

Second Appeal No.273 of 2008

----- Appellant/Plaintiff

Versus

- Respondents/Defendants**

For Appellant/Plaintiff : Mr.Vimlesh Bajpai, Advocate
For Res.No.1/Def.No.1 : Mr.Manoj Paranjape and Mr.
Anurag Singh, Advocates
For Respondent No.2/State: Ms Anjali Singh Chauhan, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal
Judgment on Board

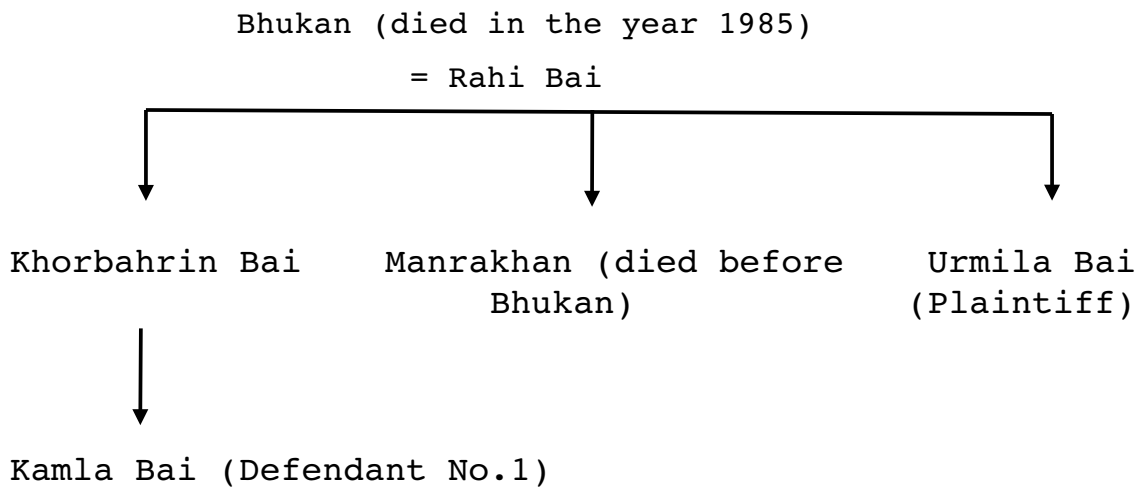
28.01.2020

- 1.The substantial question of law involved, formulated and to be answered in this second appeal preferred by the plaintiff is as under:-

"Whether both the Courts below were justified in holding that Will (Ex.P-2) dated 20.11.1991 executed by Rahi Bai in favour of Urmila Bai is forged and fabricated and not proved under Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 by recording a finding which is perverse to the record ?"

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

2. The following genealogical tree would demonstrate the relationship among the parties:-



3. The suit property was originally held by Bhukan. Rahi Bai-his wife was impleaded as defendant No.2 died during the pendency of the suit. Plaintiff herein-Urmilabai is daughter of Bhukan and defendant No.1 is granddaughter of Bhukan (daughter of Khorbahrin Bai). Plaintiff-Urmilabai filed a suit for declaration of title and permanent injunction impleading Rahi Bai as party defendant No.2 in the suit stating inter-alia that she is title-holder of the suit property and also entitled for permanent injunction. Rahi Bai who had inherited the property after death of Bhukan. By way of amendment, the plaintiff introduced cause of action that Rahi Bai had executed the Will dated 20.11.1991 (Ex.P-2) in her favour bequeathing her share in the suit property and prayed for decree of declaration of title and permanent injunction.

4. Defendant No.1 filed his written statement and also preferred counter-claim that she is entitled for decree of partition and possession of 1/2 share in the suit property.
5. The trial Court upon evaluation and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 11.05.2007, dismissed the suit of the plaintiff and decreed counter-claim preferred by defendant No.1 for partition and possession of 1/2 share in the suit property. On appeal being preferred by the plaintiff, the first appellate Court upheld the judgment and decree of the trial Court. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/plaintiff, in which substantial question of law has been formulated by this Court, which has been set-out in the opening paragraph of this judgment.
6. Mr. Vimlesh Bajpai, learned counsel for the appellant/plaintiff, would submit that both the Courts below have disbelieved the Will dated 20.11.1991 (Ex.P-2) executed by Rahi Bai in favour of plaintiff-Urmila Bai only on the ground that the Will was executed by Rahi Bai at Durg, but it was registered at Tahsil-Saja where the suit property is situated, therefore, it is fabricated and it is not valid Will.

The said finding runs contrary to Section 28 of the Registration Act, 1908 (hereinafter called as 'Act of 1908') which permits registration of the document within whose sub-district the whole or some portion of the property to which such document relates is situate. He would further submit that due execution and attestation of the Will has been proved by examining attesting witness Prahlad (PW-4) and scribe Advocate Dyaneshwar Yadav (PW-3), as such, the judgment and decree of both the Courts below deserve to be set aside.

7. Mr. Manoj Paranjape, learned counsel for respondent No.1/defendant No.1, would support the impugned judgment and decree.

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

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 others¹.]

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

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 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 Kadam**².

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

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

"One could not presume from the mere signature of Mahadeo Pershad and Nageshur appearing at the foot of the endorsement of registration that they had appended their signatures to the document as attesting witnesses or can be construed to have done so in their capacity as attesting witnesses. Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will. This provision should have been complied with in order that Mahadeo Pershad and Nageshur be treated as attesting witnesses. This line of argument therefore cannot help Gangotri."

17. 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."

- 18.** The principle laid down in the above-stated judgment has been followed with approval in 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

5(1977) 1 SCC 369

6(1974) 2 SCC 600

Joykumar Singh and others⁷ and Jagdish Chandra Sharma
(supra).

19. 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 Succession Act, 1925 read with Section 68 of the Evidence Act, 1872.

20. In Surendra Pal (supra), the Supreme Court while re-stating the guidelines regarding the nature and extent of burden of proof on the propounder of a will held that propounder has to show that the will was signed by the testator; that he was at the relevant time in a sound disposing state of mind; that he understood the nature and effect of the dispositions; that he put his signature to the testament of his own free will; and that he has signed it in the presence of the two witnesses who attested it in his presence and in the presence of each other. Once these elements are established, the onus which rests on the propounder is discharged. It was further held that in cases where the propounder has himself taken a prominent part in execution of a will which confers on

7(2009) 4 SCC 780

8(2017) 1 SCC 257

him substantial benefit that is itself one of the suspicious circumstances which he must remove by clear and satisfactory evidence.

21. 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."

22. In Janki Narayan Bhoir (supra), the Supreme Court while considering Section 63(c) of Succession Act, 1925 and Section 68 of the Evidence Act, 1872 held that mere proof of signature of the testator on the will was not sufficient, the attestation thereof is also to be proved as required by Section 63(c) of the Act Succession Act, 1925. It was observed as under: -

"10. Section 68 of the Evidence Act

speaks of as to now a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in Section 63 although Section 63 of the Succession Act requires that a will has to be attested at least by two witnesses, Section 68 of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, Section 68 gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under Section 63 of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to

prove the execution of a will. To put in other words, if one attesting witness can prove execution of the will in terms of Clause (c) of Section 63, viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attention of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attention of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under Section 63 of the Succession Act. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of Section 68 of the Evidence Act."

23. 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."

24. Similarly, in Gopal Swaroop v. Krishna Murari Mangal and others⁹, the Supreme Court has held as under:-

"21. That brings us to the third requirement, namely, that the will must be attested by two or more witnesses each of whom has seen the testator signing and

9 (2010) 14 SCC 266

affixing his mark to the will or has seen some other person signing in the presence and by the direction of the testator. ..."

25. Reverting to the facts of the present case in light of principle of law rendered by Their Lordships of the Supreme Court in the above-stated judgments (supra) qua execution and attestation of Will by a testaor, it would appear that Rahi Bai had executed a Will dated 20.11.1991 (Ex.P-2) in favour of plaintiff-Urmila Bai at Durg and it was got registered on the same day at the office of Sub-Registrar, Saja, District Durg as the suit land is situated at village Luk within Tahsil-Saja and the Will is said to be attested by Prahlad & Aatmaram and Prahlad has been examined as PW-4. In the statement before the Court, Prahlad (PW-4) has clearly stated that the Will was prepared by Dyaneshwar Yadav (PW-3) at the instance of Rahi Bai and it was read over to her and thereafter she signed the Will in his presence and presence of other witness Aatmaram and thereafter he and Aatmaram in presence of Rahi Bai signed the Will with the intention of attesting the Will and thereby attested the Will. Prahlad (PW-4) was subjected to cross-examination at the instance of defendant No.1, but except the Will is forged, execution & attestation was not seriously challenged by defendant No.1 while cross-examination.

26. The Supreme Court in the matter of Naresh Charan Das Gupta v. Paresh Charan Das Gupta and another¹⁰ has held that question of attestation of Will is a pure question of fact depending on appreciation of evidence.
27. Since defendant No.1 did not question the execution & attestation of the Will during cross-examination and Will has been duly proved in accordance with law, therefore, now the question is whether registration of the Will at village-Saja, District Durg after execution of the Will at Durg, the Will can be said to be suspicious as held by two Courts below.
28. Admittedly, the suit property situated at village Luk, which is subject-matter of the Will falls within village-Saja, District Durg. Registration of Will is optional as per Section 18(e) of the Act of 1908 and Will is not a document covered under Section 28 of the Act of 1908 requiring registration (if any) in the office of Sub-Registrar within whose sub-district the whole or some portion of the property to which such document relates to is situate, therefore, Section 29 of the Act of 1908 would apply.
29. Section 29 (1) of the Act of 1908 states as under:-

10 AIR 1955 SC 363

"29. Place for registering other documents.-(1) Every document not being a document referred to in section 28 or a copy of a decree or order, may be presented for registration either in the office of the Sub-Registrar in whose sub-district the document was executed, or in the office of any other Sub-Registrar under the State Government at which all the persons executing and claiming under the document desire the same to be registered.

(2) xxx xxx xxx."

30. Since Will is not a document covered under Section 28 of the Act of 1908 requiring registration before the Sub-Registrar within whose sub-district the whole or some portion of property is situate, it has rightly been registered at the office of Sub-Registrar, Saja by virtue of Section 29(1) of the Act of 1908 at the exclusive choice of testatrix (See Ramo Rao v. Veddayu¹¹) and that will not a suspicious circumstance warranting rejection of a Will. Even otherwise, Will is a document, registration of which is optional under the provisions of the Indian Registration Act. Thus, registration of Will at the office of Sub-Registrar, Saja where the suit land is located would not by itself be a suspicious circumstance surrounding the Will. Merely because the Will was not registered at the office of Sub-Registrar, Durg and was registered at the office of Sub-Registrar, Saja, District Durg, no exception

11 AIR 1923 Madras 447

can be taken qua validity of the Will executed by Rahi Bai in favour of plaintiff-Urmila Bai. Accordingly, finding recorded by both the Courts below that the Will executed by Rahi Bai in favour of plaintiff-Urmilabai is forged and fabricated is hereby set-aside. Since the Will has been found valid in favour of the plaintiff, the plaintiff will get 1/3rd share by virtue of inheritance and 1/3rd share of Rahi Bai, as such, the plaintiff will be entitled for 2/3rd share in the suit property, whereas defendant No.1 will be entitled for 1/3rd of her mother's share. It is held accordingly.

31. The second appeal is allowed in part to the extent indicated hereinabove leaving the parties to bear their own cost(s). Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-