of execution of a will."



12. Admittedly, in the present case, only one of the witnesses, namely *Mahendra Pal Rastogi*, appeared and testified. A perusal of his deposition would show that, on account of business relations, he deposed that he was called by the testator on 20.09.2004 and informed that the Will in question had been executed on 10.09.2004 in favour of the present appellant. The testator further requested the witness to put his signature on the Will. On being explained the contents of the Will in vernacular, the witness put his signature on the Will. On the next day, i.e., 21.09.2004, he along with the testator and the testator's grandson, *Amit Anand*, went to the office of the other witness, i.e., *Dr. K.K. Rathi*, and on the said date, the second witness also put his signature on the Will in the presence of the first witness. In cross-examination, he admitted that the signatures of the executant appearing at points 'A' to 'G' were not put in his presence. One and a half pages of the Will were already written, and the remaining part of the Will was written in his presence on 20.09.2004. He also admitted that at the time of execution of the Will on 10.09.2004, he was not present.

13. The appellant also examined himself as PW-2 and deposed about the execution of the first Will in the year 1993, as well as the execution of the Will in question on 10.09.2004. The Will in question was exhibited as Ex. PW-1/A. The witness further deposed that the Will was handwritten in the handwriting of the testator. He, however, did not state in detail about the attestation by the two witnesses. In cross-examination, he denied the suggestion that the Will was not executed in his presence. He stated that the signatures appearing at points 'E', 'F', and 'G' of page 2 of the Will were made on 20.09.2004.



14. *Amit Anand*, the grandson of the testator, appeared as PW-3 and admitted that the Will was not executed in his presence, however, he stated about his presence at the time of the attestation of the Will by the second witness, i.e., *Dr. K.K. Rathi*.

15. The appellant also summoned one *Ashok Kumar*, a clerk from *Canara Bank, 74, Janpath, New Delhi*, as PW-4 to place on record the Account Opening Form of the testator's bank account. The witness, in his cross-examination, admitted that the signatures at point 'A' on the said document were not put in his presence.

16. The above would show that the Will in question was executed in two parts. The first part, whereby the testator had bequeathed his estate for the benefit of the appellant and *Kishore Kumar @ Raju*, was executed on 10.09.2004. The testator had put his signatures on both the pages at points 'A' to 'G'. While the first attesting witness, i.e., *Mahendra Pal Rastogi*, had appended his signature on 20.09.2004, the second witness appended his signature as well as a certification of the testator's good health and mind. There is no dispute that *Mahendra Pal Rastogi* had signed as an attesting witness, the status of *Dr. K.K. Rathi* as the second attesting witness is doubted.

17. Two questions arise for consideration: first, whether *Dr. K.K. Rathi* can be considered an attesting witness; and second, whether the execution of the Will stands proved in terms of the deposition of the attesting witness, i.e., *Mahendra Pal Rastogi*. The mere signing of a document does not amount to attestation within the meaning of Section 63 of the ISA. The word 'attestation' means to bear witness to a fact. The essential conditions of a



valid attestation are: (i) two or more witnesses have seen the testator sign the instrument; and (ii) each of them has signed the instrument in the presence of the testator. The witness putting his signature has to append the same with *animus attestandi*, which is the necessary ingredient to prove the factum of attestation. The appending of the signature by Dr. K.K. Rathi does not satisfy the requirement of proving either the attestation or the execution of the document. The said witness merely appended his signatures certifying that the testator was in good health. Needless to observe, the appending of his signature was done on 21.09.2004.

Coming to the second issue, concededly, *Mahendra Pal Rastogi* had attested the Will on 20.09.2004. In his evidence, he admitted that he was not present at the time of the execution of the Will on 10.09.2004. The execution and attestation having been done on different dates, the attesting witness not being present at the time of execution, cannot be held to satisfy the requirement of proof of execution. Even the appellant's reliance on Section 65(c) of the Evidence Act is misplaced, as neither the appellant nor his son have stated to be present at the time of execution. Though the appellant in his examination-in-chief did not state of his being present at the time of execution, however, in cross-examination he stated otherwise. The Will is an unregistered document.

18. The Trial Court noted that the appellant's deposition in cross-examination is contradictory not only to *Mahendra Pal Rastogi's* examination-in-chief but also to the record. The Trial Court also noted a contraction in the statement of the appellant, as he had stated that the signatures at points 'E', 'F', and 'G' at page 2 of the Will were put on



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20.09.2004, whereas the same were actually put on 10.09.2004.

19. As noted above, respondent no. 2 had filed a partition suit, in which the statement of the appellant was recorded, wherein the appellant had admitted that the Will in question was not written in his presence. The Trial Court, on an overall assessment, reached the conclusion that not only was the Will shrouded by suspicious circumstances, but the alleged Will is also not in conformity with the requirements of Section 63(c) of the ISA.

20. In the considered opinion of this Court, even on a re-appreciation of the facts and the evidence on record, there is no reason to differ from the conclusion reached by the Trial Court. Accordingly, the impugned judgment is upheld, and the present appeal is dismissed.

(MANOJ KUMAR OHRI)
JUDGE

MAY 26, 2026

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