(2019) 08 CHH CK 0144

Chhattisgarh High Court

Case No: Second Appeal No. 477 Of 2004

Vishnu Ram And Ors	APPELLANT
Vs	
Radha Bai And Ors	RESPONDENT

Date of Decision: Aug. 22, 2019

Acts Referred:

- Succession Act, 1925 - Section 63, 63(c)
- Evidence Act, 1872 - Section 68

Hon'ble Judges: Sanjay K. Agrawal, J

Bench: Single Bench

Advocate: Vishnu Koshta, Shobhit Koshta, R.N. Jha, Anshuman Rabra

Final Decision: Dismissed

Judgement

Sanjay K. Agrawal, J

1. This second appeal by the defendants was admitted on the following substantial questions of law:-

Â ""(i) Whether the lower appellate Court erred in law in holding that the will dated 22.8.1977 (Ex.P-1) was proved in accordance with law?

(ii) Whether the plaintiff becomes the owner of the suit property to the extent of Â½ share in it on the strength of will deed?

(Parties hereinafter will be referred as per their status shown in the plaint before the trial Court.)

2. The suit property was originally held by Firtu who died on 24-12-1977. He died issue-less. He was said to have executed Will in favour of plaintiff

Radha Bai on 22-8-1977 (Ex.P-1). Plaintiff Radha Bai is daughter of Kunwar Singh who was brother of Firtu. Kunwar Singh was defendant No.1 in

the plaint, but later-on, on account of his death, he was substituted by his son Hemram and thus, the present defendant No.1 is son of Kunwar Singh

and other defendants No.2, 3 and 4 are sons of Hemram - defendant No.1. After death of Firtu, the defendants got their names mutated in the

revenue records leading to filing of suit for declaration of title, possession and permanent injunction in which the defendants set up a plea that the suit

property was the joint Hindu family property of Firtu and Kunwar Singh both and there was no partition during the lifetime of Firtu among them and

therefore undivided interest could not have been bequeathed in favour of plaintiff Radha Bai and if the Will is found to be proved then also, the Will is

forged and fabricated and as such, the suit deserves to be dismissed.

3. The trial Court after appreciating oral and documentary evidence on record partly decreed the suit in favour of the plaintiff on the basis of

succession holding that the plaintiff is entitled for half of the property and the sale deed executed by Kunwar Singh in favour of defendants No.2, 3 &

4 is null and void. The first appellate Court in appeals preferred by both the parties i.e. the plaintiff as well as the defendants, though dismissed the

appeals but reversed the finding of Will in favour of the plaintiff finding Will in her favour is established and also reversed the finding of declaring the

sale deed as null and void, but eventually dismissed the appeals.

4. Now, only defendants No.2, 3 & 4 have preferred second appeal in which the substantial questions of law framed are with regard to due execution

and attestation of will and set-out in opening paragraph of this judgment.

5. Mr. Shobhit Koshta, learned counsel appearing for the appellants herein / defendants No.2, 3 & 4, would submit that the Will has not been proved in

accordance with law by the two attesting witnesses as per Section 63(c) of the Succession Act, 1925 as such the judgment & decree of the first

appellate Court deserve to be set aside.

6. Mr. R.N. Jha, learned counsel appearing for the plaintiff / respondent No.1 herein, would support the impugned judgment & decree.

7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and went through the record with utmost

circumspection.

8. The short question for consideration would be, whether execution and attestation of the Will Ex.P-1 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 others (2015) 8 SCC 615.]

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 (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 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 Singh AIR 1955 SC 346, 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.

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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 others 4 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 4 AIR 1959 SC 443 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 others 5,

Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora 5 (1977) 1 SCC 369 and another 6, Yumnam Ongbi Tampha Ibema Devi v. Yumnam

Joykumar Singh and others 7 and Jagdish Chand Sharma (supra).

19. In the matter of Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another 8, the

Supreme Court has again reiterated the need of proving the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with

Section 68 of the Evidence Act, 1872.

20. Reverting to the facts of the present case in light of the principles of law laid down by Their Lordships of the Supreme Court qua execution and

attestation of Will by the testator, the following factual position would emerge on the face of record: -

1. Testator Firtu died issue-less on 24-12-1977 and executed an unregistered Will in respect of his property in favour of plaintiff Radha Bai (his

brother's daughter) in presence of two attesting witnesses Rikeshwar Sahu (PW-2) and Uderam (PW-3), duly examined before the trial Court.

2. Rikeshwar Sahu (PW-2) also acted as scribe of the Will.

3. The Will was executed on 22-8-1977 and Firtu died on 24-12-1977. Radha Bai - plaintiff was present at the time of execution of the Will.

4. Rikeshwar Sahu (PW-2) has clearly stated in his statement before the Court that Firtu has signed the Will Ex.P-1 as shown in 'A' to 'A' portion and

he got the Will executed in presence of him i.e. Rikeshwar Sahu and another witness Uderam (PW-3).

He has further stated that the testator was in sound and 6 (1974) 2 SCC 600 7 (2009) 4 SCC 780 8 (2017) 1 SCC 257 disposing state of mind at the

time of executing the Will. He has refuted the suggestion that the Will was executed at the instructions of Radha Bai, the plaintiff herein. He has also

stated that Firtu was issue-less. He has also admitted the fact of writing the Will at the instance of Firtu.

5. Likewise, another attesting witness Uderam (PW-3) has proved his signature in the Will (Ex.P-1) from 'B' to 'B' portion and stated that the Will

was scribed by Rikeshwar Sahu (PW-2) and at the time of execution of Will, he and Rikeshwar Sahu (PW-2), both, were present and testator Firtu

was in sound and disposing state of mind and he was not seriously ill. Since Firtu was issue-less, the plaintiff was staying with him as his daughter. He

has proved the attestation of Will as per his signature from 'B' to 'B' portion. He has been subjected to cross-examination but nothing has been elicited

to conclude that the Will was not executed at the instance of Firtu.

21. Mr. Koshta, learned counsel for the appellants / defendants No.2 to 4, has laid great emphasis on the fact that both the witnesses have not said

that firstly the Will was signed in presence of both the attesting witnesses and they have not said that at the time of executing the Will, both were

present. The argument deserves to be rejected. Both the attesting witnesses are villagers and they have clearly stated that the Will was executed in

presence both of them and testator Firtu signed the Will scribed by one of the attesting witnesses Rikeshwar Sahu (PW-2) and his thumb impression is

as shown in the Will at 'A' to 'A' portion. Rikeshwar Sahu (PW-2) has stated that he and another witness Uderam (PW-3) have come at the instance

of Firtu and thereafter, the Will was got executed. They have also refuted the fact of execution of Will at the instance of Radha Bai.

22. Now, Mr. Koshta has further submitted that since the plaintiff was present at the time of execution of Will having taken active participation in the

Will, therefore, the Will becomes suspicious document unless the suspicious circumstance is displaced by leading admissible evidence.

23. The Supreme Court in Yumnam Ongbi Tampha Ibema Devi (supra) has clearly held that the attestation of will is not an empty formality.

Highlighting the importance of attestation of Will it was held it means signing a document for the purpose of testifying of the signatures of the

executant. The attesting witness should put his signature on the will animo attestandi and it was held as under:-

13. Therefore, having regard to the provisions of Section 68 of the Evidence Act and Section 63 of the Succession Act, a will to be valid should be

attested by two or more witnesses in the manner provided therein and the propounder thereof should examine one attesting witness to prove the will.

The attesting witness should speak not only about the testator's signature or affixing his mark to the will but also that each of the witnesses had signed

the will in the presence of the testator.

24. It is not the case of the defendants in the written statement that the plaintiff has used undue influence, fraud or coercion in the execution of Will.

In the instant case, active participation of the plaintiff is not seriously disputed, but no evidence has been led by defendants No.1 to 4 that any undue

influence, fraud or coercion has been played on the testator when he executed the Will. As such, mere participation of the plaintiff in executing the

Will will not make the Will suspicious, as the defendants have failed to prove any due influence, fraud or coercion on the testator was acted upon the

testator while making the Will and even it has not been pleaded in the written statement.

25. Likewise, the testator has made the Will of his undivided share in the suit property which cannot be invalid, as it is well settled that a person can

make Will of his undivided share in the suit property.

26. In view of the above, I am of the considered opinion that the first appellate Court is absolutely justified in holding that the Will has been proved in

accordance with law and it is not a suspicious document. The substantial questions of law are answered accordingly. I do not find any merit in the

second appeal, it deserves to be and is accordingly dismissed leaving the parties to bear their own cost(s).

27. A decree be drawn-up accordingly.