

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 130 of 2003**

- Mst. Mantora Bai (Died) Through Legal Heir- Smt. Chitrarekha Bai, D/o Mantora Bai, W/o Udalram Dhruv, Aged About 39 Years R/o Village Sonewara, P.H. No. 68, Tahsil And District Dhamtari Chhattisgarh

---- Appellant**Versus**

1. Mst. Ganeshiya Bai W/o Manbodh Gond, Aged About 54 Years R/o Village Kanharpuri, Tah. And Distt. Dhamtari
2. State Of Chhattisgarh Through-Collector Dhamtari, Distt. Dhamtari Chhattisgarh

---- Respondents

For Appellant	:	Shri Bhaskar Payashi, Advocate
For Respondent No.1	:	Shri Vishnu Koshta, Advocate

S.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****04/09/2019**

This appeal is directed against impugned judgment and decree dated 30/11/2002 passed by the Additional District Judge, Dhamtari in Civil Appeal No.40-A/2002 by which, the judgment and decree dated 20/10/1997 passed by the Trial Court has been affirmed.

2. This appeal was admitted on following two substantial questions of law -
 - a) Whether both the Courts below are justified in dismissing the suit of the plaintiff holding there is no partition ignoring the admission of partition made by defendant No.1 in para 7 (b) of the written statement ?
 - b) Whether both the Courts below are justified in holding after having held that

the Will executed by Fagni Bai in favour of plaintiff-Mantora Bai is proved, then also the plaintiff is even not entitled for 2/3rd share in the suit property ?

3. The appellant / plaintiff filed a suit seeking decree of declaration, permanent injunction and mesne profits on the pleadings *inter alia* that the property in dispute belong to one Lachhan – father of plaintiff and defendant and after his death, the property devolved upon the plaintiff firstly, as according to the customary laws of succession, the plaintiff was residing in the parental house along with her husband, property of the deceased would wholly devolve upon the daughter and the son-in-law and secondly, on the basis that in any case, the mother of the plaintiff and defendant namely – Fagni wd/o of Lachhan had executed a Will on 25/09/1984 by which, she bequeathed entire property in dispute received by her from her deceased husband in favour of the plaintiff, by virtue of which, the plaintiff became entitled to the property in dispute to the exclusion of all, including her own sister – Ganeshiya Bai, the defendant.

4. The defendant – Ganeshiya Bai denied plaintiff's claim and allowed customary law of succession as pleaded by the plaintiff, came out with a case that the property in dispute was partitioned amongst the plaintiff, defendant and their mother 4-5 years before, in which, the defendant received 5.50 acres of land as her share and she was also allotted a share in the eastern part of the house and since then, the defendant is in possession. The defendant denied that any Will Deed was executed by Fagni Bai in favour of the plaintiff – Mantora Bai and the same was disputed as false and fictitious.

5. Learned Trial Court framed as many as 8 issues. Learned Trial Court held that the evidence led by both the parties prove that in the matter of succession, the parties are governed by Hindu Law of Succession. Learned Trial Court, however,

held that the plaintiff's case that there exists any custom or succession under which, the daughter living in the parental house is entitled to succeed to the property was not established and it was held that the plaintiff's claim could not be allowed. Learned Trial Court further held that, though, the Will Deed dated 25/09/1984 (Ex.P/1) was proved, it could not have any effect on the share of the defendant.

6. Aggrieved by the judgment and decree of the Trial Court, the appellant / plaintiff preferred an appeal. Learned lower Appellate Court affirmed all the findings of the Trial Court and dismissed the appeal giving rise to this Second Appeal.

7. Learned counsel for the appellant would argue that even if it is held that the plaintiff could not succeed in proving customary law of succession, in view of the finding recorded by the learned Courts below that the parties are governed by Hindu Law of Succession, the plaintiff is entitled to 1/3rd share in the property. The next submission is that both the Courts below have recorded concurrent finding of fact with regard to Will Deed dated 25/09/1984 (Ex.P/1). Having held so, the plaintiff was entitled to succeed to the share of her mother – Fagni Bai and thus, would be entitled to 2/3rd share in the property, if not the entire property, as claimed by her in the suit.

8. Learned counsel for the respondent firstly prays for framing of additional substantial question of law on the issue regarding proof of Will dated 25/09/1984 by contending that the Courts below have held the Will proved, even though, the legal requirement of proof of Will as mandated under Section 68 of the Indian Evidence Act, 1872 (for short 'the Act of 1872') and Section 63 (c) of the Indian Succession Act, 1925 (for short 'the Act of 1925') were not proved by the plaintiff and her witness. According to him, there is no clinching evidence that the testator of the

Will, at the time of its execution, was in a fit state of mind and health and was not acting under any undue influence or that it was not an outcome of any misrepresentation. If the evidence led by the plaintiff is tested on the touchstone on these legal requirement, it cannot be said that the plaintiff succeeded in proving the Will in her favour, so as to entitle her to the share of her mother – Fagni Bai, after Fagni Bai died in the year 1986.

He would next submit that the plaintiff came out with a case that the plaintiff is entitled to succeed to the entire property to the exclusion of the defendant, her case is based entirely on so called customary law of succession. Once the Court below recorded a finding that the plaintiff failed to prove such customary law of succession, the plaintiff was not entitled to any relief and the suit has rightly been dismissed. It is also submitted that a specific pleading has been made by the parties regarding partition of the property prior to filing of the suit. This evidence is also an impediment in granting any relief in favour of the plaintiff in respect of any other property because according to the defendant, the defendant has confined his interest to that part of the property, which according to the defendant, was received by her at the time of partition.

9. As far as prayer for framing additional question of law is concerned, this Court, after going through the pleadings and evidence and the concurrent finding of fact recorded by both the Courts below finds that those concurrent finding of fact do not suffer from any patent illegality, perversity nor can it be said to be falling short of legal requirement of proof of Will as mandated under Section 68 of the Act of 1872 read with Section 63 (c) of the Act of 1925.

10. The provisions contained in Section 63 (c) of the Act of 1925 incorporates specific provision as to how Will is to be executed. Relevant provision is as under -

“S.63 (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 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.”

It is, thus, clear that the requirement of special law in case of proof of Will is that the Will is required to be proved by attesting witness (i) who has seen the testator affixing signature or mark on the Will document, or (ii) who has seen some other person sign the Will, in the presence and by the direction of the testator (iii) or has received from the testator his personal acknowledgment of his signature or mark, or the signature of such other person.

The law of general application, as contained in Section 68 of the Act of 1872 requiring proof of documents which are required to be attested is as below -

S.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 not 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.]

In view of aforesaid provision, where a party is required to prove execution of document which is required by law to be attested, that document would not be used

in evidence unless one attesting witness atleast, has been examined for the purpose of proving its execution, if there being an attesting witness alive and subject to the process of the Court and capable of giving evidence.

The proviso deals with the situation which is not applicable in case of a Will.

11. Legal requirement of proof of Will has been considered by the Supreme Court as also by this Court in plethora of decisions in the case of **Janki Narayan Bhoir vs. Narayan Namdeo Kadam, 2003 (1) CGLJ 190**. Their Lordships in the Supreme Court examined the legal requirement of proof of Will, as below:-

“7. We think it appropriate to look at the relevant provisions, namely, [Section 63](#) of the Indian Succession Act, 1925 and [Sections 68](#) and [71](#) of the Indian Evidence Act, 1872 which read:

[Section 63](#) of the Succession Act "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)

(b)

(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."

[Section 68](#) of the Evidence Act "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..."

[Section 71](#) of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of [Section 63](#) of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that 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; (c) the most important point with which we are presently concerned in this appeal, is that 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 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.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

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 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 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 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 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](#), [Evidence Act](#), to meet a situation where it is not possible to prove the execution of the will by calling 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 bye to the mandate of law relating to proof of execution of a will."

12. The legal requirement with regard to execution of will as mandated under Section 63 (c) of the Indian Succession Act amongst other things is that 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 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.

13. In the present case, the plaintiff has pleaded in para 12 of the plaint that her mother – Fagni had executed a Will Deed on 25/09/1984 in respect of the disputed house and land in favour of the plaintiff which was duly registered and on that basis, the plaintiff has succeeded to the entire property. In order to prove execution of Will, the plaintiff examined herself as Mantora Bai (PW1), attesting witness, Johatram (PW2) and the document writer / ascriber of the Will – Gopal Rao (PW3). The evidence of Johatram (PW2), attesting witness is that the Will was prepared under the instructions of Fagni Bai by Gopal Rao (document writer) and he was present at the time of preparation of Will. He has specifically deposed that the Will Deed was prepared under the instructions of Fagni Bai. It has also been deposed that at the time of preparation and execution of Will Deed, Fagni Bai was in healthy state. He has proved his signature and has also proved signature of another attesting witness. It is an emphatic evidence that Fagni Bai affixed her thumb impression in her presence. Nothing could be elicited in her cross-examination to doubt the version of this witness as the attesting witness. Though, learned counsel for the respondent would submit that this witness is not reliable as he claims ignorance of pendency of civil dispute between her, Mantora Bai and Ganeshiya Bai, that is not relevant to doubt the testimony of this witness as being the attesting witness. In the cross-examination also, this witness has reiterated that the Will Deed was prepared and executed in his presence and Fagni Bai stated that she has given the entire property to Mantora Bai (the plaintiff).

14. Even though, it is not the requirement of law, document writer – Gopal Rao (PW3), has deposed regarding preparation and execution of Will Deed by Fagni Bai in his presence. He has emphatically stated that the Will Deed was prepared by him as per the instructions of Fagni Bai and he has stated that the Will was prepared by Mantora Bai, Fagni Bai was in healthy state and after preparation of

Will, the same was read over by him and then upon satisfaction, Fagni Bai affixed her thumb impression. He has clearly stated that the Will was ascribed by him and he had obtained thumb impression at different places in the Will and then required the witnesses also, who affixed their signature. He has named Johatram and Punitram. Johatram (PW2) has clearly stated regarding execution of Will in favour of Mantora Bai and the same attested by him. Learned counsel for the respondent vehemently argued that in the cross-examination of Gopal Rao (PW3), it has been elicited that Fagni Bai was extremely weak so much so that he could die anytime. It is submitted that on the basis of such evidence, it cannot be said that at the time of execution of so called Will, Fagni Bai was physically and mentally sound and capable of execution of Will. Upon close scrutiny of the evidence, the submission is liable to be rejected. Both Johatram (PW2) and Gopal Rao (PW3) in their evidence, have stated that at the time of execution of Will, Fagni Bai was in healthy state. A suggestion given to Gopal Rao (PW3) that Fagni Bai had become so weak that she could die anytime, does not mean that it has been deposed that at the time of execution of Will, she was not in fit physical and mental state. The witness has explained that he has accepted the suggestion because Fagni Bai, at the time of execution of Will, was about 70 years of age. If the entire evidence of this witness regarding what has been stated by him in the examination-in-chief as well as in the cross-examination, is read as a whole, all that can be said is that at the time of execution of Will, Fagni Bai was old and weak also and she had restricted locomotive movement. However, that cannot be used to reach to a conclusion that her condition became so bad that she could not understand anything. The evidence of Johatram (PW2) and Gopal Rao (PW3) is emphatic. It is stated by both of them that ascriber prepared the Will Deed which was read over and after arriving at her own satisfaction, Fagni Bai affixed her thumb impression. As this evidence of Johatram (PW2) and Gopal Rao (PW3) is reliable, the legal

requirement of proof of Will, by atleast one of the witness is fulfilled and thus, the Will was clearly proved in accordance with the provisions of Section 63 (c) of the 1923 and Section 68 of the Act of 1872. The concurrent finding of the Courts below in this regard does not suffer from any perversity and therefore, no error of law arises on this account.

15. Both the Courts below have clearly held that the parties, in the matter of succession, are governed by Hindu Law. Even if the Courts below were of the similar view and recorded concurrent finding that the plaintiff failed to prove customary law to the effect that where married daughter resides along with her husband in the house of her father, upon death of her father, she would succeed to the entire property, if there are no male descendants, the plaintiff, in any case, was entitled to atleast 1/3rd share in the property. It is the admitted position as pleaded by both the parties that Lachhan Gond died in the year 1976. After his death, according to Hindu Law of Succession, the property devolved upon his widow and two daughters. It is an admitted position that Lachhan Gond had no male issue. Thus, the wife and two daughters, Mantora Bai (plaintiff) and Ganeshiya Bai (defendant) would be entitled to equal share.

16. Once the Will is proved to the extent of share of Fagni Bai, the Will will take effect and confer valid title in favour of the beneficiary of the Will. On this settled legal position, on the date of execution of Will i.e. 25/09/1984, Fagni Bai was having 1/3rd share in the property. Therefore, in so far as share of Fagni Bai is concerned, Will conferred valid title to the extent of share of the testator of the Will namely Fagni Bai i.e. 1/3rd share of the total property held jointly by Fagni Bai, Mantora Bai and Ganeshiya Bai could be bequeathed by Will. The result would be that by virtue of Will, Mantora Bai would be entitled to succeed to the entire share which Fagni Bai was holding on the date of her death in the year 1986. Resultantly, the plaintiff-

Mantora Bai, in addition to her $\frac{1}{3}^{\text{rd}}$ share in the property, would be entitled to succeed to $\frac{1}{3}^{\text{rd}}$ share of Fagni Bai also. Ganeshiya Bai (defendant), the other daughter of Fagni Bai, would be entitled to $\frac{1}{3}^{\text{rd}}$ share in the property. Thus, on the basis of the pleadings and evidence led by the parties, the plaintiff was entitled to a decree to the extent of $\frac{2}{3}^{\text{rd}}$ share in the property in dispute.

17. The first substantial question of law with regard to partition actually did not arise for consideration. The plaintiff did not come out with suit for partition and the plaintiff's case was based on declaration of title over the entire property. Even according to the defendant, she had taken only her share. The defendant does not claim that she was entitled to more than her share in the property which she would have taken along with Fagni Bai and Mantora Bai, the plaintiff.

18. The second substantial question of law is accordingly decided in the manner that the Courts below, having held that the Will executed by Fagni Bai, in favour of Mantora Bai, is proved, the plaintiff is entitled to $\frac{2}{3}^{\text{rd}}$ share in the property. Accordingly, plaintiff's suit was liable to be decreed atleast to the extent of $\frac{2}{3}^{\text{rd}}$ share of the suit property, though, liable to be rejected to the extent of remaining $\frac{1}{3}^{\text{rd}}$ share to which, Ganeshiya Bai was entitled under the law.

19. In the result, the impugned judgment and decree passed by the lower Appellate Court is set aside. Plaintiff's suit is partly decreed. It is held that the plaintiff is entitled to declaration of title in respect of $\frac{2}{3}^{\text{rd}}$ share of the property in dispute and defendant – Ganeshiya Bai would take only $\frac{1}{3}^{\text{rd}}$ share of the property as her own share.

A decree of permanent injunction is also granted in favour of the plaintiff and against the defendant that the defendant is restrained from interfering with the $\frac{2}{3}^{\text{rd}}$ share of the plaintiff over the property in dispute which comprised of land and

house. The defendant is entitled to only 1/3rd share of the property which according to the defendant, is holding in her hand.

The parties to bear respective costs. Let appellate decree be drawn accordingly.

Sd/-
(**Manindra Mohan Shrivastava**)
Judge