

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.239 of 2008**

Khorbahra Satnami (Dead) through LR's

1. Smt. Bhagobai (Died and deleted)
2. Smt. Sadhanbai aged 50 years – (Daughter) W/o Pakluram, D/o late Khorbahra
3. Smt. Kamla Kurre aged 47 years – (Daughter) W/o Jagdish Kurre, D/o Late Khorbahra
No.1 to 3 R/o Gram-Chicholi, Tah. Tilda, Distt. Raipur (CG)
4. Smt. Binda Bai aged 45 years – (Daughter) W/o Paskaran, D/o Late Khorbahra R/o Gram – Keshla, Tah-Tilda, Distt. Raipur (CG)
5-A Sarita aged about 21 years – (Daughters-Daughter) D/o Shiv Kumar,
5-B Nita aged 19 years – (Daughters-Daughter) D/o Shiv Kumar, R/o 5-A to 5-B Gram Bardih, Tah. Tilda, Distt. Raipur (CG)
6. Smt. Pushpabai aged 36 years (Daughter) W/o Shri Lal das R/o Gram-Chicholi, Tah. Tilda, Distt. Raipur (CG)
7. Smt. Basanti aged 34 years – (Daughter) W/o Awadh, D/o Late Khorbahra, Gram – Mohadi, Tah. Tilda, Distt. Raipur (CG)

---- LR's of Appellant/Defendant No.1**Versus**

1. Human Satnami Aged 22 years S/o Metandas Satnami R/o Chicholi Sub Tahsil-Kharora, District Raipur (CG) Present resident-Village Aman-Shivani, Tahsil and District Raipur (CG)

---- Plaintiff

2. State of Chhattisgarh Through Collector, Raipur (CG)

---- Respondents/Defendant No.2

For LR's of Appe./Def.No.1:	Mr. Anand Kumar Gupta, Advocate
For Res.No.1/Plaintiff	: Mr. Deepak Jain, Advocate
For Respondent No.2	: Mr. Anshuman Rabra, P.L.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

12.02.2020

1. The substantial question of law involved, formulated and to be answered in this second appeal preferred by the appellant/defendant No.1 is as under:-

"Whether the Lower Appellate Court was justified in reversing the judgment and decree passed by the trial Court and decreeing the suit in favour of respondent No.1/plaintiff despite recording a finding that execution of Will (Ex.-P/2) by Ledgi Bai was not established in accordance with law ?"

[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 suit property was originally held by Bhagbali Satnami. Defendant No.1 is son of Bhagbali and Ledgi Bai was daughter of Bhagbali. She died issueless in whose name the property stood recorded at the time of her death on 6.4.89. The plaintiff filed a suit that Ledgi Bai has executed a Will dated 8.2.1988 (Ex.P-2) in his favour out of love and affection for him, he is title-holder and possession-holder of the suit land and defendant No.1 be restrained from interfering with the suit land.
3. Defendant No.1 filed his written statement and denied the averments made in the plaint stating inter-alia

that he is son of Bhagbali and Ledgi Bai has not executed a Will in favour of the plaintiff and after death of Ledgi Bai the suit property came in the name of defendant No.1, as such, the plaintiff's suit deserves to be dismissed.

4. The trial Court upon evaluation and after appreciation of oral and documentary evidence available on record, by its judgment and decree dated 8.1.2008, dismissed the suit holding that the plaintiff is not titleholder of the suit land as Will has not been executed by Ledgi Bai in his favour on 8.2.1988 (Ex.P-2) in accordance with law. On appeal being preferred, the first appellate Court though held that attesting witnesses of the Will have not been examined, but further held that since scribe and clerk from the office of Sub-Registrar have been examined, the Will is proved and accordingly, granted decree in favour of the plaintiff. 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/defendant No.1, in which substantial question of law has been formulated, which has been set-out in the opening paragraph of this judgment.
5. Mr. Anand Kumar Gupta, learned counsel for legal representatives of the appellant/defendant No.1, would

submit that though attesting witness Namdas has died, but other attesting witness Shyamlal though he is alive was deliberately not examined. Even otherwise, in absence of attesting witnesses, the procedure prescribed under Section 69 of the Indian Evidence Act, 1872 could have been followed by the plaintiff and further scribe and clerk of the Sub-Register office cannot be the attesting witness, therefore, the first appellate Court is absolutely unjustified in setting aside the judgment and decree of the trial Court.

6. Mr. Deepak Jain, learned counsel for the respondent No.1/plaintiff, would submit that scribe and clerk from the office of Sub-Registrar have been examined and therefore, the first appellate Court has rightly held that the Will has been proved despite the fact that two attesting witnesses have not been examined before the trial Court.

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

8. The question for consideration would be, whether the Will Ex.P-2 has been proved and established by the plaintiff in view of the provisions contained in Section 63 of the Succession Act, 1925 read with

Section 68 of the Evidence Act, 1872.

9. It is trite law that a will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer *res integra*, that it carries with it an overwhelming element of sanctity. [See Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and 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.

2(2003) 2 SCC 91

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

19. Admittedly, in the present case, the Will (Ex.P-2) was attested by two witnesses namely Namdas and Shyamlal, however Namdas has died and Shyamlal Chelak was not examined. Recourse to Section 69 of the Indian Evidence Act was also not taken by the plaintiff which provides for proof of Will by proving the handwriting of one of the attesting witnesses and signature of executant of the document to be in the handwriting of that person.

20. Section 69 of the Evidence Act provides as

5(1977) 1 SCC 369

6(1974) 2 SCC 600

7(2009) 4 SCC 780

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 document is in the handwriting of that person."

21. Section 69 of the Evidence Act came-up for consideration before the Supreme Court in the matter of **Babu Singh and others v. Ram Sahal @ Ram Singh**⁸ 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."

22. As such, the provision contained in Section 69 of the Evidence Act, 1872 has not been followed for proving the Will in absence of examination of two attesting witnesses.

23. Now, question for consideration would be, whether the Registrar/clerk of office of Registrar examined can be said to be an attesting witness in terms of Section 63(c) of the Indian Succession Act, 1925.

24. The Supreme Court in the matter of Dharam Singh v. Aso and another⁹ has held that (Registering Authority (Registrar) cannot be a statutory attesting witness.

25. The proposition of law laid down in Dharam Singh (supra) has been followed by the Supreme Court in the matter of Bhagat Ram and another v. Suresh and others¹⁰.

26. Now, the next question for consideration would be, whether scribe Narayan Das Kurre (PW-3) can be said to be an attesting witness.

27. The Supreme Court in the matter of N. Kamalam (Dead) and another v. Ayyasamy and another¹¹ held that the effect of subscribing a signature on the part of the scribe cannot be identified to be of the same status as that of attesting witnesses and observed as under: -

"26. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of same status as that of the attesting witnesses. The signature of the attesting witness as noticed above on a document, requiring attestation (admittedly in the case of a will the same is required), is a requirement of the statute, thus cannot be equated with that of the scribe. ...

27. ... The animus to attest, thus, is

9 AIR 1990 SC 1888

10 AIR 2004 SC 436

11(2001) 7 SCC 503

not available, so far as the scribe is concerned: he is not a witness to the will but a mere writer of the will. The statutory requirement as noticed above cannot thus be transposed in favour of the writer, rather goes against the propounder since both the witnesses are named therein with detailed address and no attempt has been made to bring them or to produce them before the court so as to satisfy the judicial conscience. Presence of scribe and his signature appearing on the document does not by itself be taken to be the proof of due attestation unless the situation is so expressed in the document itself – this is again, however, not the situation existing presently in the matter under consideration. Some grievance was made before this Court that sufficient opportunity was not being made available, we are however, unable to record our concurrence therewith. No attempt whatsoever has been made to bring the attesting witnesses who are obviously available.

32. While it is true that Arunachalam, in the facts of the matter under consideration, did write the will and has also signed it but it is of utmost requirement that the document ought to be signed by the witnesses in order to have the statutory requirement fulfilled. Arunachalam has signed the document as a scribe not as a witness, if there were no signatures available as witness, probably we would have to specifically deal with such a situation and consider that aspect of the matter but presently in the fact situation of the matter under consideration, we have the advantage of two attesting witnesses, none of whom have been examined and the factum of their non-availability also has not satisfactorily been proved. The evidence of one person, namely, Arunachalam, cannot displace the requirement of the statute when Arunachalam himself has specifically identified himself as writer and not as a witness though in

his evidence, he tried to improve the situation, but this improvement, however, cannot (*sic*) said to be accepted: the will thus fails to have its full impact and its effect stands out to be non est."

28. The Supreme Court in the matter of **S.R. Srinivasa & Ors. v. S. Padmavathamma**¹² following the principle of law laid down in **N. Kamalam** (supra) has held that none of the attesting witnesses were examined and scribe has not stated that he had signed Will with intention to attest and merely stated that he was scribe of Will. Thus mere signature of scribe cannot be taken as proof of attestation.

29. Reverting to the facts of the present case in the light of principle of law laid down by the Supreme Court in the above-stated judgments (supra), it is quite vivid that none of the attesting witnesses have been examined as Namdas has already been died and second witness Shyamlal was not examined by stating that the plaintiff has developed some dispute with him and he is not likely to support him, but the fact remains that the provision contained in Section 69 of the Evidence Act, 1872 has not followed by the plaintiff. Scribe Narayan Das Kurre (PW-3) has been examined. He is document writer. He has stated that he does not know testatrix Ledgi Bai personally, she came

with two witnesses Namdas and Shyamlal and after typing the Will he took thumb impression of Ledgibai. He has written the Will on the dictation of Ledgibai. He has stated that he has taken thumb impression of testatrix Ledgibai on the Will and signatures of two attesting witnesses. He has not stated that Will was signed by both the witnesses with intention to attest the Will. He has also not stated that attesting witnesses were present when Ledgibai made her thumb impression on the Will and both the witnesses were signed the Will in presence of testatrix Ledgibai, as such, requirement of Section 63(c) of the Succession Act, 1925 is not satisfied and therefore, scribe Narayan Das Kurre (PW-3) cannot be branded as an attesting witness.

30. In view of that, the first appellate Court is absolutely unjustified in holding that the Will in favour of the plaintiff has been proved despite the fact of non-examination of attesting witnesses and non-compliance of the provisions contained in Section 69 of the Evidence Act, 1872. Accordingly, the impugned judgment and decree passed by the first appellate Court is set-aside and that of the trial Court is hereby restored. The substantial question of law is answered in favour of defendant No.1 and

against the plaintiff.

31. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

32. Decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-