

## Prem Devi and Others Vs Bholanath Gattani

**Court:** Rajasthan High Court (Jaipur Bench)

**Date of Decision:** Aug. 11, 2015

**Acts Referred:** Evidence Act, 1872 - Section 68, 69, 70, 90  
Succession Act, 1925 - Section 63(c)

**Citation:** AIR 2015 Raj 200

**Hon'ble Judges:** Prakash Gupta, J.

**Bench:** Single Bench

**Advocate:** J.P. Goyal, Sr. Counsel, Abhi Goyal, Aditya Sharma, Namita Shaktawat and Manish Surana, for the Appellant; Sudesh Bansal, for the Respondent

**Final Decision:** Dismissed

### Judgement

Prakash Gupta, J.

This second appeal is preferred by the plaintiffs-appellants against the Judgment and Decree dated 23-01-1998 passed by the Additional District Judge No. 2, Jaipur City, Jaipur (hereinafter referred to as "the appellate Court") in Civil Regular Appeal No. 34/94

whereby, the appellate Court dismissed the appeal and confirmed the Judgment and Decree dated 23/09/94 passed by the Civil Judge (J.D.) East,

Jaipur City, Jaipur (hereinafter referred to as "the trial Court") in civil suit No. 444/1993. The brief facts giving rise to the this appeal are that the

appellants-plaintiffs (hereinafter referred to as "appellant") filed a suit for possession and permanent injunction with respect to disputed property

described as two ""Saals"" situated in the house Pitalion Ka Chowk, Chowkari Vishvesharji, Jaipur. The said ""Saals"" have been shown and marked

in the map as "A" and "B". It is also alleged that previously, these two ""saals"" were one but later on had converted into two. The disputed ""Saals

belonged to one Smt. Gulab Devi who was said to be the elder mother-in-law of Smt. Rama Bai. It is also alleged in the plaint that Gulab Devi was

the owner and in possession thereof and she vide Will dated 12-08-1940 bequeathed the said ""Saal"" to Smt. Rama Bai. Rama Bai made a

registered Will dated 06-01-1969 in favour of the appellants and thereafter the appellants are owner and in possession of the disputed ""Saals"".

Smt. Gulab Devi died in the year 1945 and Smt. Rama Bai in the year 1969. The respondents defendants (hereinafter referred to as "the

respondents") have been in possession of this ""Saal"" with the permission of Smt. Rama Bai. The father of the respondent Arjundas took the ""Saal

on license orally from Smt. Rama Bai. In the year 1969, some dispute between the parties arose regarding raising of construction and alteration

and the respondents filed a suit bearing No. 597/69 in the Court of Munsif, Jaipur City, Jaipur in that suit the respondents filed written statement on

28-05-1970 wherein they claimed the ownership of the disputed ""Saal"".

2. The respondents resisted the suit by filing the written statement wherein they denied the execution of the Will by either Smt. Gulab Devi or Smt.

Rama Bai. The ownership of the Smt. Gulab Devi and Rama Bai was also denied and it is contended that the respondents themselves are the

owners of the disputed property. Smt. Gulab Devi was not elder mother-in-law of the Smt. Rama Bai. Smt. Gulab Devi was elder sister-in-law of

respondent's grand father Banshidhar. Kanhaiyalal husband of Smt. Gulab Devi and Banshidar were real brothers and belonged to a joint Hindu

Family.

3. On the basis of the pleadings, the trial Court framed as many as eight issues, to prove the issues the plaintiffs examined 10 witnesses and

defendant examined 13 witnesses. The trial Court vide Judgment and Decree dated 23/09/1994 dismissed the suit of the appellants. Feeling

aggrieved the appellants filed an appeal which was dismissed by the Appellate Court vide the impugned Decree and Judgment dated 23/01/98

hence, this second appeal.

4. This appeal was admitted on 22/08/2006 on the following substantial question of law:--

WHETHER, the Will dated 12/08/1940 executed by Smt. Gulab Devi was more than 30 years old and produced from proper custody then the

valid presumption of its due execution and attestation can be raised under Section 90 of the Evidence Act?

5. I have heard learned counsel for the parties and perused the material on record minutely and carefully.

6. It is submitted by the learned senior counsel for the appellants Sh. J.R Goyal that both the Courts below have failed to draw presumption about

the execution of the Will dated 12-08-1940 executed by Smt. Gulab Devi in as much as the said Will was more than 30 years old and have been

produced from the proper custody, therefore, a presumption should have been taken under Section 90 of the Evidence Act by the Courts below

for its due execution and attestation. He submitted that both the courts below have failed to take into consideration the fact that scribe and all the

attesting witnesses of the Will Ex. -2 had died. The Will Ex. -2 was duly proved by the PW2 Suraj Narain to PW4 Padamchand and PW3

Anandilal who were well conversant with the writing of attesting witnesses, therefore, requirement of Section 63(c) of Indian Succession Act and

Section 68 of the Evidence Act were fulfilled. In support of his contention, he relied upon Munnalal, minor and others vs. Mst. Kashibai and

othersAIR 1947 15 (Privy Council) , Munnalal, minor and others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) , Munnalal, minor and

others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) .

7. Per contra the learned counsel for the respondents Sh. Sudesh Bansal has submitted that presumption regarding documents which are 30 years

old does not apply to a Will. A Will has to be proved in terms of the provision contained in Section 63(c) of the Succession Act and Section 68 of

the Evidence Act. He submitted that merely that the Will is more than 30 years old no presumption under Section 90 of the Evidence Act can be

drawn that the Will has been duly executed and attested by persons by whom it purports to have been executed and attested. The Will Ex. -2 was

not duly proved by the appellants and both the Courts below have rightly held that Will Ex. -2 has not been proved by the appellants. He

submitted that the Smt. Gulab Devi was not the owner and in possession of the property, therefore, she had no right or interest in the property

which could be transferred by a Will. Therefore, on the basis of the Will Ex. -2, the appellants are not the owner of the disputed property. In

support of his contention he relied upon Munnalal, minor and others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) ; Munnalal, minor

and others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) Munnalal, minor and others vs. Mst. Kashibai and othersAIR 1947 15

(Privy Council) & Munnalal, minor and others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) .

8. I have given my thoughtful consideration to rival submissions made by the learned counsel for both the parties and perused the material on

record carefully and minutely.

9. In Munnalal, minor and others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) though it was held that in a case of Will which is more

than 30 years old presumption under Section 90 of Evidence Act could be drawn, but in the case of Munnalal, minor and others vs. Mst. Kashibai

and othersAIR 1947 15 (Privy Council) the Hon"ble Apex Court in para No. 17 has observed as under :--

At the same time we cannot accept the submission on behalf of the respondents as well that merely because the Will was more than 30 years old,

a presumption under Section 90 of the Evidence Act, 1872 ("the Evidence Act", for short) ought to be drawn that the document has been duly

executed and attested by the persons by whom it purports to have been executed and attested. As held by this Court in Munnalal, minor and

others vs. Mst. Kashibai and othersAIR 1947 15 (Privy Council) , a presumption regarding documents 30 years old does not apply to a Will. A

Will has to be proved in terms of Section 63(c) of the Succession Act read with Section 68 of the Evidence Act.

10. In the case of Munnalal, minor and others vs. Mst. Kashibai and others AIR 1947 15 (Privy Council) the Hon"ble Apex Court in para No. 19

has observed as under:--

The provisions of Section 90 of the Evidence Act, 1872 keeping in view the nature of proof required for proving a Will have no application. A

Succession Act, 1925 and Section 68 of the Evidence Act, 1872. In the event the provisions thereof cannot be complied with, the other provisions

contained therein, namely, Sections 69 and 70 of the Evidence Act providing for exceptions in relation thereto would be attracted. Compliance

with statutory requirements for proving an ordinary document is not sufficient, as Section 68 of the Evidence Act postulates the execution must be

proved by at least one of the attesting witnesses, if an attesting witness is alive and subject to the process of the court and capable of giving

evidence. (See Munnalal, minor and others vs. Mst. Kashibai and others AIR 1947 15 (Privy Council) ).

11. In view of the above legal proposition, in my considered view, the Will must be proved in terms of the provision of Section 63(c) of the

Succession Act, 1925 and Section 68 of the Evidence Act, 1872. Keeping in view the nature of proof required for proving a Will the provisions of

Section 90 of Evidence Act, 1872 have no application. Therefore, no presumption could be drawn under Section 90 of the Evidence Act with

regard to Will Ex. -2 dated 12/08/1940 which was said to be executed by Smt. Gulab Devi.

12. So far as the contention that if the attesting witnesses cannot be found, the execution can be proved by examining the witnesses who can

identify the signature of the attester concerned, there is no dispute about it, but in the present case, after having done a thorough appreciation of

evidence, both the courts below have categorically held that Will Ex. -2 has not been proved. I scrutinized the whole evidence regarding this and

found no perversity in the findings recorded by the courts below. Even otherwise the plaintiffs utterly failed to prove that the property in question

was personal property of Smt. Gulab Devi and she had any right to bequeath the same. In this regard the findings recorded by the learned trial

Court are reproduced as under:--

13. The findings with regard to the ownership of the Smt. Gulab Devi recorded by the Appellate Court are reproduced as under:--

In this regard the learned senior counsel for the appellants has not challenged the above findings during the course of the arguments. Learned senior

counsel has not been able to point out any other substantial question of law during the course of arguments. From the perusal of record of the case

also no other substantial question of law arises for consideration of this Court.

From the above discussion, this appeal is devoid of merits and hence same is dismissed. No order as to costs.