

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.16 of 2003

1. Pitamber Singh, S/o Jokhan Singh, Aged about 40 years
2. Ram Budhan, S/o Jokhan Singh, Aged about 38 years

Both R/o Village Nagara, Tahsil Pal, Distt. Sarguja (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Rattu Singh, S/o Karnu Singh, Aged about 50 years, Occupation Agriculture, R/o Vill. Nagara, Tah. Pal, Distt. Sarguja (C.G.)
2. State of Chhattisgarh, Through the Collector, Sarguja, Ambikapur (C.G.)

(Defendants)
---- Respondents

For Appellants: Mr. D.N. Prajapati, 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

08/10/2018

1. The substantial questions of law involved, formulated and to be answered in the plaintiffs' second appeal are as under: -

(i) Whether the finding of the learned lower Appellate Court that the will deed in question executed in favour of the defendants is in accordance with law, is erroneous as the same has been arrived at by placing burden of proof on the plaintiffs instead of the defendants, the propounders of the will?

(ii) Whether learned lower Appellate Court has wrongly reversed the well reasoned judgment of the trial Court and thereby failed to exercise the discretion vested in it under section 96 of the Code of Civil Procedure?

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

2. The plaintiffs, two in number, brought an action for declaration of their title, permanent injunction and for declaring the will dated 16-12-1984 as illegal stating inter alia that the suit property was originally self-acquired property of Gokul Singh and said Gokul Singh during his lifetime, kept his son-in-law Jokhan Singh as *gharjamai* and his daughter Andhiya Devi as *gharjiha* and during his lifetime, said Gokul Singh was in possession of the suit land. It was further pleaded that after the death of Gokul Singh, his widow Thakni Devi and his daughter Andhiya Devi were in possession of the suit land and after their death, the property came in the possession of Jokhan Singh and the plaintiffs are sons of Jokhan Singh. Since defendant No.1 got the suit land mutated on the basis of will dated 16-12-1984 executed by Smt. Thakni Devi, the instant suit was brought claiming aforesaid reliefs.
3. Defendant No.1 filed his written statement and averred that Thakni Devi had executed will dated 16-12-1984 in his favour out of love and affection and since then he is in possession of the suit land and as such, the suit deserves to be dismissed.
4. The trial Court after appreciating documentary evidence on record decreed the suit holding that the plaintiffs are owners of the suit property being successors of Thakni Devi and will dated 16-12-1984 executed by Thakni Devi in favour of defendant No.1 is not proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 69 of the Evidence Act, 1872.

5. On appeal being preferred, the first appellate Court reversed the finding and held that burden of proving the will was on the plaintiffs and will dated 16-12-1984 (Ex.D-1) is in accordance with law. Questioning that judgment, second appeal has been preferred by the plaintiffs in which substantial questions of law have been framed and set-out in the opening paragraph of the judgment.
6. Mr. D.N. Prajapati, learned counsel appearing for the appellants/ plaintiffs, would submit that the first appellate Court is absolutely unjustified in placing the burden of proof of will in accordance with law upon the plaintiffs, it is for the propounder of the will i.e. defendant No.1 who has to plead and establish proper execution and attestation of will in accordance with law. Therefore, the first appellate Court is absolutely unjustified in holding the will executed by Thakni Devi in favour of defendant No.1 to be proved, as such, the finding of the first appellate Court deserves to be set aside.
7. None present for respondent No.1 / defendant No.1, though served.
8. Mr. Rahul Tamaskar, learned Panel Lawyer, appeared for the State / defendant No.2.
9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost circumspection.
10. It is not in dispute that Thakni Devi was owner of the suit property and the plaintiffs are close relatives of Thakni Devi and have succeeded the property, but defendant No.1 had set up a plea that Thakni Devi has executed a will in his favour vide Ex.D-1 on 16-12-

1984 and one Ganga was also present at the time of execution of the said will.

11. The question for consideration would be, whether the will Ex.D-1 has been proved and established by defendant No.1 in view of the provisions contained in Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

12. It is trite law that a will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer *res integra*, that it carries with it an overwhelming element of sanctity. [See Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others¹]

13. In order to consider the plea raised at the bar, it would be appropriate to notice Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.

14. Section 63 of the Act of 1925 provides as under:-

“63. Execution of unprivileged Wills.—Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall 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 for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

¹ (2015) 8 SCC 615

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has 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 shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

15. As per the provisions of Section 63 of the Succession Act, 1925 for due execution of a will (1) the testator should sign or affix his mark to the will; (2) the signature or the mark of the testator should be so placed that it should appear that it was intended thereby to give effect to the writing as a will; (3) the will should be attested by two or more witnesses; and (4) each of the said witnesses must have seen the testator signing or affixing his mark to the will and each of them should sign the will in the presence of the testator.

16. The above-stated provision of attestation of will under Section 63(c) of the Succession Act, 1925 by two or more witnesses has been held to be mandatory by Their Lordships of the Supreme Court in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam².

17. Section 68 of the Evidence Act, 1872 provides as under:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as 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:

Provided that it shall be 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 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”

18. By the aforesaid provision, a document required by law to be attested to have its execution proved by at least one of the attesting witnesses if alive and it is subject to process of the court conducting the proceedings involved and is capable of giving evidence. However, proviso to Section 68 of the Evidence Act, 1872 is not available in case of will.

19. In the matter of Girja Datt Singh v. Gangotri Datt Singh³, Their Lordships of the Supreme Court have held that in order to prove the due attestation of will, the propounder of will has to prove that ‘A’ and ‘B’, the two witnesses saw the testator sign the will and they themselves signed the same in the presence of the testator. Their Lordships while considering Section 68 of the Evidence Act, 1872 further held that from the mere signature of two persons appearing at the foot of the endorsement of registration of will it cannot be presumed that they had appended their signature to the document as an attesting witness or can be construed to have done so in their capacity as attesting witness. It was pertinently observed as under:-

“In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for

3 AIR 1955 SC 346

truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.”

“One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.”

20. In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁴ the Supreme Court speaking through Gajendragadkar, J., elaborately laid down the principles relating to the nature and standard of evidence required to prove a will. It was held as under:-

“(1) Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since [Section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [Section 63](#) of the Evidence Act, 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.

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to

4 AIR 1959 SC 443

be discharged on proof of the essential facts which go into the making of the will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

21. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁵, Surendra Pal and others v. Dr. (Mrs.) Saraswati

⁵ (1977) 1 SCC 369

Arora and another⁶, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others⁷ and Jagdish Chandra Sharma (supra).

22. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another⁸, the Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

23. In Surendra Pal (supra), the Supreme Court while re-stating the guidelines regarding the nature and extent of burden of proof on the propounder of a will held that propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of the dispositions; that he put his signature to the testament of his own free will; and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. It was further held that in cases where the propounder has himself taken a prominent part in execution of a will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence.

24. The Supreme Court in Yumnam Ongbi Tampha Ibema Devi

6 (1974) 2 SCC 600

7 (2009) 4 SCC 780

8 (2017) 1 SCC 257

(supra) has clearly held that the attestation of will is not an empty formality. Highlighting the importance of attestation it was held it means signing a document for the purpose of testifying of the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi* and it was held as under:-

“13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator’s signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.”

25. In Janki Narayan Bhoir (supra), the Supreme Court while considering Section 63(c) of Succession Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of signature of the testator on the will was not sufficient, the attestation thereof is also to be proved as required by Section 63(c) of the Act Succession Act, 1925. It was observed as under: -

“10. Section 68 of the Evidence Act speaks of as to now 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 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 an 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 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 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 other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attention 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 attention 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.”

26. The principle of law laid down in Janki Narayan Bhoir (supra) has been followed with approval in Jagdish Chandra Sharma (supra) by which it was held as under:-

“52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held Janki Narayan Bhoir (supra) that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz., attestation by two attesting witnesses in the manner as contemplated therein. It was expounded that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required Under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will Under Section 68 of 1872 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.”

27. Reverting to the facts of the present case in light of the principle of law rendered by Their Lordships of the Supreme Court in the above-noted judgments (supra) qua execution and attestation of will by a testator, the following factual position would emerge on the face of record.

1. Testator Thakni Devi is said to have executed will in respect of the suit property in favour of defendant No.1 on 16-12-1984 which is unregistered will.
2. The said will is said to be attested by two attesting witnesses

Parsuram (DW-2) and Buturam (DW-3).

3. Both the attesting witnesses Parsuram and Buturam were examined before the trial Court as DW-2 and DW-3 respectively. Parsuram (DW-2), one of the attesting witnesses, has stated that he has signed Ex.D-1 and it was also signed by other attesting witness Buturam (DW-3) and another witness Ganga, and he has signed the will at the behest of Thakni Devi – testator of the will.
 4. Other attesting witness Buturam (DW-3) has also stated that on the will Thakni Devi had signed and it was also signed by him and other witness Parsuram (DW-2) and one more witness Ganga has signed the will.
 5. Remarkably, both the witnesses Parsuram (DW-2) and Buturam (DW-3) did not state that the testator has signed the will in their presence (Parsuram and Buturam) and they also omitted to say that they signed the will in presence of the testator.
28. From the aforesaid narration of facts, it is quite vivid that compliance of Section 63(c) of the Succession Act, 1925 is missing though strict compliance of the said provision is imperative. Defendant No.1 being propounder of the will must have proved that the testator has signed the will in presence of attesting witnesses Parsuram (DW-2) & Buturam (DW-3) and the attesting witnesses have also signed in presence of the testator. Section 63(c) of the Succession Act, 1925 clearly lays down the requirement of valid and enforceable will that it shall be attested by two or more

witnesses, each of them has seen the testator signing or affixing his mark to the will and each of the witnesses has signed the will in presence of the testator as held by the Supreme Court in H. Venkatachala Iyengar (supra) that a will has to be proved like any other document except that evidence tendered in proof of will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 apart from under Section 68 of the Evidence Act, 1872.

29. Analysing the facts of the present case, it would appear that defendant No.1 being the testator of the will has failed to prove the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of Evidence Act, 1872. Both the attesting witnesses Parsuram (DW-2) & Buturam (DW-3) did not state before the Court that testator Thakni Devi signed the will in their presence and they signed the will in presence of the testator. Mere signing of a will as a witness would not per se amount to compliance of Section 63(c) of the Succession Act, 1925 as *animo attestandi* is absolutely missing. In the matter of Bhagat Ram v. Suresh⁹, it has been held that to be an attesting witness it is essential that the witness should have put his signature *animo attestandi* for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. Therefore, this Court is fully satisfied that execution and attestation of will is not found established in accordance with law and defendant No.1 has failed to discharge his burden placed upon him by law to prove attestation

9 (2003) 12 SCC 35

of a will.

30. Apart from this, the first appellate Court is absolutely unjustified in holding that it is for the plaintiffs to establish execution and attestation of will in accordance with law. Defendant No.1, being propounder of the will, was duty bound to prove execution and attestation of will in accordance with law.
31. Consequently, I hold that defendant No.1 being propounder of will has failed to establish due attestation of will in accordance with Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, and the finding recorded by the first appellate Court deserves to be set aside.
32. As a fallout and consequence of the above-stated discussion, the substantial questions of law framed are answered against the defendant and in favour of the plaintiffs. The judgment & decree passed by the first appellate Court is set aside and that of the trial Court is restored. The second appeal is allowed leaving the parties to bear their own cost(s).
33. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge