

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 541 of 2003**

- Ghondul Das (dead) through LR Smt. Basanti Bai W/o. Bachan Das Manikpuri, R/o. Village – Polkara, Tah.-Rajim, Block – Fingeshwar, Distt. - Raipur presently residing at Village – Kurra, Tah. - Abhanpur, Distt. - Raipur (CG)

---- Appellant**Versus**

- Chatur Das S/o. Chen Das aged about 45 years, R/o. Village – Kurra, Tah. - Abhanpur, Distt. Raipur (CG)

---- Respondent

For Appellant	:	Shri Y.C.Sharma with Shri N.T. Qaudri, Advocates
For Respondent / State	:	Shri Amrito Das, Addl. Adv. Gen. for the State.

S.B.: Hon'ble Shri Justice Manindra Mohan Shrivastava**Judgment On Board****26/09/2019**

This Second Appeal is directed against impugned judgment and decree dated 27/06/2003 passed by the 3rd Additional District Judge in Civil Appeal No.46-A/2002 whereby the learned lower Appellate Court reversed the judgment and decree dated 04/09/97 passed by the Trial Court and decreed plaintiff's suit holding the Will dated 16/01/1992 proved.

2. Respondent / plaintiff filed a suit seeking declaration of title of permanent injunction in respect of land admeasuring 0.656 hectares, situated in khasra no.271/1 in village – Kurra, P.H.No.161 Rajaswa Nigam Mandal – Nawapara, on the pleadings *inter alia* that his aunt Dulin Bai was issueless and in order to seek help during her life time due to old age, she kept the plaintiff with her since 1990. Since

then, it was pleaded, the plaintiff started residing in-service with old lady Dulin Bai and was also managing her property and agricultural activity. Out of affection, Dulin Bai executed a Will on 16/01/1992 in favour of plaintiff, by which, about 1½ acres of her total land was given to the plaintiff. Dulin Bai died on 09/06/1994 and all last rites and rituals were performed by the plaintiff. The plaintiff remained in possession of the property in dispute. However, later on, the defendant claiming to be one of the relative of the deceased, started interfering with the possession of the plaintiff and as a cloud was cast on plaintiff's title, it gave rise to a cause of action in favour of the plaintiff to file suit seeking declaration of title and injunction.

3. The defendant denied plaintiff's claim stating that Dulin Bai and her sister – Dhanir Bai, both were issueless. The plaintiff was not related to her. Taking undue advantage of the old age, a fictitious document was got prepared. The plaintiff was working only as a servant with Dulin Bai extending help in agricultural activities.

4. Learned Trial Court framed as many as four issues including issue as to whether the so called Will said to be executed by Dulin Bai in favour of plaintiff is illegal and void and on that basis, the plaintiff is entitled to claim title. Though the plaintiff examined one of the attesting witness-Sukhram, learned Trial Court, taking into consideration certain attending circumstances and doubts, held that execution of Will is doubtful and plaintiff's suit was dismissed.

Aggrieved by the judgment and decree passed by the Trial Court, plaintiff filed an appeal. Learned lower Appellate Court, after examining oral and documentary evidence and judgment of the Trial Court, recorded a finding that the circumstances, which led the Trial Court to extend doubt with regard to execution of Will were not enough and evidence was not properly appreciated. On such consideration, learned lower Appellate Court, reversed the judgment and decree of

the Trial Court and held the Will proved and decreed the suit of the plaintiff giving rise to this appeal.

5. This appeal was admitted on following substantial question of law -

“Whether the finding of the first Appellate Court while reversing the order of the Trial Court holding that the Will Deed has been properly executed is proper, legal and justified ?”

6. Assailing legality and validity of the impugned judgment of learned lower Appellate Court, learned counsel for the appellant would argue that the legal requirement of proof of a Will as per mandate of Section 63 (c) of the Indian Succession Act, 1925 (for short 'the Act of 1925') read with Section 68 of the Evidence Act could not be fulfilled as the execution of the Will itself is suspicious. Learned counsel for the appellant would contend that whether or not, a Will was voluntarily executed by the testator, is required to be examined not only on the basis of the evidence of the attesting witness but all other attending circumstances. He would argue that the evidence of the sole attesting witness is shaky, contradictory and suffers from inherent improbabilities which render it highly suspicious that Dulin Bai executed any Will in favour of plaintiff. Taking his argument further, learned counsel for the appellant would submit that there are certain circumstances creating doubt on the very execution of Will that only one attesting witness was examined and other attesting witness - Bhuvanlal was not examined. The scribe of the Will was also not examined. The attesting witness- Sukhram has not correctly described the name of scribe, Dulin Bai was too old aged and suffering from physical and mental disability. According to the witness, Dulin Bai did not leave the village, plaintiff failed to establish any relationship with Dulin Bai, no employee of the office of the Registrar was examined and that the photograph of Dulin Bai, affixed on writ pustika (Ex.P/2) bears certification date

by Tahsildar on 24/06/1993. Therefore, execution of the Will is highly suspicious. Learned lower Appellate Court ignoring all those material discrepancies which create serious doubt with regard to very execution of Will, mechanically accepted the version of Sukhram (PW2).

7. There is no representation made on behalf of the respondent.

8. I have heard learned counsel for the appellant and perused records.

9. Before advertng to the oral and documentary evidence and the finding of the learned lower Appellate Court, it is considered apposite to deal with the settled legal position with regard to legal requirement of proof of Will, as considered by this Court in the case of **Mantora Bai (dead) through LR Smt. Chitrarekha Bai v. Ganeshiya Bai and anr.** (S.A.No.130/2003).

“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 it's 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.

10. The common thread of all the aforesaid decisions is that mandate of Section 63 (c) read of the Act of 1925 read with Section 68 of the Evidence Act require that Will is required to be proved by examining atleast one attesting witness. Moreover, it has also been consistently held that attesting witness has to clearly depose that the testator of the Will voluntarily executed the Will after having understood the contents and thereafter, signed / affixed thumb impression in presence of the attesting witnesses followed by attestation by the attesting witness. It is also trite law that even if an attesting witness may have stated regarding attestation, yet the Will may be found to be suspicious.

11. Keeping in forefront aforesaid settled legal position, it has to be seen whether the learned lower Appellate Court has committed any patent illegality or perversity in holding the Will proved thereby reversing the judgment and decree of the Trial Court.

12. As far as legal requirement of proof of Will by one attesting witness is concerned, plaintiff has examined Sukhiram (PW2) as the attesting witness of the Will (Ex.P/1) dated 06/01/1993. It has also to be noted that the Will is a registered one.

Sukhiram (PW2) has deposed in his evidence that four years before (i.e. in the year 1992), he had come along with Dulin Bai to Raipur and there, Dulin Bai had executed a Will in favour of Chaturdas in the office of Sub-Registrar, Raipur. He has stated that the Will was scribed by document writer - Radheshyam Dubey in Tahsil office. He has further deposed that Dulin Bai stated in presence of document writer that she is willing to execute a Will of her property admeasuring 1½ acres of land, in favour of Chaturdas and also that she is also willing to give three acres of her land by way of Will to Kabir Koti. He has further deposed that on that day, Dulin Bai had executed two Wills. He has also deposed that when document writer prepared Will as per directions by Dulin Bai, it was read over to her. Thereafter, Dulin Bai affixed her thumb impression in presence of the witness and thereafter, witness signed the Will. This witness has testified his own as also thumb impression of Dulin Bai. He, then, deposed that Dulin Bai had gone to the office of the Sub-Registrar and there also, thumb impression affixed. This witness has been subjected to detailed cross-examination. In cross-examination, he has stated that along with him and Dulin Bai, Bhuvanlal was also there. He further deposed that he was not interested in taking Chaturdas along with him. He further clarified that as Dulin Bai was with him, there is no question of keeping Chaturdas. He has further deposed that at Raipur, they had gone to the

office of the document writer and from there, they went to the office of the Registrar. He cannot say why Dulin Bai executed two Will deeds. A suggestion that when Will was executed, Dulin Bai had not accompanied him but Chaturdas had come and another woman impersonated Dulin Bai and that is why, her photograph is not there in the Will Deed, has been denied. He himself states that photograph of Dulin Bai was affixed in 'rin pustika'. In his cross-examination, it has also been elicited that this witness has come along with Chatur Das.

There is no suggestion given to the witness why he would be interested in getting a false document prepared. Nothing has come in his evidence that he was a close associate of Chaturdas. This witness has clearly stated regarding execution of Will by Dulin Bai in his presence after the Will Deed prepared under instructions of Dulin Bai was read over to her. From the cross-examination of this witness also, there does not appear to be any doubt with regard to execution of Will by Dulin Bai out of her own volition and will. It needs to be noticed that according to this witness, Chaturdas, the plaintiff, did not accompany Dulin Bai and this witness. He was not at all present at the time of preparation and execution of Will. Moreover, it is also noticed that the Will is a registered document and there is clear evidence that the Will, after being prepared and after thumb impression of Dulin Bai being affixed and witness having signed, all had gone to the office of Sub-Registrar and thereafter, thumb impression was again affixed on the Will. It is to be noted that thumb impression of Dulin Bai and witnesses are present in the Will deed. Another important circumstance revealed from the evidence is that it is not a case where Dulin Bai bequeathed by Will, her entire property. Only 1½ acres of land was given to the plaintiff by way of Will. Another three acres were bequeathed by Will for charitable purpose. This lays credence to the evidence of the attesting witness.

13. Learned Trial Court entertained doubt on the genuineness of the Will mainly

on account of certain suspicious circumstances. One was that according to the attesting witness, name of the document writer was Radheshyam Dubey whereas the Will itself shows that it was prepared by one Anil Dubey. Next is that though attesting witness-Sukhram (PW2) states that at the time of execution of Will, 'rin pustika' was available, attested photo contains a date subsequent to the date of execution of Will. Another circumstance, which has been relied upon to create doubt on the Will is that the plaintiff has not proved that he was the son of the sister of testator of Will. All these aspects have been dealt with by the learned lower Appellate Court. It has held that possibility of photo being attested by Revenue Officer on a date subsequent, could not be ruled out and on this aspect, no explanation was put to the witness as to how the photograph fixed in the 'rin pustika' was attested one or not. Learned lower Appellate Court has also taken into consideration that the evidence of the defence witnesses itself proves that prior to death of Dulin Bai, the appellant had come and started living with her for couple of years. Learned lower Appellate Court has also taken into consideration that the defence witnesses have also admitted that after death of Dulin Bai, her last ceremonies and rites were performed by the plaintiff. Only because the name of document writer has not been correctly stated, the entire case with regard to execution of Will, particularly when the attesting witness cannot be said to be a person having any reason to give false evidence in the Court in favour of Chaturdas and support of fictitious document, Will cannot be held to be suspicious. The attesting witness – Sukhram (PW2) was a villager and he came along with the testator to the Raipur city and they had gone to meet a document writer. His surname has been correctly mentioned but the first name was not correctly mentioned. That by itself, without anything more, could not be made a basis to throw a registered Will. It is not the requirement of law that all the witnesses of attestation of Will should be examined. If the evidence of one of the attesting witness is reliable and creditworthy, the Will can be held to be proved. Credibility to

the Will is strengthened because the beneficiary - Chaturdas is not stated to be present through out the process of preparation and execution of Will. According to Sukhram (PW2), Dulari Bai came to Raipur for preparation and execution of Will along with Sukhram and Bhuvanlal. That means, the beneficiary, the plaintiff, did not even accompany. Moreover, it is not the entire property but only a part of property has been bequeathed in favour of the plaintiff.

14. Upon consideration of the entire evidence, it cannot be said that the learned lower Appellate Court committed any perversity or patent illegality in relying the evidence of attesting witness but at the most, is in the realm of appreciation of evidence. In the absence of there being any perversity and patent illegality committed and unless the case involves a substantial question of law, interference by this Court would not be possible. Such view of learned lower Appellate Court is based on appreciate of records.

15. Accordingly, the question of law is answered in the manner that the finding of the lower Appellate Court holding that the Will Deed is properly executed, cannot be said to be suffering from any patent illegality or perversity.

16. In the result, the appeal fails and is hereby dismissed. Let appellate decree be drawn accordingly. Parties to bear their respective costs.

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