

HIGH COURT OF CHHATTISGARH AT BILASPUR**Second Appeal No. 235 of 2007**

Trilochan, Aged about 30 years, Agriculturist,
Caste Kanwar, S/o Bulbul, R/o Village Parasi,
Tahsil Pendra Road, Distt. Bilaspur,
Chhattisgarh.

---Appellant/Defendant No. 2

Versus

1. Thakur Ram, Aged about 29 years, Caste Kewat, S/o
Heera Lal, R/o Village Barour, Tahsil Pendraroad,
Distt. Bilaspur, Chhattisgarh. **--- Plaintiff**

2. Bhuvneshwar, Aged about 23 years, Caste Kewat,
S/o Heera Lal, Tahsil Pendra Road, Distt.
Bilaspur, Chhattisgarh. **--- Defendant No. 1**

3. State of Chhattisgarh, Through Collector,
Bilaspur, Chhattisgarh. **--- Defendant No. 3**

--- Respondents

For Appellant :- Mr. Ravindra Agrawal, Advocate
For Respondent No. 1 :- Mr. Manoj Chauhan, Advocate
For State :- Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board (Th. Video Conferencing)

02/07/2021

1. This second appeal preferred by the
appellant/defendant No. 1 was admitted for

hearing on 31/03/2008 by formulating the following substantial question of law :-

"Whether due to a clear denial by the appellant/defendant Trilochan regarding the execution of will dated 03.10.1975 by Ramdhani, the Courts below were not justified in holding that the said will is not required to be proved in accordance with law?"

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

2. The suit property was admittedly held by Ramdhani, who had two wives namely Likhaniyabai and Sirvatiyabai respectively. Out of his wedlock with Likhaniyabai, Ramdhani had one daughter namely Leelawati and defendant No. 2 is the son of Leelawati; and out of his wedlock with Sirvatiyabai, Ramdhani had one daughter namely Kheermati and plaintiff and defendant No. 1 are sons of Kheermati.
3. It is the case of the plaintiff that defendant No. 2 filed an application under Section 178 of Chhattisgarh Land Revenue Code, 1959 before the Court of Naib Tahsildar, Pendra Road wherein by order dated 28/04/1994 (Ex. D/5) the Tahsildar held that plaintiff as well as defendant No. 1,

both being the sons of Kheermati, would jointly take $\frac{1}{2}$ share in the suit property and defendant No. 2, being the son of Leelawati, would take the other $\frac{1}{2}$ share in the suit property and accordingly partitioned the suit property. The appeal preferred by the plaintiff against the order of the Tahsildar also remained unsuccessful. Now, the plaintiff has filed the instant suit for declaration of title and partition stating inter alia that suit property was earlier held by Ramdhani, who had executed a Will deed dated 03/10/1975 (Ex. P/1) in favour of plaintiff and defendants No. 1 and 2 that each one of them will take $\frac{1}{3}^{\text{rd}}$ share in the suit property, therefore, decree for partition be passed and plaintiff as well as defendants No. 1 and 2 be declared as title-holders of $\frac{1}{3}^{\text{rd}}$ share each.

4. Defendant No. 1 supported the stand of the plaintiff whereas defendant No. 2 filed his separate written statement stating inter alia that the Naib Tahsildar has already made partition by order dated 28/04/1994 (Ex. D/5), which is absolutely in accordance with law as plaintiff and defendant No. 1, both are sons of

Kheermati, daughter of Ramdhani born out of his wedlock with his second wife Sirvatiyabai whereas defendant No. 2 is the son of Leelawati, daughter of Ramdhani born out of his wedlock with his first wife Likhaniyabai, therefore, plaintiff as well as defendant No. 1 would jointly take $\frac{1}{2}$ share and defendant No. 2 would take $\frac{1}{2}$ share in the suit property. In paragraph 3 of his written statement, defendant No. 2 further pleaded the Will (Ex. P/1) to be a forged document and stated that no title/interest has been received by plaintiff and defendant No. 1 on the basis of the said Will.

5. Learned trial Court, upon appreciation of oral and documentary evidence on record, decreed the suit by its judgment and decree dated 28/07/2001 holding that plaintiff has proved due execution and attestation of Will (Ex. P/1) and specifically recorded a finding in paragraphs 13 and 14 of the judgment that no specific plea has been raised by defendant No. 2 in his written statement qua valid execution and attestation of the Will, as such, on the basis of the said Will, plaintiff as well as defendants No. 1 and

2, each of them will take 1/3rd share in the suit property. On appeal being preferred by defendant No. 2, learned first appellate Court affirmed the findings recorded by the trial Court and dismissed the appeal by its impugned judgment and decree dated 22/03/2007 against which this second appeal under Section 100 of CPC has been preferred by the appellant/defendant No. 2, in which substantial question of law has been framed and set out in the opening paragraph of this judgment.

6. Mr. Ravindra Agrawal, learned counsel for the appellant/defendant No. 2, would submit that both the Courts below have concurrently erred in holding that since execution and attestation of Will (Ex. P/1) has not been disputed expressly by defendant No. 2, the said Will is proved in accordance with law, whereas the execution and attestation of Will (Ex. P/1) has been specifically denied by defendant No. 2 and moreover, it is the duty of the propounder of the Will to establish due execution and attestation of the Will in accordance with Section 63(c) of Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act,

1872. He would rely upon the decision rendered by the Supreme Court in the matter of Rajesh Verma (died) th. Lrs. v. Lajesh Saxena (died) th. LRs.¹. He would further submit that though the scribe has been examined before the trial Court, but he cannot be a competent witness particularly when the attesting witnesses of the Will are alive and plaintiff deliberately did not file an application for their examination in view of paragraph 15 of plaintiff's cross-examination (P.W. 1). Therefore, the judgment and decree of both the Courts below deserve to be set aside and the instant appeal deserves to be allowed.

7. Mr. Manoj Chauhan, learned counsel for respondent No. 1/plaintiff, would support the judgment and decree passed by both the Courts below in his written submission as well as his oral submission and submit that both the Courts below have concurrently and rightly held that the Will (Ex. P/1) has been proved in accordance with law and on the basis of the said Will, plaintiff and defendants No. 1 and 2, each of them will get 1/3rd share in the suit property,

as such, the instant appeal deserves to be dismissed.

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

9. It is not in dispute that in partition proceedings initiated by defendant No. 2 under Section 178 of Chhattisgarh Land Revenue Code, 1959, the Tahsildar vide order dated 28/04/1994 (Ex. D/5) directed that plaintiff and defendant No. 1, both will take $\frac{1}{2}$ share in the suit property jointly and defendant No. 2 will take the other $\frac{1}{2}$ share in the suit property and the appeal preferred by the plaintiff against the order of Tahsildar was also dismissed by order dated 24/03/1995 (Ex. D/6) passed by the Sub-divisional Officer. Thereafter, plaintiff filed the instant suit for declaration of title and partition on the basis of Will deed dated 03/10/1975 (Ex. P/1) executed by Ramdhani in favour of plaintiff as well as defendants No. 1 and 2 that each one of them will take $\frac{1}{3}^{\text{rd}}$ share in the suit property. Learned trial Court as well as the first appellate Court, both have

held that since the execution and attestation of the Will (Ex. P/1) has not been specifically denied by defendant No. 2 and mutation has already been made in the name of plaintiff as well as defendants No. 1 and 2, therefore, the Will (Ex. P/1) stands proved in accordance with law and though the two attesting witnesses namely Ramdin and Hardin are alive yet they have not been examined by the plaintiff.

10. It is well settled law that the propounder of the Will has to prove the due execution and attestation of the Will in accordance with Section 63(c) of Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. The principles which govern the proving of a Will are well settled. (See H. Venkatachala Iyengar v. B.N. Thimmajamma², Rani Purnima Devi v. Khagendra Narayan Dev³, Inder Bala Bose v. Manindra Chandra Bose⁴, 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

2AIR 1959 SC 443

3AIR 1962 SC 567

4AIR 1982 SC 133

5(1977) 1 SCC 369

6(1974) 2 SCC 600

Joykumar Singh and others⁷, Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others⁸ and Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another⁹.)

11. The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872.
12. In H. Venkatachala Iyengar (supra), the Supreme Court has clearly held with regard to proof of Will by observing as under: -

“The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Sec. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a hand-writing under Secs. 45 and 47 of the Act the opinions of experts and of persons acquainted with

7(2009) 4 SCC 780

8(2015) 8 SCC 615

9(2017) 1 SCC 257

the handwriting of the person concerned are made relevant of Section 68. Evidence Act deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribed the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of Law. ..."

13. As such, the provisions prescribed under Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 are mandatory and unless the prescribed requirement are satisfied, the Will cannot be said to be proved by merely not filing additional pleading in terms of Order 8 Rule 9 of the CPC.

14. Their Lordships of the Supreme Court in the matter of S.R. Srinivasa and others v. S. Padmavathamma¹⁰ laid down the mode and manner of proof of Will and summarized the legal position thereof and also summarized the legal position with regard to admissions and evidentiary value thereof and held that mere admission about making of Will does not amount to admission of due execution and genuineness of Will, and observed as under: -

"48. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the will, in view of the admissions made in OS No. 233 of 1998 and the evidence of PW1. In fact there is no admission except that Puttathayamma had executed a will bequeathing only the immovable properties belonging to her in favour of Indiramma. The first appellate court, in our opinion, correctly observed that the aforesaid admission is only about the making of the will and not the genuineness of the will. ...

49. In view of the above we are of the opinion that the High Court committed an error in setting aside the well-considered finding of the first appellate court. The statements contained in the plaint as well as in the evidence of PW 1 would not amount to admissions with regard to the due execution and genuineness of the will dated 18-6-1974."

15. Similarly, in the matter of Ramesh Verma (supra), Their Lordships of the Supreme Court have clearly held that even in a case where the opposite party does not deny the execution of the Will in his written statement, yet the Will has to be proved in terms of Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. Paragraphs 13 and 14 of the judgment state as under :-

"13. A Will like any other document is to be proved in terms of the provisions of Section 68 of the Indian Succession Act and the Evidence Act. The propounder of the Will is called upon to show by

satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the disposition and put his signature to the document on his own free will and the document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. This is the mandate of Section 68 of the Evidence Act and the position remains the same even in a case where the opposite party does not specifically deny the execution of the document in the written statement.

14. In *Savithri v. Karthyayani Amma* reported as (2007) 11 SCC 621 at page 629, this Court has held as under:-

"A Will like any other document is to be proved in terms of the provisions of the Succession Act and the Evidence Act. The onus of proving the Will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the Will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the Will. It is required to be shown that the Will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the Will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exists suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the Court before it can be accepted as genuine." "

16. Reverting to the facts of the present case, it is quite vivid that in the instant case though

the Will has been filed and exhibited as Exhibit P/1, but none of the attesting witnesses namely Ramdhin and Hardin have been examined by the plaintiff before the trial Court even though they were available the time of evidence, which is apparent from the statement of the plaintiff (P.W. 1) in paragraphs 3 and 15 wherein he has clearly stated that though the attesting witnesses are available for examination, but on account of their relationship with defendant No. 2, the attesting witnesses are not interested in appearing in the witness box, but in paragraph 15 of his statement, the plaintiff has clearly admitted that he did not take any steps for summoning the attesting witnesses of the Will at the time of evidence before the trial Court. The plaintiff merely examined himself before the trial Court, but he did not get either of the attesting witnesses examined in order to prove the due execution and attestation of the Will which runs contrary to the aforesaid decisions rendered by the Supreme Court as the Will (Ex. P/1) has to be proved in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872

and even if the Will (Ex. P/1) has not been specifically denied in the written statement, then also the propounder of the Will has to establish the Will in accordance with law.

17. Both the Courts below have committed legal error in holding that merely because mutation has been done in the names of plaintiff and defendants No. 1 and 2 and the execution and attestation of the Will has not specifically been denied by defendant No. 2, as such, the Will stands proved, which runs contrary to the well settled legal position in this regard. Thus, the first appellate Court fell in legal error in affirming the judgment and decree passed by the trial Court without considering the mandatory provision in this regard as noticed herein-above.

18. Now, it is the contention of learned counsel for respondent No. 1/plaintiff that the scribe namely Mohan Singh has been examined who has proved the attestation and execution of the Will, which learned counsel for the appellant/defendant No. 2 has opposed by stating that the scribe cannot be a competent witness as that of an attesting witness and he has relied

upon the decisions rendered by the Supreme Court in the matters of M.L. Abdul Jabbar Sahib v. M.V. Venkata Sastri & Sons and Others¹¹ and N. Kamalam (dead) and Another v. Ayyasamy and Another¹².

19. In the matter of M.L. Abdul Jabbar Sahib (supra), it has been held by the Supreme Court that under Section 3 of Transfer of Property Act, 1882, it is essential that witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature. If a person puts his signature on the document for some other purpose, e.g. to certify that he is a scribe or an identifier or a registering officer, he is not an attesting witness.

20. The Supreme Court in the matter of N. Kamalam (supra) has considered the effect of subscribing a signature on the part of scribe and held as under :-

"25. The effect of subscribing a signature on the part of the scribe cannot in our view be identified to be of the same status as that of the attesting witnesses. The signature of the attesting witness as

111969 (1) SCC 573
12 (2001) 7 SCC 503

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."

21.Their Lordships in N.Kamalam (supra) finally held as under :-

"32. ... 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."

22.Thus it is quite clear that though the two attesting witnesses namely Ramdhin and Hardin were admittedly available for examination on the date on which other plaintiff's witnesses were examined, but none of the two attesting witnesses have been examined, as such, testimony of the Scribe Mohan Singh (P.W. 2) cannot be accepted as attesting witness as he has signed the Will as Scribe and not as an attesting witness, as such, plaintiff has failed to prove the due execution and attestation of the Will in accordance with law and the trial Court as well as the first appellate Court, both have

committed grave legal error in holding that plaintiff has proved the execution and attestation of the Will in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 merely on the ground that mutation has already been done in the names of plaintiff as well as defendants No. 1 and 2 on the basis of the Will and further on the ground that defendant No. 2 has not specifically denied the execution and attestation of the Will.

23. Consequently, the judgment and decree passed by both the Courts below are hereby set aside being perverse and contrary to the material available on record and plaintiff's suit stands dismissed. The second appeal is allowed to the extent indicated herein-above. No cost(s).

24. Accordingly, the application filed by respondent No. 1/plaintiff under Order 41 Rule 27 of CPC stands disposed of in view of the aforesaid finding.

25. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge