

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.61 of 2006

1.A. Ramkali, widow of Jawahar, aged about 50 years, R/o Village Budhatol, Post Pathaiti, Tahsil Pushprajgarh, District Anuppur, M.P.

1.B. Kuswa Bai, W/o Top Singh, S/o Jagat Singh, aged about 45 years, R/o Ghordeva Para, (Nagwahi), Tahsil Pendra Road, District Bilaspur (C.G.)

1.C. Jhalku Bai, W/o Daya, D/o Jagat Singh, aged about 40 years, R/o Ghordeva Para (Nagwahi), Tahsil Pendra Road, District Bilaspur (C.G.)

(Defendants)
---- Appellants

Versus

1. Hiraundiya Bai, widow of Bhagbali, aged about 65 years, R/o Nagwahi, Tahsil Pendra Road, District Bilaspur (C.G.)

(Plaintiff)

2. State of C.G. Through the Collector, Bilaspur (C.G.)

---- Respondents

For Appellants:	Mr. Rakesh Pandey, Advocate.
For Respondent No.1:	None present, though served.
For Respondent No.2/State: -	Mr. Rahul Tamaskar, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

05/10/2018

1. The substantial question of law involved, formulated and to be answered in this defendants' second appeal is as under: -

“Whether the learned lower appellate Court was justified in reversing the judgment of the trial Court by holding that registered Will dated 14-12-1980 has not been proved in accordance with Section 68 of the Evidence Act, particularly when the attesting witnesses were dead and the defendant has examined the Writer of the Will to prove the due execution?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown in the suit before the trial Court.)

2. Plaintiff Hiraundiya Bai filed a suit for declaration of title and possession stating inter alia that she be declared Bhumiswami of the suit land and be granted possession of the said land, as she is the title holder and being the ancestral property, she is entitled for the said relief which was opposed by the defendant by filing written statement that the will deed dated 4-12-1980 was executed in her favour by Late Bisahu – father of the plaintiff. The trial Court held that the plaintiff is not the Bhumiswami of the suit land, as the will Ex.D-3 was executed on 4-12-1980 in favour of the defendant and the defendant is in possession and on the basis of the will deed, the title of defendant Jagat Singh was declared. On appeal being preferred, the first appellate Court reversed the finding on the question of will by granting the appeal filed by the plaintiff against which this second appeal has been preferred in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.
3. Learned counsel for the appellants/defendants would submit that the finding recorded by the first appellate Court on the question of will is perverse and contrary to record, as the will was registered will and it has been proved by examining the scribe of the will as required under Section 69 of the Evidence Act, 1872.
4. None present for the plaintiff / respondent No.1, though served.
5. The property originally belongs to Bisahu who died on 11-10-1980 and the defendant set up his case on the basis of will deed dated 4-12-1980 (Ex.D-3). The attesting witnesses of the said will were Thakur Devsharan and Gayadin who were already dead on the date of institution of suit. In order to prove the will, the defendant examined scribe of the will Uttam Singh (DW-3). The trial Court held that Uttam

Singh has proved the execution as well as attestation of the will which has been reversed by the first appellate Court. The question is whether the will has been proved in accordance with law, particularly in view of Section 69 of the Evidence Act, 1872, as admittedly, both the attesting witnesses were not alive on the date of institution of suit. Section 69 of the Evidence Act, 1872, provides for proof when the attesting witness cannot be found and it states as under: -

“69. Proof where no attesting witness found.—If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the documents is in the handwriting of that person.”

6. Thus, Section 69 of the Evidence Act, 1872 provides for proof of will by proving the handwriting of one of the attesting witnesses and signature of executant of the document to be in the handwriting of that person.
7. Section 69 of the Evidence Act, 1872 came-up for consideration before the Supreme Court in the matter of **Babu Singh and others v. Ram Sahai @ Ram Singh**¹ in which Their Lordships held as under: -

“14. It would apply, inter alia, 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. Only in that event, the Will may be proved in the manner indicated in [Section 69](#), i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

15. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of [Section 63](#) of the Indian Succession Act and [Section 68](#) of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in [Section 69](#), must be proved.”

8. Neither Section 68 nor Section 69 of the Evidence Act 1872 postulates

¹ AIR 2008 SC 2485

the examination of scribe treating the scribe as attesting witness. The Supreme Court in the matter of N. Kamalam (Dead) and another v. Ayyasamy and another² held that the effect of subscribing a signature on the part of the scribe cannot be identified to be of the same status as that of attesting witnesses and observed as under: -

“26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, requiring attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe. ...

27. ... The animus to attest, thus, is not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself – this is again, however, not the situation existing presently in the matter under consideration. Some grievance was made before this Court that sufficient opportunity was not being made available, we are however, unable to record our concurrence therewith. No attempt whatsoever has been made to bring the attesting witnesses who are obviously available.

32. While it is true that Arunachalam, in the facts of the matter under consideration, did write the will and has also signed it but it is of utmost requirement that the document ought to be signed by the witnesses in order to have the statutory requirement fulfilled. Arunachalam has signed the document as a scribe not as a witness, if there were no signatures available as witness, probably we would have to specifically deal with such a situation and consider that aspect of the matter but presently in the fact situation of the matter under consideration, we have the advantage of two attesting witnesses, none of whom have been examined and the factum of their non-availability also has not satisfactorily been proved. The evidence of one person, namely, Arunachalam, cannot displace the requirement of the statute when Arunachalam himself has specifically identified himself as writer and not as a witness though in his evidence, he tried to improve the situation, but this improvement, however, cannot (*sic*) said to be accepted:

2 (2001) 7 SCC 503

the will thus fails to have its full impact and its effect stands out to be non est.”

9. Reverting to the facts of the present case, it is the case of the defendants that both the attesting witnesses have already died and not available for proving the will. In these circumstances, duty is cast on the defendants to prove the signature of the executant on the document that it is of his own and at least the signature of one attesting witness has to be identified in the manner known to law. Mere saying that the signature of attesting witness is of him may not be sufficient unless he produces the signature of the attesting witness on some admissible document and make both the signatures available for comparison by the court to find out whether the person acted as real witness, which has admittedly, not been done in the instant case. A careful perusal of the testimony of Uttam Singh (DW-3) (scribe) reveals, he has stated that he has written the will and read-over the will to Bisahu (testator) and at the time of execution of will, Thakur Devsharan and Gyadain were present and they have signed the will. In his cross-examination, he has admitted that he did not know Bisahu (testator) at the time of execution of will and did not identify the signature of one of the attesting witnesses by filing the admitted document containing the signature of one of the attesting witnesses and as such failed to identify the signature of either of the attesting witnesses and he has not proved the handwriting of the testator of the will as held by the Supreme Court in **Babu Singh** (supra) and in accordance with Section 69 of the Evidence Act, 1872.
10. As a fallout and consequence of the aforesaid discussion, it cannot be held that the first appellate Court is unjustified in reversing the finding of the trial Court qua the execution and attestation of will. The substantial question of law is answered against the defendant and in

favour of the plaintiff. The second appeal is dismissed. No order as to cost(s).

11.A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma