(2022) 07 CHH CK 0001

Chhattisgarh High Court

Case No: First Appeal No. 110 Of 2008

Amritlal Agrawal		APPELLANT
	Vs	
Vishnukant		RESPONDENT

Date of Decision: July 1, 2022

Acts Referred:

- Code Of Civil Procedure, 1908 - Section 96, Order 18 Rule 4, Order 41 Rule 23A
- Indian Succession Act, 1925 - Section 63(3), 63(c)
- Evidence Act, 1872 - Section 68, 69
- Hindu Sucession Act, 1956 - Section 8

Hon'ble Judges: Narendra Kumar Vyas, J

Bench: Single Bench

Advocate: A.K. Prasad, Rajeev Shrivastava, Savita Tiwari, Sonam Shukla, Sanjeev Agrawal

Final Decision: Allowed

Judgement

1.The instant First Appeal has been filed by the appellant/ plaintiff under Section 96 of the Code of Civil Procedure,1908 challenging the judgment and

decree dated 10.04.2008 passed by First Additional District Judge, Bilaspur in Civil Suit No. 52-A/2005 by which the suit filed by the plaintiff has been

dismissed.

2. Brief facts necessary for disposal of this appeal are that plaintiff Amritlal and defendant No.1 Vishnukant are the sons of late Vyashnarayan.

Defendant No.2 Shankaralal was also son of Vyashnarayan, subsequently, he was adopted by Ramkrishna, brother of Vyashnarayan. Defendant No.

4 Rajkumari Bai was the wife of defendant No.1. The property described in Schedule A, B and C is the suit property. The property described in

Schedule-B is situated at village Baloda, Tahsil Janjgir Champa, District Janjgir Champa, measuring 14 acres of lands belonging to defendant's mother

Smt. Rampyari Bai. After her death property described in Schedule-B has been inherited by plaintiff and defendant Vishnukant and they are entitled

for Â½ of the shares in the property. It has been contended that the property described in Schedule-C, land bearing khasra No. 67/1/31/B area 25

decimal, name of defendant No.1 has been recorded in the revenue record and land bearing khasra No. 67/2/28/2 area 25 dismissal was recorded in

the name of defendant No.4. These two lands measuring 50 dismissal have been purchased by mother of plaintiff late Rampyari Bai from her own

sources. It has been contended that after death of Rampyari Bai, the plaintiff and defendant No.1 are entitled to get Â½ of the shares in the suit house

and the plot. It has been further contended that Rajkumar (defendant No. 4) has no right over the suit property as the plaintiff mother Rampyari Bai

has purchased the property from her own sources. There was dispute between the plaintiff and defendant No.1 and the plaintiff has filed the Civil Suit

No. 9-A/97 which was decided by 6th Additional District Judge, Bilaspur in favour of plaintiff on 11 March 1998. It has also been contended that this

judgment and decree was assailed by the defendant before the High Court but the plaintiff has not received any notice about filing of the suit,

therefore, it is presumed that no appeal has been filed. After death of Rampyari, the plaintiff has made an attempt for partition of the suit property but

in vain which has necessitated the plaintiff to file suit for partition, declaration and injunction with regard to suit property mentioned in schedule A,B

and C. It has also been prayed that though defendant No. 2 Shankarlal is adopted son of Ramkrishna, still the Court granted the share after decreeing

the suit for partition in favour of defendant No.2 also then he has no objection with regard to grant of share to defendant No.2.

3. The defendant No.1 and defendant No. 4 have filed the joint written statement admitting the relationship between the parties but denying the

allegation made in the plaint. It has been contended that as per the partition taken place between the plaintiff, defendant No.1 and mother Rampyari

Bai on 31.10.1983, the property described in Schedule-A and B of the plaint house and land measuring 14 acres has been given to Ram Kumar Bai, as

such she was sole owner of the property. It has been further contended that Rampyari Bai has executed a Will on 15.12.1983 in her lifetime in favour

of defendant No.1 and as per Will the defendant No.1 has taken possession, title over the suit property. It has also been contended that Civil Suit No.

9-A97 has filed on 30.04.1984 before the Court of 6th Additional District Judge, Bilaspur which was decided on 11-9-1998. The plaintiff himself

admitted about the execution of Will by Rampyari Bai on 15.12.1983 still he has claimed Â½ of the share which is not correct. It has been further

contended that the property has been given to the Ram Kumar Bai as per family partition but Ram Kumar Bai has executed the Will in favour of

defendant No.1 and the plaintiff has no right or title over the suit property. It has been further reiterated that the plaintiff is well aware of the

execution of the Will but he has never challenged the execution of the Will. It has also been contended that the suit is time and the defendants would

further submit that the suit filed by the plaintiff be dismissed with cost.

4. On the pleadings of the parties, learned trial Court has framed as many as six issues. The issue No. 2, 4 and 5 are necessary for adjudication of the

present lis between the parties, therefore, they are being extracted below:-

(1)- Whether after death of Rampyari Bai, plaintiff Amritlal and defendant No.1 Vishnukant have inherited the property described in Schedule A, B

and C ?

(2)- Whether deceased Rampyari Bai has received the property described in Schedule A and B as per partition dated 31.10.1983 ?

(3)- Whether deceased Rampyari Bai has executed a registered Will dated 15.12.1983 and has given property to defendant No.1?

5. The plaintiff to substantiate his case has examined himself as (PW-1) and has exhibited documents Khasra (Ex.P1), Kistabandi (Ex.P-2), Khatauni

(Ex.P-3), Khasra (Ex.P-4). The defendants to substantiate their case has examined Vishnukant Agrawal (DW-1) and has exhibited documents Will

(DW-1).

6. Amritlal (PW-1) has filed affidavit under Order 18 Rule 4 CPC and has reiterated the stand taken by him. He has specifically stated that deceased

Ram Kumari Bai has not executed the will on 15.12.1983. It has also been contended in examination-in-chief that deceased Ram Kumar Bai was ill

and not capable to understand the things, there is specific denial of the Will executed by Rampayari Bai in favour of defendant on 15.12.1983.

7. Vishnukant Agrawal (DW-1) has examined himself by way of affidavit filed under Order 18 Rule 4 CPC and reiterated the stand taken by him in

his written statement. It has been mentioned in the examination-in-chief that in pursuance of Will dated 15.12.1983 after death of his mother, he

inherited the property. This witness has further stated that in the Will his brother-in-law R.K. Agrawal has put his signature and one witness Chhedilal

has also put his signature and later on he has expired. This witness was extensively cross-examined by the plaintiff and in the cross examination, he

has admitted that in the earlier round of litigation he has denied about the partition taken place between them. He has also admitted that the decree

was passed in favour of the plaintiff. He has preferred an appeal which is pending. He has also stated that document with regard to partition has been

done on the basis of memory of the parties and as per partition they are in possession of their shares. He has stated that appeal was filed by him

before this Court and he does not want to prosecute the same and wants to withdraw. He has again stated that the will was executed on 15.12.1983

and the Will was registered at Bilaspur. He has stated that his mother was not suffering from any illness though it has been mentioned in Will that she

was ill. He has stated that he is not aware why his mother has not informed him about execution of the Will. He stated that before her death, his

mother executed the Will in his favour

8. Learned trial Court after appreciating the evidence, material on record has dismissed the suit filed by the plaintiff. Learned trial Court while

dismissing the suit has recorded finding that the plaintiff has stated that his mother has not executed any will in favour of defendant No.1 but he has

not proved the fact by examining any witnesses and the trial Court after appreciating the Will has recorded a finding that the property described in the

Will has been received by Rampyari Bai through partition from his husband and she has executed the Will in favour of defendant No.1 Vishnukant

Agrawal through registered sale dated 15.12.1983. The plaintiff has not specifically pleaded that the property is an ancestral property even no

documentary evidence has been proved whereas from the evidence adduced from the record, it is quite vivid that Rampyari Bai has executed the Will

in favour of defendant No.1 and defendant No.1 has inherited the property on the basis of Will. It has also been stated that no evidence has been

brought on record to prove that the property described in Schedule-C has been purchased by Ram Kumari Bai from her own source of income for

defendant No.1 and 4, therefore, issue No. 2 and 3 have not been proved and issue No. 4 and 5 decided in favour of defendants. Accordingly, the trial

Court has dismissed the suit.

9. Being aggrieved by the judgment and decree passed by the trial court on 10.04.2008 the plaintiff has filed First Appeal under Section 96 CPC

before this Court.

10. Learned Counsel for the appellant/ plaintiff would submit that the finding recorded by the trial Court is perverse and contrary to the record. He

would further submit that the trial Court should have considered the fact that onus to prove due execution of Will is always upon the propounder of the

Will. He would submit that admission and knowledge of the other party regarding Will is also of no consequence and in order to prove due execution

of the Will, the propounder has to examine at least one attesting witness. He would further submit that one of the witnesses was alive at the time of

examination of the witness, however, the defendant No.1 has failed to adduce his evidence in order to establish his Will, as such it cannot be said that

the will was proved in accordance with the law. He would further submit that on earlier round of litigation Rampyari Bai, mother of plaintiff and

defendant No.1 was alive, as such there was no question of examining the will as the Will operates only after death of testator. He would further

submit that Will has not proved in accordance with Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Evidence Act and would

pray that the judgment and decree passed by the trial Court may kindly be allowed. In support of his submission, he has relied upon the judgment of

Hon'ble Supreme Court in the case of N. Kamalam(dead) and Another vs. Ayyasamy and Another (2001)7 SCC 503, Bharpur Singh and Others vs.

Shamsher Singh (2009) 3 SCC 687,S.R. Srinivasa and Others vs. S. Padmavathamma (2010) 5 SCC 274, Surajlamp and Industries private Limited (2)

through Director vs. State of Haryana and Another (2012)1 SCC 656, M.B. Ramesh (dead) by Lrs vs. K.M. Veeraje URS (dead) by Lrs and

Another (2013) 7 SCC 490, Ramesh Verma (dead) through Legal Representative vs. Lajesh Saxena (dead) By legal Representative and another

(2017) 1 SCC 257 and Shivakumar Vs. Sharanabasappa (2021) 11 SCC 277.

11. Learned Sr. Counsel for defendant No.1 and 4 would submit that defendant No. 1 to 4 have specifically pleaded in their written statement that

Rampyari Bai has executed a registered Will on 15.12.1983 in favour of defendant No.1 in her lifetime and on the basis of Will, by which defendant

No.1 became the owner of the property described in Schedule A and B. He would further submit that the execution of the Will was also admitted by

the plaintiff in his Civil Suit No. 9-A/97 but the plaintiff has never challenged the registered Will dated 15.12.1983 and never sought any relief for

cancellation of the Will dated 15.12.1983. He would further submit that the Will is a registered document, by which a person expresses its

testamentary intentions and how the properties owned by the person will devolve after the death of the person. In support of his submission, he would

refer to the judgment of Hon'ble Supreme Court in the case of Uma Devi Nambiar v. T.C. Sidhan (2004) 2 SCC 321. Learned Sr. Counsel would

further submit that the plaintiff in his evidence before the trial Court at paragraph 12 has stated that he has no knowledge about the execution of the

Will by his mother but in paragraph 15 he has stated that whether he has done anything to nullify the Will dated 15.12.1983 executed by his mother.

There is no specific denial by the plaintiff about the execution of the Will, it means admission of fact. Learned Sr. Counsel in support of his submission,

has relied upon the judgment of Hon'ble Supreme Court in the case of Jafauri Sah and others vs. Dwarika Prasad Jhunjhunwala AIR 1967 SC 109.

Learned Sr. Counsel for the defendants No.1 to 4 would submit that the conduct of the plaintiff by not specifically challenge the correctness and

validity of the Will dated 15.12.83 which is in fact acquiescence of the Will and thus the plaintiff has waived its right to challenge the Will and now at

the appellate stage the plaintiff cannot challenge the Will, as now the case of the plaintiff would be bound by the principle of estoppal. In support of his

contention, he relied upon the judgment of Hon'ble Supreme Court in the case of Chairman, SBI v. M.J. James, (2022) 2SCC 301. He would further

submit that even if, it is assumed that the plaintiff is not aware about in earlier round of litigation, therefore, it is incumbent on the plaintiff to amend the

pleading after seeing the written statement wherein they have clearly pleaded about execution of Will dated 15.12.83, therefore, the plaintiff is

refrained from challenging the legality and validity of the Will in the Appellate stage. In support of his submission, he has referred to the judgment of

Hon'ble Supreme Court in the case of Venkataraja & Ors. vs. Vidyane Doureradjaperumal (2014) 14 SCC 502 and would pray that the finding

recorded by the trial Court is neither perverse nor contrary to evidence available on record which warrants interference by this Court and appeal may

kindly be dismissed. Lastly, he would submit that if there is possibility to remand the party for adjudicating the case afresh, affirmed the Will, this Court

can exercise its power under Order 41 Rule 23 (A) or 25 CPC to substantiate his submission and there is contingency available on record for remand,

he would refer to the judgment of Hon'ble Supreme Court in the case of Jegannathan v. Raju Sigamani (2012) 5 SCC 540.

12. On the other hand, learned counsel for the plaintiff would submit that this is not a fit case where the matter can be remanded because the Will has

to be proved in accordance with Section 63(3) of the Indian Succession Act and Section 68 of the Evidence Act. But the defendant No. 1 to 4 have

not proved the Will in accordance with the provisions of law and the remand order will tantamount to allow the parties to fill up the lacuna which is not

purpose of remand.

13. From the pleadings of the parties and material on record, the point to be determined by this Court are under:-

(1)Whether non-challenging the validity of Will by the plaintiff, the defendant No.1 is escaped from proving the Will as per the provisions of law and

estoppel operates against the plaintiff for raising the question with regard to validity of the Will in the First Appeal.

(2) Whether the Will has been proved in accordance with Section 63 (C) of Indian Succession Act or Section 68 of the Evidence Act.

14. Before adverting to the legal submission made by the parties, it would be expedient for this Court to extract relevant provisions which are

applicable for deciding the present controversy raised in the appeal.

15. Section 63 of the Indian Succession Act, 1925 -

63. Execution of unprivileged Wills.â€"Every testator, not being a soldier employed in an expedition or engaged in actual warfare,12 [or an airman so

employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:â€

(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 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.

16. Section 68 of the Indian Evidence Act, 1872

68. Proof of execution of document required by law to be attested.â€" 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:

17. Section 69 of the Indian Evidence Act, 1872

69. Proof where no attesting witness found.â€"If no such attesting witness can be found, or if the document purports to have been executed in the

United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting, and that the signature of the person

executing the document is in the handwriting of that person.

Point No.1;-

18. Learned Sr. Counsel for the defendants has vehemently argued that the plaintiff has not challenged validity of the Will before the trial Court

despite having knowledge of execution of the Will and it is amounting to acquisition and waiver right to challenge the validity of Will, therefore, he is

estopped from challenging the validity of the Will before the first Appellate Court. He would refer to the judgement of Honâ€™ble Supreme Court in

case of Chairman, SBI (supra). It is well settled position that it is for the beneficiary of the Will to prove the Will in accordance with the law.

19. The Hon'ble Supreme Court in case of Ramesh Verma (D) Tr. Lrs (Supra) has examined the issue with regard to execution of will and has held

that even in case where opposite party does not specifically deny execution of document in written statement it is for the propounder of the will to

show by satisfactory evidence that will was signed by the testator and that testator at the relevant time was in sound and disposing state of mind and

he understands the nature and effect of disposition and put his signature in document on his own free will. Hon'ble Supreme Court in para 13 to 16 of

the judgment has held as under: â€œ

â€œ13. 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:-â€œA 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.â€

15. It is not necessary for us to delve at length to the facts of the matter as also the evidence adduced by the parties before the High Court. Suffice it

to note that the execution of the Wills has to be proved in accordance with Section 68 of the Indian Evidence Act.

16. Insofar as the execution of the first Will dated 07.12.1969 is concerned, the witnesses Shyam Mohan Bhatnagar and scribe Mahesh Narayan have

stated that the testator Jaydevi executed the Will and witnesses Shyam Mohan an signed. Witness Johri was the brother-in-law of Ramesh Verma

and thus interested witness. Scribe Mahesh Narayan is known to mother-in-law of Ramesh Verma. After referring to their evidence, High Court held

that execution of the Will has not been proved. Further, the High Court in its judgment has pointed out the contradictions in their evidences and

recorded the factual finding that the Will could not have been executed in the manner as alleged by the witnesses. We do not find any reason to

interference with the factual findings recorded by the High Court.â€

20. Since it is incumbent upon the beneficiary of the Will to prove the validity of the Will even if it has not been specifically assailed by the plaintiff,

therefore, the contention raised by learned Sr. Counsel for the defendants that the plaintiff is estopped from challenging the validity of the Will is not

acceptable as no estopple operates against the law. This issue has come up for consideration before the Honâ€™ble Supreme Court in Civil Appeal

No. 4578-4580/2022 decided on 16 June 2022 in the case of Krishna Rai (Deed) vs. Banaras Hindu University. The Honâ€™ble Supreme Court has

held in paragraph 31 of its judgment as under:-

31. Further in the case of Tata Chemicals Ltd.Vs. Commissioner of Customs (preventive), 28 Jamnagar it has been laid down that there can be no

estoppel against law. If the law requires something, then it must be done in that manner, and if it is not done in that manner, then it would have no

existence in the eye of the law. Paragraph 18 of the said judgment is reproduced below:

â€œ18.The Tribunalâ€™s judgment has proceeded on the basis that even though the samples were drawn contrary to law, the appellants would be

estopped because their representative was present when the samples were drawn and they did not object immediately. This is a completely perverse

finding both on fact and law. On fact, it has been more than amply proved that no representative of the appellant was. In fact, present at the time the

Customs Inspector took the samples. Shri K.M. Jani who was allegedly present not only stated that he did not represent the Clearing Agent of the

appellants in that he was not their employee but also stated that he was not present when the samples were taken. In fact, therefore, there was no

representative of the appellants when the samples were taken. In fact, therefore, there was no representative of the appellant when the samples were

taken. In law equally the Tribunal ought to have realized that there can be no estopple against law. If the law requires that something be done in a

particular manner, it must be done in that manner, and if not done in that manner has no existence in the eye of aw at all. The Customs Authorities are

not absolved from following the 2015 (11) SCC 628 29 law depending upon the acts of a particular assessee. Something that is illegal cannot convert

itself into something legal by the act of a third personâ€.

21. Therefore, it is incumbent upon the defendant No.1 to prove the Will which they have miserably failed to prove, therefore, point No.1 is decided

against the defendant No.1 and in favour of the plaintiff by recording a finding that the plaintiff is not estopped from challenging the validity of the Will

and no estoppal is applicable against the plaintiff.

On point No.2

22. From the evidence brought on record by the plaintiff, it is quite vivid that plaintiff in his evidence has categorically stated that Will has never been

executed by his mother in favour of defendant No.1 and in the cross examination the witness reiterated that in earlier round of litigation he could not

remember whether he pleaded about the execution of the Will by the mother. The defendant No.1 in the examination-in-chief has reiterated that his

mother has executed will in his favour and in the cross-examination, he has admitted that one of the attesting witnesses Ramkhilawan Agrawal is

living at Haridwar but has not examined the witness. DW-1 has nowhere stated that at the time of execution of the Will, his mother was healthy and

was capable of understanding the fact of execution of the Will. The defendant No.1 has not examined any of the attesting witnesses which is clear cut

violation of section 68 of the Indian Evidence Act. It is well settled legal position of law that if a particular thing has to be done in a particular manner

then it has to be done in the same manner any divergent from the prescribed mode invalidate the entire action. Section 68 of the Evidence Act,

provides that the Will has to be attested by two witnesses and at least one of the witnesses should be examined before the Court. No attesting

witnesses have been examined, therefore, Will has not been proved, as such learned Trial Court has committed illegality in relying upon the Will

executed in favour of the defendant No. 1. Honâ€™ble Supreme Court in the case of Janki Narayan Bhoir vs. Narayan Namdeo Kadam 2003(2)

SCC 91. Paragraphs 8,9, and 10 of the said judgment are reproduced below:

8. To say will has been duly executed the requirements mentioned in clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied

with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction;

(b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place from which it could appear

that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in

this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark

to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the

testator a personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in

the presence of the testator.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

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 does 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 attestation 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 attestation 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. Learned trial Court while dismissing the suit has decided the issue No. 5 in favour of defendants and has recorded a finding that existence of Will

has nowhere been challenged, therefore, the defendant No.1 is entitled to hold the property as per the Will. This is perverse and illegal finding of

learned trial Court which deserves to be set aside and accordingly it is set aside. Since the will has not been proved in accordance with the law, it is

not disputed that the plaintiff and defendants No. 1 and 2 are sons of late Shri Vyash Narayan and they are Hindus and governed by Hindu

Succession Act. As Will has not been proved, therefore, Section 8 of the Hindu Succession Act will come in operation and their rights of inherent will

be governed as per Hindu Sucession Act, 1956. It is also not in dispute that the plaintiff and the defendant No.1 and 2 are brothers and class-1 heirs as

per Schedule-A of the Hindu Succession Act, therefore, they are entitled to get equal share. It is also not in dispute that Shankar Lal, who is said to be

adopted son of Ram Krishna Agrawal, was also made party to the case as defendant No.2. But the trial Court while dismissing the suit has recorded a

finding that it has not been proved that defendant No. 2 has become the adopted son, as such it is held by the learned trial Court that defendant No.2 is

not adopted son. This finding was not assailed by the defendant No.1 by filing cross objection and the plaintiff in the plaint has specifically pleaded that

if share is required to be given to defendant No. 2, he has no objection. As such, the plaintiff and defendant No. 1 and 2 are entitled to get equal share

of the property mentioned in Schedule-A, B and C.

24. The property described in Schedule-A is a residential house, therefore, plaintiff and defendant No.1 and 2 are at liberty to move an application

before the competent authority for getting partition of 1/3 share in property mentioned in schedule-A. Similarly, property described in Schedule- B is an

agricultural property for which they can file an appropriate application before Tahsildar for mutation and partition and they are entitled to get 1/3 share

in the property mentioned in schedule-B. Property described in Schedule-C is non-agricultural land; therefore, they may file an appropriate application

before the competent authority for partition to get 1/3 share in the property described in schedule-C.

25. Accordingly, the appeal filed by the plaintiff is allowed and the judgment and decree dated 10.04.2008 passed by the trial court is set aside.

26. A decree be drawn up accordingly.

27. No order as to the costs.