

AFR

HIGH COURT OF CHHATTISGARH, BILASPUR**SA No. 534 of 2003**

- Baturam @ Batul S/o. Shri Dukhu Gond, R/o. Gram – Sakarpoga, Tahsil and District – Raigarh

---- Appellant**Versus**

1. Smt. Suket W/o Shri Uttranik Gond, R/o. Village - Haldijhariya,

Present address – Viillage – Dumrawali, Post – Banoura, Tahsil and District – Raigarh

2. State of Chhattisgarh, Through the Collector, Raigarh (CG)

---- Respondents

For Appellant	:	Ms. Sharmila Singhai, Advocate
For Respondent No.1	:	Shri Ramkumar Tiwari, Advocate
For State	:	Shri Vikas Shrivastava, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava**Order On Board****04/03/2020**

This appeal is directed against impugned judgment and decree dated 29/07/2003 passed by the Second Additional District Judge, Raigarh in Civil Appeal No.44A / 2002 by which, the learned lower Appellate Court has decreed the suit of the plaintiff, while dismissing the appeal filed by the present appellant / defendant.

2. The respondent / plaintiff – Suket filed a suit seeking declaration of title and permanent injunction on the pleadings *inter alia* that the property in dispute originally belonged to one Gada Rai and after his death, it was recorded in the name of Heeramati - wife of Anjor Gond. Heeramati was aunt of plaintiff. Anjor, husband of Heeramati died in 1980. Heeramati died in 1999 and according to the customary law

of succession, after death of Heeramati, as she was not survived by any son or daughter, property devolved upon the plaintiff–Suket. The defendants had started disputing on the basis of Will dated 19/03/1999, which has given her cause of action to file suit. The plaintiff prayed for declaration that the Will dated 09/03/1999 be declared as inoperative, not binding and the defendant be restrained from interfering with the possession of the plaintiff.

3. On the other hand, the defendant – Baturam came out with the case that the property in dispute belonged to Heeramati. Heeramati was cultivating the land with the assistance of defendant – Baturam who was also taking care of Heeramati and Heeramati, as a reward, executed Will in his favour on 09/03/1999.

4. As the case of the plaintiff and the defendant, as pleaded in the respective pleadings, related mainly on the issue of Will and as to whether there was any customary law that the property would devolve upon the plaintiff, learned Trial Court decided these questions by framing appropriate issues along with other issues. Though, learned Trial Court held that the Will is suspicious, having held that the plaintiff failed to prove customary law of succession, as pleaded by her in the plaint, suit was partly decreed holding that the Will is not binding. Other reliefs sought, were not granted.

Aggrieved by the said judgment and decree, the plaintiff – Suket Bai and defendant – Baturam, both filed their respective appeals. Learned lower Appellate Court also concurred with the finding of the Trial Court with regard to Will being suspicious, but upset the finding with regard to customary law and plaintiff's entitlement to succeed to the property of the deceased. It was held that the plaintiff was entitled to succeed to the property of the deceased – Heeramati under the customary law of succession. In this manner, Suket's appeal was allowed and relief sought in the suit was granted in entirety whereas the appeal filed by Baturam was

dismissed giving rise to this second appeal.

5. This appeal was admitted on following substantial question of law -

“Whether the Courts below were justified in holding that defendant has failed to establish the due execution, attestation and validity of the Will dated 09/03/1999 (Ex.D.4) executed by Heeramati in his favour in accordance with law?”

6. Learned counsel for the appellant would argue that both the Courts below committed gross perversity and patent illegality in holding the Will to be suspicious even though, the execution of the Will was duly proved in accordance with the legal requirements of Section 63 (c) of the Indian Succession Act, 1925 (for short 'the Act of 1925') read with Section 68 of the Evidence Act, 1872 (for short 'the Act of 1872'). Learned counsel for the appellant would contend that the Will was proved not only by the reliable evidence of execution, namely Sudama (DW2) and Suresh Kumar (DW3) but also from the evidence of the notary - Janki Prasad (DW4). Even though, the evidence of these witnesses could not be impeached on any ground whatsoever, learned Courts below relied upon certain extraneous circumstances, which by itself, could not create suspicion with regard to execution of Will. It is argued that the learned Courts below have created suspicion on the Will on the grounds like, the notary was not familiar with the testator; the Will was not immediately disclosed after death of Heeramati; in the matter of execution of Will, Baturam had played active role; Heeramati was not physically and mentally fit and that the defendant has failed to explain the suspicious circumstances as to why the Will prepared in favour of Manglu was, later on, cancelled and then, a new Will was executed in favour of Baturam.

7. Learned counsel for the respondent would argue that both the Courts below have recorded concurrent finding of fact that the Will is suspicious. In order to hold

that the Will is suspicious, the Courts below have taken into consideration the evidence with regard to health condition of the deceased – Heeramati; Baturam played active role in the matter of execution of Will and name of Baturam was not disclosed immediately after death of Heeramati and that earlier, Heeramati had executed Will in favour of Manglu but later on, the earlier Will was cancelled and then executed in favour of Baturam. Even if, the witnesses of the Will have stated regarding execution of the Will in their presence and have proved their signature, if other attending circumstances create suspicion, it is within the power of the fact finding Courts to hold the Will suspicious. According to him, once the Courts below have recorded concurrent finding of fact, it is not open for the appellant to seek re-appreciation of evidence in the garb of question of law framed by this Court. His argument is that in the present case, no question of law arises for consideration.

8. I have heard learned counsel for the parties and perused the records.

9. In the present case, both the Courts below have recorded concurrent finding that the Will is suspicious. While holding so, the Courts below have not recorded any specific finding why the evidence of two witnesses should be disbelieved. Without there being any serious challenge to the credibility of the evidence of witnesses of execution, the Courts below have relied upon certain attending circumstances to hold the Will suspicious.

10. Though, ordinarily, in the second appeal, the High Court would not interfere with the concurrent finding of fact, but it is not inviolable rule. In appropriate cases, where the Court finds that the concurrent findings are based on illegal approach, perverse or erroneous in nature or where the order passed is based on misconstruction of oral and documentary evidence, even the concurrent finding of fact may also be interfered with.

11. In the present case, the appellant / defendant, in order to prove execution of Will, has examined both the attesting witnesses of the Will namely Sudam (DW2) and Suresh Kumar (DW3). Not only this, even though the law did not require, even the notary-Janki Prasad (DW4) has also proved execution of Will, as according to him, it is executed in his presence.

12. Before adverting to the evidence of attesting witness of the Will, it is apposite to refer to the settled legal position with regard to legal requirement of proof of Will as mandated under Section 63 (c) of the Act of 1925 read with Section 68 of the Act of 1872. In the case of **Mantora Bai (dead) through LR Smt. Chitrarekha Bai v. Ganeshiya Bai and anr.** (S.A.No.130/2003), this Court examined the legal position with reference to several judicial authorities.

“10. The provisions contained in Section 63 (c) of the Act of 1925 incorporates specific provision as to how Will is to be executed. Relevant provision is as under -

“S.63 (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 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.”

It is, thus, clear that the requirement of special law in case of proof of Will is that the Will is required to be proved by attesting witness (i) who has seen the testator affixing signature or mark on the Will document, or (ii) who has seen some other person sign the Will, in the presence and by the direction of the testator (iii) or has received from the testator his personal acknowledgment of his signature or mark, or the signature of such other person.

The law of general application, as contained in Section 68 of the Act of 1872 requiring proof of documents which are

required to be attested is as below -

S.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 not 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.]

In view of aforesaid provision, where a party is required to prove execution of document which is required by law to be attested, that document would not be used in evidence unless one attesting witness atleast, has been examined for the purpose of proving its execution, if there being an attesting witness alive and subject to the process of the Court and capable of giving evidence.

The proviso deals with the situation which is not applicable in case of a Will.

11. Legal requirement of proof of Will has been considered by the Supreme Court as also by this Court in plethora of decisions. In the case of **Janki Narayan Bhoir vs. Narayan Namdeo Kadam, 2003 (1) CGLJ 190**, Their Lordships in the Supreme Court examined the legal requirement of proof of Will, as below:-

“7. We think it appropriate to look at the relevant provisions, namely, [Section 63](#) of the Indian Succession Act, 1925 and [Sections 68](#) and [71](#) of the Indian Evidence Act, 1872 which read:

[Section 63](#) of the Succession Act "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)

(b)

(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."

Section 68 of the Evidence Act "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..."

Section 71 of the Evidence Act "71. Proof when attesting witness denies the execution.- If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of **Section 63** of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

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 does 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 attestation 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.

11. Section 71 of the Evidence Act is in the nature of a safeguard to the mandatory provisions of [Section 68](#), [Evidence Act](#), to meet a situation where it is not possible to prove the execution of the will by calling attesting witnesses, though alive. This Section provides that if an attesting witness denies or does not recollect the execution of the will, its execution may be proved by other evidence. Aid of [Section 71](#) can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence. [Section 71](#) has no application to a case where one attesting witness, who alone had been summoned, has failed to prove the execution of the will and other attesting witnesses though are available to prove the execution of the same, for the reasons best known, have not been summoned before the court. It is clear from the language of [Section 71](#) that if an attesting witness denies or does not recollect execution of the document, its execution may be proved by other evidence. However, in a case where an attesting witness examined fails to prove the due execution of will as required under clause (c) of [Section 63](#) of the Succession Act, it cannot be said that the Will is proved as per [Section 68](#) of the Evidence Act. It cannot be said that if one attesting witness denies or does not recollect the execution of the document, the execution of will can be proved by other evidence dispensing with the evidence of other attesting witnesses though available to be examined to prove the execution of the will. Yet, another reason as to why other available attesting witnesses should be called when the one attesting witness examined fails to prove due execution of the Will is to avert the claim of drawing adverse inference under [Section 114](#) illustration (g) of [Evidence Act](#). Placing the best possible evidence, in the given circumstances, before the Court for consideration, is one of the cardinal principles of [Indian Evidence Act](#). [Section 71](#) is permissive and an enabling Section permitting a party to lead other evidence in certain circumstances. But [Section 68](#) is not merely an enabling Section. It lays down the necessary requirements, which the Court has to observe before holding that a document is proved. [Section 71](#) is meant to lend assistance and come to the rescue of a party who had done his best, but driven to a state of helplessness and impossibility cannot be let down without any other means of proving due execution by "other evidence" as well. At the same time [Section 71](#) cannot be read so as to absolve a party of his obligation under [Section 68](#) read with [Section 63](#) of the Act and liberally allow him, at his will or choice to make available or not a necessary witness otherwise available and amenable to the jurisdiction of the court concerned and confer a premium upon his omission or lapse, to enable him to give a go bye to the mandate of law relating to proof of execution of a will."

12. The legal requirement with regard to execution of Will as mandated under Section 63 (c) of the Indian Succession Act amongst other things is that 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 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.

13. Keeping in forefront the aforesaid settled principles, it has to be seen whether the attesting witnesses have proved execution of Will and whether the same is liable to be rejected on the basis that their evidence is not free from doubt.

14. Sudam (DW2), who is not related to any of the parties, has deposed that one day, Manglu asked him to accompany to Dumarपाली and when he went to Dumarपाली, Budhnibai, Baturam and Manglu were present and Heeramati stated that she wants some papers to get prepared but in whose name, she did not disclose at that time. Then, he called Chowkidar and Heeramati declared that she will go to Raigarh to get the documents prepared. He then advised Heeramati to request the Upsarpanch to accompany. In para 5 of his evidence, this witness states that next day, he went to Dumarपाली along with Baturam and Suresh Kumar. Budhnibai was already present and Heeramati asked them to hire a vehicle and they all sat on the vehicle and went to Raigarh where the Will deed was executed in favour of Manglu. Later on, Manglu expressed his inability and said that he do not want the land as he is not willing to enter into any dispute and he suggested that the Will may be executed in favour of Basant and Baturam. Further evidence of this witness is that he, along with Suresh, went to Heeramati and then Heeramati told that she would like to execute the Will in

favour of Baturam. Again all of them sat in the Jeep. He, along with Suresh, Manglu and other, came to Raigarh where documents were prepared in the name of Baturam which was signed by him and Suresh and Heeramati affixed her thumb impression and thereafter, it was notarized by Janki Prasad. He has proved his signature. He has been subjected to detailed cross-examination. In his cross-examination, this witness has again deposed and affirmed execution of Will and all suggestions against execution of Will have been denied. He has denied suggestion that on the insistence of Baturam, Manglu got his Will canceled. Thus, evidence of this witness does not create any doubt with regard to role played by this witness towards attestation of Will.

15. The other witness - Suresh Kumar (DW3) has also proved execution of Will. He has deposed that Heeramati executed Will in favour of Baturam and the Will was prepared as per the dictates and directions of Heeramati and at that time, Heeramati was in good condition of health. This witness was also subjected to a detailed cross-examination. In para 14, he has stated that Heeramati got the Will executed of her own. Even though, this witness has been subjected to detailed cross-examination, there is nothing to impeach credibility of this witness, as the attesting witness of execution of Will. The legal requirement of Section 63 (c) of the Act of 1925 read with Section 68 of the Act of 1872 in this regard are, thus fulfilled.

16. Thus, when the execution of Will is proved in accordance with the provisions of law by not only one but both the attesting witnesses, learned Courts below were required to appreciate the evidence of other witnesses to find out as to what was that extra ordinary circumstance of clinching nature which would completely dislodge the Will by holding it to be suspicious, particularly when, its execution has been proved by attesting witnesses. In order to create suspicion over the Will, learned Courts below have recorded a finding that Heeramati was not keeping well. At the first

place, merely because a person is old and not keeping well, no presumption can be drawn that she was not in a position to execute the Will. Once the execution of Will is proved by the attesting witnesses, the burden on the party who disputed the Will, is very high. Therefore, clear, cogent and clinching evidence is required to be led to prove that the testator of the Will, at the time of alleged execution of Will, was infirm, either physically or mentally and that it cannot be said that the testator had voluntarily executed the Will in favour of the beneficiary. The pleadings and evidence led by the plaintiff is that Heeramati was old and was bed ridden and her daily routines were also performed on bed. Suket (PW1) has stated that about 1½ months before death, Heeramati was bed ridden and her daily routines were performed on the bed. She stated that her mental state was also not proper. However, this evidence is too vague. In para 8 of cross-examination, though she states that she had called the doctor, she does not know the name of the doctor nor she has produced the document with regard to treatment of Heeramati. Thus, her evidence only proves that Heeramati was bed ridden, but there is no evidence relating to her mental state except bald statement and there is no document or certificate or oral evidence of treating doctor produced in support of her mental condition from which, it could be inferred that the testator had lost mental balance.

17. The other witness Pithambar (PW2) has stated that before two months of her death, Heeramati was unable to walk and mostly remained on bed. He has not stated with regard to her mental condition. Third witness, Bindubai (PW3) has also stated that Heeramati was not keeping well and used to reside in her home alone. Except this, nothing more has been stated in her evidence. Govindram Goda (PW4) has deposed in para 5 of his evidence that about 8 days before her death, Heeramati had lost senses. Even if this evidence is accepted, it being an admitted position that Will was executed on 09/03/1999 and Heeramati died on 26/03/1999, the aforesaid evidence does not prove that on the date of execution of Will,

Heeramati had lost her mental balance and was physically and mentally unfit to voluntarily execute the Will.

18. Learned counsel for the respondent drew attention of this Court to evidence of defendant - Baturam (DW1) that he has also stated that Heeramati was not keeping well. If his entire evidence with regard to health condition is taken into consideration, none of the witnesses, either the plaintiff or defendant have been able to prove that Heeramati had become so physically and mentally incapacitated that she could not execute Will. There is hardly any evidence that Heeramati had lost mental balance and her mental state was so much deteriorated that it was not expected of her to execute Will. Merely because Heeramati was an old lady and bed ridden, only on this count, no inference can be drawn that she was not in a fit state of mind to execute the Will. The finding of the learned Courts below on this aspect are more on the basis of surmise rather than clinching evidence. The approach of learned Courts below is fundamentally flawed because once the execution is proved from reliable evidence, merely because the testator is old and bed ridden, inference of testator being mentally unfit towards execution of Will, could not have been readily drawn. The Courts below, if I may say so, have jumped to the conclusion without legally admissible evidence and therefore, such decision suffers from gross perversity.

19. The other attending circumstances which have been brought into consideration to hold the Will doubtful are that Baturam, in whose name the Will was executed, had played an active role. True it is that the person in whose favour Will was executed, has played an active role. The evidence with regard to proof of Will is required to be examined with utmost care and caution and at the same time, it cannot be said that in all cases, the Will has to be thrown even if it is proved from the reliable evidence of attesting witnesses.

20. Learned lower Appellate Court has also raised suspicion on the Will on the ground that earlier, the Will was executed in favour of Manglu and then it was cancelled and it was executed in favour of Baturam which he has not explained. At the first place, in what circumstances, the Will was executed and in what circumstances, the Will executed in favour of Manglu was cancelled, has been stated by attesting witnesses - Sudam (DW2) and Suresh Kumar (DW3). The evidence in this regard is that firstly, a Will was executed in favour of Manglu but upon apprehension of onset of dispute, Manglu having expressed his inability, the testator was again approached and then the testator expressed to execute Will in favour of Baturam by cancelling earlier Will executed in favour of Manglu. From perusal of Will (Ex.D-4), there is clear recital that the Will executed in favour of Manglu was cancelled. The appreciation by the learned lower Appellate Court is without proper consideration / assessment of categorical evidence led by Sudam (DW2), Suresh Kumar (DW3) and Janki Prasad (DW4), but other circumstance that immediately on the date of death of Heeramati, execution of Will in the name of Baturam was not disclosed. In the opinion of this Court, this does not, by itself, is suspicious circumstance. The evidence led by the two plaintiff witnesses Pithambar (PW3) and Govindram Goda (PW4) is that Heeramati herself had gone to Raigarh to execute the Will. This is what is stated by all the witnesses including Sudam (DW2) and Suresh Kumar (DW3). This completely goes against plaintiff's case that Heeramati was physically and mentally unfit to execute the Will.

21. The evidence of the defendant is also to the effect that Baturam was nephew of Heeramati and he was doing agriculture activities on her land and also taking care of his aunt – Heeramati. Infact, the evidence shows that both Manglu and Baturam were taking care.

22. In view of above, the finding of the Courts below holding the Will to be

suspicious, suffers from gross perversity and patent illegality in as much as that it has failed to apply correct principles of appreciation of evidence in the matter of proof of Will.

The question of law is accordingly decided.

23. In the result, the impugned judgment and decree passed by the Courts below is unsustainable in law and is set aside. The plaintiff's suit is dismissed. The parties shall bear their respective costs. Appellate decree be drawn accordingly.

Sd/-

(Manindra Mohan Shrivastava)
Judge