

**HIGH COURT OF CHHATTISGARH, BILASPUR****SA No.252 of 2002**

1. Chengti Bai (Dead) Through Lrs. Nil
  1. (A). Ringhu Ram (Died) Through Lrs. Nil
  - 1(A)(a) Rugmen W/o Late Ringhu Ram Aged About 55 Years R/o Village - Rakelim P.S. - Darima, Tahsil - Ambikapur, District Surguja Chhattisgarh
  - 1(B). Sewak Ram S/o Budhan Aged About 35 Years Occupation Agriculture, R/o Village Rakeli, P.S. Darima, Tehsil Ambikapur, District Surguja Chhattisgarh. (Plaintiff)

---- **Appellants**

**Versus**

1. (A). Shiv Ratan (Died) Through Lrs.
  - 1.(A).(a). Moharsai S/o Late Shivratan Aged About 32 Years R/o Village Bhattikala, Tahsil - Ambikapur, District Surguja Chhattisgarh,
  - B. Moharsay, S/o Shivratan (dead)
  - 1.B(A) Vijay Kumar, S/o Late Moharsay, aged about 24 years, R/o Village Jogibandh, Tahsil Ambikapur, District Surguja (CG)
  - 1.B(B) Bundal Bai, Wd/o Late Moharsay, aged about 55 years, R/o Village Jogibandh, Tahsil Ambikapur, District Surguja (CG)
  - C. Tiwari Ram, S/o Shivratan, Aged 27 years,
  - 1.C.a Ramkumar, S/o Late Tiwari Ram, aged about 23 years, R/o Village Jogibandh, Tahsil-Ambikapur, District Surguja (CG)
  - 1.C.b Manoj, S/o Late Tiwari Ram, aged about 19 years, R/o Village Jogibandh, Tahsil-Ambikapur, District Surguja (CG)
  - D. Moharmaniya, S/o Shivratan, Aged 25 years,
  - 1.(E). Hira, S/o Shivratan, Aged About 25 Years R/o Village Jogibandh, Tehsil Ambikapur, District Surguja Chhattisgarh
  - 1.(F). Kunti, D/o Shivratan, Aged About 23 Years R/o Village Jogibandh, Tehsil Ambikapur, District Surguja Chhattisgarh
2. Sukhni Bai (Died) Through Lrs. Nil
  - 2(a). Ritu Raj (dead)
  - 2(b). Bholaram, S/o Late Somarsay, Aged About 48 Years, R/o Village Bhattikala, Tahsil-Ambikapur, District Surguja (CG)
  - 2(c). Dharma Ram, S/o Late Somarsay, Aged About 47 Years, R/o Village Bhattikala, Tahsil-Ambikapur, District Surguja (CG)
3. (A). Khoru S/o Katuram Aged About 30 Years R/o Village Rampur, Tehsil Ambikapur, District Surguja Chhattisgarh
4. (A). Ramvishal (Died) Through Lrs. Nil

- 4(A)(a) Milan Prasad S/o Late Ramvishal Aged About 30 Years, R/o Village Bhittikala, Tahsil-Ambikapur, District Surguja (CG)  
 4(A)(b) Balkaran S/o Late Ramvishal Aged About 26 Years, R/o Village Bhittikala, Tahsil-Ambikapur, District Surguja (CG)  
 4(A)(c) Satyanarayan S/o Late Ramvishal Aged About 23 Years, R/o Village Bhittikala, Tahsil-Ambikapur, District Surguja (CG)  
 4.(A)(d) Ramjila Wd/o Late Ramvishal Aged About 50 Years, R/o Village Bhittikala, Tahsil-Ambikapur, District Surguja (CG)

(B) Fulbasiya (dead) (Nil)

(C). Gangabai D/o Nansay Aged About 20 Years, R/o Village- Bhittikala, Tah. Ambikapur, Distt. Surguja CG

5. (A). Bandhan S/o Shivilal Aged About 42 Years R/o Village Bhittikala, Tehsil Ambikapur, District Surguja Chhattisgarh  
 5.1 - (B). Ramdhan S/o Shivilal Aged About 34 Years, R/o Village Bhittikala, Tehsil Ambikapur, District Surguja Chhattisgarh  
 5.2 - (C). Somarsay S/o Shivilal Aged About 24 Years, R/o Village Bhittikala, Tehsil Ambikapur, District Surguja Chhattisgarh  
 5.2-(D) Sukhram, S/o Shivilal, aged 20 years, R/o Village Bhittikala, Tehsil Ambikapur, District Surguja Chhattisgarh  
 5.4 -(E). Shivilal S/o Khalha, Aged About 80 Years, R/o Village Bhittikala, Tehsil Ambikapur, District Surguja Chhattisgarh ---- Respondents

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|---------------------------|---|------------------------------------------------------|
| For Appellants/Plaintiffs | : | Mr. A.K. Prasad with<br>Ms. Shuchita Bais, Advocates |
| For Respondents           | : | Ms. Priyanka Mehta, Advocate                         |

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**S.B. Hon'ble Shri Justice Manindra Mohan Shrivastava**

**Order On Board**

**19/12/2019**

Heard.

1. This appeal is directed against impugned judgment and decree dated 20.03.2002 passed by the First Additional District Judge, Ambikapur in Civil Appeal No.144-A/2001 by which, appellant's appeal has been dismissed, affirming judgment and decree dated 16.02.1996 passed by the Trial Court in the suit filed by the appellant/plaintiff.
2. The appellant/plaintiff filed a suit seeking declaration of title, partition and separate possession on the pleadings, *inter alia*, that the property comprised in different schedule A, B & C of the plaint, belonging to the father of the plaintiff, after his death, devolved upon the plaintiff and defendant sister, in all being six in number, as the successor in interest of deceased Dhansay. It was stated in the plaint that as Dhansay had daughters and no sons, in order to protect the property

for being grabbed by other male members in the family of their cousin, various documents were prepared, however, the parties never intended to dispose off the property by various deeds in favour of any particular member in the family but it was intended to remain joint. The plaintiff's prayer was that the plaintiff be declared entitled to 1/6<sup>th</sup> share in the property comprised in schedule B & C and it be also partitioned and separate possession be granted.

3. Out of defendant sisters of the plaintiff, except Duggibai, all other defendant sisters admitted the claim of the plaintiff. However, Duggibai did not accept plaintiff's claim and came out with the plea of succeeding to different parts of the property, claimed in the plaint, as belonging to her. In respect of the property comprised in Schedule-C, defendant Duggibai came out with the plea that she succeeded to that property to the exclusion of all other sisters including plaintiff because by way of Will dated 20.11.1980, that property was bequeathed in her favour by her father. Plea was also taken that the plaintiff's suit was otherwise barred by limitation.

4. Learned Trial Court after framing issue with regard to the plaintiff's claim in respect of the property comprised in Schedule B & C came to the conclusion that the plaintiff is not entitled to any relief and dismissed the suit.

5. Aggrieved by the impugned judgment and decree of the Trial Court, the appellant preferred an appeal. The Appellate Court also did not accept the plaintiff's claim and concurrent finding were recorded in dismissing the appeal.

6. This appeal was admitted on following substantial question of law :

“Whether both the Courts below are unjustified in holding that defendant No.5 has proved the execution and attestation of Will dated 20.11.80(Ex.D/1) in accordance with the provisions contained in Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 ?”

7. Learned counsel for the appellant argued that both the Courts below committed gross perversity and illegality in granting decree by holding Will dated 20.11.80 proved, even though, the only surviving attesting witness Shivratan did not support the plaintiff's case and denied execution of Will Deed. He argued that the provision contained in Section 63(c) of the Indian Succession Act, 1925 (for short 'the Act of 1925') read with Section 68 of the Indian Evidence Act, 1872 (for short 'the Act of 1872') laid down the specific requirement with regard to proof of execution of Will. The law requires the Will to be proved by atleast one attesting

witness. In the present case, one of the attesting witness died and the other attesting witness Shivratan, though appeared as witness, denied execution of Will. Learned Courts below in such a circumstance, were left with no option but to hold that the defendants failed to prove execution of Will Deed dated 20.11.80 Ex.D/1. Instead, it is argued, learned Courts below relied upon evidence of scribe of the Will, M.K. Mehta (DW-5), who was not an attesting witness. Learned counsel for the appellants further argued that this witness only claims to have scribed the Will and does not claim to be the attesting witness. Therefore, his evidence could not be made a basis to hold the Will proved.

8. In support of his contention, he has relied upon the judgment of the Supreme Court in the case of **N. Kamalam (dead) and another Vs. Ayyasamy and another, 2001(7) SCC 503**.

9. Next submission is that even if it is accepted for the argument sake that the evidence of the scribe of the Will is relevant, the Courts below fell in grave error of law in holding Will proved on the basis of his evidence because in any case, the evidence of M.K. Mehta (DW5), with regard to proof of essential ingredients as specified in Section 63(c) of the Act of 1925, are not proved. He would argue that M.K. Mehta (DW5) an Advocate, only stated that three persons had come to him, out of which, one claimed to be Dhansay and other two persons claimed to be Ramprasad and Shivratan though, he does not know them. This witness states that he had prepared draft of the Will which was later on typed. The evidence of this witness could not be relied upon to hold execution of Will proved. Therefore, for this reason also, the impugned judgment and decree are not sustainable in law.

10. Learned counsel for the appellants also prayed for framing an additional substantial question of law on the issue whether the Courts below were justified in holding the suit as barred by limitation. On this aspect, learned counsel for the appellants argued that as far as Will is concerned, the Will came to the light only after death of Dhansai and was disclosed for the first time in the written statement filed by the defendants as soon as it was disclosed that the plaintiff specifically denied execution of Will. There was no occasion for the plaintiffs to seek any relief for declaration that the Will is inoperative because once the execution of Will is denied, it was incumbent upon the defendants to prove execution of Will in accordance with law and a question of limitation would not arise.

11. On the other hand, learned counsel for the respondents would argue that present is a case where out of two attesting witnesses, one attesting witness Ram Prasad died and the other attesting witness Shivratan was examined, who denied

execution of the Will deed. Therefore, it was permissible under the law to lead other evidence to prove execution of Will in view of provision contained in Section 71 of the Evidence Act, as held by the Supreme Court in the cases of **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, 2003(2) SCC 91** and further followed in **Jagdish Chand Sharma V. Narain Singh Saini (dead) through Legal representatives and others, 2015(8) SCC 615**. Next submission of learned counsel for the respondents is that in the present case, it was not necessary for the defendants to prove execution of Will because the plaintiff-Chengti Bai, examined as PW3, has clearly admitted in her cross-examination that her father Dhansay had executed a Will in favour of defendant-Duggibai. In such a situation, where execution of Will has been admitted as a fact, irrespective of legality of the same, the defendants were not required to lead evidence for strict proof of the Will as required under Section 63(c) of the Act of 1925. Reliance has been placed on the judgment of the Supreme Court in the case of **Poonnamma Jagadamma and others Vs. Narayanan Nair and Others, 2017(6) SCC 778**. Reliance has also been placed on the judgment of the Supreme Court in the case of **Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta, AIR 1955 SC 363** in support of the submission as advanced herein above.

12. I have heard learned counsel for the parties and perused the records.

13. Present is a case where the Will Ex.D/1 was relied upon by defendant-Duggi Bai in support of her case that as far as property comprised in Schedule C of the plaint is concerned, that was bequeathed on her by way of Will dated 20.11.80 executed by her father Dhansay. It is not in dispute that out of two attesting witnesses, namely Ramprasad and Shivratan. Ramprasad died. Though Shivratan was examined as DW1, Shivratan did not support the case of the defendants and denied execution of the document of Will. The defendants also examined scribe of the Will namely M.K. Mehta (DW5). This witness supported execution of Will in his evidence. Learned Trial Court as well as the Appellate Court both relied upon the evidence of this witness to hold execution of Will proved.

14. The question which arises for consideration is whether the law permits proof of Will by evidence of witnesses other than attesting witnesses and if so, under what circumstances.

15. As far as proof of Will is concerned, Section 63 of the Indian Succession Act clearly lays down the mode and manner in which the execution of Will could be proved. Relevant provision in this regard is reproduced herein below :

**“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.”

16. Further the requirements of proof of Will is to be understood not only in the context of legal requirement as contained in Section 63(c) of the Indian Succession Act but also general provisions contained in Section 68 of the Evidence Act which, for ready reference is extracted herein 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.]”

17. 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 (supra)**, Their Lordships in the Supreme Court examined the legal requirement of proof of Will, as below:-

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

[Section 63](#) of the Succession Act "63. Execution of unprivileged wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare, or an airman so employed or engaged, or a mariner at sea, shall execute his will according to the following rules:-

(a) .....

(b) .....

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by

the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person;

and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

[Section 68](#) of the Evidence Act "68. Proof of execution of document required by law to be attested.- If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

Provided..."

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

8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of [Section 63](#) of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

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

10. [Section 68](#) of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of [Section 63](#) of the Succession Act with [Section 68](#) of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will

was that of the testator but must also prove that attestations were also made properly as required by clause (c) of [Section 63](#) of the Succession Act. It is true that [Section 68](#) of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in [Section 63](#). Although [Section 63](#) of the Succession Act requires that a will has to be attested at least by two witnesses, [Section 68](#) of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, [Section 68](#) gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under [Section 63](#) of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of clause (c) of [Section 63](#), viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under [Section 63](#) of the Succession Act. Where one attesting witness examined to prove the will under [Section 68](#) of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of [Section 68](#) of the Evidence Act.

18. In the present case, admittedly one of the attesting witness, Ram Prasad died. The other attesting witness Shivratan was however, examined but he denied execution of Will. In such a situation, whether a party supporting Will could be permitted to lead other evidence by taking recourse to the provision contained in Section 71 of the Act of 1872 was considered by their Lordship in the Supreme Court in the case of **Janki Narayan Bhoir (supra)**. In para 11 of the aforesaid decision, it was observed as below :

“11. [Section 71](#) of the Evidence Act is in the nature of a safeguard to the mandatory provisions of [Section 68](#) of the [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 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 the 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-by to the mandate of law relating to proof of execution of a will."

19. In view of the aforesaid authoritative pronouncement, it is clear that in a case where none of the attesting witnesses are found, a party can take recourse to [Section 71](#) of the Act of 1872 and lead other evidence to prove execution of Will. In another situation, where one attesting witness has been examined but has denied execution of Will and other attesting witness though available has not been examined, it has been held that it is not open for a party to take recourse to [Section 71](#) of the Act of 1872 and lead other evidence to prove execution of Will when another witness, though available, has not been called as witness to prove execution of Will. In Yet another situation where out of two, only one witness is available who has denied execution of Will, recourse could be taken to [Section 71](#) of the Act of 1872 and evidence could be led to prove and evidence of other witness than attesting witness could be led to prove execution of Will. This legal position was reiterated by the Supreme Court in a subsequent decision in the case

of Jagdish Chand Sharma (*supra*) as below :

“52. While dwelling on the respective prescripts of [Section 63](#) of the Act and [Sections 68](#) and [71](#) of the 1872 Act vis-à-vis a document required by law to be compulsorily attested, it was held in *Janki Narayan Bhoir case* 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.”

20. Therefore, in view of the aforesaid consideration and the legal position, it has to be held that in the present situation, where out of two witnesses, one died and the other was examined but denied execution of Will, law permitted the parties supporting the Will to prove execution of Will by other evidence in view of the provision contained in Section 71 of the Evidence Act. Therefore, the evidence of the other witness, in this case, scribe of the Will namely M.K. Mehta (DW5) could not be brushed aside only on the ground that it was not permissible under the law to prove execution of Will except from the evidence of an attesting witness.

21. Reliance placed on the decision of the Supreme Court in the case of *N. Kamalam (supra)* is misplaced in law. That judgment declares general principle applicable in the matter of proof of a Will in the light of provision contained in Section 63(c) of the Indian Succession Act read with Section 68 of the Evidence Act. That decision is not proposition for an authority to deal with situation which have been specifically dealt with by the Supreme Court in the case of *Janki*

*Narayan Bhoir (supra)*, referred to herein above.

22. Next submission of learned counsel for the appellants that even if the evidence of M.K. Mehta (DW5) is taken as it is, the requirement of proof of execution of Will as required under Section 63(c) of the Indian Succession Act is not fulfilled, cannot be accepted. M.K. Mehta (DW5) in his evidence has very clearly stated not only with regard to the fact that it was he who had prepared the draft of the Will but also that after the Will was prepared, the same was read over by him to the testator of the Will and then in his presence, not only the testator but two witnesses, namely, Ramprasad and Shivratan both affixed their signatures. This fact has been reiterated by this witness in the cross-examination.

23. The argument of learned counsel for the appellants that as Shivratan had denied the execution, M.K. Mehta (DW5) is not familiar and known to the witnesses of execution of Will, his evidence was liable to be disbelieved. This part of argument of learned counsel for the appellants is the essentially in the realm of re-appreciation of evidence. Both the Courts below have scrutinized the evidence of Shivratan as well as M.K. Mehta (DW5) and have recorded concurrent finding of fact that the evidence of M.K. Mehta (DW5) is reliable and can be acted upon. Therefore, on this count, no interference is called for.

24. Additionally, this Court also finds that though the plaintiff-Chengtibai (PW3) in her plaint denied execution of Will, what she stated in para 9 of her evidence is important.

“9. यह बात सही है कि बची हुई जो जमीन है उसे भी शिवलाल एवं उसके पुत्र लोग कमाते खाते है यह बात सही है कि मेरे पिता ने अपने मृत्यु के पूर्व इस तीन एकड़ जमीन को मेरी बहन दुग्गी को वसीयत कर दिया था। गवाह से दुबारा पूछने पर कहती है कि मेरे पिता ने जिस भूमि को वसीयत किया था उसे ही दुग्गी के पुत्र लोग कमाते आ रहे है। मेरे पिता की मृत्यु हुए काफी दिन हो गया। मेरे पिता को मेरे लगभग 12 साल हो गया है। यह बात सही है कि मेरे पिता को मेरे 15-16 साल होता होगा।”

25. This shows that the plaintiff, herself, has stated in her evidence that her father Dhansay has executed a Will in favour of her sister Duggibai, defendant No.5. In the case of *Poonnamma Jagadamma (supra)*, the Supreme Court observed thus :

“9. The High Court noticed that the attestors to Ext. A-1 were not alive at the time of filing of the suit and therefore, could not be examined. The High Court also noted that Exts. A-1, A-4, A-5, and Book No.III Vol.18 and the Thumb Impression register were produced before the Trial Court and duly considered. From the evidence of PW2 relied upon in respect of Ext. A-1 Will, the same was proved. The High Court then noted the

contention of the Respondent No.1 – plaintiff, that the execution of the Will was not specifically denied by the defendants; and that even if the Will was not proved, the right of Respondent No.1 - plaintiff over the suit property as the co-owner, being one of the sons of the original owner of the property, was indisputable. For that reason, it was unnecessary to go into the question of genuineness of the Will. It was open to the co-owner to ask for a prohibitory injunction and that could not be refused. To that extent, Respondent No.1 succeeded before the High Court.”

26. There is substance for the argument of learned counsel for the respondents that the question of law as framed is not a substantial one because there is no other substantial question of law framed that concurrent finding by the Court below that the suit was barred by limitation is perverse or unjustified in law. Therefore, irrespective of decision on the question of law as framed by the Court, the result of the case would not change and the decision on the same would not have any material bearing in the result of the case.

27. Even if it is accepted that there is an arguable case for framing substantial question of law on the aspect of limitation, having considered the case of the appellants on the merits itself, this Court is not inclined to frame any other question.

28. In the result, substantial question of law is accordingly answered against the appellants and in favour of respondents and decided that the Courts below were justified in holding that the defendant No.5 has proved the execution and attestation of Will dated 20.11.80 in accordance with the provision contained in Section 63(c) of the Act of 1925 read with Section 68 of the Act of 1872.

29. In the result, the appeal fails and is accordingly dismissed.

30. The parties shall bear their own costs.

31. The appellate decree be accordingly drawn.

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