

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.410 of 2009**

1. Radheshyam, aged 41 years, S/o late Shri Shiv Prasad Soni, R/o Village Pendra, Tahsil Pendraroad, District Bilaspur (C.G.)
2. Kamla Bai, aged 40 years, W/o late Shri Sitaram Soni,
3. Ravi Prakash, aged 19 years, S/o Shri Sitaram Soni,
4. Ku. Shashi, aged 18 years, D/o Shri Sitaram,
5. Savitri Bai, aged 7 years, D/o late Sitaram,
6. Ku. Parwati, aged 11 years, D/o late Shri Sitaram Soni,

No.5 and 6 are minor through the natural guardian mother Kamla Bai, the appellant No.2, R/o Village Gaurela, Tahsil Pendraroad, District Bilaspur (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Mamta, aged 38 years, W/o late Shri Raju Soni,
2. Ghanshyam, aged 20 years, S/o late Shri Raju Soni,
3. Sagar, aged 19 years, S/o late Shri Raju Soni,
4. Ku. Priti, aged 16 years, D/o late Shri Raju Soni, minor through the natural guardian mother Mamta the respondent No.1,
5. Ghanshyam, aged 39 years, S/o late Shri Shiv Prasad Soni,

All are residents of Village Pendra, Tahsil Pendraroad, District Bilaspur (C.G.)

(Defendants)
---- Respondents

For Appellants/Plaintiffs: Mr. Somnath Verma, Advocate.
For Respondents/Defendants: -
Mr. Yogendra Chaturvedi, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

08/03/2021

1. This second appeal preferred by the plaintiffs / appellants herein

was admitted for hearing by formulating the following substantial questions of law: -

“1. Whether both the Courts below were justified in holding that the plaintiffs have failed to prove the execution and attestation of the Will (Ex. P/4) executed by Badri Prasad on 03.04.1991 in favour of the plaintiffs by recording a finding which is perverse to the record?

2. Whether both the Courts below were justified in holding that the suit filed by the plaintiff was barred by limitation by recording a finding which is perverse to the record?

3. Whether both the Courts below were justified in holding that the suit was filed by non-joinder of necessary party by recording a finding which is perverse to the record?”

(For the sake of convenience, parties hereinafter will be referred as per their status shown and ranking given in the plaint before the trial Court.)

2. The suit property was admittedly the property held by Badri Prasad and Ramdulari was his wife, both died issue-less. The plaintiffs and defendant No.5 are legal heirs of Shiv Prasad, brother of Badri Prasad. The plaintiffs filed suit that since Badri Prasad and his wife both were issue-less and out of love, Badri Prasad has executed a will on 3-4-1991 (Ex.P-4) in presence of witnesses Murari & Charku and died on 14-7-1993, whereas his wife Ramdulari died on 24-4-2001. It was further pleaded that the defendants are not legal heirs of Badri Prasad and they have no right and title over the suit property, but defendant No.1 has unauthorisedly got his name mutated in the revenue records, therefore, need for filing of suit for declaration of title and delivery of possession has arisen, as such, decree be granted on the basis of execution of Will dated 3-4-1991.
3. Resisting the suit, the defendants have filed written statement

stating inter alia that Badri Prasad & Ramdulari have adopted Raju – father of defendants No.2 to 4, and also pleaded that Ramdulari on 16-6-2000 executed a Will (Ex.D-1) in favour of defendant No.1 – wife of Raju, as such, she is title holder of the suit land. Other objections with regard to limitation and non-joinder of necessary party was also raised.

4. The trial Court after appreciating oral and documentary evidence available on record, dismissed the suit holding that the plaintiffs have failed to establish execution and attestation of Will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, which has been affirmed by the first appellate Court. The trial Court held the suit to be within limitation, but the first appellate Court has recorded a finding that the suit is clearly barred by limitation, though the suit has been held to be within limitation by the trial Court, however, the first appellate Court has affirmed the judgment & decree of the trial Court against which this second appeal has been preferred by the plaintiffs in which substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment for the sake of completeness.
5. Mr. Somnath Verma, learned counsel appearing for the appellants herein / plaintiffs, would submit that attesting witness Murari (PW-2) has proved the Will in accordance with law and as such the decree deserves to be set aside. He would further submit that since the trial Court has held the suit to be within limitation and there is no appeal or cross-objection preferred by the defendants, therefore, no finding could have been arrived at

by the first appellate Court holding the suit to be barred by limitation.

6. On the other hand, Mr. Yogendra Chaturvedi, learned counsel appearing for the defendants / respondents herein, would support the impugned judgment & decree and would submit that the attesting witnesses have not proved the Will accordance with law.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

Answer to substantial question of law No.2: -

8. The trial Court has clearly held the suit to be within limitation and there is no appeal or cross-objection preferred by the defendants and that finding recorded by the trial Court in absence of challenge by the defendants has attained finality, therefore, the first appellate Court had no occasion to consider and examine the plea of limitation on the appeal preferred by the plaintiffs, as such, the finding of the first appellate Court that the suit based on Will is barred by limitation, deserves to be and is hereby set aside, as the first appellate Court has no business to record that finding in absence of any appeal or cross-objection by the defendants. Therefore, the second substantial question of law is answered in favour of the plaintiffs and against the defendants.

Answer to substantial question of law No.3: -

9. The fact as to non-joinder of the State as party defendant was considered by this Court in the matter of **Puranlal Sunanda**

Ramteke v. Ramji Lal Narayan Khandelwal¹ and it has been held that the said defect is a curable defect. However, in the present case, since the suit of the plaintiffs is based on Will, such a finding recorded by the first appellate Court also deserves to be set aside. Accordingly, the third substantial question of law is also answered in favour of the plaintiffs and against the defendants.

Answer to substantial question of law No.1: -

10. In order to prove the Will Ex.P-4, the plaintiffs have examined their star / one of the attesting witnesses Murari. The question for consideration would be, whether execution and attestation of Will Ex.P-4 (unregistered) has been proved and established by the plaintiffs in view of the provisions contained in Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872.

11. 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 others**².]

12. 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.

13. Section 63 of the Act of 1925 provides as under:-

1 AIR 2019 Chh 145

2 (2015) 8 SCC 615

“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.”

14. 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.

15. 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

Kadam³.

16. 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.”

17. 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.

18. In the matter of Girja Datt Singh v. Gangotri Datt Singh⁴, 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

³ (2003) 2 SCC 91

⁴ AIR 1955 SC 346

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.”

19. In the matter of H. Venkatchala Iyengar v. B. N. Thimmajamma and others⁵ 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.”

20. The principle laid down in the above-stated judgment has been followed with approval in Smt. Jaswant Kaur v. Smt Amrit Kaur and others⁶, Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another⁷, Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others⁸ and Jagdish Chandra Sharma (supra).

21. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another⁹, 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.

22. 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

6 (1977) 1 SCC 369

7 (1974) 2 SCC 600

8 (2009) 4 SCC 780

9 (2017) 1 SCC 257

presence of the testator.”

23. 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.”

24. 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.”

25. Reverting to the facts of the present case in the light of the principles of law rendered by their Lordships of the Supreme Court in the above-noted judgments (supra) qua execution and attestation of Will by a testator, the following factual position would emerge on the face of record: -

1. Testator Badri Prasad is said to have executed unregistered will in respect of his properties in favour of the plaintiffs on 3-4-1991 vide Ex.P-4.
2. The Will dated 3-4-1991 is said to be attested by three witnesses namely Murari, Charku and Sukhi Bai.
3. Murari – one of the attesting witnesses, who signed the Will, has been examined as PW-2. In his application under Order 18 Rule 4 of the CPC, he has stated as under: -

3/ यह कि, वर्तमान में बद्रीप्रसाद की मृत्यु हो चुकी है, जिनके द्वारा उक्त वसीयतनामा को लिखा गया था तथा रसीदी टिकट में मेरे सामने हस्ताक्षर भी किया गया था तथा जिसमें मेरे द्वारा हस्ताक्षर भी किया गया है, तथा मेरे साथ ही चरकू के द्वारा हस्ताक्षर किया गया तथा बद्रीप्रसाद की बहन के द्वारा अंगुठा निशानी लगाया गया था । साथ ही मृतक बद्रीप्रसाद के द्वारा यह भी बताया गया था कि मैं अपनी चल व अचल संपत्ति को अपने भतीजों लोगों को दे रहा हूं क्योंकि मेरी पत्नी उक्त संपत्ति को मायके पक्षवालों को देने के लिये दबाव डालती रहती है ।

26. Reverting to the facts of the present case in light of the aforesaid narration of facts, it is quite vivid that compliance of Section 63(c) of the Succession Act, 1925 is absolutely missing in the present case though strict compliance of the said provision is mandatory. Murari (PW-2) in his statement before the Court under Order 18 Rule 4 of the CPC has simply stated that Badri Prasad has executed the Will on stamp paper and signed in his presence. He has not stated that testator Badri Prasad has not signed the Will in his presence and in presence of other witnesses. He has also not stated that Charku and/or other attesting witness have not seen the testator signing the Will or Charku has signed the Will in presence of testator Badri Prasad. As such, one of the important ingredients that other attesting witness has seen the testator signing Will, is missing. Similarly, it has also not been stated that other witnesses have signed the Will in presence of the testator. Even otherwise, mere signing of Will as a witness would not per se amount to compliance of Section 63(c) of the Succession Act, 1925 as *animo attestandi* is absolutely missing. In the matter of **Bhagat Ram v. Suresh**¹⁰, it has been held that to be an attesting witness it is essential that the witness should have put his signature *animo attestandi* for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.

27. As such, I am satisfied that both the Courts below have rightly concluded that the plaintiffs have failed to prove execution and attestation of Will in accordance with Section 63(c) of the

Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, and the plaintiffs have failed to discharge their burden placed upon them by law to prove the attestation of a Will. The first substantial question of law is answered in favour of the defendants and against the plaintiffs.

28. Concludingly, the two substantial questions of law (2nd & 3rd) are answered in favour of the plaintiffs and one substantial question of law (1st) with regard to execution and attestation of Will, is answered against the plaintiffs.

29. Resultantly, this Court has no option except to dismiss the second appeal. Accordingly, the second appeal is dismissed leaving the parties to bear their own cost(s).

30. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge