AFR

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.284 of 2003

1. Dinesh Kumar Dubey, S/o Shri Rameshwar Prasad Dubey, aged about 38 years.

2. Akhilesh Kumar (Dead) Through LRs

   2(a). Smt. Madhu Dubey, widow of late Akhilesh Dubey, aged about 40 years,

   2(b). Bharat Lal Dubey, S/o late Akhilesh Dubey, aged about 23 years,

   2(c). Rishikesh Dubey, S/o late Akhilesh Dubey, aged about 21 years,

   2(d). Anil Kumar Dubey, S/o late Akhilesh Dubey, aged about 18 years,

   All R/o Wadrafnagar, Tahsil Wadrafnagar, District Surguja (C.G.)

3. Mithilesh Kumar Dubey, S/o Rameshwar Prasad Dubey, aged about 33 years.

4. Awdhesh Kumar Dubey, S/o Rameshwar Prasad Dubey, aged about 29 years.

5. Savitri Devi, wife of Rameshwar Prasad Dubey, aged about 60 years.

   All caste Brahmin, occupation Agriculture, R/o Wadrafnagar, Tah Wadrafnagar, District Surguja (C.G.)

(Defendants)
---- Appellants

Versus

1. Ayodhya Dubey (Died and deleted)

2. Smt Malti Devi, wife of Surendra Tiwari, aged about 45 years, D/o Late Phoolmati Devi, R/o Village Korea Kala, P.S. Gadhwa (Jharkhand).

(Plaintiff)

3. Surendra Kumar Sethia, S/o Chunnilal Sethia, aged about 40 years, caste Oswal, R/o Village Wadrafnagar, Tah. Wadrafnagar, Distt. Surguja (C.G.)

(Defendant No.7)

4. State of Chhattisgarh, through Collector, Surguja, Ambikapur (C.G.)
(Proforma Defendant)
---- Respondents

For Appellants:	Mr. Sourabh Sharma and Mr. Tarkeshwar Nande, Advocates.
For Respondent No.2:	Mr. A.K. Prasad, Advocate.
For Respondent No.3:	Mr. D.N. Prajapati, Advocate.
For Respondent No.4 / State: -	Mr. Adhiraj Surana, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

12/10/2018

1. The substantial questions of law involved, formulated and to be answered in this defendants' second appeal are as under: -

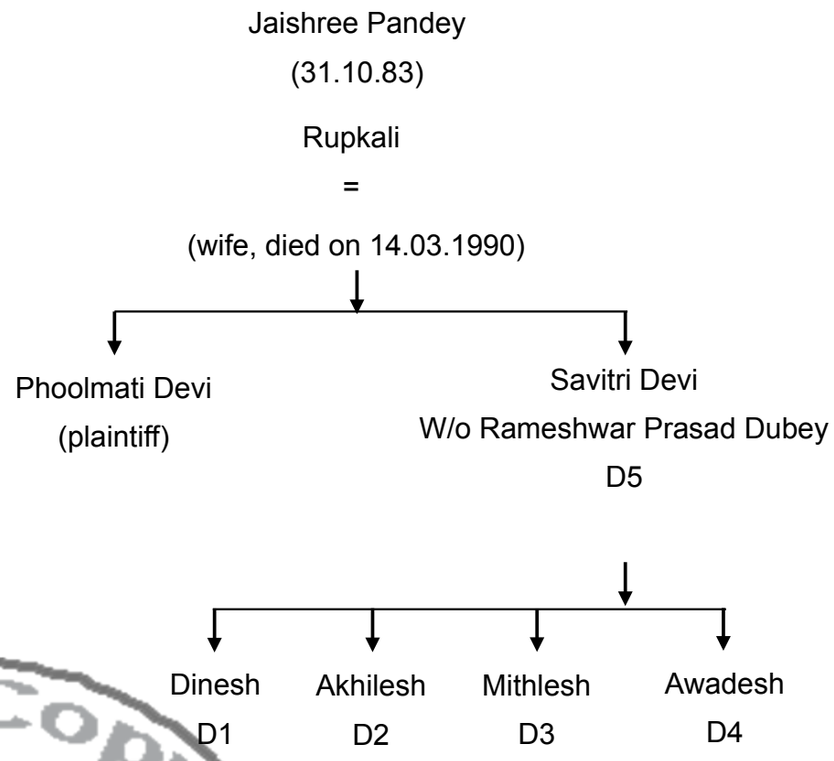
> “a) Whether the Courts below were justified in holding the Will as not proved by comparing signature of the deceased – Jaishree Pandey without there being any report of any hand writing expert on record?
>
> b) Whether the Courts below were justified in holding the Will as not proved on the circumstance that Jaishree Pandey had filed a suit against Savitri and Rameshwar in the year 1981?”

2. With the consent of the parties, the following substantial question of law, which arises for determination, is additionally framed: -

> “Whether both the Courts below are justified in holding that Will Ex.D-7 has not been proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872?”

3. Learned counsel appearing for the respondents accept notice on the additional substantial question of law, waives-off the formal service of notice, noted the same and agree to argue finally.

4. The following genealogical tree would demonstrate the relationship amongst the parties: -



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

5. Smt. Phoolmati Devi – original plaintiff, who died during the pendency of the first appeal, filed a suit for declaration that the Will deed dated 7-9-1983 (Ex.D-7) executed by the original holder of the suit property – Jaishree Pandey in favour of defendants No.1 to 4 is null and void and the plaintiff being one of the daughters of Jaishree Pandey is entitled for ½ share in the suit property stating that her father Jaishree Pandey – original holder, died on 31-10-1983 and defendants No.1 to 4 – sons of defendant No.5, on the basis of said Will dated 7-9-1983, got their names mutated in the revenue records vide Ex.D-6 on 22-9-1987 (Ex.D-6) by filing an application on 2-1-1987.

6. Defendants No.1 to 5 filed their joint written statement denying the adverse and contrary allegations in the plaint and stating that Late

Jaishree Pandey, their maternal grandfather, has executed a Will dated 7-9-1983 in their favour (defendants No.1 to 4) and they have rightly got the suit land recorded in their names as they are already continuing in possession of the suit land.

7. The trial Court after appreciating oral and documentary evidence, decreed the suit holding that parties are in joint possession of the suit property and Late Jaishree Pandey, original holder, has not executed Ex.D-7 in favour of defendants No.1 to 4 and the plaintiff has ½ share in the suit property and is entitled for partition and decree of injunction which was upheld by the first appellate Court in first appeal preferred by defendants No.1 to 5. In second appeal preferred by defendants No.1 to 5, substantial questions of law and additional substantial question of law have been formulated and set-out in the opening paragraph of this judgment.

8. Mr. Sourabh Sharma, learned counsel appearing for the appellants herein / defendants No.1 to 5, would submit that both the Courts below have grossly erred in holding that defendants No.1 to 4, being the propounders of the Will, have not proved attestation and execution of the Will Ex.D-7 dated 7-9-1983 in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, as they have proved the will by examining one of the attesting witnesses Dilbaran (DW-3) who has categorically disclosed the fact of execution and attestation of Will in favour of defendants No.1 to 4 at the dictation of the testator and as such, the Will is duly proved as the law required. He would rely upon the judgments of the Supreme Court in the matters of **M.B.**

Ramesh (Dead) by LRs. v. K.M. Veeraje Urs (Dead) by LRs. and others[1] (paragraph 24), **Madhukar D. Shende v. Tarabai Aba Shedage**[2] (paragraphs 8 & 9), **Mahesh Kumar (Dead) By LRs. v. Vinod Kumar and others**[3] (paragraphs 44 & 45), **Gopal Swaroop v. Krishna Murari Mangal and others**[4], **National Textile Corporation Limited v. Nareshkumar Badrikumar Jagad and others**[5], **Ajay Kumar Parmar v. State of Rajasthan**[6] and **Rur Singh (Dead) Through LRs. and others v. Bachan Kaur**[7] to buttress his submission.

9. Mr. A.K. Prasad, learned counsel appearing for the plaintiff / respondent No.2 herein, would support the impugned judgment & decree, whereas Mr. D.N. Prajapati, learned counsel appearing for defendant No.7 / respondent No.3 herein, would support defendants No.1 to 5.

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

11. The short question for consideration would be, whether execution and attestation of the Will Ex.D-7 has been proved and established by defendants No.1 to 4 in view of the provisions contained in Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872?

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1 (2013) 7 SCC 490
2 2002 AIR SCW 242
3 (2012) 4 SCC 387
4 (2010) 14 SCC 266
5 (2011) 12 SCC 695
6 (2012) 12 SCC 406
7 (2009) 11 SCC 1

12. 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**[8].]

13. 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.

14. 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."

15. As per the provisions of Section 63 of the Succession Act, 1925 for

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8 (2015) 8 SCC 615

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.

16. 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**[9].

17. 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."

18. 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

9 (2003) 2 SCC 91

available in case of will.

19. In the matter of **Girja Datt Singh v. Gangotri Datt Singh**[10], 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

10 AIR 1955 SC 346

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."

20. In the matter of **H. Venkatchala Iyengar v. B. N. Thimmajamma and others**[11] 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

11 AIR 1959 SC 443

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."

21. The principle laid down in the above-stated judgment has been followed with approval in **Smt. Jaswant Kaur v. Smt Amrit Kaur and others**[12], **Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another**[13], **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others**[14] and **Jagdish Chandra Sharma** (supra).

22. In the matter of **Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal**

12 (1977) 1 SCC 369
13 (1974) 2 SCC 600
14 (2009) 4 SCC 780

Representatives and another[15], 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.

23. 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.

24. 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

15 (2017) 1 SCC 257

> 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."

25. 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 Act Succession Act, 1925. It was observed as under: -

> "10. Section 68 of the Evidence Act speaks of as to now 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."

26. 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 exposited 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."

27. In **Madhukar D. Shende** (supra), which is the judgment cited by Mr. Sharma, 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."

28. Similarly, in **Gopal Swaroop** (supra), it has been held as under: -

> "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. ..."

29. Reverting to the facts of the present case in light of the principle of law rendered by Their Lordships of the Supreme Court in the above-noted judgments (supra) qua execution and attestation of will by a testator, the following factual position would emerge on the face of record: -

1. Testator Jaishree Pandey is said to have executed unregistered will in respect of his properties in favour of defendants No.1 to 4 excluding his two daughters namely, plaintiff Phoolmati Devi and defendant No.5 Savitri Devi on 7-9-1983 vide Ex.D-7.

2. The will dated 7-9-1983 is said to be attested by two witnesses namely, Nadheer and Rambaksh, but it is signed by four witnesses namely Nadheer, Rambaksh, Rameshwar Prasad Dubey and Dilbaran.

3. Rameshwar Prasad Dubey – father of defendants No.1 to 4 is one of the witnesses named in the will.

4. Dilbaran – one of the witnesses, who signed the will, has been examined as DW-3.

5. The will (Ex.D-7) is said to be executed by Jaishree Pandey on 7-9-1983 and he died on 31-10-1983, thereafter, the widow of Jaishree Pandey (testator) filed an application for mutation

in her name on 10-4-1984 which was allowed by the revenue officer on 28-8-1984 vide Ex.P-5. Thereafter, on 2-1-1987, defendants No.1 to 4 filed an application for mutation in their names which was granted by the revenue authority on 22-9-1987 (Ex.D-6).

6. The plaintiff filed the instant suit for partition and possession on 4-4-1996.

7. Dilbaran (DW-3) said to be the attesting witness has stated in his deposition that Jaishree Pandey executed the will on 7-9-1983 which was written by Ramnaresh (DW-2) – scribe in which he has signed, Late Jaishree Pandey has also signed signed his presence and Nadhir has affixed his mark and son-in-law of Jaishree Pandey has also signed on the will. He did not state that he has signed the will in presence of testator Jaishree Pandey and he also did not state that Nadhir has also signed in presence of the testator. Likewise, he also did not state about Ramnaresh Singh (DW-2) that he has signed the will in presence of the testator.

30. Reverting to the facts of the present case in light of the aforesaid narration of facts, it is quite vivid that compliance of Section 63(c) of the Succession Act, 1925 is absolutely missing in the present case though strict compliance of the said provision is imperative. Defendants No.1 to 4 being propounders of the will must have proved that the testator has signed the will in presence of attesting witnesses and in their presence they have signed the Will. Section 63(c) of the Succession Act, 1925 clearly lays down the

requirement of valid and enforceable will that it shall be attested by two or more witnesses, each of them has seen the testator signing or affixing his mark to the will and each of the witnesses has signed the will in presence of the testator as held by the Supreme Court in **H. Venkatachala Iyengar** (supra) that a will has to be proved like any other document except that evidence tendered in proof of will should additionally satisfy the requirement of Section 63 of the Succession Act, 1925 apart from under Section 68 of the Evidence Act, 1872.

31. Analysing the facts of the present case, it would appear that defendants No.1 to 4 – propounders of the will, have failed to prove the attestation of will in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of Evidence Act, 1872, as one of the attesting witnesses Dilbaran (DW-3) examined before the Court did not state before the Court that he has signed the will in presence of the testator and he has seen the testator signing the will and other witnesses have signed the will or marked their affix in presence of the testator. Mere signing of a will as a witness would not per se amount to compliance of Section 63(c) of the Succession Act, 1925 as *animo attestandi* is absolutely lacking. In the matter of **Bhagat Ram v. Suresh**[16], it has been held that to be an attesting witness it is essential that the witness should have put his signature *animo attestandi* for the purpose of attesting that he has seen the executant sign or has received from him a personal acknowledgement of his signature.

16 (2003) 12 SCC 35

32. Additionally, one of the suspicious circumstances which defendants No.1 to 4 have failed to dispel is that the testator has executed the will on 7-9-1983 and the testator died on 31-10-1983, but they (defendants No.1 to 4) only filed application for mutation as late as on 2-1-1987 (Ex.D-6). If defendants No.1 to 4 were having will in their favour and also in possession since 7-9-1983, certainly they would have filed application in the revenue court to get their names mutated on the basis of will after few months of the death of testator, but they did not do anything and for the first time, after three years of the death of the testator, they have brought the will in daylight that a will has been executed by their maternal grand-father in their favour and did not disclose any one about the factum of execution of will but kept silent for more than three years, which was totally unnatural conduct on the part of defendants No.1 to 4 and which throws suspicion on the said will. This is one of the suspicious circumstances particularly when the will is unregistered that they have failed to disclose with regard to the aforesaid will.

33. The submission of Mr. Sharma that such a specific question has not been raised from one of the attesting witnesses examined, has also no substance because, defendants No.1 to 4 being the propounders of the will have to establish the will in accordance with law. Non-questioning the testimony of attesting witness on this aspect would not make any difference or would absolve the propounders from proving the will in the manner contemplated by law to prove the attestation of will.

34. Concludingly, this Court is fully satisfied that execution and

attestation of will is not found established in accordance with law and defendants No.1 to 4 have failed to discharge their burden placed upon them by law to prove attestation of a will.

35. So far as the finding of both the Courts below that by comparing the signature of the deceased with other signatures in the court proceeding and recording of finding that the attestation of will is not proved in accordance with law is concerned, the same is not correct finding, as the attestation of will has to be proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of Evidence Act, 1872.

36. In view of the above, judgments & decrees of both the Courts below are affirmed, but on different finding, as such, the substantial questions of law are answered accordingly. In the result, the judgment & decree passed by the first appellate Court are hereby affirmed.

37. As a fallout and consequence of the above-stated discussion, the substantial questions of law framed are answered against the defendants and in favour of the plaintiff and this second appeal is dismissed accordingly leaving the parties to bear their own cost(s).

38. A decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma

HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.284 of 2003

Dinesh Kumar Dubey and others

Versus

Smt Malti Devi and others

Head Note

Will as an instrument of testamentary disposition of property, carries with it an overwhelming element of sanctity.

सम्पत्ति के वसीयती व्ययन के एक लिखत के रूप में वसीयत (विल) शुद्धता का तीव्र तत्व वहन करता है।