

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No. 469 of 2006**

1. Bholaram, S/o Sunder Lal Uikey, Aged about 45 years,
2. Tholaram, S/o Sunder Lal Uikey, Aged about 43 years,
3. Legal Representatives of Amoliram-
 - a) Rewti Bai, W/o Amoliram, Aged about 30 years,
 - b) Vikram, S/o Amoliram, Aged about 14 years (Minor)
Through Legal Guardian Mother Rewti Bai
 - c) Vandna, D/o Amoliram, Aged about 12 years
(Minor) Through Legal Guardian Mother Rewti Bai
 - d) Mesh Kumar, S/o Amoliram, Aged about 10 years
(Minor) Through Legal Guardian Mother Rewti Bai
 - e) Meghawati, S/o Amoliram, Aged about 10 years
(Minor) Through Legal Guardian Mother Rewti Bai
4. Ferha, S/o Sunder Lal Uikey, Aged about 39 years
5. Mannuram, S/o Sunderlal Uikey, Aged about 36 years,
6. Jamuna Bai, D/o Sunderlal Uikey, Aged about 37 years,
7. Samcha Bai, Widow of Sunderlal Uikey, Aged about 60 years,

All are resident of Devpura, Tehsil – Chikhadan, Dist – Rajnandgaon
(C.G.)

---- Appellants/Defendants

Versus

1. Rajendra Kumar, S/o Kishanlal Pradhan, Aged about 38 years,
R/o Devpura, Teshil – Chuikhadan, Dist – Rajnandgaon (C.G.)

..... Plaintiff

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

---- Respondents

For Appellants	:	Mr. Ravindra Agrawal, Advocate.
For Respondent No. 1	:	Mr. H.B. Agrawal, Senior Advocate with Mrs. Prabha Sharma, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

19/07/2019

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

“Whether the execution of Will by Late Agrotin Bai on
21.1.1987 in favour of plaintiff – Rajendra Kumar was
established as required by law ?

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

(2) The imperative facts required to be noticed for adjudication of this appeal are as under:

(2.1) The suit property is originally held by Agrotin Bai. She died issue-less. She executed a Will dated 21.01.1987 (Ex.P-1) in favour of plaintiff – Rajendra Kumar. Said Rajendra Kumar filed a suit for declaration of title, possession and permanent injunction on the basis of Will, which the trial Court dismissed holding the unregistered Will dated 21.01.1987 (Ex.P-1) to be suspicious. On an appeal being preferred by the plaintiffs, the First Appellate Court, reversed the judgment & decree of the trial Court and decreed the suit in plaintiff's favour holding that the alleged Will dated 21.01.1987 is proved and established in accordance with law, against which this second appeal has been preferred by the appellants/defendants

in which the substantial question of law has been formulated and set out in the opening paragraph of the judgment.

(3) Learned counsel appearing for the appellants/defendants would submit that the first appellate Court is absolutely unjustified in holding that plaintiff, being the propounder of the Will, has proved attestation and execution of the Will Ex.P-1 dated 21.1.1987 in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 and, therefore, the first appellate Court ought not to have reversed well reasoned findings of the trial Court and therefore, the judgment and decree granted by the first appellate Court deserve to be set aside and the decree of the trial Court deserves to be restored, and thereby the suit be dismissed.

(4) Per contra, Shri H.B. Agrawal, learned Senior Counsel appearing for respondent No.1/plaintiff while supporting the impugned judgment and decree of the first appellate Court would submit that the first appellate Court is absolutely justified in holding that Will (Ex.P-1) dated 21.1.1987 executed by Agrotin Bai in favour of plaintiff – Rajendra Kumar has been established in accordance with law, which does not call for any interference in the instant second appeal.

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

(6) The short question for consideration would be, whether execution and attestation of the Will (Ex.P-1) dated 21.1.1987 has been proved and established

by Agrotin Bai in favour of plaintiff is proved and established in view of the provision contained in Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 ?

(7) 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 others¹]

(8) 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.

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

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

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

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

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

1 (2015) 8 SCC 615

(10) 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.

(11) The above-stated provision of attestation of will under Section 63(c) of the Succession Act, 1925 by two or more witnesses has been held to be mandatory by Their Lordships of the Supreme Court in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam².

(12) 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.”

(13) 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.

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

“In order to prove the due attestation of the will Ex. A-36 Gangotri would have to prove that Uma Dutt Singh and Badri Singh saw the deceased sign the will and they themselves signed the same in the presence of the deceased. The evidence of Uma Dutt Singh and Badri Singh is not such as to carry conviction in the mind of the Court that they saw the deceased sign the will and each of them appended his signature to the will in the presence of the deceased. They have been demonstrated to be witnesses who had no regard for truth and were ready and willing to oblige Gur Charan Lal in transferring the venue of the execution and attestation of the documents Ex. A-23 and Ex. A-36 from Gonda to Tarabganj for reasons best known to themselves.”

“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.”

(15) In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁴

the Supreme Court speaking through Gajendragadkar, J., elaborately laid down the principles relating to the nature and standard of evidence required to prove a will. It was held as under:-

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

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

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

4 AIR 1959 SC 443

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.”

(16) The principle laid down in the above-stated judgment has been followed with approval in **Smt. Jaswant Kaur v. Smt Amrit Kaur and others**⁵, **Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another**⁶, **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others**⁷ and **Jagdish Chandra Sharma** (supra).

(17) In the matter of **Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another**⁸, 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.

(18) 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 of Will it was held it means signing a document for the

5 (1977) 1 SCC 369

6 (1974) 2 SCC 600

7 (2009) 4 SCC 780

8 (2017) 1 SCC 257

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.”

(19) 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 is 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.”

(20) 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 exposited 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.”

(21) Reverting to the facts of the present case in light of the principle of law rendered by Their Lordships of the Supreme Court in the above-cited judgments (supra) qua execution and attestation of Will by a testator, the following factual position would emerge on the face of record :-

- (i) Testator Agrotin Bai is said to have executed unregistered Will in respect of her properties in favour of plaintiff – Rajendra Kumar excluding the defendants, who are near relatives on 21.1.1987 (Ex.P-1) .
- (ii) The will dated 21.1.1987 is said to have attested by two witnesses namely Deepaklal (PW-4) and Gowcharan, he is dead now.
- (iii) At the time of execution of Will, respondent No.1/plaintiff was present.

(22) Analysing the facts of the present case in light of the aforesaid provisions, it is quite vivid that in order to prove the Will, Plaintiff has examined one of the attesting witnesses namely Deepaklal as PW-4, who has stated before the Court that Will was prepared as per instruction of Agrotin Bai and thereafter she signed the Will and her signature in the Will (Ex.P-1) is “B” to “B”. He did not state that he signed the Will in presence of testator and he also did not state that another attesting witness Gocharan, who died now, has also signed the Will in presence of the testator. Another witness Shyam Lal (PW-3), brother of attesting witness – Gocharan, has also proved the

signature of Gocharan in Will (Ex.P-1). But by proving the signature of the testator, if any, would not serve any purpose as the fact of attestation of Will by two attesting witnesses is the requirement of law and even otherwise, if one of attesting witness is no more, then signature of one attesting witnesses has to be identified in the manner known to law. Mere saying that the signature of attesting witness is of him may not be sufficient unless he produces the signature of the attesting witness or some admissible document and to 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 instant case. Even otherwise, 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 lacking. In the matter of **Bhagat Ram v. Suresh**⁹, 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.

(23) Additionally, one more suspicious circumstances is available on the record as plaintiff / propounder of the Will was present at the time of execution of Will; and he is not only present at the time of execution of Will but has active participated in the execution of the Will, but no evidence has been brought on record to dispel doubt, which has been created by active participation. Concludingly, this Court is satisfied that the execution and attestation of Will is not found established in accordance with law and the plaintiff has failed to discharge his burden place upon him by law to prove the attestation of Will. Accordingly, Substantial question of law is answered in favour of defendants and against the plaintiff.

(24) Resultantly, the judgment and decree of the first appellate Court is set aside and judgment and decree of the trial Court is restored. Consequently, the second appeal is allowed and the plaintiffs' suit stands dismissed. No cost(s).

(25) Decree be drawn up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-

