

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 472 of 2004**

Man Kumari, wife of Sewa Das Satnami, aged about 40 years, resident of Village Dharampur, Tah. Lormi, District Bilaspur (C.G.)

----- Appellant/Plaintiff

Versus

1. Hari Prasad, son of Jugut Satnami, aged about 59 years, resident of Village Chandali, Tah. Lormi, District Bilaspur (C.G.)

2. State of Chhattisgarh, Through – Collector, Bilaspur (C.G.)

----- Respondents/defendants

For Appellant	:	Mr. H.S. Patel, Advocate.
For Respondent No. 1	:	Mr. Sushil Dubey, Advocate.
For Respondent No. 2	:	Mr. Akash Pandey, PL

Hon'ble Shri Justice Sanjay K. Agrawal

Judgement On Board

30/09/2019

(1) The substantial question of law involved, formulated and to be answered in this second appeal preferred by plaintiff states as under:

“Whether the will dated 07.1.1988 (Ex.P-1) has been duly proved by the plaintiff in accordance with section 68 of the Indian Evidence Act ?”

(For the sake of convenience, parties would be referred hereinafter as per their status shown

and ranking given 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) The suit property was originally held by Pran Satnami. He died issueless leaving behind his widow Jaikunwar. It is the case of the plaintiff that Jaikunwar bequeathed the suit property in favour of plaintiff being her niece and, therefore, she had become owner of the suit property and entitled for declaration of title and recovery of possession, which she has been dispossessed by defendant No.1.

(2.2) The defendant No. 1, by filing written statement, set up a plea that he being the legal representative of Jaikunwar & Pran Satnami has inherited the property as legal heir and he is in possession of the suit property in that capacity, as such, suit deserves to be dismissed.

(3) The trial Court, after appreciating the oral and documentary evidence available on record, recorded a finding that the plaintiff has failed to prove the execution & attestation of Will dated 07.1.1988 (Ex.P-1) but held that she being the legal heir of the deceased Jaikunwar has succeeded the suit property by virtue of provisions contained in Section 15 (1)(c) of the Hindu

Succession Act, 1956. That was challenged by defendant under Section 96 of the CPC, in which, the first appellate Court has reversed the judgment and decree of the trial Court and held that the plaintiff is not the heir of Jaikunwar / Pran Satnami under Section 15(1)(c) of the Act, 1956 and allowed the appeal and set aside the judgment and decree of the trial Court, against which second appeal has been preferred by the plaintiff, in which only one substantial question of law with regard to Will has been formulated and set out in the opening paragraph of this judgment.

(4) Learned counsel for the appellant/plaintiff would submit that the first appellate Court is absolutely unjustified in setting aside the judgment and decree of the trial Court as the Will executed by Jaikunwar in favour of plaintiff has duly been established and, therefore, she is entitled for decree of declaration of title and recovery of possession.

(5) On the other hand, learned counsel appearing for the respondents/defendants would submit that the trial Court negatived the theory of Will propounded by the plaintiff, against which neither plaintiff preferred first appeal nor filed cross objection before the first appellate Court, therefore, finding with regard to Will has become final and, therefore, it cannot be re-opened

by the plaintiff in the second appeal.

(6) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(7) Plaintiff set up a case on the basis of Will dated 07.1.1988 (Ex.P-1) executed by Jaikunwar in her favour, which the trial Court did not accept and recorded a finding that Will has not been executed and its attestation has not been proved in accordance with law, against, which admittedly the plaintiff did not prefer any first appeal or also not prefer any cross objection in the first appeal preferred by the defendant and the decree granted by the trial Court in favour of the plaintiff is based on Section 15(1)(c) of the Act, 1956 has been set aside by the first appellate Court.

(8) Now in the second appeal preferred by the plaintiff, she cannot question the legality, validity and correctness of the judgment of the first appellate Court on the ground of Will, which has become final in absence of challenge by the plaintiff before the first appellate Court. However, the substantial question of law has been framed by this Court on the issue of will. It would be appropriate to examine the statement of the plaintiff that she is entitled to succeed the suit land

on the ground of Will executed by Jaikunwar Bai in favour of plaintiff vide Ex.P-1, dated 7.1.1988. Will (Ex.P-1) has been executed by Jaikunwar Bai in which Masicharan (PW-2) and Seetaram both two witnesses were examined as attesting witnesses.

(9) Masicharan (PW-2) has been examined as attesting witness as PW-2. He has simply stated that Jaikunwar Bai has executed a Will in favour of plaintiff – Mankunwar Bai and she has signed the Will and she had voluntarily executed the Will.

(10) The question of consideration is whether the Will (Ex.P-1) has been proved and established by plaintiff in view of the provisions contained in Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

(11) 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.]

(12) In order to consider the plea raised at the Bar, it

¹ (2015) 8 SCC 615

would be appropriate to notice Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.

(13) Section 63 of the Act of 1925 provides as under:-

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

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(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."

(14) 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.

(15) 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.

(16) Section 68 of the Evidence Act, 1872 provides as under:-

"68. Proof of execution of document required by law to be

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."

(17) 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.

² (2003) 2 SCC 91

However, proviso to Section 68 of the Evidence Act, 1872 is not available in case of will.

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

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

3 AIR 1955 SC 346

"One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement or 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. The provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore held Gangotri.

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

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

(2) Since [Section 63](#) of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by [Section 63](#) of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

(3) Unlike other documents, the will speaks from the death of the

4 AIR 1959 SC 443

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 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 make the initial onus heavier and therefore, in cases where the circumstances attendant upto 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."

(20) 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).

(21) In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxen (dead) by Legal Representatives and another⁸, the Supreme Court has again reiterated the need of proving the attestation of

5 (1977) 1 SCC 369

6 (1974) 2 SCC 600

7 (2009) 4 SCC 780

8 (2017) 1 SCC 257

will in accordance with Section 63 (c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

(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-cited judgments (supra), it is quite vivid that though defendant No. 1 has denied the execution and attestation of the Will by Jaikunwar in favour of plaintiff as one of the attesting witnesses Masihcharan was examined on behalf of the plaintiff as PW-2 and he simply stated that the testator affixed his thumb mark on the will, which was executed in favour of the plaintiff, even he did not state that testator had signed the Will in his presence and in presence of another attesting witness Seetaram. Even he did not state that testator Jaikunwar Bai had signed the Will in presence of Masicharan and Sitaram and Masicharan and Sitaram have also signed the will in presence of the testator, as such, the compliance of Section 63(c) of the Succession Act, 1925 is totally missing though strict compliance of the said provision is imperative. The plaintiff being propounder of the will must have proved that the testator has signed the will in presence of Masicharan and Sitaram and Masicharan and Sitaram have also signed the will in presence of testator. Section 63 (c) of the Succession Act, 1925 clearly lays

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

(23) In the matter of Bhagat Ram v. Suresh⁹, their Lordships of the Supreme Court have held that for attesting witness, it is essential that the witness should have put his signature *animo attestandi* for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. Therefore, I hold that the first appellate Court is absolutely justified in holding that plaintiff being the propounder of will has failed to establish due attestation of will in accordance with Section 63 (c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872, the said finding recorded by the first appellate Court is hereby re-affirmed.

9 (2003) 12 SCC 35

(24) As a fallout and consequence of the above-stated discussion, the substantial question of law framed is answered against the plaintiff and this second appeal is dismissed accordingly leaving the parties to bear their own cost(s). A decree be drawn accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

