

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.504 of 2004

Budhu (Dead) Through LRs

(Dfd. No.1)

a. Balki, D/o Late Budhu, W/o Sukhnath, aged about 48 years, R/o Village Chatauri, Tahsil Manora, P.S. Sanna, District Jashpur (C.G.)

b. Suganti, D/o Late Budhu, aged about 40 years, Village Karamkona, P.S. Manora Chowki, Tahsil Manora, District Jashpur (C.G.)

c. Lilendra, S/o Tudhu, aged about 12 years, through natural Guardian Gulabi, aged about 42 years, R/o Village Chatauri, Tahsil Manora, P.S. Sanna, District Jashpur (C.G.)

---- Appellants

Versus

1. Balram, S/o Dukha, age 35 years, Caste Nagesiya, Occupation Agriculture, R/o Chatauri, Tehsil Jashpur, District Jashpur (C.G.)
(Plaintiff)

2. The State of Chhattisgarh, through Collector, District Jashpur (C.G.)
(Defendant No.2)
---- Respondents

For Appellants: Mr. A.K. Prasad, Advocate.

For Respondent No.1: None present.

For Respondent No.2 / State: -

Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board06/12/2019

1. This second appeal preferred by defendant No.1 was admitted on the following substantial questions of law: -

“1. Whether the trial Court is justified in holding that the respondent/plaintiff (Balram) has proved the Execution and attestation of Will EX.P-4 in his favour by Faudi Bai in accordance with Section 63(C) of the Indian Succession Act, 1925?

2. Whether the First Appellate Court is justified in

affirming the judgment and decree of the learned trial Court regarding Will by recording findings which are perverse and contrary to the record?”

(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.)

3. The suit property bearing Khasra Nos.28/2, 199 & 67/4, total area 3.60 acres, was originally held by Guddu Nagesiya. He died leaving behind his wife Faudi Bai who inherited the suit property and thereafter, she executed a Will dated 22-3-1996 (Ex.P-4) in favour of the plaintiff who got his name mutated in the revenue records by the order of the Tahsildar which was set aside by the Sub-Divisional Officer (Revenue) at the instance of defendant No.1 necessitating the institution of civil suit for declaration of title and for confirmation of possession and in alternative, possession and permanent injunction in which defendant No.1 setup the plea that he is adopted son of Guddu Nagesiya and thereby, he has succeeded the property and his adopted mother Faudi Bai never executed Will in favour of the plaintiff and she was not of sound and disposing mind at the time of alleged execution of Will Ex.P-4 and the alleged Will is surrounded with suspicious circumstances and therefore the Will is false and fabricated and the suit deserves to be dismissed.
4. The trial Court upon appreciation of oral and documentary evidence on record, held that the plaintiff has succeeded in proving the execution and attestation of Will in accordance with law and defendant No.1 is even not the adopted son of Guddu Nagesiya and the plaintiff is in possession of the suit land and accordingly,

dismissed the suit which the first appellate Court also did not interfere in the first appeal preferred by defendant No.1 leading to filing of second appeal under Section 100 of the CPC in which two substantial questions of law have been framed which have been set-out in the opening paragraph of this judgment.

5. Mr. A.K. Prasad, learned counsel appearing for the appellants herein / LRs of defendant No.1, would vehemently submit that the plaintiff has failed to prove execution as well as attestation of Will in accordance with law i.e. Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 and even the Will is surrounded with suspicious circumstances which has not been dispelled by the plaintiff though he was required to dispel the suspicion created over execution and attestation of Will. Therefore, both the Courts below have committed grave legal error in holding the Will has been established in accordance with law. The findings are perverse and contrary to the provisions contained in Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 and deserve to be set aside. He would rely upon the judgment of this Court in the matter of **Dinesh Kumar Dubey and others v. Smt. Malti Devi and others**¹ against which special leave to appeal has not been entertained by the Supreme Court in Special Leave to Appeal (C) No.2810/2019 (Dinesh Kumar Dubey and others v. Malti Devi and others) on 18-9-2019 by dismissing the special leave to appeal. Therefore, it is a fit case where the judgments of both the Courts below deserve to be set aside and the suit be dismissed.

¹ S.A.No.284/2003, decided on 12-10-2018

6. None appeared on behalf of respondent No.1 herein / plaintiff, though served and no representation has been made.
7. I have heard learned counsel for the appellants / LR's of defendant No.1 and considered his rival submissions made herein-above and also went through the record with utmost circumspection.
8. The short question for consideration would be, whether execution and attestation of the Will Ex.P-4 dated 22-3-1996 has been proved and established by the plaintiff in view of the provisions contained in Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872?
9. 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 others².]
10. 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.
11. 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.”

12. As per the provisions of Section 63 of the Indian 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.

13. The above-stated provision of attestation of Will under Section 63(c) of the Indian 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 Kadam³.

14. 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

3 (2003) 2 SCC 91

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.”

15. 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.

16. In the matter of Girja Datt Singh v. Gangotri Datt Singh⁴, 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

4 AIR 1955 SC 346

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.”

17. In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁵ 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

5 AIR 1959 SC 443

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.”

18. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur

and others⁶, Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another⁷, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others⁸ and Jagdish Chandra Sharma (supra).

19. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another⁹, the Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

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 of Will 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 Indian Succession Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of

6 (1977) 1 SCC 369

7 (1974) 2 SCC 600

8 (2009) 4 SCC 780

9 (2017) 1 SCC 257

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 Indian 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 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.”

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 the light of the principles 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 Faudi Bai is said to have executed registered Will in respect of her properties in favour of plaintiff Balram on 22-3-1996 vide Ex.P-4.
2. Will dated 22-3-1996 is said to be executed in presence of two attesting two witnesses namely, Bhikhu (PW-3) and Ignes (PW-2), and scribe Phoolchand Baraik (PW-5) has also been examined as PW-5.
3. The testator died after two months of the execution of Will.
4. Two attesting witnesses Ignes (PW-2) & Bhikhu (PW-3), both, have been examined and Ignes (PW-2) has stated in para 6 of his statement that testator Faudi Bai, plaintiff Balram, he himself and Bhikhu (PW-3), all the four persons, went to the Office of the Registrar, Jashpur on the said date and Faudi Bai (testator) was enquired by the Registrar and then, in presence of the Registrar, she executed Will and he {Ignes (PW-2)} signed the Will as attesting witness. Similar statement has been made by Bhikhu (PW-3). Surprisingly, in the cross-examination, no question either with regard to attestation or with regard to her mental condition, has been asked by or on behalf of the plaintiff. The only submission

that has been made on behalf of the plaintiff forcefully and vehemently was, both the attesting witnesses did not state / did not add that they signed the Will in presence of testator or the testator signed the Will in their presence.

24. The Supreme Court (Constitution Bench) in the matter of **Naresh Charan Das Gupta v. Paresh Charan Das Gupta and another**¹⁰

has considered the effect of attesting witnesses not mentioning that they have signed the Will in presence of testator and held as under:-

“(12) It was also argued for the appellant that there was no proof that the will was duly attested as required by S. 63, Indian Succession Act, and that it should therefore be held to be void. P.Ws. 1 and 2 are the two attestors, and they stated in examination-in-chief that the testator signed the will in their presence, and that they attested his signature. They did not add that they signed the will in the presence of the testator. Now, the contention is that in the absence of such evidence it must be held that there was no due attestation. Both the Courts below have held against the appellant on this contention.

The learned Judges of the High Court were of the opinion that as the execution and attestation took place at one sitting at the residence of P.W. 1, where the testator and the witnesses has assembled by appointment, they must all of them have been present until the matter was finished, and as the witnesses were not cross-examined on the question of attestation, it could properly be inferred that there was due attestation. It cannot be laid down as a matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence. ...”

25. Reverting finally to the facts of the present case, it is quite vivid that the testator and two witnesses, all were assembled in the Office of the Registrar by appointment and they have sworn in their affidavits

10 AIR 1955 SC 363

that they have come together and they got the will executed and registered, as such, it was required on the part of defendant No.1 to effectively cross-examine the two attesting witnesses on the question of attestation, but it was not done. Following the decision of the Supreme Court in Naresh Charan Das Gupta (supra), it cannot be held that mere omission on the part of the attesting witnesses to state clearly in the examination-in-chief that they have signed the Will in presence of the testator, would render the Will illegal and it cannot be held that the Will is not established in accordance with law i.e. Section 63(c) of Indian Succession Act, 1925.

26. The next submission raised by Mr. Prasad, learned counsel appearing for the appellants herein / LRs of defendant No.1, is that testator Faudi Bai was not in sound and good disposing mind, therefore she could not have executed the Will. In paragraph 8 of the written statement though it has been stated that the testator has not executed the Will and it is an outcome of fabrication and conspiracy, Faudi Bai was seriously unwell and she was not in good mental condition, she was a woman of unsound mind, she was unable to undergo her daily activities and unable to understand; but while the plaintiff and attesting witnesses were examined, not a single question has been asked with regard to her mental condition for the reasons best known to defendant No.1. Even in the statement on affidavit before the Court, all the three witnesses namely, plaintiff Balram (PW-1) and the two attesting witnesses – Ighes (PW-2) & Bhikhu (PW-3), made stereotype statements that Faudi Bai was well and in sound mind and able to speak. Except

this nothing, has been brought on record. Even otherwise, the two Courts below have concurrently examined the said question, whether the testator was of sound and disposing mind and have come to a categorical conclusion that she was capable of making Will and was of good and sound mind and executed the Will. This is a finding of fact, it is neither perverse nor contrary to the record. I do not find any perversity or illegality in the finding recorded by the two Courts below that execution and attestation of Will has been proved in accordance with law by the plaintiff. As such, the substantial questions of law are answered accordingly and the second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

27. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge