

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 406 of 2003**

Nanki (since deceased) through LRs:-

Aaju Ram, Son of Late Permanand, resident of Village Lulwa, Patwari
Halka No. 6/78, RNN Tehsil Baloda Bazar, District Baloda Bazar (C.G.)

----Appellant/Plaintiff

Versus

1. Yashwant Kumar, aged about 26 years, son of Late Ghanshyam,
2. Keshaw, son of Shri Ghanshyam, aged about 20 years,
3. Komal Bai, wife of Ghanshyam, aged about 22 years,

Resident of village Lutwa, P.H. No. 6/76, R.N.M. Tah. Baloda Bazar,
Raipur (C.G.)

---- Respondents.

For Appellant	: Mr. M.D. Sharma, Advocate.
For Respondents	: None present, though served.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

08/03/2019

(1) The substantial questions of law involved, formulated and to be answered in this plaintiff's second appeal state as under:

“Whether the findings arrived at by the 1st appellate court in respect of accepting the will dated 7.9.91 executed to be properly executed by will deed are proper or not ?

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

(2) The imperative facts required to be noticed for adjudication of this appeal are

as under:

2.1 Maniram had two sons namely Guman Singh & Nain Singh. The plaintiff – Nanki is daughter of Guman Singh. After death of Guman Singh, suit property was held by Nanki and Nain Singh jointly. Nain Singh died issues. It is the case of plaintiff that she has been dispossessed by defendants No. 1 to 4 from the suit land on 27.01.1997 leading to the filing of the suit for possession based on title and permanent injunction.

2.2 Defendants No. 1 to 4 filed written statement pleading inter alia that Nain Singh has executed a registered will dated 17.9.1991 in favour of Ghanshaym, who was father of defendants No. 1 to 3 and husband of defendant No.4, as such, they are title holders of the suit land.

2.3 The trial Court on appreciation of oral and documentary evidence available on record, decreed the suit disbelieving the execution of registered Will in favour of Ghanshaym and on an appeal being preferred, the first appellate Court allowed the appeal of defendants and dismissed the suit finding that Will has been proved in accordance with law against which the second appeal has been preferred in which the substantial question of law has been set out in opening paragraph of the judgment.

(3) Mr. M.D. Sharma, learned counsel appearing for the appellant/plaintiff would submit that the first appellate Court is absolutely unjustified in dismissing the suit of the plaintiff by holding that Will (Ex.D-1) in favour of Ghanshaym, who was father of defendants No. 1 to 3 and husband of defendant No. 4 was duly proved in accordance with law, which is perverse and runs contrary to the provisions contained

Section 63 of the Succession Act, 1925.

- (4) None has appeared on behalf of the defendants despite service of notice.
- (5) I have heard counsel for the appellant herein and considered his submissions made herein-above and went through the record with utmost circumspection.
- (6) The short question for consideration is whether the Will (Ex.D-1) has been proved and established by defendants No. 1 to 4 in view of the provisions contained in Section 63 of the Succession Act, 1925 reads with Section 68 of the Evidence Act, 1872.
- (7) 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 others**¹]
- (8) 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.
- (9) 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.

¹ (2015) 8 SCC 615

- (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.”

(10) 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.

(11) 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.

(12) 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

² (2003) 2 SCC 91

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.”

(13) 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.

(14) 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

³ AIR 1955 SC 346

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.”

(15) In the matter of **H. Venkatchala Iyengar v. B. N. Thimmajamma and others**⁴

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,

4 AIR 1959 SC 443

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.”

(16) The principle laid down in the above-stated judgment has been followed with approval in **Smt. Jaswant Kaur v. Smt Amrit Kaur and others**⁵, **Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another**⁶, **Yumnam Ongbi**

⁵ (1977) 1 SCC 369

⁶ (1974) 2 SCC 600

Tampha Ibema Devi v. Yumnam Joykumar Singh and others⁷ and **Jagdish Chandra Sharma** (supra).

(17) In the matter of **Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another**⁸, 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.

(18) 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.

(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 it was held it means signing a document for the purpose

⁷ (2009) 4 SCC 780

⁸ (2017) 1 SCC 257

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.”

(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 principles of law rendered by the Their Lordships of the Supreme Court in the above-cited judgments (*supra*) *qua* execution and attestation of Will by a testator, the following factual position would emerge on record.

1. Testator Nainsingh had executed a Will in respect of suit property in favour of Ghanshyam, who is father of defendants No. 1 to 3 and husband of defendant No. 4 on 17.9.1991, excluding his

niece and got it registered in the office of the Sub-Registrar, Balodabazar.

2. The Will is said to be attested by two witnesses namely Motiram Sahu (DW-2) and Gowkaran Painkra (not examined) and scribed by Rajaram Sahu (DW-3).

3. One of the attesting witnesses Motiram Sahu was examined on behalf of defendants as DW-2. He stated that Will (Ex.D-1) was executed in his presence and it was typed by Rajaram Sahu (DW-3), but omitted to state he & another attesting witness Gowkaran Sahu signed the Will in presence of testator, and testator signed the Will in presence of both the attesting witnesses, through in paragraph 2 of his cross-examination he tried to explain it by stating that firstly he signed the Will, and thereafter Gowkaran Signed the Will and such mere signing the Will is not sufficient, unless it is signed with the intention of attesting the Will that is *animo attestandi* .

(23) From the above-stated narration of the 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. Defendants being successor-in-interest of propounder must have proved that testator has signed the will in presence of both the attesting witnesses. 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.

(24) Analysing the facts of the present case, it would appear that defendants being successor-in-interest of the propounder have failed to prove attestation of Will in accordance with Section 63 of the Indian Succession Act read with Section 68 of the Evidence Act, 1872 as the attesting witness Motiram Sahu (DW-2) has failed to stated that testator has signed the Will in presence of both the attesting witnesses or they signed the Will in presence of testator.

(25) There is one more reason for disbelieving the Will (Ex.D-1), which has been highlighted by learned counsel for the appellant/plaintiffs is that the plaintiff is niece of the deceased – Nain Singh ; suit property is joint family property and there is no reason why the plaintiff / niece was excluded while executing the Will; and one stranger was preferred by testator of the Will as there is no evidence that relationship of plaintiff and her uncle Nain Singh was not cordial. In paragraph 2 of the Will (Ex.D-1), it has been stated that photo copy of the suit property has been attached along with the Will (Ex.D-1), whereas, there is no attachment of the said photo copy and description of property with the Will (Ex.D-1), which also makes the will suspicious.

(26) Consequently, I hold that the first appellate Court is absolutely unjustified in holding that defendants No. 1 to 4 being successor-in-interest of the propounder of Will have proved and establish due attestation of Will in accordance with Section 63 (c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, the said finding recorded by the first appellate Court is liable to be set aside.

(27) In view of the aforesaid discussion, the judgment and decree passed by the

first appellate Court is liable to be and is hereby set aside and the judgment and decree passed by the trial Court is restored. The second appeal is consequently, allowed the plaintiff's suit stands decreed. Substantial of law is answered accordingly in favour of plaintiff and against the defendants.

(28) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

