

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.249 of 2006Judgment reserved on: 7-7-2021Judgment delivered on: 20-7-2021

1. Bahartin Bai, W/o Bodhram, D/o Chamra, Aged about 57 years, R/o Thelkabhata, Tehsil Sarangarh, District Raigarh (C.G.)
2. Laxminarayan, S/o Malik Ram, Aged about 46 years.
3. Sukhi Ram, S/o Malik Ram, Aged about 42 years.
4. Nakul, S/o Malik Ram, Aged about 37 years.
5. Ram Kumar, S/o Malik Ram, Aged about 35 years.

Appellants/plaintiffs No.2 to 5 are Agriculturists, R/o Village Bunga, Tehsil & District Raigarh (C.G.)

(Plaintiffs)
---- Appellants

Versus

1. Jagannath, S/o Late Shri Sahas Ram, Aged about 34 years.
2. Narsingh, S/o Late Shri Sahas Ram, Aged about 30 years.
3. Amarmati, D/o Late Shri Sahas Ram, Aged about 27 years.
4. Agas Ram, S/o Late Shri Kashi Ram, Aged about 47 years.
5. Usat Ram, S/o Late Shri Gaya Ram (*in the impugned judgment and decree father's name of Usat Ram wrongly mentioned as Late Shri Kashi Ram*), Aged about 38 years.

All respondents/defendants are Agriculturists, R/o Village Bunga, Tehsil & District Raigarh (C.G.)

(Defendants)
---- Respondents

For Appellants/Plaintiffs: Mr. Rajendra Tripathi, Advocate.
For Respondents/Defendants: Mr. Amit Sharma, Advocate.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Judgment

1. Proceedings of this matter have been taken-up through video conferencing.
2. This second appeal preferred by the plaintiffs was admitted for hearing on 26-8-2019 by formulating the following substantial question of law:-

“Whether the first appellate Court was justified in holding that Ex.D-1C, executed by Mungra Bai in favour of Agas Ram, is duly established in accordance with Section 63(1) of the Indian Succession Act, 1925 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.)

3. Late Shri Bhudsal had three sons namely Baldeo, Govind Ram and Munau Ram, all three have died. The dispute relates to the house left by Mungra Bai, widow of Ghasi Ram, S/o Baldeo. Mungra Bai died issue-less on 3-2-1992. The plaintiffs are grand-daughter and grand-sons of Govind Ram. The defendants are heirs of Munau Ram. It is the case of the plaintiffs that since Mungra Bai died issue-less, therefore, her suit house will be divided equally between the heirs of Govind Ram – the plaintiffs herein and the heirs of Munau Ram – the defendants herein, as they would succeed jointly. Whereas, the defendants claimed that Mungra Bai had executed a Will dated 15-10-1991 (Ex.D-1) in favour of Agas Ram – defendant No.2, therefore, the suit deserves to be dismissed.
4. The trial Court after appreciating oral and documentary evidence available on record, did not accept the Will executed by Mungra Bai in favour of defendant No.2 Agas Ram and decreed the suit holding that both parties will take half and half share in the suit property which was reversed by the first appellate Court holding that the Will is duly proved in accordance with law and therefore the plaintiffs would not be

entitled to inherit the property against which this second appeal has been preferred preferred by the plaintiffs in which substantial question of law has been formulated and which has been set-out in the opening paragraph of this judgment for the sake of completeness.

5. Mr. Rajendra Tripathi, learned counsel appearing for the appellants herein / plaintiffs, would submit that the first appellate Court fell in error in holding that the Will Ex.D-1 has been proved in accordance with Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, as Will is a suspicious document and it has not been proved in accordance with law, therefore, judgment & decree of the first appellate Court deserve to be set aside.
6. Mr. Amit Sharma, learned counsel appearing for the respondents herein / defendants, would support the judgment & decree of the first appellate Court and submit that Will has been proved in accordance with law as attesting witness Sufal (DW-4) has been examined and he has clearly proved the Will executed by Mungra Bai in favour of defendant No.2 Agas Ram in accordance with law. As such, the first appellate Court is justified in reversing the judgment & decree of the trial Court and the appeal deserves to be dismissed.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and gone through the record with utmost circumspection.
8. The short question for consideration would be, whether execution and attestation of the Will Ex.D-1C has been proved and established by the defendants 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 Indian 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 Indian 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 Indian 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 Kadam².

14. Section 68 of the Indian 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 the matters of 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 Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others⁸.

19. 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

5 (1977) 1 SCC 369

6 (1974) 2 SCC 600

7 (2009) 4 SCC 780

8 (2015) 8 SCC 615

9 (2017) 1 SCC 257

Indian Succession Act, 1925 read with Section 68 of the Indian 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 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 Yunnam 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 Succession Act, 1925. It was observed as under: -

“10. Section 68 of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. It is true that Section 68 of Evidence Act 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. In the matter of **Madhukar D. Shende v. Tarabai Aba Shedage**¹⁰, the Supreme Court has laid down that the propounder of the will has to establish the will in the manner contemplated by law and held as under: -

“9. It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.”

25. Similarly, in the matter of **Gopal Swaroop v. Krishna Murari Mangal and others**¹¹, it has been held as under: -

10 2002 AIR SCW 242

11 (2010) 14 SCC 266

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

26. In the instant case, it is not in dispute that the suit house was owned by Ghasi Ram who died issue-less leaving his wife Mungra Bai who also died on 3-2-1992. It is the case of the plaintiffs that their grandfather Govind Ram and Munau Ram, both were brothers. The plaintiffs are legal heirs of Govind Ram and the defendants are legal heirs of Munau Ram, therefore, both will succeed to the extent of half share which defendant No.2 Agas Ram disputed by holding that Mungra Bai had already executed Will dated 15-10-1991 (Ex.D-1C) in his favour. The trial Court held the Will to be suspicious document, whereas the first appellate Court held the Will to be valid and proved in accordance with Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 and accordingly, dismissed the suit.

27. In order to prove the Will, one of the attesting witnesses Sufal (DW-4) has been examined. Sufal (DW-4), in his examination-in-chief, in paragraph 5, has stated that Mungra Bai has executed *ikrarnama* Ex.D-1 which was read over by scribe Leelaram Maitri (DW-3) to Mungra Bai and which was heard by himself (Sufal – DW-4), Dayaram Maitri, Madho, Laxman and Gajanan, and thereafter, Mungra Bai has put her thumb impression on the Will and thereafter, he has signed the Will and other witnesses have also signed the Will. Said witness Sufal (DW-4) did not state clearly that at the time of signing the Will by putting thumb impression by Mungra Bai, he and other attesting witness were present. He also did not say that they (he and other attesting witness) have signed the Will in presence of Mungra Bai and

Mungra Bai seen them signing the Will. As such, the basic requirements of Section 63(c) of the Indian Succession Act, 1925 are missing in the statement made by attesting witness Sufal (DW-4). Therefore, the first appellate Court is absolutely unjustified in holding that execution and attestation of Will has been proved in accordance with law. The said Will is also not free from doubts. There is overwriting in the date of Will, but it has not been certified by the testatrix or the scribe. Secondly, it appears that Will has not been read-over to the testatrix, otherwise, it could have been corrected at the time of its making. Admittedly, the testatrix was female, but a careful perusal of the Will would show, as if the testatrix was male. As such, this Court is of the opinion that defendant No.2 Agas Ram has failed to prove the execution and attestation of Will in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872. The substantial question of law is answered accordingly.

28. As a fallout and consequence of the aforesaid discussion, judgment & decree of the first appellate Court is hereby set aside and that of the trial Court is restored. The second appeal is allowed to the extent indicated herein-above. No order as to cost(s).

29. Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge