

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.290 of 2004

Roshan Lal S/o Jaijug, Caste-Rajwar, aged about 35 years, Occupation-Service, Bhatgaon Colliery, P.S. & Tehsil Pratappur, Distt. Surguja, C.G.

(Plaintiff)

---- Appellant

Versus

1. Moharlal (died and deleted)
2. Somar Sai (Dead) through LR's
  - 2.a. Manoj S/o Late Somar Sai, aged about 20 years,
  - 2.b. Nini D/o Late Somar Sai, aged about 24 years,
  - 2.c. Sonamati D/o Late Somar Sai, aged about 22 years,
 All R/o Village - Jhumarpara, Tahsil-Surajpur, District-Surajpur (CG)
3. Shyam Lal S/o Moharlal, Caste-Rajwar, aged about 45 years, Occupation-Agriculture,
4. Ram Vilas S/o Moharlal, Caste-Rajwar, aged about 40 years, Occupation-Agriculture,
5. Atibai S/o Moharlal, Caste-Rajwar, aged about 35 years,  
All r/o village Jhumarpara, Tehsil Surajpur, Distt. Surguja, C.G.

(Defendants)

6. The State of Chhattisgarh, through Collector, Surguja, At & Post Ambikapur, Distt. Surguja, C.G.

---- Respondents

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For Appellant/Plaintiff : Mr.A.K.Prasad, Advocate  
 For Res.No.2(a) to (c), : Mr.Ashok Kr. Shukla, Advocate  
 3, 4 and 5  
 For Respondent NO.6 : Ms Anjali Singh Chouhan, P.L.

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Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

25/11/2019

1. This plaintiff's second appeal under Section 100 of the CPC was admitted for hearing by formulating the following substantial question of law: -

"Whether the judgment and decree passed by the first appellate court regarding the

will (Ex.P/2) is doubtful, not proved and consequently illegal, is perverse ?”

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

2. The suit property was originally held by Dashrath. He is said to have executed a unregistered Will in favour of the plaintiff on 28.11.94 (Ex.P-2) bequeathing the suit property owned by him. Dashrath died in the year 1998, after his death, the plaintiff got his name mutated in revenue records, but thereafter defendant No.1 on the basis of earlier Will dated 23.10.97 (Ex.D-1) alleged to have executed by Dashrath in his favour preferred an appeal before the appellate authority. The Sub-Divisional Officer (R.), Surajpur set aside the order of mutation and remanded the matter to the Tahsildar for passing the order afresh in accordance with law, which necessitating the filing of the suit for declaration of title and permanent injunction by the plaintiff stating inter-alia that he is title-holder of the suit land on the basis of Will dated 28.11.94 (Ex.P-2) executed by Dashrath in his favour, whereas the defendants set-up a plea that before execution of Will in favour of the plaintiff on 28.11.94 (Ex.P-2), Dashrath has also executed a Will in his favour on 23.10.97 (Ex.D-1),

as such, the suit be dismissed.

3. The trial Court after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 27.8.2003, decreed the suit holding that Dashrath had executed a Will in favour of the plaintiff and the plaintiff has proved the execution and attestation of Will in his favour in accordance with law. On appeal being preferred by the defendants, the first appellate Court reversed the judgment and decree of the trial Court and dismissed the suit holding that the plaintiff has failed to prove the due execution and attestation of Will in accordance with law. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff before this Court, in which substantial question of law has been formulated which has been set-out in the opening paragraph of this judgment.

4. Mr.A.K.Prasad, learned counsel for the appellant/plaintiff, would submit that the first appellate Court is absolutely unjustified in holding that the plaintiff has failed to prove the execution and attestation of Will (Ex.P-2) in his favour in accordance with law as attesting witness Mohd. Shafiq (PW-3) has been examined to prove a

valid attestation of Will in favour of the plaintiff and remaining two witnesses i.e. Brahmdev and Dharampal have already died, as such, finding of the first appellate Court that execution and attestation of Will dated 28.11.94 (Ex.P-2) by Dashrath in favour of the plaintiff is not in accordance with law deserves to be set aside being perverse and contrary to record.

5. Mr.Ashok Kumar Shukla, learned counsel for the respondents No.2(a) to 2(c), 3, 4 and 5/defendants, would submit that the Will having been specifically denied by defendant No.1 in his written statement holding it to be not executed by Dashrath and it being unregistered, the plaintiff was called upon to prove the Will by examining one of the attesting witness as provided in Section 68 of the Indian Evidence Act, 1872. He would further submit that Mohd. Shafiq (PW-3) was only identifier of deceased Dashrath before notary, he cannot be called as attesting witness and therefore, he was not attesting witness. In case two other witnesses have already died, it was incumbent upon the plaintiff to follow the procedure prescribed in Section 69 of the Evidence Act, which has not been done, as such, due attestation of Will (Ex.P-2) by Dashrath in favour of the plaintiff is not proved in accordance with law and therefore, no exception can be taken

to the judgment and decree of the first appellate Court holding that attestation of Will (Ex.P-2) is not proved in accordance with Section 68 of the Evidence Act, as such, the appeal deserves to be dismissed.

6. I have heard learned counsel for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.
7. The question is only with regard to finding of the first appellate Court regarding the Will dated 28.11.94 (Ex.P-2), which is perverse and it has not been proved in accordance with law ?
8. Admittedly, the suit property was originally held by Dashrath. It is the case of the plaintiff that vide Ex.P-2 Will has been executed in his favour by Dashrath being his grandson.
9. A careful perusal of the Will dated 28.11.94 (Ex.P-2) would show that the Will has been executed by Dashrath in presence of Brahmdev and Dharampal. Admittedly, both witnesses have not been examined. Reason being that they were dead at the time of evidence in suit. The plaintiff has examined Mohd. Shafiq (PW-3) claiming him to be attesting witness. Undisputedly, in front page of Will, it has not been signed by said Mohd. Shafiq and in back page

of said Will, there is attestation by notary, which has been certified by notary-Hriday Narayan Mishra that testator of the Will i.e. Dashrath S/o. Bhukhal Rajwar has been identified by Mohd. Shafiq (PW-3) and whose signature is appended and thereafter notary-Hriday Narayan Mishra has attested the Will, as such, Mohd. Shafiq is only identified the testator of the Will namely Dashrath before notary.

10. The Supreme Court in the matter of **Girja Datt Singh v. Gangotri Datt Singh**<sup>1</sup> has held that the two persons who had identified the testator at the time of the registration of the will and had appended their signatures at the foot of the endorsement by the Sub-Registrar, were not put "animo attestandi".
11. The question what is the meaning of attestation, what are the essential conditions of valid attestation and whether identifier or registering officer is an attesting witness came to be considered by Their Lordships of the Supreme Court in the matter of **M.L. Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and others etc.**,<sup>2</sup> in which Their Lordships after detailed consideration has held that identifier or registering officer is not attesting witness. Para-8 of the report states as under:-

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1 AIR 1955 SC 346

2 AIR 1969 SC 1147

"8. Section 3 of the Transfer of Property Act gives that definition of the word "attested" and is in these words:-

"Attested", in relation to an instrument, means and shall be deemed to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time and no particular form of attestation shall be necessary."

It is to be noticed that the word "attested", the thing to be defined occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of a valid attestation under Section 3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness."

12. In the matter of Beni Chand (Since Dead) now by

L.Rs.v.Smt. Kamla Kunwar and others<sup>3</sup> the Supreme

Court while defining the meaning of attesting

witness with reference to Section 63(c) of the

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3 AIR 1977 SC 63

Succession Act, 1925 read with Section 68 of the Evidence Act held that by attestation is meant the signing of a document to signify that the attestor is a witness to the execution of the document; and by Section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document.

13. Similarly, in the matter of Bharat Ram v. Suresh<sup>4</sup> the Supreme Court has held that to be an 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.
14. Thus, it is essential that the witness should have put his signature in Will *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

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4 (2003) 12 SCC 35

15. Reverting to the facts of the present case, it is quite vivid that admittedly, Mohd. Shafiq (PW-3) did not sign the Will for the purpose of attesting the Will and he has only signed the Will as identifier of the testator in presence of notary, which is quite apparent from back portion of Ex.P-2, in which notary has clearly recorded that Mohd. Shafiq (PW-3) has identified the testator and his signature is appended thereto and thereafter notary has attested the Will, as such, Mohd. Shafiq (PW-3) has not signed the Will *animo attestandi* and he has only identified the testator of the Will namely Dashrath, therefore, he cannot be said to be attesting witness and attestation of the Will cannot be proved by a person who is not attesting witness. In view of that, evidence of Mohd. Shafiq (PW-3) cannot be read as testimony of attesting witness and remaining two witnesses have already died at the time of evidence in suit. Therefore, recourse available to the plaintiff is to follow the procedure prescribed in Section 69 of the Evidence Act which provides for proof of will by proving the handwriting of one of the attesting witnesses and signature of executant of the document to be in the handwriting of that person. Section 69 of the Evidence Act states as under:-

**"69. Proof where no attesting witness**

**found.**— If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

16. Section 69 of the Evidence Act, 1872 came-up for consideration before the Supreme Court in the matter of Babu Singh and others v. Ram Sahai @ Ram Singh<sup>5</sup> in which Their Lordships held as under:-

“14. It would apply, inter alia, in a case where the attesting witness is either dead or out of the jurisdiction of the court or kept out of the way by the adverse party or cannot be traced despite diligent search. Only in that event, the Will may be proved in the manner indicated in [Section 69](#), i.e., by examining witnesses who were able to prove the handwriting of the testator or executant. The burden of proof then may be shifted to others.

15. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of [Section 63](#) of the Indian Succession Act and [Section 68](#) of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and attestation stands relaxed. However, signature and handwriting, as contemplated in [Section 69](#), must be proved.”

17. Thus, duty is cast on the plaintiff to prove the signature of the executant on the document that it is of his own and at least the signature of one attesting witness has to be identified in the manner known to law. Mere saying that the signature of attesting witness is of him may not be

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<sup>5</sup> AIR 2008 SC 2485

sufficient unless he produces the signature of the attesting witness on some admissible document and make both the signatures available for comparison by the court to find out whether the person acted as real witness, which has admittedly, not been done in the present case.

18. In view of the aforesaid analysis, I am of the considered opinion that finding recorded by the first appellate Court that the Will dated 28.11.94 (Ex.P-2) executed by Dashrath in favour of the plaintiff has not been proved in accordance with law does not suffer from any perversity or illegality. I do not find any merit in this second appeal.

19. Accordingly, the second appeal being devoid of merit is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

20. A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)  
Judge

B/-