

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.212 of 2008Judgment reserved on : 3-2-2020Judgment delivered on: 12-2-2020

Devlal, S/o Somnath, Aged about 50 yrs., Caste Raut, R/o Village
Dongargaon, Tahsil Bhanupratappur, Distt. North Bastar Kanker (C.G.)
(Plaintiff)
---- Appellant

Versus

1. Dayavati, W/o Patiram, Caste Raut, Aged about 38 yrs., R/o Village Ghededa, Tahsil Bhanupratappur, Distt. North Bastar Kanker (C.G.)
2. Samaru Ram (Died and deleted)
3. State of Chhattisgarh, Through Collector, North Bastar Kanker (C.G.)
(Defendants)
4. Abhijit Singh, S/o Radhoshyam, Caste Kshatri.
5. Aghantin Bai, W/o Samaruram Raut, Aged about 58 yrs.
6. Amrit (Died and deleted)
7. Rajlal, S/o Samaruram Raut, Aged about 35 yrs.
8. Rambai, W/o Nandlal, Aged about 38 yrs.
9. Chhabiram, S/o Nandlal, Aged about 19 yrs.

Respondents No.4, 5 and 7 to 9 are Caste Raut, R/o Village
Dongargaon, Tahsil Bhanupratappur, District North Bastar Kanker
(C.G.)

---- Respondents

For Appellant / Plaintiff: -

Mr. Prakash Tiwari and Mr. Palash Tiwari, Advocates.

For Respondents No.1, 4, 5 and 7 to 9 / Defendants: -

None present though served.

For Respondent No.3 / State: -

Mr. Ravi Kumar Bhagat, Deputy Government Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This appeal preferred by the plaintiff was admitted on the following substantial question of law: -

“Whether the finding recorded by both the Courts below that execution of will dated 21.05.1969 by Samari Bai in favour of the appellant/plaintiff was not established 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 Kunwar Singh. He died issueless leaving his wife Samari Bai and her name came to be recorded in the revenue records and she was, in her lifetime, in the cultivating possession of the suit land. It is the case of the plaintiff that he served Samari Bai therefore, out of love and affection, she executed a will of her property vide Ex.P-1 on 21-5-1969 in his favour in presence of two attesting witnesses Kolaram (PW-1) & Navlu (PW-3) and therefore he has become title-holder of the suit land, but defendants No.1 & 2 got their names recorded in the revenue records leading to filing of suit for declaration of title and permanent injunction in which defendants No.1 & 2 setup the plea that no such will was ever executed by Samari Bai in favour of the plaintiff and they are the title-holders of the suit land and they are in possession. The trial Court did not accept the case of the plaintiff and dismissed the suit holding that the plaintiff has failed to prove execution and attestation of will in his favour which was affirmed by the first appellate Court in appeal preferred by the plaintiff against which this second appeal has been preferred in which substantial question of law has already been formulated and which has been set-out

in the opening paragraph of this judgment.

3. Mr. Prakash Tiwari, learned counsel appearing for the appellant herein / plaintiff, would submit that both the Courts below have concurrently erred in holding that the plaintiff has failed to prove the due execution and attestation of will. He would further submit that mere statements of attesting witnesses Kolaram (PW-1) & Navlu (PW-3) and scribe Pancham Singh Patel (PW-5) clearly establish that the will is the last wish of deceased Samari Bai and some part of the statement of attesting witness Kolaram (PW-1) in paragraph 5 of his evidence would not wipe out the will executed by Samari Bai in favour of the plaintiff. As such, the second appeal deserves to be allowed and the suit deserves to be decreed with costs.
4. None present for respondents No.1, 4, 5 and 7 to 9 herein / defendants.
5. I have heard learned counsel for the appellant herein / plaintiff and considered his submissions and also went through the record with utmost circumspection.
6. The short question for consideration would be, whether execution and attestation of Will dated 21-5-1969 (Ex.P-1) has been proved and established by the plaintiff in view of Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian 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 Indian Evidence Act, 1872.

9. Section 63 of the Indian Succession Act, 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.”

10. 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.

11. 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 Kadam².

12. Section 68 of the Indian 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 and is capable of giving evidence.

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 Indian Evidence Act, 1872 further held that from the mere signature of two persons appearing at the foot of the

² (2003) 2 SCC 91

³ AIR 1955 SC 346

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 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 the matters of Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁵, Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another⁶, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others⁷ and Jagdish Chandra Sharma (supra).
17. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another⁸, 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 Indian 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 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

5 (1977) 1 SCC 369

6 (1974) 2 SCC 600

7 (2009) 4 SCC 780

8 (2017) 1 SCC 257

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 Indian Succession Act, 1925 and Section 68 of the Indian 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 Indian Succession Act, 1925. It was observed as under: -

"10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act 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 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.”

21. Reverting to the facts of the present case in light of the principles of law rendered by their Lordships of the Supreme Court in the above-quoted judgments (*supra*) qua execution and attestation of will by a testator, it is quite vivid that the property was held by Samari Bai – testatrix, after death of her husband and she is said to have executed an unregistered will in respect of her property in favour of plaintiff – Devlal on 21-5-1969 vide Ex.P-1 which was attested by two attesting witnesses – Kolaram & Navlu and scribed by Pancham Singh Patel, who have been examined as PW-1, PW-3 and PW-5, respectively.

22. A careful perusal of the aforesaid statement would show that at the time of execution of will, Devlal – propounder of the will, was present and both the attesting witnesses Kolaram (PW-1) & Navlu (PW-3) are close

relatives of propounder of the will – Devlal and the will was scribed by Pancham Singh Patel (PW-5). Attesting witness Kolaram (PW-1) has clearly admitted in his cross-examination that Devlal is his brother. He has also admitted that another attesting witness Navlu (PW-3) is nephew of Devlal (sister's son of Devlal). As such, all the three are related to each other.

23. Admittedly, Devlal was present at the time of executing the will and he was rather instrumental in getting the will executed in his favour. Kolaram (PW-1) – attesting witness has clearly admitted that will Ex.P-1 was already written by Pancham Singh Patel (PW-5) before reached to the place where the will was executed and Pancham Singh Patel (PW-5) got his thumb impression on the said will. It appears from the statement of Kolaram (PW-1) that he was informed that Devlal (propounder of the will) had assured Samari Bai (testatrix of the will) to maintain throughout her life and on that assurance, she agreed to execute will in favour of plaintiff Devlal (see para 5). From para 9 of the statement of Kolaram (PW-1) it appears that the attempt of this witness (PW-1) was to get the will executed any how in favour of plaintiff Devlal and he persuaded the testatrix and thereby the will was executed by Samari Bai in favour of the plaintiff. It was nowhere explained that will was read-over and explained to testatrix Samari Bai and out of free will and without any pressure and undue influence from the propounder and other two attesting witnesses, the will was executed by testatrix Samari Bai in favour of the plaintiff.

24. The aforesaid circumstances noticed herein-above, would clearly show that the will was neither executed at the instance of Samari Bai nor the

will was prepared at her instance, the will was already prepared by Pancham Singh Patel (PW-5) – scribe and when attesting witness Kolaram (PW-1) reached for execution of will, all the witnesses who are closely related to the propounder of the will were present and that is how the will was got executed in favour of the plaintiff. Propounder of the will – Devlal has failed to discharge his burden by explaining the suspicious circumstances surrounding the will with regard to execution of will by Samari Bai out of free will and without pressure.

25. In light of the above-stated facts, both the Courts below have rightly held that the plaintiff has failed to prove the execution and attestation of will in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. The said finding recorded by the two Courts below is a finding of fact based on the evidence available on record, it is neither perverse nor contrary to the record. The substantial question of law is answered accordingly and I do not find any merit in this second appeal, it deserves to be and is accordingly dismissed. No order as to cost(s).

26. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge