

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.710 of 2003

- 1a. Ghanshyam S/o Banshidhar, Aged about 58 years,
 1b. Padman S/o Banshidhar, Aged about 52 years,
 1c. Laxman S/o Banshidhar, Aged about 48 years,
 All R/o Dhansara, Tahsil-Sarangarh, District-Raigarh (CG)
 2. Radheshyam, Son of Banshidhar, aged about 35 yrs Caste:
 Patwari, resident of Baramkela, Tahsil : Sarangarh, Distt : Raigarh

(Defendants No.1 & 3)
 ---- Appellants

Versus

1. Deepak Kumar Patnayak, Son of Manohar Patnayak, aged about 6 years, minor through Caste friend & Guardian – Manohar Patnayak, Son of Bhuvaneshwar Patnayak, resident of Dhansara, presently residing at Vill Dhangardeepa, Raigarh, Tahsil & Distt : Raigarh.
 2. Manohar Patnayak, Son of Bhuvaneshwar Patnayak, aged about 35 years, Occupation : Agriculturist, resident of vill : Dhangardeepa, Raigarh, Tahsil & Distt : Raigarh
 3-A) Sushila Bahidar, Wd/o Daya Ram Bahidar, aged about 70 years,
 3-B) Jagindro S/o Daya Ram Bahidar, aged about 35 years,
 3-C) Kamlesh S/o Daya Ram Bahidar, aged about 30 years,
 3-D) Lochan S/o Daya Ram Bahidar, aged about 25 years,
 3-E) Chameli D/o Daya Ram Bahidar, aged about 23 years,

All are R/o Village-Dansara, Tehsil-Sarangarh, District Raigarh (CG)

(Plaintiffs)

4. Jogendra, Son of Dayaram Bahidar, aged about 34 years, Occupation : Agriculturist, resident of village Dhansara, Tahsil : Sarangarh, Distt : Raigarh
 5. State of Chhattisgarh through the Collector, Raigarh

---- Respondents

For Appellants/Defendants No.1&3: Mr.P.R.Patankar, Advocate
 For Respondents No.1 and 2/plaintiffs: Mr.H.S.Patel, Advocate
 For Respondent No.5 / State: -Mr.S.K.Agrawal, G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

08/03/2019

1. The substantial questions of law involved, formulated and to be answered in the second appeal preferred by defendants No.1 and 3 are as under: -

“Whether the lower appellate Court was not justified in reversing the findings of trial Court and holding that the will-dated 18.1.93 (Ex.-D/1) was not duly proved?

And

Whether the execution of will-dated 18.1.93 (Ex.-D/1) was duly proved under the provisions of Section 68 of the Indian Evidence Act?

[For the sake of convenience, the parties would be referred hereinafter as per their status shown and nomenclature in the suit before the trial Court].

2. The suit property was originally held by Anand Bihari. He had only one daughter namely Vimla Bai. Plaintiff No.2 is son-in-law and plaintiff No.1 is grand son of Anand Bihari. Vimla Bai died on 4.12.92, whereas Anand Bihari died on 4.4.93. The plaintiffs- Deepak Kumar Patnayak and Manohar Patnayak filed a suit for declaration of title, permanent injunction and possession of the suit property mentioned in Schedule 'A' and 'B' attached with the plaint. The plaintiffs claimed that Anand Bihari has executed Will in favour of his daughter-Vimla Bai on 9.4.1991.
3. Defendants No.1 and 2 claimed that Anand Bihari has executed Will in their favour on 8.1.93 (Ex.D/1), as such, they are title-holders of the suit land. The trial Court after appreciating oral and

documentary evidence available on record, by its judgment and decree dated 14.3.2002, partly allowed the suit, but held that Will dated 8.1.93 (Ex.D/1) has been proved in favour of defendants No.1 and 2 and therefore, they are title-holders of part of the suit land. On appeal being preferred by the appellants/plaintiffs, the First Appellate Court held that Will dated 8.1.93 (Ex.D/1) has not been proved in accordance with law and appeal has been allowed and suit has been decreed in toto, against which, this second appeal under Section 100 of the CPC by defendants No.1 and 3 in which the substantial questions of law have been formulated and set-out in the opening paragraph of the judgment.

4. Mr.P.R.Patankar, learned counsel appearing for the appellants/defendants No.1 and 3, would submit that the first appellate Court is absolutely unjustified in holding that the Will (Ex.D-1) was not duly proved in accordance with law, whereas it has been proved in accordance with law by examining Vijay Shankar (DW-4), who has clearly stated that the testator has signed the Will in his presence and he has also signed in presence of the testator, as such, the requirement of Section 63 of the Succession Act, 1925 is duly met-out. He relied upon a decision of the Supreme Court in the matter of M.B. Ramesh (dead) by LRs. v. K.M. Veeraje Urs (dead) by LRs. and others¹, a decision of this Court in the matter of Dayashankar and others v. Jaishankar (since deceased) through his L.Rs. and others² and a decision of the Gauhati High Court in the matter of Damodhar Bordoloi v. Mrinalini Devi Trust

1 (2013) 7 SCC 490

2 2012(2) C.G.L.J. 518

Board and others³ to buttress his submission.

5. Mr.H.S.Patel, learned counsel for respondents No.1 and 2/plaintiffs, would support the impugned judgment and decree and submit that the first appellate Court is absolutely justified in allowing the appeal and granting decree in favour of the plaintiffs.
6. I have heard learned counsel for the parties herein and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
7. The short question for consideration is whether the Will Ex.D-1 has been proved and established by defendants No.1 and 2 in view of the provisions contained in Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.
8. 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**⁴]
9. In order to consider the plea raised at the bar, it would be appropriate to notice Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872.
10. Section 63 of the Act of 1925 provides as under:-

“63. Execution of unprivileged Wills.—Every testator,

³ AIR 1999 Gauhati 53

⁴ (2015) 8 SCC 615

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.”

11. 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.

12. 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 Kadam⁵.

13. Section 68 of the Evidence Act, 1872 provides as under:-

“68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and 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.”

14. By the aforesaid provision, a document required by law to be attested to have its execution proved by at least one of the attesting witnesses if alive and it is subject to process of the court conducting the proceedings involved and is capable of giving evidence. However, proviso to Section 68 of the Evidence Act, 1872 is not available in case of will.

15. In the matter of Girja Datt Singh v. Gangotri Datt Singh⁶, 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

⁶ AIR 1955 SC 346

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.”

“One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri.”

16. In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁷ 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

⁷ AIR 1959 SC 443

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

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence,

coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

17. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁸, Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another⁹, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others¹⁰ and Jagdish Chandra Sharma (supra).

18. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another¹¹, the Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

19. In Surendra Pal (supra), the Supreme Court while re-stating the guidelines regarding the nature and extent of burden of proof on the propounder of a will held that propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of the dispositions; that he put his signature to the testament of his own free will; and that he has signed it in the presence of the

8 (1977) 1 SCC 369

9 (1974) 2 SCC 600

10 (2009) 4 SCC 780

11 (2017) 1 SCC 257

two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. It was further held that in cases where the propounder has himself taken a prominent part in execution of a will which confers on him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence.

20. The Supreme Court in Yumnam Ongbi Tampha Ibema Devi (supra) has clearly held that the attestation of will is not an empty formality. Highlighting the importance of attestation it was held it means signing a document for the purpose of testifying of the signatures of the executant. The attesting witness should put his signature on the will *animo attestandi* and it was held as under:-

“13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will. The attesting witness should speak not only about the testator’s signature or affixing his mark to the will but also that each of the witnesses had signed the will in the presence of the testator.”

21. In Janki Narayan Bhoir (supra), the Supreme Court while considering Section 63(c) of Succession Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of signature of the testator on the will was not sufficient, the attestation thereof is also to be proved as required by Section 63(c) of the Act Succession Act, 1925. It was observed as under: -

“10. Section 68 of the Evidence Act speaks of as to now a document required by law to be attested can be

proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63 although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attention of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the *execution of the will* does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under

Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act.”

22. The principle of law laid down in Janki Narayan Bhoir (supra) has been followed with approval in Jagdish Chandra Sharma (supra) by which it was held as under:-

“52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held Janki Narayan Bhoir (supra) that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz., attestation by two attesting witnesses in the manner as contemplated therein. It was expounded that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required Under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will Under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.”

23. 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-noted judgments (supra) qua execution and attestation of Will by a testator, the following factual position would emerge on the face of record.

1. Testator Shri Anand Bihari executed a Will in respect of his properties in favour of defendants No. 1 and 2 (his younger brothers), excluding his son-in-law Manohar Patnayak and maternal grand son Deepak Kumar Patnayak on 18.1.93 (Ex.D/1) and got it registered in the office of the Sub-Registrar, Sarangarh.
2. The Will is said to be attested by two witnesses namely Vijay Shankar (DW-4) and Khemraj (not examined) and scribed by Shri Mishra (not examined).
3. Defendants No.1 and 2, the propounders of the Will, were present at the time of execution of Will.
4. One of the attesting witnesses Vijay Shankar was examined on behalf of defendants No.1 and 2 as DW-4. He stated that at the time of execution of Will, testator (Anand Bihari) was of sound and disposing mind. He also stated that the testator signed the Will in his presence in two places and he has also signed the said Will.
5. The said witness (DW-4) did not say that other attesting witness namely Khemraj was present and testator had signed the Will in presence of Khemraj and Khemraj signed in presence of the testator. He omitted to state that other

attesting witness Khemraj had seen the testator signing on the will.

6. In para-8 of his cross-examination, he has expressly declined his inability to state whether Khemraj has signed the Will or not.

24. From the above-stated narration of facts, it is quite vivid that compliance of Section 63(c) of the Succession Act, 1925 is missing though strict compliance of the said provision is imperative. Defendants No.1 and 2 being propounders of the Will must have proved that the testator has signed the Will in presence of two witnesses-Vijay Shankar & Khemraj and they have signed in presence of the 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.

25. Analysing the facts of the present case, it would appear that defendants No.1 and 2 – propounders of the Will, have failed to prove the attestation of Will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of Evidence Act, 1872, as one of the attesting witnesses Vijay Shankar (DW-4) examined

before the Court did not state before the Court that the testator – Anand Bihari signed the will in presence of another attesting witness Khemraj and the said witness marked his signature in presence of the testator and mere signing of a Will as a witness would not per se amount to compliance of Section 63(c) of the Succession Act, 1925 as *animo attestandi* is absolutely missing. In the matter of **Bhagat Ram v. Suresh**¹², it has been 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. Therefore, this Court is fully satisfied that execution and attestation of Will is not found established in accordance with law and defendants No.1 and 2 have failed to discharge their burden placed upon them by law to prove attestation of a will.

26. In the present case also, one attesting witness Vijay Shankar (DW-2) was summoned and examined to prove the attestation of will, which was legally permissible as per Section 68 of the Evidence Act, 1872, but he had failed to prove the due attestation of Will as held herein-above and other attesting witness namely Khemraj though available has not been examined for the reason best known to defendants No.1 and 2.

27. Consequently, I hold that the first appellate Court is absolutely justified in holding that defendants No.1 and 2 being the propounders of Will have failed to establish due attestation of Will in

12 (2003) 12 SCC 35

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.

28. As a fallout and consequence of the above-stated discussion, the substantial questions of law framed are answered against defendants No.1 and 2 and in favour of the plaintiffs and this second appeal is dismissed accordingly leaving the parties to bear their own cost(s).

29. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

B/-