High Court of Madhya Pradesh
SA-113-2002
(Rajaram through LRs Smt. Bhagwati Bai & ors. Vs. Laxman & ors.)

Gwalior, Dated : 18-07-2019

Shri Abhishek Singh Bhadoriya, counsel for the appellant.

None for the respondents.

This second appeal under Section 100 of CPC has been filed against the judgment and decree dated 30.10.2001 passed by 4th Additional District Judge, Vidisha in Regular Civil Appeal No. 27-A/2001 thereby affirming the judgment and decree dated 19.03.2001 passed by 1st Civil Judge, Class-II, Vidisha in Civil Suit No. 20-A/1997.

2. The necessary facts for the disposal of the present appeal in short are that the original plaintiff Rajaram (who expired during the pendency of this appeal and the present appellants are his legal representatives) filed a suit for declaration of title and permanent injunction. His case was that Prabhulal had five sons. The plaintiff Rajaram and the defendant No. 2 Babulal are the sons of Prabhulal. Another son Narayan Singh has expired. Fourth son Hukum Singh was already given in adoption and the fifth son Ramcharan has renowned the world. The defendant No. 1 is a minor son of the defendant No. 2. It was pleaded that Narayan Singh has died issueless and he was the owner of agriculture land bearing Survey No. 314 min area 0.113 hectare and Survey No. 651/1 area 0.481 hectare situated in

village Atarikhejda, Tahsil Gyaraspur, District Vidisha. As Narayan Singh was unmarried and has died issueless, therefore, the plaintiff as well as defendant No. 2 have equal share in his property. It was further pleaded that as Narayan Singh was not keeping well, therefore, taking advantage of the same, a forged Will dated 07.02.1995 was got prepared by the defendant No. 2, which was in fact antedated, by which the property was bequeathed by Narayan Singh in favour of the defendant No. 1 and it was claimed that since the Will dated 07.02.1995 was a forged and concocted document, therefore, the defendant No. 1 does not get any title by virtue of the Will in question. It was further pleaded that Narayan Singh was jointly looked after by the plaintiff and defendant No. 2. The plaint was later on amended and it was pleaded that in the light of the order dated 31.03.1997 passed by SDO, Vidisha, the defendants No. 1 and 2 have forcibly taken possession of the disputed property and thus, relief for possession as well as mesne profit @ Rs.500/- was also incorporated.

3. The defendants No. 1 and 2 filed their written statement and claimed that Narayan Singh was having Survey No.651/1/1 area 0.481 hectares and Survey No. 314 min area 0.112 hectare. It was further admitted that Narayan Singh was unmarried. It was further pleaded that Narayan Singh had executed a Will dated 10.11.1995 in the presence of the respected members of the Society in favour of the defendant No. 1 and from thereafter the defendant No. 1 is the owner

and title holder of the property in dispute. It was further denied that the Will is forged or concocted document. It was specifically pleaded that in fact, Narayan Singh had executed the said Will. It was further pleaded that Narayan Singh was residing with the defendant No. 2 for the last 25 years and it was the defendant No. 2 who was looking after Narayan Singh. Even the last rites were performed by the defendant No. 2. It was further denied that the defendants had ever taken forcible possession, but it was pleaded that the defendants are in possession of the land right from the very beginning and thus, it was prayed that the suit be dismissed.

4. The Trial Court after framing the issues and recording the evidence dismissed the suit and held that Mitthu Singh (DW-2) has specifically admitted that he is the scribe of the Will and this witness has also admitted the signature of Narayan Singh and other witnesses on the said Will (Ex. D-2). It was held by the Trial Court that the plaintiff has not led any evidence to show that the Will (Ex. D-2) executed by Narayan Singh was forged or concocted. Accordingly, the suit was dismissed.

5. Being aggrieved by the judgment and decree passed by the Trial Court, the appellant filed the regular civil appeal, which too suffered dismissal by judgment and decree dated 30.10.2001 passed by 4th Additional District Judge, Vidisha in Regular Civil Appeal No. 27-A/2001.

6. The present appeal has been admitted on the following substantial question of law:-

> "Whether the Will (Ex.D/2) dated 10.11.1995 is duly proved as required under Section 63(c) of the Indian Succession Act, 1925?"

7. Challenging the judgment and decree passed by the Courts below, it is submitted by the counsel for the appellant that the defendants have failed to prove the execution of the decree as per the provision of Section 63(c) of the Indian Succession Act and neither any attesting witness was examined nor any witness who could identify the signatures of the attesting witnesses have been examined. The defendants have examined only Mitthu Singh (DW-2) who is the scribe of the Will. It is further submitted that the Courts below have wrongly put the burden on the plaintiff, whereas it is for the propounder of the Will to prove the Will beyond all the suspicious circumstances.

8. None appears for the respondent though served.

9. Heard the learned counsel for the appellant.

10. Mitthu Singh (DW-2) has stated that he had written the Will, on which Narayan Singh had affixed his thumb impression. However, this witness is completely silent about the signing of the Will by attesting witnesses. Mitthu Singh (DW-2) merely stated that at the time of execution of the Will, Ganesh Ram, Hukum Singh, Ratan Singh, Hari Singh and one more Hari Singh were present, but he has

not stated that the Will was signed by these witnesses. Thus, the evidence of Mitthu Singh (DW-2) can be read only to the extent that he is scribe of the Will (Ex. D-2) and Narayan Singh had affixed his thumb impression.

11. The next question for consideration is that whether the scribe of the Will can be said to be an attesting witness or not ? A coordinate Bench of this Court in the case of **Noorbaksh Khan Vs. Salim Khan and others** reported in **2014 (3) MPLJ 542** has held as under:-

> "**6**. For a valid 'will' in terms of section 63 of Succession Act (39 of 1925), it is to be attested by two witnesses. Further, to prove factum of execution of 'will', in terms of section 68 of the Evidence Act, it is to be proved at least by one of the attesting witnesses.
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> **7.** Section 3 of the Transfer of Property Act defines the word "attested" and the meaning of the definition clause is well explained by the Hon'ble Apex Court reported in AIR 1969 SC 1147, M.L.Abdul Jabbar Sahib Vs. H.V.Venkata Sastri & Sons to the following effect:
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> > "8. It is to be noticed that the word "attested", the thing to be defined, occurs as part of the definition itself. To attest is to bear witness to a fact. Briefly put, the essential conditions of valid attestation under S.3 are: (1) two or more witnesses have seen the executant sign the instrument or have received from him a personal acknowledgment of his signature; (2) with a view to attest or to bear witness to this fact each of them has signed the instrument in the presence of the executant. It is essential that the witness should have put his signature *animo attestandi*, that is, for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgment of his signature. If a person puts his signature on the document for some other purpose, e.g., to certify that he is as scribe or an identifier or a registering officer, he is not an attesting witness."

> **8.** In AIR 2001 SC 2802, N. Kamalam (dead) and another Vs. Ayyaswamy and another, Hon'ble Supreme Court has again elaborately and lucidly explained the scope, meaning and consequences of attestation in the context of factum of execution of 'will'. Significant requirements are found to be two fold; (1) that, the attesting witness should witness the execution which implies his presence; and (2) that, he should certify or mark for execution by subscribing his name as a witness; which implies a concious intention to attest, i.e., attesting witness as *animus to attest.*
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> **9.** Subscribing of signatures on the 'will' by the scribe cannot be equated with the signatures of attesting witnesses as signatures of the attesting witnesses are for a specific purpose of having witnessed the execution and for fulfillment of the statutory requirements.
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> **10.** The scribe appends his signatures on the 'will' as scribe. He is not a witness to the 'will' but a mere writer of the 'will'. The element of the *animus to attest* is missing, i.e., intention to attest is missing. His signatures are only for the purpose of authenticating that he was a scribe of the 'will'.
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> **11.** In view of the aforesaid enunciation of law holding the field, the evidence of the scribe, P.W.2, Jai Babu in the case in hand cannot substitute for that of attesting witnesses.
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> **13.** As such, deposition of P.W.2, Jai Babu cannot be substituted to that of attesting witnesses and the 'will' cannot be said to have been proved. His deposition leads to suspicion as regards not only factum of its execution but also contents thereof."

Thus, the evidence of Mitthu Singh cannot be equated with that of attesting witness. Further Mitthu Singh has not stated that the Will was executed on the dictations of Narayan Singh and the Will was ever read over to Narayan Singh before he put his thumb impression. The defendant has not examined any of the attesting witnesses.

12. The Supreme Court in the case of **H. Venkatachala Iyengar v. B.N. Thimmajamma** reported in **AIR 1959 SC 443** has held as under:-

> "**18.** What is the true legal position in the matter of proof of wills? It is well-known that the proof of wills presents a recurring topic for decision in courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Section 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to

be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will? Did he understand the nature and effect of the dispositions in the will? Did he put his signature to the will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the court will start on the same enquiry as in the case of the proof of documents. The propounder would be 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 dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence

> in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter."

13. The Supreme Court in the case of **Babu Singh and others Vs. Ram Sahai alias Ram Singh** reported in **(2008) 14 SCC 754**, has held as under:-

> "**12.** Indisputably, a will is to be attested by two witnesses in terms of Section 63(1)(*c*) of the Succession Act, 1925. Indisputably, the requirement of Section 68 of the Evidence Act, 1872 (the Act) is required to be complied with for proving a will. Section 63(1)(*c*) of the Succession Act mandates attestation by two witnesses. Thus, not only must the execution of will be proved, but actual execution must also be attested by at least two witnesses. Attestation of execution of will must be in conformity with the provisions of Section 3 of the Transfer of Property Act.

> **13.** "Attestation" and "execution" connote two different meanings. Some documents do not require attestation. Some documents are required by law to be attested.
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> **14.** In terms of Section 68 of the Act, although it is not necessary to call more than one attesting witness to prove due execution of a will but that would not mean that an attested document shall be proved by the evidence of one attesting witness only and two or more attesting witnesses need not be examined at all. Section 68 of the Act lays down the mode of proof. It envisages the necessity of more evidence than mere attestation, as the words "at least" have been used therein. When genuineness of a will is in question, apart from execution and attestation of will, it is also the duty of a person seeking declaration about the validity of the will to dispel the surrounding suspicious circumstances existing, if any. Thus, in addition to proving the execution of the will by examining the attesting witnesses, the propounder is also required to lead evidence to explain the surrounding suspicious circumstances, if any. Proof of execution of the will would, inter alia, depend thereupon.
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> **15.** The court, while granting probate of the will, must take into consideration all relevant factors. It must be found that the will was product of a free will. The testator must have full knowledge and understanding as regards the contents thereof. For the said purpose, the background facts may also be taken note of. Where, however, a plea of undue influence was taken, the onus therefor would be on the objector and not on the offender. (See *Savithri* v. *Karthyayani Amma*.)

14. The Supreme Court in the case of **Balathandayutham and another v. Ezhilarasan** reported in **(2010) 5 SCC 770** has held as under:-

> "**14.** When a will is surrounded by suspicious circumstances, the person propounding the will has a very heavy burden to discharge. This has been authoritatively explained by this Court in H. Venkatachala Iyengar v. B.N. Thimmajamma. P.B. Gajendragadkar, J. (as His Lordship then was) in para

20 of the judgment, speaking for the three-Judge Bench in H. Venkatachala held that in a case where the testator's mind is feeble and he is debilitated and there is not sufficient evidence as to the mental capacity of the testator or where the deposition in the will is unnatural, improbable or unfair in the light of the circumstances or it appears that the bequest in the will is not the result of the testator's free will and mind, the court may consider that the will in question is encircled by suspicious circumstances.

15. Going by this test, as we must, we find that both the wills, Ext. B-19 and Ext. B-20 are surrounded by suspicious circumstances. The ratio in H. Venkatachala is that in such a situation the Court

> "would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, courts will be reluctant to treat the document as the last will of the testator." (See AIR p. 452, para 20.)

Following the aforesaid principle, this Court is constrained to hold that the appellants did not succeed in discharging its onus of removing the suspicious circumstances surrounding Exts. B-19 and B-20. As such there is no reason for us to find any error in the judgment of the High Court.

16. Insofar as the execution of the will is concerned, under Section 63 of the Succession Act, 1925 it has to 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 acknowledgment 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.

17. Section 68 of the Evidence Act, 1872 further provides that if a document is required by law to be attested it shall not be used as an 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 is capable of giving evidence. There is a proviso under Section 68 but we are not concerned with the proviso here.
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> **18.** Commenting on these provisions, this Court in H. Venkatachala laid down that Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as an evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a court of law. It was further held that Section 63 of the Succession Act requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. (See AIR p. 451, para 18.)
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> **19.** The law, thus, laid down in H. Venkatachala is still holding field and this Court has followed the same in various other judgments. (See Madhukar D. Shende v. Tarabai Aba Shedage, Niranjan Umeshchandra Joshi v. Mrudula Jyoti Rao and Savithri v. Karthyayani Amma.)"

Thus, it is for the propounder of the Will to remove all the suspicious circumstances. The Courts below have wrongly shifted the burden on the plaintiff to prove that the Will was not forged or concocted one.

15. It is not out of place to mention here that the testator of the Will had died within a month of the execution of the Will. None of the

witnesses has stated that Narayan Singh was medically and mentally fit at the time of the execution of the Will. On the contrary, it is the case of the defendants themselves that Narayan Singh was not keeping well. Babulal (DW-1) has also not stated that the Will was ever signed by Narayan Singh in his presence.

16. The Supreme Court in the case of **Ganesan (D) Th. LRs. Vs. Kalanjiam** by judgment dated **11.07.2019** passed in **Civil Appeal No. 5901-5902 of 2009** has held that where the signature of the testator on the Will is undisputed, then it is not necessary that it must be proved that the testator must necessarily sign the Will in the presence of the attesting witnesses only or both the attesting witnesses put their signatures on the Will simultaneously at the same time in presence of each other and the testator. However, in the present case, thumb impression of Narayan Singh has not been admitted by the plaintiff. Thus, where the signature / thumb impression of the testator of the Will are not admitted then the Will is required to be strictly proved in accordance with the provisions of Section 63(c) of the Indian Succession Act. As the respondents / defendants have failed to prove the Will in accordance with the provisions of Section 63(c) of the Indian Succession Act, this Court is of the considered opinion that the Courts below committed material illegality by shifting the burden on the plaintiff and have wrongly held that the Will was duly proved by the defendants.

17. Accordingly, the substantial questions of law is answered in favour of the appellants.

18. The judgment and decree dated 30.10.2001 passed by 4th Additional District Judge, Vidisha in Regular Civil Appeal No. 27-A/2001 and the judgment and decree dated 19.03.2001 passed by 1st Civil Judge, Class-II, Vidisha in Civil Suit No. 20-A/1997, are hereby set aside. The suit filed by the plaintiff / appellant is hereby decreed.

19. In view of the undisputed fact that Narayan Singh was the owner of Survey No. 314 min area 0.113 hectare and Survey No. 651/1 area 0.481 hectare and the plaintiff Rajaram and defendant Babulal being the real brothers of Narayan Singh are his Class-II heirs, therefore, the following decree is passed:

1. The appellants and defendant No. 2 have 1/2 share in the property in dispute, i.e., Survey No. 314 min area 0.113 hectare and Survey No. 651/1 area 0.481 hectare situated in village Atarikhejda, Tahsil Gyaraspur, District Vidisha.

2. The appellants are entitled for possession of 1/2 of the disputed property after partition.

3. The appellants are entitled to get their names mutated in the revenue records.

4. Counsel's fee if certified.

20. Resultantly, the appeal succeeds and is hereby allowed. The decree be drawn accordingly.

(G.S. Ahluwalia)
Judge

Abhi