

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 196 of 2010****Judgment reserved on 18/09/2020****Judgment delivered on 29/09/2020**

1. Choudhari S/o Budhu Rajwar, Aged about 50 years, Caste Rajwar, R/o Village Pidha, P.S. & Tahsil Surajpur, District Surguja, Chhattisgarh.
2. Jokhu S/o Budhu Rajwar, Aged about 48 years, Caste Rajwar R/o Village Kunjnagar, P.S. Jainagar, Tahsil Surajpur, District Surguja, Chhattisgarh.
3. Puran S/o Budhu Rajwar, Aged about 46 years, Caste Rajwar R/o Village Kunjnagar, P.S. Jainagar, Tahsil Surajpur, District Surguja, Chhattisgarh.

---Appellants/Plaintiffs**Versus**

1. Ramkaran S/o Rangu (died) through LRs. :-
 - A. Ragmen, Wd/o Late Ramkaran, Aged about 70 years.
 - B. Hanslal S/o Late Ramkaran, Aged about 48 years.Both are R/o Village Salka, Tahsil Bhaiyathan, District Surajpur, Chhattisgarh.
- C. Muto Bai D/o Late Ramkaran, Aged about 50 years, R/o Village Odgi, Tahsil and District Surajpur, Chhattisgarh.

D. Birjho Bai D/o Late Ramkaran, Aged about 45 years, R/o Village Karwa, Tahsil and District Surajpur, Chhattisgarh.

E. Guddi Bai D/o Late Ramkaran, Aged about 40 years, R/o Village Bhatgaon, P.S. Bhatgaon, District Surajpur, Chhattisgarh.

2. Devsharan S/o Rangu, Aged about 58 years, Caste Rajwar, R/o Village Karaunti, Tahsil Surajpur, District Surguja, Chhattisgarh.

3. Ramsaran S/o Rangu, Aged about 56 years, Caste Rajwar, R/o Village Karaunti, Tahsil Surajpur, District Surguja, Chhattisgarh.

4. (a). Sumitra D/o Late Dilbes, Aged about 40 years.

(b). Rajesh S/o Late Dilbes, Aged about 38 years.

(c). Samaylal S/o Late Dilbes, Aged about 35 years.

4(a) to 4(c) R/o Village Pondi, Tahsil Surajpur, District Surguja, Chhattisgarh.

5. Jhingo Bai D/o Rangu, Aged about 36 years.

6. Thakur Dayal S/o Gaya Rajwar (died) through LRs. :-

A. Maharajo Bai Wd/o Late Thakur Dayal, Aged about 65 years.

B. Radheshyam S/o Late Thakur Dayal, Aged about 43 years.

C. Pankaj S/o Late Thakur Dayal, Aged about 39 years.

D. Urmila D/o Late Thakur Dayal, Aged about 33 years.

E. Parmila D/o Late Thakur Dayal, Aged about 30 years.

All R/o Village Karauti, Tahsil Odgi, District Surajpur, Chhattisgarh.

F. Shamir Ram S/o Late Thakur Dayal, Aged about 36 years, Village Salka, Post Bhatgaon, Tahsil Bhaiyathan, District Surajpur, Chhattisgarh.

7.State of Chhattisgarh, Through the Collector, Ambikapur, District Sarguja, Chhattisgarh.

--- Respondents/Defendants

For Appellants :- Mr. Ashok Ku. Shukla, Advocate
 For Respondents :- Mr. J.K. Shastri, Advocate
 For State :- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal
C.A.V. Judgment
(Through Video Conferencing)

1.This second appeal preferred by the appellants/plaintiffs was admitted for hearing on the following substantial question of law :-

"Whether the finding of both the Courts below relating to will is perverse ?"

[For the sake of convenience, parties will hereinafter be referred to as per their status shown before the trial Court.]

2.The suit land shown in Schedule 'A' annexed with the plaint was originally held by one Jhulan

Rajwar, who acquired patta of suit land in his favour in Surguja Settlement. During his lifetime, he remained in possession of the suit land and died issueless leaving behind his wife Sonmet. It is the case of the plaintiffs (sons of Budhu Rajwar) that since Jhulan Rajwar was issueless, he adopted his nephew Ramcharan's son namely Budhu Rajwar (plaintiffs' father) and also executed a Will dated 05/03/1942 (Ex. P/4) in his favour in the presence of two witnesses and after the death of Jhulan Rajwar, Budhu Rajwar came into possession of the said suit land by way of the Will (Ex. P/4) which defendants No. 1 to 6 refuted by stating that after the death of Jhulan Rajwar his wife Sonmet executed a gift deed in favour of Rangu i.e. defendants' predecessor-in-interest on 21/5/1962 registered on 22/05/1962, as such, plaintiffs' suit deserves to be dismissed.

3. Learned trial Court, upon appreciation of oral and documentary evidence on record, dismissed the suit by its judgment and decree dated 11/07/2008 holding that plaintiffs have failed to prove the Will in accordance with Section 63(c) of the

Indian Succession Act, 1925 read with Section 68-69 of the Indian Evidence Act, 1872.

4. On appeal being preferred by the plaintiffs, learned first appellate Court declined to interfere with the judgment and decree of the trial Court and dismissed the appeal by its impugned judgment and decree dated 06/05/2010 against which this second appeal has been preferred under Section 100 of the CPC in which one substantial question of law has been framed and set out in the opening paragraph of this judgment.

5. Mr. Ashok Kumar Shukla, learned counsel for the appellants/plaintiffs, would submit that since both the attesting witnesses of the Will (Ex. P/4) had died prior to the institution of the suit, they could not be examined to prove the due execution and attestation of the Will and one Jagmohan Mishra, i.e. the grandson of one of the attesting witnesses namely Gangaram, has been examined as P.W. 2 and he has proved the signature of Jhulan Rajwar on the Will, therefore, the Will has been duly proved as per the provision contained in Section 69 of the Evidence Act, 1872. Alternatively, he would

submit that the Will dated 05/03/1942 (Ex. P/4) is a more than 30 years old document which has been produced from proper custody, therefore, presumption of valid execution of the Will would be made and even if the attesting witnesses have not been examined, presumption of due execution and attestation of the Will (Ex. P/4) will be raised by virtue of the provision contained under Section 90 of the Evidence Act, as such, the judgment and decree passed by both the Courts below be set aside and the appeal be allowed by decreeing the suit of the plaintiffs for declaration of title and permanent injunction.

6. Mr. J.K. Shastri, learned counsel for the respondents/defendants, would submit that if the attesting witnesses of the Will (Ex. P.4) are not available for proving the due execution and attestation of the Will, the proper procedure would be to follow the statutory provisions prescribed by Section 69 of the Evidence Act to prove the Will to which the plaintiffs have utterly failed. He would also submit that Section 90 of the Evidence Act which states about the presumption of validity of a 30 years old document is not applicable in this case and the Will has to

proved in accordance with Section 63(c) of the Indian Succession Act read with Section 68-69 of the Indian Evidence Act, therefore, the second appeal deserves to be dismissed.

7. I have heard learned counsel for the parties, considered their rival submissions made hereinabove and went through the records with utmost circumspection.

8. The suit land admittedly belonged to Jhulan Rajwar who died issueless leaving only his wife Sonmet and it is the case of the plaintiffs that Jhulan Ram had executed a Will dated 05/03/1942 (Ex. P/4) in favour of their father Budhu Rajwar and that Will is said to be attested by two witnesses namely Bhullu Rajwar and Gangaram Mishra. It is the admitted position on record that both the attesting witnesses had already died at the time of institution of the suit and so they were not available for examination to prove the execution and attestation of the Will. Once it is held that attesting witnesses are not available for proving the Will, the said Will has to be proved in accordance with the provision contained in Section 69 of the Evidence Act.

9. The question that arises for consideration is whether in the instant case the Will dated 05/03/1942 (Ex. P/4) has been proved in accordance with law Section 69 of the Evidence Act ?

10. Section 69 of the Evidence Act, 1872, provides for proof when the attesting witness cannot be found and it states as under :-

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

11. Section 69 of the Evidence Act provides that if execution of Will could not be proved by examining the attester or in absence of non-availability of attester, to prove the Will, secondary evidence could be adduced by proving the handwriting of one of the attesting witnesses and signature of the executant of the document to be in the handwriting of that person. Two conditions are required to be proved for valid proof of the Will, the person who has

acquaintance of the signature of one of the attesting witnesses and also the person executing the document should identify both the signatures before the Court.

12. Section 69 of the Evidence Act came up for consideration before the Supreme Court in the matter of Babu Singh and Others v. Ram Sahai @ Ram Singh¹ in which Their Lordships held as under :-

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

15. Whereas, however, a Will ordinarily must be proved keeping in view the provisions of Section 63 of the Indian Succession Act and Section 68 of the Act, in the event the ingredients thereof, as noticed hereinbefore, are brought on record, strict proof of execution and

¹ AIR 2008 SC 2485

attestation stands relaxed. However, signature and handwriting, as contemplated in Section 69, must be proved."

13. Similarly, in the matter of K. Laxamanan v. Thekkayil Padmini², the Supreme Court while considering Section 69 of the Evidence Act held as under :-

"32. Since both the attesting witnesses have not been examined, in terms of Section 69 of the Act it was incumbent upon the appellant to prove that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. ..."

14. Recently, in the matter of Kalyanswami (died) by LRs. v. L. Bakthavatsalam (D) Thr. Lrs.³, the Supreme Court while dealing with Section 69 of the Evidence Act held as under :-

"84. Reverting back to Section 69 of the Evidence Act, we are of the view that the requirement therein would be if the signature of the person executing the document is proved to be in his handwriting, then attestation of one attesting witness is to be proved to be

² (2009) 1 SCC 354

³ 2020 SCC Online 584

in his handwriting. In other words, in a case covered under Section 69 of the Evidence Act, the requirement pertinent to Section 68 of the Evidence Act that the attestation by both the witnesses is to be proved by examining at least one attesting witness, is dispensed with. It may be that the proof given by the attesting witness, within the meaning of Section 69 of the Evidence Act, may contain evidence relating to the attestation by the other attesting witness but that is not the same thing as stating it to be the legal requirement under the Section to be that attestation by both the witnesses is to be proved in a case covered by Section 69 of the Evidence Act. In short, in a case covered under Section 69 of the Evidence Act, what is to be proved as far as the attesting witness is concerned, is, that the attestation of one of the attesting witness is in his handwriting."

15. Reverting to the facts of the present case, it is quite vivid that both the attesting witnesses of the Will (Ex. P/4) namely Bhullu Rajwar and Gangaram had already died at the time of institution of the suit and they were not available to prove the Will. In these circumstances, duty is cast upon the plaintiffs

to prove the Will as per Section 69 of the Evidence Act that the signature of the executant on the Will that it is of his own and at least the signature of one of the attesting witnesses has to be identified in the manner known to law. Merely saying that the signature of the attesting witness is of him may not be sufficient unless he produces the signature of the attesting witness on some admissible document and make both the signatures available for comparison by the Court to find out whether the person acted as real witness, which has admittedly not been done in the instant case. Jagmohan Mishra, the grandson of one of the attesting witness namely Gangaram, has been examined as P.W. 2 and in para 2, he has simply stated that his grandfather Gangaram's signature is present on the Will (Ex. P/4) and he has also stated that the Will was written by his grandfather. He has not even identified the signature of the testator i.e. Jhulan Rajwar on the said Will. It has already been held that merely proving the signature of the attesting witness would not amount to the due compliance of Section 69 of the Evidence Act as enunciated by the Supreme Court in **Babu Singh** (supra). The

plaintiffs were required to file an admissible document containing the signature of one of the attesting witnesses and after making comparison between the said document and the Will (Ex. P/4), it could have been proved the signature of said attesting witness on behalf of the plaintiffs and similarly, P.W. 2 Jagmohan Mishra has even not identified the signature of the testator on the Will, as such, it cannot be held that the Will (Ex. P/4) has been proved in accordance with Section 69 of the Evidence Act.

16. Coming to the next submission made by learned counsel for the appellants/plaintiffs that since the Will (Ex. P/4) is a more than thirty years old document having been executed on 05/03/1943, presumption under Section 90 would be applicable to it.

17. Section 90 of the Evidence Act, 1872 provides as under :-

"90. Presumption as to documents thirty years old.—Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document,

which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested.

Explanation.—Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be; but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable."

18. Section 90 of the Evidence Act is founded on necessity and convenience because it is extremely difficult and sometimes not possible to lead evidence to prove handwriting, signature or execution of old documents after lapse of thirty years. In order to obviate such difficulties or improbabilities, to prove the execution of an old document, Section 90 has been incorporated in the Evidence Act, 1872, which does away with the strict rule of proof of private documents. Presumption of genuineness may be raised, if the document in question is raised from proper custody. It is however, the discretion of the

Court to accept the presumption flowing from Section 90. There is however, no manner of doubt that judicial discretion under Section 90 should not be exercised arbitrarily and not being informed by reasons. (See : Laxmi Barvah v. Padma Kanta Lalita⁴)

19. With regard to the question as to whether presumption under Section 90 of the Evidence Act would be applicable in the case of Will, the Supreme Court in the matter of Bharpur Singh v. Shamsheer Singh⁵ has clearly held that the provisions of Section 90 of the Evidence Act would have no application in the case of Will and held as under :-

"14. ... The provisions of Section 90 of the Indian Evidence Act keeping in view the nature of proof required for proving a Will have no application. A Will must be proved in terms of the provisions of Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions contained therein, namely, Sections 69 and 70 of the Indian Evidence Act providing for exceptions in relation

4 (1996) 8 SCC 357

5 AIR 2009 SC 1766

thereto would be attracted. Compliance with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Indian Evidence Act postulates that execution must be proved by at least one of the attesting witness, if an attesting witness is alive and subject to the process of the Court and capable of giving evidence. {See B. Venkatamuni vs. C.J. Ayodhya Ram Singh & ors.⁶. ”

20. In view of the aforesaid authoritative pronouncement of the Supreme Court in **Bharpur Singh** (supra), Section 90 of the Evidence Act would have no application in case of Will in view of the strict requirement contained in Section 63(c) of the Indian Succession Act read with Section 68 of the Indian Evidence Act, I am of the considered opinion that the argument raised on behalf of the appellants/plaintiffs that the Will (Ex. P/4) being a 30 years old document, presumption of genuineness of the Will (Ex. P/4) under Section 90 of the Evidence Act would be applicable is not acceptable and is hereby rejected.

21. Consequently, I do not find any merit in the submissions of learned counsel for the

6 (2006) 13 SCC 449

appellants/plaintiffs and the first appellate Court is absolutely justified in dismissing the appeal and affirming the judgment and decree passed by the trial Court which is hereby re-affirmed.

22.The second appeal deserves to be and is hereby dismissed leaving the parties to bear their own cost(s).

23.Decree be drawn up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Harneet