

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.154 of 2005**

1. Purshottam S/o Mohar Sai, aged about 54 years,
2. Birabal S/o Mohar Sai, aged about 52 years,
3. Samay Lal S/o Mohar Sai, aged 50 years,

All of resident of Village Salka, Post Baikunthpur, Tahsil Baikunthpur,
District Korea (CG)

---- Appellants/Defendants

Versus

1. Babu Lal S/o Ram Prasad, aged about 21 years, by caste Cherva, occupation cultivation, resident of Village Bhandarpara Salka, Post Baikunthpur, Tahsil Baikunthpur, District Korea (CG)

---- Plaintiff

2. The State of Chhattisgarh, through the Collector, Korea (CG)

---- Respondents

For Appellants/Defendants	:	Mr.Sunil Tripathi, Advocate
For Res.No.1/Plaintiff	:	Mr.Amiyakant Tiwari, Advocate
For Respondent No.2	:	Mr.Ravi Kumar Bhagat, Dy.G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

26/07/2019

1. The substantial questions of law involved, formulated and to be answered by this Court in this defendants' second appeal are as under:-

“1. Whether the finding of the lower Appellate Court in reversing the well reasoned judgment of the Trial Court in proper particularly in the light of the evidence of PW-4 Ganesh Bahadur Singh ?

2. Whether the finding of the lower Appellate Court

accepting the Will Deed dated 29.07.1998 to be properly and duly executed in accordance with the provision of Evidence Act is correct ?”

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

2. The suit property was originally held by Thakur jointly with his uncle Mohar Sai. He is said to have executed Will in favour of plaintiff-Babulal on 26.6.98 (Ex.P-4), subsequently he died on 17.7.98 and that Will was registered at the instance of the plaintiff on 29.7.98. Thereafter, Plaintiff-Babulal filed a suit for declaration of title and possession of 1/2 share held by Thakur on the strength of Will.

3. Defendants No.1 and 2 disputed the Will holding that it is fabricated Will as Thakur has no relationship with the plaintiff and there was no reason to execute the Will in favour of the plaintiff as he is not member of their family. Even otherwise, the particulars of immovable property have not been mentioned in the Will. It was allegedly executed in the house of the plaintiff and the plaintiff has taken active participation in execution of the Will and therefore, it is suspicious Will, if any, as such, it should not be relied upon. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 29.11.2003, dismissed the suit holding the Will to be suspicious and fabricated document. On appeal being preferred by the plaintiff, the first appellate Court did not agree with the findings of the trial Court and reversed those findings and decreed the suit in favour of the plaintiff. Questioning that judgment and decree,

this second appeal under Section 100 of the CPC has been preferred by the appellants/defendants, in which substantial questions of law have been framed by this Court, which have been set-out in the opening paragraph of this judgment.

4. Mr.Sunil Tripathi, learned counsel for the appellants/defendants, would submit that the first appellate Court has fallen into grave legal error in holding that the Will is duly proved and it is genuine document, ignoring the fact that Thakur has executed an unregistered Will in the house of the plaintiff and the plaintiff had actively participated in execution of the Will and particulars of the property have not been mentioned in the Will. He would further submit that statement of Ganesh Bahadur Singh (PW-4) makes the Will doubtful as he was not present at the time of execution of Will, whereas presence of the plaintiff and his witnesses was proved. Therefore, the judgment and decree of the first appellate Court deserves to be set aside and that of the trial Court be restored.

5. Mr.Amiyakant Tiwari, learned counsel for respondent No.1/plaintiff, would support the impugned judgment and decree of the first appellate Court and submit that mere active participation in execution of Will will not make the Will suspicious. It has to be pleaded and proved that he forced the testator to execute the Will in his favour. Since the testator was living along with the plaintiff at the time of his death, therefore, he has executed the Will in his residence. He would further submit that though details of immovable property are not shown

in the Will, but testator has clearly written that he is executing Will of his undivided share in suit property in favour of the plaintiff, which is supportable in law, as such, the second appeal deserves to be dismissed.

6. I have heard learned counsel appearing for the parties, considered their rival submissions made herein-above and also went through the records with utmost circumspection.

7. The short question for consideration would be, whether execution and attestation of Will dated 29.7.1998 (Ex.P-4) has been proved and established by the plaintiff in view of Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 ?

8. 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].

9. 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.

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

¹(2015) 8 SCC 615

“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.
- (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.”

11. 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.

12. 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.

13. 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.”

14. 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 and is capable of giving evidence.

15. 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

²(2003) 2 SCC 91

³AIR 1955 SC 346

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 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.”

16. 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

⁴AIR 1959 SC 443

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 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.”

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

18. 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.

19. The Supreme Court in Yumnam Ongbi Tampha Ibema Devi (supra) has clearly held that the attestation of will is not an empty formality. Highlighting the importance of attestation of Will it was held it means signing a document for the purpose of testifying of the signatures

5(1977) 1 SCC 369

6(1974) 2 SCC 600

7(2009) 4 SCC 780

8(2017) 1 SCC 257

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.”

20. 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.”

21. 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.”

22. 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 Thakur is said to have executed unregistered Will in respect of his share in joint family property in favour of the plaintiff excluding his near relatives i.e. defendants No.1 to 3

on 26.6.98 vide Ex.P-4 and the Will got registered at the instance of the plaintiff on 17.7.98.

2. The Will dated 26.6.98 is said to be attested by two witnesses namely, Ramashankar and Ful Sai. Ramashankar was examined as PW-2 and Anirudh Singh, scribe, was also examined as PW-3.
3. The Will was executed in the house of the plaintiff-Babulal as at that time Shri Thakur was residing with him and he has also signed the Will (Ex.P-4).
4. Ramashankar (PW-2), one of the attesting witness, has clearly stated before the Court on oath that after the Will was written, testator Thakur signed the Will and thereafter he and other attesting witness Ful Sai both have signed the Will and Babulal, plaintiff, has also signed the Will. He has also stated that Ganesh Singh was also present at the time of execution of Will. Ganesh Bahadur Singh has also been examined as PW-4, whereas he has denied the fact of being present at the time of execution of Will.
5. The first appellate Court after appreciating evidence available on record has clearly come to the conclusion that execution and attestation of Will has been proved in accordance with law.

23. The first objection that has been raised on behalf of defendants No.1 to 3 is that the plaintiff has taken active participation in

execution of the Will, which makes the Will suspicious.

24. The Supreme Court in the matter of **Pentakota Satyanarayan and others v. Pentakota Seetharatnam and others**⁹ relying upon **Sridevi v. Jayaraja Shetty**¹⁰ has held that in case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. It was observed as under:-

“21.....No evidence has been led in by the respondents to show the exercise of any fraud or undue influence at the time of execution of the Will. No evidence was adduced to show that the testator was not in sound state of mind and in fact, the finding is that he was of sound mind.....

25.It is settled by a catena of decisions that any and every circumstance is not a suspicious circumstance. Even in a case where active participation and execution of the Will by the propounders/beneficiaries was there, it has been held that that by itself is not sufficient to create any doubt either about the testamentary capacity or the genuineness of the Will. It has been held that the mere presence of the beneficiary at the time of execution would not prove that the beneficiary had taken prominent part in the execution of the Will. This is the view taken by this Court in Sridevi vs. Jayaraja Shetty. In the said case, it has been held that the onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the proof of signature of the testator as required by law would not be sufficient to discharge the onus. In case, the person attesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same and that as to what suspicious circumstances which have to be judged in the facts and circumstances of each particular case. ”

25. The Supreme Court in the matter of **Rur Singh (Dead) Through LRS. and others v. Bachan Kaur**¹¹ has held as under:-

9 (2005) 8 SCC 67

10 (2005) 2 SCC 784

11 (2009) 11 SCC 1

“27. Only because one of the beneficiaries attested the will, the same would not mean that he had taken an active part in it. In any event, the learned trial Judge as also the first appellate court found sufficient explanation therefor holding that as the will was executed in testator's house and he had been living jointly with his sons, their presence in the house was natural.”

26. In the instant case, though active participation of the plaintiff at the time of execution of Will is not in dispute, but no evidence has been led by defendants No.1 to 3 that any undue influence, fraud or coercion was made to the testator while making the Will, as such, mere active participation of the plaintiff will not make the Will suspicious as the defendants have failed to prove any undue influence, fraud or coercion on the testator by the plaintiff while making the Will. Since testator Thakur at the time of his death was staying with the plaintiff, execution of the Will on his residence will not make it suspicious. The testator has made the Will of his undivided share of the suit property, which also cannot be held to be invalid as it is well settled that a person can make Will of his undivided share in the suit property. Likewise, presence of Ganesh Bahadur Singh (PW-4) has been pleaded by the plaintiff which Ganesh Bahadur Singh (PW-4) has denied. Presence or absence of Ganesh Bahadur Singh at the time of execution of Will not make the Will suspicious, if the Will is proved in accordance with law. I am of the considered opinion that the first appellate Court is absolutely justified in holding that Will has been proved in accordance with law and it is not suspicious document. The substantial questions of law are answered in favour of the plaintiffs and against the defendants.

27. Accordingly, the second appeal deserves to be and is hereby

dismissed leaving the parties to bear their own cost(s).

28. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-