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Legal Aspects Concerning the Proving of a Will

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Abstract

This paper enlightens about the legal provisions and aspects involved in proving a will based on Section 63 of Indian Succession Act 1925 read with Section 68 of Indian Evidence Act 1872. The paper talks about the procedure to be followed while proving the will in various situations and gives a comparison between the two Acts.

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Introduction

A 'Will' is an instrument by which a person makes a disposition of his property to take effect after his death and which is in its own nature ambulatory and revocable during his life. A 'Will' is an obstruction in the line of succession. Alternatively, 'Will' may be defined as a continuous act of gift up to the moment of death.[2] In civil law, 'Will' is also known as 'Testament' or 'Elogium'. Lord Penzance in the matter of *Leimage v. Goodban*[3] held that, a 'Will' is an aggregate of a man's testamentary intentions so far as they are manifested in writing duly executed according to the requirements of the statute for time being in force. In the absence of a statute, a 'Will' may be in any form, oral or in writing. A document can be said to be a 'Will' only when it is executed with an intention to regulate succession after death. This paper specially emphasizes on proving unprivileged will as defined under section 63 of Indian Succession Act, 1925 which limits the testator of the will to men and women engaged in armed forces of the country and also set forth the following conditions for the execution of the will:

1. Testator shall sign the will himself or shall be signed by someone else in his presence as per his direction.
2. Such signature shall be placed that it will appear that it was intended to give effect to the will.
3. The will shall be attested by at least two witnesses.

Hypothesis

Section 63 of Indian Succession Act 1925 read with Section 68 of Indian Evidence Act 1872 provide for substantive procedure for proving a will.

[2]Tagore v. Tagore, (1872) 9 Beng LR 377
[3]LR 1 P&D 57

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Research Methodology

The research methodology adopted in this paper is purely doctrinal, thus so, to a large extent the research undertaken by the researcher is mostly library-based. The researcher has written this research paper in the light of government Acts, authoritative books, case studies and reports. The researcher has critically reviewed the content each of these literary works on which she has relied upon.

Proving a will

In the matter of, *Gaurdhouse v. Blackburn*[4], it was held that, a 'Will' that has been read over to the testator in a proper manner, and the contents of which have been brought to the notice of the testator before execution, must in the absence of fraud or coercion, be presumed to have been approved by the testator. In view of the provisions of Section 63 of the Indian Succession Act, 1925 ('ISA') read with Section 68 of the Indian Evidence Act, 1872 ('IEA'), 'Will' is required to be proved by examining at least one attesting witness if he is alive.[5] According to Section 63 of the ISA, a Will needs to be attested by two or more witnesses, each of whom must have seen the testator sign or affix his mark to the 'Will' and further, each of the witnesses to the 'Will' should have signed the 'Will' with the requisite animus attestandi. Likewise, according to Section 68 of IEA, a document required by law to be attested has to be proved by calling for the purpose of proving its execution at least one attesting witness.

In the matter of *Vesakha Singh v. Jat Singh*[6], it was held that, an obligation has been put by law upon the propounder to show by cogent (and satisfactory) evidence that the 'Will' on which the propounder relies was signed by the testator; and, the testator was in sound disposing

[4](1866) LR 1 P&D 109
[5]Rajinder Singh &Anr v. Subedar Hari Singh &Ors, AIR 2000 P&H 257
[6] (1996) 114 PLR 45

mind when he signed the 'Will'; and, he understood the nature and effect of the dispositions; and, he placed his signatures on the document of his own freewill (and accord), without any force, coercion or undue influence.

According to the purport of Section 61 of the ISA, a 'Will' or any part of a 'Will', the making of which has been caused by fraud or coercion, or by such importunity which takes away the free agency of the testator, is void. However, persuasion and flattery is not forcible importunity.[7]

The burden of proving that fraud was played upon the testator in obtaining the execution of the 'Will' is upon the person who alleges it.[8] Similarly, the burden of proving that the 'Will' was executed under undue influence rests upon the party who alleges it.[9]

The onus probandi in each case lies upon the propounder, and the propounder has to discharge it by satisfying the conscience of the court that the instrument propounded is the last and final 'Will' of the testator and it was executed by the testator sans any force, coercion or undue influence.[10]

In the matter of*, Ajit Chandra Majumdar v. Akhil Chandra Majumdar*[11], it was held that there is always good reason to presume that holographic 'Will' is a genuine 'Will' because the mind of the testator in physically writing the 'Will' by himself is more apparent in a holographic 'Will' than where his signatures alone appear on a typed script or on a script already written by someone else. It is important to note that, a 'Will' on a printed form, with the blanks filled in the handwriting of the deceased is not a holographic 'Will'.

[7] Parvati v. Sheo, AIR 1926 Oudh 262
[8] Prakash Narain Mishra v. D.D.C, Kanpur, 1984 ALJ 1028
[9] Craig v. Lamoureux, 1920 AC 349
[10] Barry v. Butlin, (1836) UKPC 9
[11] AIR 1960 Cal 551

Procedure to be followed by the Propounder to Discharge the Burden while Proving a Will

In the matter of *GirijaDatt Singh v. Gangotri DattSingh*[12], the Hon'ble Supreme Court of India laid down the following three-point test in this regard:

1. The propounder of the 'Will' has to prove that the 'Will' was signed by the testator in the presence of two attesting witnesses;
2. The attesting witnesses should have seen the testator sign the 'Will' or else, the attesting witnesses should depose that they were been told by the testator that the 'Will' is that of the testator and it is the testator who has signed the 'Will'; and,
3. It is not necessary that both or all the attesting witnesses to the 'Will' must be examined to prove the 'Will', rather, at least one attesting witness should be called to prove the due execution of the 'Will'.

Similarly in the case of *Janki Narayan Bhoir v. Narayan Namdeo Kadam*[13], the Hon'ble Supreme Court of India held that, Section 68 of the IEA necessitates that a document which is required by law to be attested shall not be used as evidence, until and unless, at least one attesting witness to that document has been called in evidence for the purpose of proving its execution. Thus, according to the mandate of Section 68 of the IEA, if there be an attesting witness to a document, alive and capable of giving evidence, then that attesting witness subject to the process of the court has to be necessarily examined before the document required by law to be attested can be used as evidence.

In the case of *BangaBihara v. Baraja Kishore Nanda*[14], it was held that, if a document is required by law to be attested, it shall not be used as evidence until one attesting witness at

[12] AIR 1955 SC 343
[13] (2003) 2 SCC 91
[14] (2007) 9 SCC 728

least has been summoned 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. However, it is not necessary to call an attesting witness in proof of the execution of any document, not being a 'Will', which has been registered in accordance with the provisions of the Indian Registration Act, 1908, unless its execution by whom-so-ever it purports to have been executed is specifically denied.

Comparison of Provisions Relating to Will under Indian Succession Act and Indian Evidence Act

1. Section 63 of the ISA declares the substantive law regarding the execution of an unprivileged 'Will' and it mandates that the testator has to sign or affix his mark in the presence of two or more attesting witnesses, it being not necessary that the two attesting witnesses should simultaneously be present to witness the execution of the 'Will'.
2. On a combined reading of Section 63 of the ISA and Section 68 of the IEA, it is clear as daylight that a person propounding the 'Will' must prove that the 'Will' was duly and validly executed, and this cannot be done by simply proving that the signature on the 'Will' is that of the testator but by also proving that the attestations made on the 'Will' are in the manner (and form) as required by clause (c) of Section 63 of the ISA.
3. Section 68 of the IEA does not say that both (or all) the attesting witnesses must be examined. However, at least one attesting witness has to be called to prove the due execution of the 'Will' as envisaged in Section 63 of the ISA. Although Section 63 of the ISA requires that a 'Will' has to be attested at least by two attesting witnesses, but, Section 68 of the IEA 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 is capable of giving evidence and subject to the process of the court.

4. Section 68 of the IEA gives a concession to those who want to prove and establish a 'Will' in the court of law by examining only one attesting witness, although, the 'Will' has to be attested by at least two witnesses as is mandatorily required by Section 63 of the ISA. What is significant to note is that, the sole attesting witness who is examined to prove the 'Will' should be in a position to establish the due execution of the 'Will'. If the sole attesting witness can prove the due execution of the 'Will' in terms of clause (c) of Section 63 of the ISA then the rule of attestation by two attesting witnesses as contemplated in Section 63 of the ISA shall stand fulfilled. The sole attesting witness who is examined to prove the 'Will', in his evidence has to satisfy the attestation of the 'Will' not only by him but also by the other attesting witness, in order to prove that there was due execution of the 'Will'. If the sole attesting witness who is examined, besides his execution does not, in his evidence satisfy the requirements of attestation of the 'Will' by the other attesting witness, then, such an attestation falls short of the attestation of the 'Will' as required by Section 63 (c) of the ISA, for a simple reason that the execution of the 'Will' does not merely mean the signing of it by the testator but rather it means the fulfilling of all the formalities contemplated under Section 63 of the ISA.[15]
5. Where one attesting witness examined to prove the 'Will' under Section 68 of the IEA fails to prove the due execution of the 'Will', then, the other available attesting witness has to be called to supplement the evidence of the erstwhile attesting witness 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 then there will be deficiency in meeting the mandatory requirement of Section 68 of the IEA.

[15]Jagdish Prasad v. State, FAO (OS) 355/2008, High Court of Delhi, Decision Dated: 03.03.2015 (Pradeep Nandrajog & Pratibha Rani, JJ.)

6. Section 68 of the IEA mandates that if an attesting witness to a 'Will' is alive then necessarily the 'Will' is to be proved by examining that attesting witness. However, Section 68 of the IEA has no application where there are no attesting witnesses alive or surviving.
7. Section 69 of the IEA comes into play when both (or all) the attesting witnesses to the 'Will' are dead (or cannot be found). Section 69 of the IEA states that, if both (or all) the attesting witnesses to the 'Will' are dead (or cannot be found) then the 'Will' is to be proved by proving that the attestation of at least one attesting witness to the 'Will' is in his handwriting, and that the signature of the testator on the 'Will' is in his own handwriting.
8. In the case of *Babu Singh & Ors Ram Sahay*[16], it was observed that, Section 69 of the IEA would apply in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. As per the mandate contained in Section 69 of the IEA the 'Will' is to be proved by proving the handwriting of the testator and that those of the attesting witnesses.
9. A 'Will' has to be executed in the manner required by Section 63 of the ISA. Section 68 of the IEA requires that a 'Will' has to be proved by examining at least one attesting witness. Section 71 of the IEA is another connected section which in a way reduces the rigours of the mandatory provision of Section 68 of the IEA. Section 71 is meant to lend assistance and come to the rescue of a party which had done its best to prove the due execution of the 'Will' but was let down by the attesting witnesses, who either denied the execution of the 'Will' or failed to recollect the fact of execution of the 'Will' by the testator.
10. Section 71 of the IEA establishes that if the attesting witness of the will rejects or does not recollect the execution of the Will, its execution may be proved using other

[16] (2008) 14 SCC 754

evidence. Section 71 of the IEA is a sort of safeguard introduced by the legislature to the mandatory provisions of Section 68 of the IEA, where it is not possible to prove the execution of the 'Will' by calling the attesting witnesses, though alive. Section 71 of the IEA can only be requisitioned when the attesting witnesses who have been called fail to prove the execution of the 'Will' by reason of either their denying their own signatures, or denying the signatures of the testator, or having no recollection as to the execution of the document ('Will').

11. Section 71 of the IEA has no application when one attesting witness has failed to prove the due execution of the 'Will' and the other attesting witnesses are available who can prove the execution of the 'Will' if they are called.
12. In the case of *Kunvarjeet Singh Khandpur Kirandeep Kaur &Ors*[17], it was held that, the period of three years (Article 137 of the Limitation Act, 1963) for institution of a petition for grant of probate commences from the point in time when the right to apply for probate accrues to the petitioner. Similarly, if a revocation is sought of grant of probate or letters of administration, the period of three years (Article 137 of the Limitation Act, 1963) should commence, at least from the date when the probate is granted, as once a probate is granted, the same operates in rem.[18]

Conclusion

The above interrelation between the Indian Succession Act and the Indian Evidence Act provides an amazing example of the relationship between substantial and procedural laws in India. The best way to prove a will is to follow the procedure under Section 68 of the Indian Evidence Act; it also is an effortless way to do so. It also reduces the frivolous litigations and benefits in the favour of the parties and also the court of law.

[17](2008) 8 SCC 463

[18]Maina Devi v. Rati Ram, FAO 225/2009, High Court of Delhi, Date of Decision: 30.11.2015 (Rajiv Shakdher, J.)