

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No.488 of 2003**

1. Hemlal S/o Late Raviram Chouhan, aged about 30 years,
2. Bhuwan Lal S/o Late Raviram Chouhan, aged about 34 years,
3. Babulal S/o Late Raviram Chouhan, aged about 28 years,
4. Dhanmat, widow of Late Raviram Chouhan, aged about 49 years,

All are resident of Village Godi, P.S.H.- Tamnar, Tahsil- Gharghora,
District- Raigarh, Chhattisgarh

---- Appellants/Plaintiffs

Versus

1. Budu Dead Through Lrs

1-A Sharan Bai (Deleted)

1-B Duti D/o Late Budu (Wd/o Late Keshav Prasad), aged about 50 years

1-C Sukhsagar S/o Late Budu, aged about 42 years,

All are resident of Village Garhi, Post Tamnar District Raigarh (CG)

1-D Sukhdev S/o Late Budu, aged about 44 years, R/o Patelpali, Raigarh,
District Raigarh Chhattisgarh

2. State of Chhattisgarh through Collector, Raigarh, District Raigarh (CG)

---- Respondents/Defendants

Present:-

Shri J. K. Shastri, Advocate for appellants.

Shri Ashish Surana, Advocate for respondents No.1-B to 1-D.

Shri Anand Dadariya, Advocate for the applicant-Laxmi Narayan Choudhary.

Shri Anmol Sharma, Panel Lawyer for respondent No.2-State.

Single Bench : Hon'ble Shri Justice Manindra Mohan Shrivastava

JUDGMENT

12/09/2019

Heard.

1. This second appeal arising out of the impugned judgment and decree

dated 23-07-2003 passed by the Second Additional District Judge, Raigarh in Civil Appeal No.43-A/2001, whereby and whereunder the learned lower appellate Court has reversed the judgment and decree dated 02-08-2001 passed by the learned Trial Court in Civil Suit No.13-A/1992 and dismissed the plaintiff's suit.

2. The original plaintiff-Ravi Ram Chouhan filed a suit seeking declaration of his title and recovery of possession of the property in dispute on the pleadings inter alia that the property in dispute was bequeathed by way of will dated 28-08-1980, Ex.P-1 executed by Late Kamla Bai in favour of the plaintiff, because plaintiff was selflessly serving Kamla Bai and out of her affection and affinity towards the plaintiff, Kamla Bai decided to bequeath by way of will, her property in dispute in favour of the plaintiff. Further case of the plaintiff was that the defendant-Buddu, brother of the deceased-Kamla Bai, was working and residing in another country Libiya. According to the plaintiff, cause of action arose when Buddu started interfering with his possession. On such pleadings, the plaintiff sought declaration of title based on will and also alternative relief of recovery of possession over the property in dispute.

3. Defendant No.,1-Buddu resisted plaintiff's claim on the pleadings that Kamla Bai, being sister of Buddu, was residing with Buddu. The property in dispute was purchased by Buddu in the name of Kamla Bai. According to him, Kamla Bai never executed any will deed in favour of the plaintiff-Ravi Ram Chouhan and the will deed relied upon by the plaintiff is forged, fabricated and fictitious document. The defendant also made a counter claim in respect of the property in dispute seeking declaration that the defendant has succeeded to the property of the deceased being only surviving heir, under Hindu Succession Act and also for recovery of possession as an alternative relief.

4. On the important issue as to whether the plaintiff has succeeded in proving execution of will and bequeathing of property in dispute in his favour by Kamla Bai, learned trial Court held in favour of the plaintiff that by will dated 28-08-1980, Ex.P-1, Kamla Bai had bequeathed her property in favour of the plaintiff. Counter claim of the defendant was dismissed. Aggrieved by the judgment and decree passed by the learned trial Court, the defendant-Buddu filed an appeal before the learned lower appellate Court. The learned lower appellate Court, upon assessment of evidence, oral as well as documentary, came to the conclusion that the plaintiff has failed to prove due execution of will and it was suspicious and further that the defendant's counter claim deserved to be allowed as he was the only surviving heir being brother of the deceased-Kamla Bai. On such finding, the judgment and decree passed by the learned trial Court was reversed and the plaintiff's suit was dismissed and defendant's counter claim was decreed. This second appeal arises out of the aforesaid judgment and decree passed by the learned lower appellate Court.

5. This appeal was admitted for hearing on 06-07-2005 on the following substantial question of law:-

“Whether in the facts and circumstances of the case, the first appellate Court was justified in reversing the findings of the trial Court that Ravi Ram had derived title to the suit lands through the Will executed by Kamla on 28-08-1980?”

6. Learned counsel for the appellant contended that the finding recorded by the learned lower appellate Court that the plaintiff has failed to prove due execution of the will is perverse, patently illegal in as much as the finding of the learned lower appellate Court that the evidence of document writer/Scriber of the will namely Kedar, PW-3 cannot be equated as the evidence of the attesting witness, is based on patent misleading of his evidence. He would argue that there is no legal impediment in scribe of the will to become attesting witness of

the will, which he has scribed. Referring to the provisions and mandatory requirements of proof of will as contained in Section 63(c) of the Indian Succession Act, learned counsel for the appellant would argue that in order to be attesting witness, the legal requirement as provided in Clause(c) of Section 63 of the Indian Succession Act is that if a scribe of the document proves from his evidence that the testator of the will was read over the contents of the will and thereafter, in his presence, the testator signed/affixed thumb impression on the will, his evidence can be accepted and relied upon as attesting witness and merely because, he happened to be document writer also, his evidence could not be discarded. Learned counsel for the appellant contended that the judgment of the Supreme Court in the case of ***Mehandi Lal Yadav vs. State of Chhattisgarh***¹, turned on facts as in that case, on facts, it was found that the evidence of scribe of the will was confined only to the aspect of preparation of document and that he had deposed that the testator had signed the will in his presence. Therefore, it is argued, the said decision is not an authority for the proposition that under no circumstance, scribe of the will could be an attesting witness.

7. Learned counsel for the appellant has submitted that the evidence of scribe is emphatic that on the instructions of Kamla Bai, he had scribed the will and thereafter, Kamla Bai had signed the will in his presence and he also signed the document of will. It is argued that the evidence of Kedar, PW-3, Document Writer, qualifies to be accepted and recognized as evidence of attesting witness and thereby fulfills the legal requirement of Section 63(c) of the Indian Succession Act, read with Section 68 of the Indian Evidence Act.

Further submission is that one of the attesting witness-Haribandhu, PW-4 has also proved attestation of the will by stating that will was prepared as per

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the directions of Kamla Bai and he had signed the will. He would argue that even though, he has not very specifically stated that Kamla Bai had signed the will in his presence, his evidence read in its totality, leads to inference that he was present at the time when Kamla Bai had expressed that she is willing to bequeath her property in favour of the plaintiff-Ravi Ram Chouhan. It was followed by preparation of document and signatures, meaning thereby that in the presence of this witness, Kamla Bai had signed the will. It is submitted that the finding of learned lower appellate Court that the will cannot be said to be proved as it appears to be a suspicious document, is based on patent misleading evidence of Jagdish, DW-2, other attesting witness of the will. He would submit that Jagdish has admitted his signatures on the will. Evidence of Jagdish, DW-2 that he was not witness to the execution of will and he was insisted by Ravi Ram, the plaintiff, to put his signatures on the will many years after the death of Kamla Bai, is liable to be rejected, because, in his cross-examination, he admits that 17 years before the marriage of his daughter, he had signed the will. That means, will was signed by him in the year 1980 i.e. the year, in which, it was executed, therefore, the finding of the learned lower appellate Court is patently illegal and deserves to be set aside. Learned counsel for the appellant also argued that the counter claim has been allowed without there being any legally admissible evidence on record that Buddu was entitled to succeed to the property of his sister-Kamla Bai in the absence of other heirs in accordance with Clause (a), (b) & (c) of sub section(1) of Section 15 of the Hindu Succession Act.

8. Per contra, learned counsel for the respondent-plaintiff would support the judgment and decree passed by the learned trial Court by submitting that the entire evidence led by the parties has been minutely scrutinized and analyzed by the learned lower appellate Court to record a finding of fact that the will is

suspicious and could not be said to be duly proved, taking into consideration that out of number of attesting witnesses, one attesting witness Haribandhu, PW-4 has not stated that Kamla Bai signed in his presence and other attesting witness had not at all supported, but had stated that his brother Ravi Ram insisted him to sign the document and according to him, he has also deposed that the document of will itself was prepared many years after the death of Kamla Bai. He also argued that even if the evidence of Kedar, PW-3 could be treated as attesting witness, overall appreciation of the evidence done by the learned lower appellate Court renders the very execution of will is suspicious and therefore, it essentially being a finding of fact and no interference is warranted against this finding.

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

10. While the learned trial Court has relied upon the evidence of Kedar, PW-3 and Haribandhu, PW-4, holding the execution of will deed dated 28-08-1980 duly proved, not giving much weight to the evidence of Jagdish, DW-2, the learned lower appellate Court has examined the evidence of all the witnesses led by the parties, more particularly of the Document Writer, Kedar, PW-3, attesting witness, Haribandhu, PW-4 and other attesting witness, Jagdish, DW-2.

11. As far as competency of document writer to be attesting witness is concerned, there is no legal impediment for document writer to be attesting witness of the will. None of the provisions contained in Clause VI relating to testamentary succession in Indian Succession Act, much less in Section 63 thereof, create any such bar that the person, who has scribed the will, could not be an attesting witness. Therefore, in a given case, on facts, it may be proved from reliable evidence that the person, who has scribed the will, was also an

attesting witness.

12. 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***.² 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."

13. 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.

14. On the face of such legal requirement, the evidence of witnesses as scrutinized by the learned lower appellate Court, reveals that while the plaintiff in order to prove execution of will as credible document, has examined one of the attesting witness, Haribandhu, PW-4 and the Scriber-Kedar, PW-3, the defendant has examined Jagdish, DW-2 as attesting witness of the document.

15. The will deed, Ex.P-1, said to have been prepared on 28-08-1980 speaks of as many as five witnesses. Out of five witnesses, Haribandhu has been examined as Plaintiff Witness No.4. This witness deposed in his examination-in-chief that he was informed by Kamla Bai that Ravi Ram Chouhan would maintain her and she would bequeath her property to Ravi Ram. He further deposed that 'Vasiyatnama' was prepared by Kedar Guruji and he has signed the document as a witness. However, in his examination-in-chief, he has nowhere deposed that the will deed was read over after having been prepared, it was read over to Kamla Bai and after having understood the same, he had affixed his signatures on the said will deed. Further more, in the cross-examination also, this witness has nowhere stated that Kamla Bai, after having been explained the contents of the will, had signed the will deed. The submission of learned counsel for the appellant, on totality of the evidence of this witness, it can be inferred that Kamla Bai had signed the will deed in his

presence, does not merit acceptance. Entire evidence of this witness nowhere states that Kamla Bai had signed the will in his presence. The other requirement of Section 63(c), as has been noted hereinabove, has also not been fulfilled. Therefore, the evidence of this witness cannot be accepted as attesting witness within the meaning of provision contained in Section 63(c) of the Indian Succession Act.

16. The other attesting witness, Jagdish has been examined by the defendant as his witness No.2. This witness stated that he is the brother of plaintiff-Ravi Ram Chouhan. Kedar Nath Sao, PW-3 (plaintiff's witness) has also stated in his evidence that Jagdish is brother of Ravi Ram. This witness, however, does not support execution of the will deed. The evidence of this witness is that no will was executed in his presence by Kamla Bai, though he admits his signature. In his further evidence, he explains the circumstances, under which, his signatures were obtained. The evidence that Kamla Bai had already executed will deed, prior to put his signature, to which, this witness initially refused by stating that as the document was not executed in his favour, it would not be proper for him to affix his signature, on the insistence of his brother, Ravi Ram, therefore, he signed the will deed.

This witness states that will deed was prepared after Kamla Bai died and on the date, when he put his signature on the will deed, Kamla Bai was not alive. The evidence of this witness that will deed may have been prepared after death of Kamla Bai, appears to be contradictory to what has been stated in his cross-examination. He has admitted that he has signed the document, Ex.P-1, 17 years before, he became brother-in-law of Buddu. According to this witness, his daughter was married to Budduram's son in the year 1997 and on this evidence, it appears that he had signed the document sometimes in the year

1980 and that by itself, cannot be treated as proof of attestation. The evidence of this witness does not support the plaintiff's case, though he is the brother of the plaintiff. This witness, however, states that the will deed was not prepared in his presence and he put his signature on the instruction of his brother and his signatures were obtained as soon as document was prepared in the year 1980 itself or thereafter, he put his signatures. To fulfill legal requirement, what was important was to prove that Kamla Bai had signed the will deed in his presence or that Kamla Bai was read over the contents of will deed in his presence and thereafter, she signed the document.

17. This Court has already held hereinabove that only because the witness happens to be scribe of the will, he does not disqualify to be attesting witness. However, in the present case, even if it is accepted that the evidence of Kedar Nath Sao, PW-3, document writer, can be accepted as attesting witness, because he has stated that he had prepared will deed on the instructions of Kamla Bai and Kamla Bai signed the deed in his presence and even then, in the present case, out of three witnesses, two of them did not support the plaintiff's case as attesting witness of the will deed, the evidence on record shows that some of the witnesses died. But, then the overall picture on the evidence of Kedar Nath Sao, PW-3 & Haribandhu, PW-4 and Jagdish, DW-2, renders the view of the learned lower appellate Court possible. It is not a case where the entire finding of the learned lower appellate Court turns only on the evidence of Scribe of the will namely Kedar Nath Sao, PW-3. In order to come to the conclusion that the will is suspicious as it cannot be said to be proved, the learned lower appellate Court has taken into consideration the evidence of two attesting witnesses namely Haribandhu, PW-4 and Jagdish, DW-2.

18. Therefore, in the considered opinion of this Court, even if it were to be

held that the evidence of Kedar Nath Sao, PW-3 though Scriber of the document could be treated as that of attesting witness, scrutiny of the evidence, as has been done by the learned lower appellate Court, has been only in the realm of enquiry into the facts and no substantial question of law arises for consideration, because the finding of the learned lower appellate Court rests on legally admissible evidence, particularly that the evidence of one of the attesting witness, Jagdish, DW-2, does not support the will document.

19. As far as the counter claim of the defendant is concerned, the present is a case where only substantial question of law as framed by this Court is with regard to proof of will and no other substantial question of law was framed as to whether the learned Courts below was justified in granting a decree on the counter claim of the defendant.

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

SD/-
(**Manindra Mohan Shrivastava**)
JUDGE