IJCRT.ORG ISSN : 2320-2882

INTERNATIONAL JOURNAL OF CREATIVE RESEARCH THOUGHTS (IJCRT)

An International Open Access, Peer-reviewed, Refereed Journal

Legal Aspect Concerning Validity of A WILL

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Abstract: This study has been undertaken to investigate the legal aspect concerning validity of a will with respect to Indian Evidence Act,1872. The paper discusses on how to prove a will before the court of law, rationale of a witness to prove the execution of a will, admissibility of a will under suspicious circumstances.

Index Terms **– Will, admissibility, Indian evidence act 1872, proving of will**

Introduction

Indian Evidence Act, 1872[1](Hereinafter to referred as Act) provides the procedural law under which relevancy and admissibility of a particular evidence is laid down. Evidence can be in form of documents, e-documents, eye-witnesses, recordings, etc. The law lay down in the evidence act helps parties to prove their case and also it provides the Court, the principles that has to applied when an evidence has to be considered in order to decide acquittal or conviction. Section 68 of the Act provides for requirements of a valid will. It helps the Court to ascertain the legality and validity of the will.

Will

A will is a document that is prepared by a person when he makes a decision to dispose the property after his death. It is a written document that provides information related to future owner of the property after the death of the testator. During the life time of the testator, he has the discretion to change or alter or cancel or modify the will according to his discretion. A Will brakes the chain of succession which is a natural consequence after the person is dead. Will is an intention of a person in writing that is made and executed as per requirements of law governing it. Succession Act provides the requirement of a valid will. A will must be mandatorily registered with the appropriate authority.

[1] Indian Evidence Act, 1872, Acts of Parliament, No., (1872).

Proving of "Will"

A valid Will is one that is executed and signed by the testator after reading and understanding the contents of the will, understanding the consequences of the will, has signed the will without any fraud, undue influence or coercion and has consented freely. Section 61 of the Act specifically provides that a Will or any part of the Will, executed under pressure, coercion, undue influence or force of any other form that is taking away the own free will of the testator to execute, them such Will is void. In Case of *Parvati v. Sheo*[2], the Court held that mere persuasion or flattery is not a force, and thus, it is not void under Section 61 of Act. In case of *Craig v. Lamoureux*[3], the burden of proof is on one alleges that the Will is fraud or made and executed under force. Thus, it is the propounder of the Will who has to prove the legality of the Will to the satisfaction of the Court and that the Will presented before the Court is last and final will signed and executed by the testator.

Section 63 of the Act mandates that a valid Will must be at least attested by two witnesses and all the witnesses must be present when the testator is signing or affixing his mark on the will. Section 68 of the Act provides that a will is proved through examination of at least one of the attested witness if he is alive.

In case of *Ajit Chandra Majumdar v. Akhil Chandra Majumdar*[4], the Court held that a Will hand written by the testator himself and then signed by him is more credible in comparison to one that is either written by someone else or is typed one as the mind of the testator is more apparent when he himself writes the will.

Rationale behind calling Attesting Witness to prove the execution of a Will-

Moreover, the Rule of Best Evidence requires that a party should produce the best evidence possible, for example, if there is an oral evidence, then the party should produce direct evidence. Similarly if it is documentary evidence, then it should be primary evidence. If it is both oral and documentary evidence, then documentary evidence should be proved. This is the best evidence rule. Section 165 is an aspect of inquisitorial proceedings. In a suit or proceeding, a judge cannot remain dormant rather he has to do complete justice in the case and therefore he will also play a proactive role in order to find out the real truth of the relevant facts and fact in issue. A judge has been given broad u/s 165 to ask any questions in any form to the parties or to the witnesses at any stage of the proceedings and the parties cannot object to any such question or to any such summons. The court has the power to ask questions even upon irrelevant facts. However the purpose of the above is to find the proper proof of the relevant facts. The judgment cannot be based upon any irrelevant fact. The purpose of Section 165 is to find the indicative evidence or the evidence of evidences in order to make the evidences proved by the parties more intelligible.

[2]Parvati v. Sheo, AIR 1926 Oudh 262
[3]Craig v. Lamoureux, 1920 AC 349
[4]Ajit Chandra Majumdar v. Akhil Chandra Majumdar, AIR 1960 Cal 551.

Admissibility of Will under the Evidence Act

Admission will be allowed only if it is proved that the evidence is a relevant fact. The court has to allow the evidence which is a relevant fact for the evidence. Court will examine what fact you want to prove, that how that fact will be relevant. For every case, one has to prove main facts and for proving such main facts, one has to prove many other relevant facts. When the party proposes to give the evidence of any fact, the court will always be concerned as to how is this fact going to be relevant in this case because the court cannot decide a case on the basis of irrelevant facts. So there has to be some relevant facts only which have to be proved properly. The court will allow the evidence only if it seems to be relevant facts.

Section 63 of the Indian Succession Act, 1925 provides for the statutory provisions for the procedure of execution of an unprivileged will. It is an indispensable requirement for the purpose of the Evidence Act as well as Succession Act that the testator has to put his signature or affix his mark on the will in the presence of two or more persons. These persons are called attesting witness. However, their immediate physical presence at the time of execution of will is neither intended by the legislature through this provision nor made mandatory by the courts. Further w.r.t. admissibility of a will, Section 68 states that if an instrument or document is required by law to be attested bears the necessary attestation. What this Section prohibits is a proof of execution of a document otherwise than by the evidence of an attesting witness is available. Section 68 applies only where the execution of a document has to be proved or when the allegation is that the executant was not in a fit state of mind to know the real nature of document.

Following are the ingredients of Section 68-

Documents required by law to be attested are used in evidence as follows;

i. At least one attesting witness must be called for proving its execution, if such witness is-
    a. Alive
    b. Subject to the process of the Court, and
    c. Capable of giving evidence
ii. But, if the document is a registered one and is not a will,
iii. Then it is not necessary to call an attesting witness,
iv. Unless its execution is denied by the person who has executed it.

Therefore after analysing the essentials of Section 68, it can be said that this Section is not permissive or enabling. The principle underlying this section is that execution of the will must be proved by at least one attesting witness, that it is only an attesting witness who is entitled to prove the execution of the will. The bare provision of the Section in itself uses the words, “if there can be an attesting witness alive”. It means that at least one attesting witness is required. In case where the attesting witnesses are dead, the will can certainly be proved in the manner provided for proof of a document. Therefore Section 68 is rather a

concessionary provision as it gives a concession to the party to prove the will through only one attesting witness. Therefore this particular provision is a special section, otherwise as per the general rule u/s 63; a will is required to be proved with the help of two attesting witnesses. If the will can be satisfactorily proved by only one attesting witness, then there is no need of other attesting witness. Moreover, if the parties wants to avail this concession, the attesting witness who will be examined in order to prove the will, must satisfy the absence of other attesting witness, i.e. he has to satisfy that there was a due and proper execution on behalf of the other attesting witness also. If such attesting witness fails to satisfy the requirements of proving by the other attesting witness, then such will is not considered to be proved and therefore not admissible in the eyes of the law. This is due to the fact that will is not an ordinary document which can be proved simply through signature of the testator, but the requirements under Section 63 of the Succession Act needs to be complied without any fail.

In case the attesting witness fails to prove the will on behalf of both the attesting witness including him, then the other attesting witness is called on to supplement the evidence adduced by the other attesting witness (previous one) to fulfil the requirements of Section 63 of the Succession Act and 68 of the Indian Evidence Act. This position of law was affirmed by the honourable High Court of Delhi in the case of *Jagdish Prasad v. State, 2015.*

Further if the attesting witnesses cannot be found, then Section 69 of the Evidence Act comes to rescue. It provides that if the attesting witness cannot be found, or if both of them are dead, then it must be proved that the attestation of a witness is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.

Section 71 of the Evidence Act further reduces the burden on the party relying on the will to comply with the rigors of Section 68. Section 71 provides that, “if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence”. The ingredients of Section 71 are as follows-

i) If the attesting witness-

   a. Denies or

   b. Does not recollect the execution of the document

ii) The execution may be proved by other evidence, i.e. it may be proved under Sections 69 and 70.

When an attesting witness has denied all knowledge of the matter, the case stands as if there was no attesting witness, and the execution of the document may be proved by other independent evidence. The situations anticipated u/s 71 can be when the attesting witness fails to recognise the signature of the testator denies his own signature or is not able to recall anything about the execution of the will.

Primary and Secondary Document

Section 62 and 63 of the Indian Evidence Act provides for Primary and Secondary Evidence. The original document is called primary evidence and the photocopy and any other form of that document is called secondary evidence. Document is something which is in permanent form, any written, voice recording, hard disc, video recording etc. all which is in a permanent form is called a document, i.e. in a record form. Documentary evidence is of two types-

1. Primary Evidence
2. Secondary Evidence

Evidence is anything which is allowed by the court to be proved before it in judicial proceedings for the purpose of proving or disproving the existence of a relevant fact or a fact in issue.

Section 62 of the Act lays down that the Original document is a primary evidence. In several transactions, it may be two original copies for example, in rent agreement, it may be two copies of original rent agreement and both were signed by the landlord as well as tenant, therefore both are primary evidence. Whenever a document is recorded in several original forms, each of the original form is called the primary evidence of the document. Explanation I relates to several original documents and not to the cases where the same transaction is partly recorded in one document and partly in another.

Manner in which the Propounder of 'Will' has to discharge the burden albeit the proving of the 'Will':

The Hon'ble Supreme Court and various High Courts in various cases has provided mandatory conditions of a valid Will and the requirements that Court checks when it has to make decision regarding admissibility of Will. In this regard, the case of *Girija Datt Singh v. Gangotri Datt Singh* is relevant, where the Supreme Court has laid down a three-point test for admissibility of Will. It observed that *Firstly*, the propounder of the will has to prove that the testator had signed the will in presence of at least two witness, *Secondly*, the will has to be signed or marked by the Testator and the same is seen by the attesting witnesses or if the witnesses were not present or had seen signing or marking then, such attesting witnesses must depose that they were told by the Testator that he himself has signed the Will, *Thirdly*,for proving the Will before the Court, only one attesting witness is required to depose before the Court about the execution and signing of the Will. The same was reiterated in case of *Janki Narayan Bhoir v. Narayan Namdeo Kadam*, where the Court held that the document of Will is not to be considered as evidence until one of the attesting witness is examined by the Court for the purpose of proving its execution.

In case of *Banga Bihara v. Baraja Kishore Nanda*[5], the Court observed that requirement of at least one attesting witness for proving the execution of Will is must and Court has to examine such attesting witness where such witness is alive, where it is practically possible for the witness to give deposition and when he is capable of giving evidence. However, if the document is not a will and is not registered under Indian Registration Act, 1908, then the requirement of examination of one attesting witness is not required.

Admissibility of a Will made 30 years ago

According to Section 90 of the Act, when a document is presented before the Court that is claimed to be 30 or more years old or proved to be 30 or more years old and is taken from the custody of a person, then it is discretion of the Court to consider any part of the documents or marks or signature that is in the hand writing of a particular person to be a valid document written by that person. Moreover, in case the document is attested and executed then the Court has the discretion to presume that document attested and executed by that particular person.

However, for admissibility of the Will, the requirements of Section 63 r / w 68 of the Act are to be mandatorily met. In this regard the case of Bharpur Singh v. Shamsher[6]is relevant where it was held that the presumption under Section 90 of the Act is not applicable to Will. Thus, the discretion of the Court under Section 90 is not applicable in cases of will.

Admissibility of Will executed under Suspicious Circumstances

If a Will appears to be made under Suspicious Circumstances, then the propounder of the Will has to prove and explain to the satisfaction of the Court that circumstance is normal and then the Court decides depending on the cases to case basis. The question that the execution of the Will is made by Suspicious Circumstances is a question of facts and thus it changes from case to case on the basis of facts and circumstances of each case.

In *Joga Singh v. Samma Kaur*[7], the Supreme Court of India had held that the question of suspicious circumstances would be a question of fact, and thus, it would have to be determined based on the facts and circumstances of each case, and thus, no straightjacket formula could be given for the same.

Additionally, the suspicions that may arise with regards to a will cannot be proved based on the sole fact that the propounder of the Will bears the signature of the testator, or that the testator was of a sound mind. Thus, in case the will raises the suspicion of the Court, the onus to prove that the Will is legitimate and signed under legitimate circumstances gets shifted on the propounder, who will then have to establish the legitimacy of it.[8]

[5]BangaBihara v. Baraja Kishore Nanda, (2007) 9 SCC 728.
[6]Bharpur Singh v. Shamsher, (2009) 3 SCC 687.
[7]Joga Singh v. Samma Kaur, (1996) 1 Cur CC 641 (P&H).
[8] Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369.

Conclusion

Therefore, the concept of will under the Indian Evidence Act is an important one, and more so in the present context, wherein the litigation has seen a manifold increase, as well as the fact that the people are more literate and aware of such things. The court has to look at a number of factors while determining the admissibility and the legitimacy of a Will, according to the provisions of the Evidence Act, for example, the date of the will, the mental state of testator, whether there existed any suspicious circumstances or not, etc.

A valid Will is one that is executed and signed by the testator after reading and understanding the contents of the will, understanding the consequences of the will, has signed the will without any fraud, undue influence or coercion and has consented freely. However, it is the proving of so many variables that is a challenge that the Court has to undertake so as to come at the correct conclusion.