2025:CGHC:1864

AFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

SA No. 221 of 2022

1. Smt. Asha Bai W/o Shivbhushan Prasad Kesharwani Aged About 78 Years R/o Village Kamrid, Tahsil Pamgarh, District Janjgir-Champa Chhattisgarh.
2. Rajendra Kumar S/o Shivbhushan, Aged About 62 Years R/o Village Kamrid, Tahsil Pamgarh, District Janjgir-Champa Chhattisgarh.

... Appellants

versus

1. Purnima D/o Bhagwan Prasad Aged About 47 Years W/o Santosh Kumar Kesharwani, Village - Kamrid, Tahsil Pamgarh, District Janjgir-Champa (CG. Present Address - Vill-Sarangarh, Near Santosh, Provision Store, Kesharwani Mohalla, District Raigarh Chhattisgarh.
2. Narendra S/o Bhagwan Prasad Aged About 43 Years R/o Village Kamrid, Tahsil Pamgarh, District Janjgir-Champa Chhattisgarh.
3. Anju D/o Bhagwan Prasad Aged About 41 Years W/o Teja Gupta, Village - Kamrid, Tahsil Pamgarh, District Janjgir-Champa Chhattisgarh. Present Address - Near Budhi Mai Mandir, Raigarh, Tahsil & District Raigarh Chhattisgarh.
4. Mukesh, S/o Bhagwan Prasad Aged About 39 Years R/o Village Kamrid, Tahsil Pamgarh, District-Janjgir-Champa Chhattisgarh.

5. Lata D/o Kapilnath Aged About 35 Years W/o Sarad Kesharwani, Village-Kamrid Tahsil Ramgarh, District Janjgir-Champa Chhattisgarh. Present Address In front of Girls School, Gandhi Ward, Mungeli, Tahsil & District Mungeli Chhattisgarh.
6. Manju D/o Kapilnath Aged About 41 Years W/o Dilip Kesharwani, Village Kamrid, Tahsil Pamgarh, District Janjgir Champa Chhattisgarh. Present Address - Sadar Bazar, Champa, Tahsil Champa, District Janjgir Champa Chhattisgarh.
7. Laxmi D/o Kapilnath Aged About 38 Years R/o Village Kamrid, Tah Pamgarh, District Janjgir-Champa Chhattisgarh.
8. Sanju D/o Kapilnath Aged About 36 Years R/o Village Kamrid, Tah Pamgarh, District Janjgir-Champa Chhattisgarh.
9. Surendra S/o Kapilnath Aged About 42 Years R/o Village Kamrid, Tah Pamgarh, District Janjgir-Champa Chhattisgarh.
10. Nageshwar S/o Kapilnath Aged About 28 Years R/o Village Kamrid, Tah Pamgarh, District Janjgir-Champa Chhattisgarh.
11. Nutan S/o Ganga Prasad Aged About 68 Years R/o Muchchhmalda Bhatgaon, Distt Baloda Bazar-Bhatapara (CG)
12. Pardeshi S/o Sunhar, Aged About 60 Years R/o Village Sitamadi, Korba, Tahsil And District Korba Chhattisgarh.
13. Vikash @ Banti S/o Late Shri Ramji Aged About 39 Years R/o Village -Sarangarh, Tahsil-Sarangarh, Distt Raigarh (CG)
14. Gaurav S/o Late Shri Ramji Aged About 26 Years R/o Village - Sarangarh, Tahsil-Sarangarh, District Raigarh Chhattisgarh.
15. Surbhi D/o Ramji Aged About 29 yrs respondent No.13 to 15 R/o Village Sarangarh Tahsil Sarangarh, Dist. Raigarh (CG)
16. Sapna D/o Ramji Aged About 37 Years W/o Ramkumar Kesharwani, R/o Village Bhatgaon, District- Baloda Bazar - Bhatapara Chhattisgarh.

17. Manoj S/o Jagdish Aged About 56 Years R/o Village Sarangarh, Baniyapara, Tahsil Sarangarh, Distt. Raigarh (CG)
18. Bhagwan Prasad S/o Late Pannalal Aged About 69 Years R/o Village Kamrid, Tahsil Pamgarh, Dist Janjgir-Champa (CG)
19. Kapilnath S/o Late Pannalal Aged About 66 Years Respondent No.18 & 19 R/o Village Kamrid, Tahsil Pamgarh, Dist. Janjgir-Champa Chhattisgarh.
20. Bhanu Pratap S/o Late Teras R/o Village Kamta Post Office Borda, Tahsil Nawagarh, Dist. Janjgir-Champa Chhattisgarh.
21. State of Chhattisgarh Through Collector, Janjgir-Champa, District - Janjgir Champa Chhattisgarh.

... Respondent(s)

For Appellants	:	Mr. H.V. Sharma, Advocate
For Respondent-State	:	Mr. Santosh Soni,Govt. Advocate

SB:**Hon'ble Mr. Justice Parth Prateem Sahu**

Judgment on Board

3.1.2025

1. Heard on admission.
2. This is a plaintiffs' second appeal against the judgment and decree dated 31.1.2022 passed in Civil Appeal No.23A/2020 by which learned 2nd Additional District Judge, Janjgir District Janjgir Champa (CG) has affirmed the judgment and decree dated 11.2.2020 passed by learned Civil Judge Class-2 Pamgar in Civil Suit No.15A/2014 dismissing suit of plaintiffs.
3. Facts of the case, in brief, are that plaintiffs have filed a civil suit for declaration of title, possession, partition in respect of land bearing Khasra No.38 area 89.95 acre, situate in village Kamrid, Patwari Halka No.19, Tahsil Pamgarh, District Janjgir

Champa (CG) [for short 'the suit property'] and also for declaring sale deed dated 19.12.2014 and the order dated 21.3.2018 passed in Revision No.RN06/R/A-6/179/2016 to be illegal and void. It was averred in the plaint that the suit property was recorded in land records in the name of Dashmat Bai, who died issueless. During her lifetime, on 3.11.1995 said Dashmat Bai had executed a Will Deed (Ex.P-5) in favour of plaintiff No.2 and defendant Nos.15 & 16 and bequeathed the suit property to them. After the death of Dashmat Bai, plaintiff No.2 and defendant No.15 & 16 are in possession of the suit property. An application under Sections 109, 110 of the Chhattisgarh Land Revenue Code, 1959 (henceforth 'the Code of 1959') was filed by them, which was allowed vide order dated 15.6.1998 and it is ordered that the suit property be recorded jointly in the name of plaintiff No.2, defendant No.15 & 16 and also respondents No.1 to 14. The order dated 15.6.1998 was put to challenge in an appeal before the Sub-Divisional Officer, Pamgarh and the same was also dismissed vide order dated 15.2.2007 against which an appeal is pending consideration before the Additional Collector, Janjgir.

4. Plaintiffs thereafter filed an application under Section 178 of the Code of 1959 before the Tahsildar, Pamgarh for partition of suit property among plaintiff and defendant No.15 and 16, claiming half share in the suit property. The Tahsildar vide

order dated 28.2.2004 directed for division of account among plaintiffs and defendants No.1 to 16 in the ratio of 1/18 each against which plaintiffs preferred an appeal before the Sub-Divisional Officer, Pamgarh and by the order dated 12.7.2006 the order of Tahsildar dated 28.2.2004 was set aside. After passing of the order dated 12.7.2006, defendants No.1 to 16 again submitted an application under Section178 of the Code of 1959 before the Tahsildar on which an order was passed on 28.2.2014 ordering for preparing a *fard batwara* list. Plaintiffs preferred revision against the order dated 28.2.2014 which came to be decided vide order dated 27.3.2014, setting aside the order dated 28.2.2014 and staying further proceeding for a period of three months so as to enable the parties to obtain stay order from the competent civil Court. After expiry of period of three months, the Tahsildar took up the matter and vide order dated 27.9.2014 (Ex.P-10) ordered for division of suit property among plaintiffs and defendants in the ratio of 1/18. Defendant No.11 sold her share to defendant No.2 vide registered sale deed dated 19.12.2014 (Ex.P-8).

5. During pendency of civil suit, appeal preferred by plaintiffs against the order dated 15.2.2007 came to be allowed vide order dated 8.6.2016 (Ex.P-12) and the order dated 15.2.2007 was set aside. On appeal filed by defendants, by the order

dated 21.3.2018 (Ex.P-13) the Board of Revenue set aside the order dated 8.6.2016 and restore the order dated 15.2.2007.

6. On filing of civil suit, defendants filed their written statements, denied the averments made in the plaint and prayed for dismissal of suit. It was pleaded in written statement by defendants No.2,4,6,8,9,10,15 and 16 that the suit is liable to be dismissed for want of particulars of suit property. Will deed dated 3.11.1995 has never been executed by Dashmat Bai and it is a forged one. Possession of plaintiffs over the suit property after the death of Dashmat Bai had also been denied. It was pleaded that Dashmat Bai, during her lifetime, was residing with defendant No.15 and 16 and it was they who looked after Dashmat Bai. Pursuant to the order passed by the Tahsildar, suit property came to be recorded in the name of plaintiffs and defendants in revenue records is in accordance with law and since then defendants are in possession of their respective share in the suit property.

7. Defendant No.18, purchaser of part of suit property, has also filed written statement denying the plaint averments.

8. On the basis of pleadings of both the parties, the trial Court framed as many as eight issues; after recording the evidence and evaluating the same, the trial Court vide judgment and decree dated 11.2.2020 dismissed the suit filed by plaintiffs recording that they failed to prove due execution of Will deed

in their favour by Late Dasmat Bai based on which they are seeking declaration of title over the suit property. Appellants/plaintiffs preferred a regular civil appeal before the Court of 2nd Additional District Judge, Janjgir and the said appeal was also dismissed vide impugned judgment and decree dated 31.1.2022. Aggrieved therewith, plaintiffs/ appellants have preferred this second appeal challenging the concurrent finding of the trial Court as well as First Appellate Court, proposing following substantial question of law;-

> "Whether the finding of both the learned courts below are perverse with regard to the proof of will deed dated 03.11.1995 beyond suspicion as details of the property owned by the testratrix are not mentioned though the execution and the attestation of the will has been proved by the plaintiffs?"

9. Learned counsel for the plaintiffs/appellants submits that both the Courts by misapplying the law on the subject of proof of Wills did not properly appreciate the evidence adduced by the plaintiffs and thus committed an error of law and fact while passing the impugned judgments and decrees. The trial Court has not appreciated the statement of witnesses, particularly of attesting witness Rajeshwar Singh (PW-3) examined on behalf of plaintiffs/appellants, who has supported the execution of Will by testatrix Dashmat Bai in favour of plaintiff No.2. PW-3 has stated that testatrix Dashmat had executed the Will

(Ex.P-5) in his presence and thereby it has to be presumed that the testatrix had signed in presence of attesting witnesses, however, learned trial Court has erroneously held that Will has not been proved in terms of Section 63 of the Indian Succession Act, 1925 (for short 'the Act of 1925'). He contended that suspicious circumstances as to the genuineness of Will have not been pleaded by the defendants in their written statements and therefore plaintiffs cannot be expected to prove the fact not pleaded. The onus that was on the propounder to prove the execution of Will has been discharged by examining the attestor (PW-3). He further contended that learned appellate court arrived at a conclusion that execution of Will is not in dispute but dismissed the appeal considering non-mentioning of the particulars of property in the Will to be a suspicious circumstance to disbelieve the Will. He submits that mere non-mentioning of particulars of property in Will cannot be treated to be a suspicious circumstance because as per Will (Ex.P-5), all the properties, which were in possession and enjoyment of Dashmat Bai shall devolve on the plaintiff No.2 and defendant No.15 and 16. Hence, it is submitted that substantial question of law, as mentioned in the appeal memo, arise for determination of this Court and appeal be admitted for final hearing.

10. On the other hand, learned State Counsel has supported the impugned judgment and decree.

11. Heard learned counsel for the parties and perused the record of both the Courts and the impugned judgments.

12. It is not in dispute in this case that Dashmat Bai was the recorded owner of the suit property, which she has inherited in succession from her husband. Dashmat Bai was an illiterate woman and had no child. She had allegedly executed Will (Ex.P-5) dated 3.11.1995 in favour of plaintiff No.2 and defendants No.15 and 16 and she had affixed her thumb impression in the Will (Ex.P-5). Will bequeaths half share in the suit property to plaintiff No.2 Rajendra and remaining half share in between Bhagwan and Kapilnath. Will Ex.P-5 further reflects that at the time of execution of will, testatrix was 98 years old. It is mentioned in the Will that propounders are grandsons of brothers of husband of testatrix; they are taking care of her along with all her needs including medical etc. and therefore, she has decided that after her death, the property inherited from her husband would devolve equally upon the plaintiffs and defendants No.15 and 16. The Will contains a recital that she is executing this will in her full sense and without any pressure in order to avoid any dispute by any family member in respect of her property. Particulars and details of the properties bequeathed are not mentioned in Will.

As per the contents of Will, Hargovindram Kumhar, Ramsanehi Kumbhkaar and Rajeshwar Singh are the attesting witnesses and one Mr. D.R. Tiwari, Advocate is the scriber of the Will.

13. Plaintiff Rajendra Kumar was examined as PW-1 and he has stated that in presence of witnesses Govindram Kumhar and Rajeshwar Singh, Dashmat Bai had executed the Will on 3.11.1995 in his favour, Bhagwan Das and Kapil Nath. She had affixed her thumb impression on the Will in his presence. After the death of Dashmath Bai, they are in possession and occupation of their respective share in suit property. He however admitted that particulars of property is not mentioned in the Will.

14. Rajeshwar Singh, one of attesting witnesses, was examined as PW-3 and he has stated that Dashmat Bai had no child, on 3.11.1995, in his presence, she had executed Will in respect of her movable and immovable property in favour of Rajendra (plaintiff), Bhagwan Prasad and Kapilnath (Defendant No.18 & 19) bequeathing equal half share to Rajendra and half share to Bhagwan and Kapilnath. Will deed bears his signature. Dashmat Bai had put her thumb impression on Will. Apart from him, Govind Ram Kumhar had also signed the Will as a witness. Will was scribed by Mr. S.L. Baani Advocate of Bilaspur in Kamrid. In the cross-examination, this witness has

admitted that Dashmat Bai was residing with defendant No.18 and 19 and at the time of Bhagwan Prasad and Kapilnath (Defendant No.18 & 19) were also present at the spot.

15. Plaintiff No.1 Ashabai, mother of plaintiff No.2, has been examined as PW-2 and she has stated in cross-examination that they have shifted to Shivrinarayan since 1987; Dashmat Bai was residing in Kamrid in their house, she used to go to Kamrid sometimes, not daily and in her absence, Dashmat Bai was looked after by Kapil and others.

16. Defendant No.16 Kapil (DW-1), one of beneficiary of alleged Will, has stated that last rites of Dashmat Bai were performed by him and his brother Bhagwat. Dashmat Bai had never executed Will of the suit land in favour of plaintiff No.2– Rajendra Kumar. This witness in cross-examination has denied about execution of any Will by Dashmat Bai in his favour and plaintiffs.

17. Perusal of the judgment passed by the learned trial Court would show that learned trial Court has exhaustively dealt with the issue ‘whether Dashmat Bai has executed Will Deed dated 3.11.1995 in favour of plaintiff No.2 and defendant No.15 and 17 in respect of her ownership and possessory land’ and ‘whether the plaintiffs are entitled for declaration of title in respect of half share in the suit property’. In Para-16 to 34 of judgment, trial Court has elaborately discussed how the

plaintiffs failed to prove valid execution of Will in favour of plaintiff No.2 and defendant No.15 & 16 by Dashmat Bai in respect of her ownership and possessory land and there are no suspicious circumstances to show that the Will is doubtful. Learned trial Court while not accepting the Will in question and holding it to be surrounded by suspicious circumstances, has held that there is discrepancy as to time of execution of Will (Ex.P-5) in the statement of attesting witness (PW-3) and one of the propounders (PW-1), which makes the execution of Will doubtful and unreliable. Further, attesting witness (PW-3) has stated that Dashmat Bai put her thumb impression mark in will on 03.11.1985, and nowhere deposed that testatrix Dashmat Bai affixed her thumb impression on the Will in his presence and he also signed the Will in presence of testatrix Dashmat Bai.

18. Section 63 (c) of the Act of 1925 requires that each of attesting witness has seen the testator signing or affixing his/her mark on the Will. It was further recorded that testatrix was 98 years old illiterate lady, but there is no whisper in statement of PW-3 that the contents of will had been read over and explained to the testator. Hence, mere version of attesting witness PW-3 that Will bears his signature as also thumb impression of Dashmat Bai is not sufficient to prove due execution of Will. Under theses circumstances, the trial Court concluded that in

the Will (Ex.P-5) it is not mentioned that land/property of village Kamrid is ‘willed’. Under Section 102 of the Indian Evidence Act, burden of proof is on the plaintiffs in which they failed. Considering the evidence of PW-3 with regard to time of execution of Will, trial Court concluded that it creates suspicion that Will was written in presence of PW-3.

19. From the judgment passed by the learned First Appellate Court also reveals that it has also considered the factum of execution of ‘Will’ (Ex.P-5) in Para-19 to 26 and affirmed the finding recorded by learned trial Court.

20. In case at hand, the plaintiffs and defendants are relatives of testatrix. Plaintiff has come up with the contention that testatrix Dashmat Bai had executed a Will on 3.11.1995, bequeathing half share in her property to plaintiff No.2 and remaining share in favour of defendant Nos.18 and 19.

21. Section 63 of the Indian Succession Act, 1925 and Section 68 of the Evidence Act spell out the essential requirements of wills, and their proof, in a court of law. Relevant portion of Section 63 of the Act reads as under:-

> "**63**.**Execution of unprivileged wills**.--Every testator, not being a soldier employed in an expedition nor 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) - (b) * * *

> (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 Test Case 30/1989 Page 14 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."

22. Section 68 of the Evidence Act reads thus:

> "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:..."

23. A bare reading of Section 63 (c) of the Act of 1925 makes it clear that the Will shall be attested by two or more witnesses each of whom has seen the testator signing or affixing his mark to the Will. There is a further requirement that the witnesses have to sign the Will in the presence of the testator. Section 68 of the Evidence Act states that such a document cannot be used as evidence till at least one attesting witness is called for the purpose of proving its execution, (if there such

an attesting witness is alive), and subject to the process of the court and capable of giving evidence. Such witness has to be examined before the document can be used in an evidence. A combined reading of Section 63 of the Act of 1925 with Section 68 of the Evidence Act, reveals that the propounder of a will has to prove that the will was duly and validly executed. That can be done by not merely by proving the testator's signature on the will, but also establishing that attestations were made properly as required by Section 63 (c) of the Act of 1925.

24. Legal principles regarding proof of a Will have been indicated by Hon'ble Supreme Court in case of **H. Venktachala Iyengar vs. B.N. Thimmajamma**, reported in **AIR 1959 SC 443**, which are 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 68 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 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.

25. In case of **Yumnam Ongbi Tampha Ibema Devi vs Yumnam Joykumar Singh and others**, reported in **(2009) 4 SCC 780** Hon'ble Supreme Court has discussed the requirements of a valid will and observed thus:-

> "13.As per provisions of Section 63 of the Succession Act, for the 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 presence of the testator.

26. In case of **M.B. Ramesh (Dead) by LR's vs. K.M. Veerajee Urs (Dead) by LR's and others**, reported in **(2013) 7 SCC 490**, Hon'ble Supreme Court has held thus:-

"20. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW-2 was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said to have been executed in the manner required by law, namely, as per Section 63 (c) of the Succession Act. PW-2 has stated that he has signed the will in the presence of Smt. Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt. Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt. Nagammanni. Section 63 (c) of the Succession Act very much lays down the requirement of a valid and enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the

testator. As held by a bench of three judges of this Court (per Gajendragadkar J, as he then was) way back in R. Venkatachala Iyengar Vs. B N. Thimmajamma reported in AIR 1959 SC 443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act."

(emphasis supplied)

27. In **Jagdish Chand Sharma vs. Narain Singh Saini (dead) through LRs and others**, reported in **(2015) 8 SCC 615**, it was observed thus:-

"52.While dwelling on the respective prescripts of Section 63 of the Act and Section 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held 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."
>
> (emphasis supplied)

28. Recently, the Hon'ble Supreme Court while interpreting Section 63 (c) of the Act of 1925 in **Civil Appeal No.13192/2024 (Gopal Krishan & ors vs Daulat Ram & ors),** decided on 2.1.2025, has observed thus:-

> 8. The requisites for proving of a Will are well established. They were recently reiterated in a Judgment of this Court in Meena Pradhan and others vs Kamla Pradhan and another. See also Shivkumar and others v. Sharanabasappa and others. The principle as summarized by the former are reproduced as below:-
>
> "…10.1. The court has to consider two aspects : firstly, that the will is executed by the testator, and secondly, that it was the last will executed by him;
>
> 10.2. It is not required to be proved with mathematical accuracy, but the test of satisfaction of the prudent mind has to be applied.
>
> 10.3. A will is required to fulfill all the formalities required under Section 63 of the Succession Act, that is to say:
>
> (a) 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 the said signature or affixation shall show that it was intended to give effect to the writing as a will;

(b) It is mandatory to get it attested by two or more witnesses, though no particular form of attestation is necessary;

(c) Each of the attesting witnesses must have 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 such signatures;

(d) Each of the attesting witnesses shall sign the will in the presence of the testator, however, the presence of all witnesses at the same time is not required;

10.4. For the purpose of proving the execution of the will, at least one of the attesting witnesses, who is alive, subject to the process of court, and capable of giving evidence, shall be examined;

10.5. The attesting witness should speak not only about the testator's signatures but also that each of the witnesses had signed the will in the presence of the testator;

10.6. If one attesting witness can prove the execution of the will, the examination of other attesting witnesses can be dispensed with;

10.7. Where one attesting witness examined to prove the will fails to prove its due execution, then the other available attesting witness has to be called to supplement his evidence;

10.8. Whenever there exists any suspicion as to the execution of the will, it is the responsibility of the propounder to remove all legitimate suspicions before it can be accepted as the testator's last will. In such cases, the initial onus on the propounder becomes heavier; (2023) 9 SCC 734 (2021) 11 SCC 277

10.9. The test of judicial conscience has been evolved for dealing with those cases where the execution of the will is surrounded by suspicious

> circumstances. It requires to consider factors such as awareness of the testator as to the content as well as the consequences, nature and effect of the dispositions in the will; sound, certain and disposing state of mind and memory of the testator at the time of execution; testator executed the will while acting on his own free will;
>
> 10.10. One who alleges fraud, fabrication, undue influence etcetera has to prove the same. However, even in the absence of such allegations, if there are circumstances giving rise to doubt, then it becomes the duty of the propounder to dispel such suspicious circumstances by giving a cogent and convincing explanation;
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> 10.11. Suspicious circumstances must be "real, germane and valid" and not merely "the fantasy of the doubting mind [Shivakumar v. Sharanabasappa, (2021) 11 SCC 277] ". Whether a particular feature would qualify as "suspicious" would depend on the facts and circumstances of each case. Any circumstance raising suspicion legitimate in nature would qualify as a suspicious circumstance, for example, 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, etc."

29. Let us examine the facts of the case in hand keeping in mind the broad principles which have been laid down by Hon'ble Supreme Court in above decisions interpreting Section 63 of the Act of 1925. In case at hand, one of the attesting witnesses namely Rajeshwar Singh (PW-3) was examined to prove due execution of Will. On going through the testimony of Rajeshwar Singh (PW-3) it is seen that testatrix Dashmat Bai has executed the Will in his presence. But, still there is a

serious lacuna which goes to the root of the matter as he has not at all stated in his entire testimony that testratrix has put her thumb impression mark in the Will dated 3.11.1995 in presence of witnesses and that he also signed the Will in presence of the testatrix. It is well settled that in order to prove the execution of Will, it is absolutely necessary that the witness had seen the testator/testatrix signing or affixing his/her mark on the Will and only then, it can be said that execution of Will is proved. In absence of proof of due attestation as envisaged under Section 63 (c) of the Act of 1925, the Will cannot be said to be proved. In instant case, statement of PW-3 that testatrix Dashmat Bai executed the Will in his presence, cannot be stretched up to the extent in order to hold or infer that attestation has been proved in terms of Section 63 (c) of the Act of 1925. In other words, from the statement of attesting witness Rajeshwar Singh it is not established at all that the testatrix put her thumb impression mark in his presence and the attesting witnesses also signed the Will in the presence of / before testatrix Dashmat Bai and therefore, both the Courts' have rightly held that plaintiffs have failed to prove execution of Will as per law.

30. That apart, the Will in question contained incorrect recital that plaintiff No.2 Rajendra Kumar and defendant No.15 and 16 are taking care of testatrix for the last 30 years. However,

plaintiff No.1-Asha, wife of Shivbhushan and mother of plaintiff No.2, in her cross-examination admitted that she shifted to Shivrinarayan in the year 1987 and since then they are residing there. Thus, this recital in the Will in question is wrong and creates a suspicion about genuineness of the Will, which is an unregistered document. Furthermore, one of the beneficaires of Will in question, who was impleaded as defendant, specifically denied the execution of Will Ex.P-5. In respect of the Will executed by a Hindu, if the same has been denied by one of the beneficiaries to the Will, then it is bounden duty cast upon the party claiming benefit under the Will to prove the Will as per law.

31. True it is that the first appellate Court in Para-25 of its judgment has opined that the execution and attestation of Will dated 3.11.1995 is proved without setting aside the finding recorded by learned trial Court in Para-33 and 34 of its judgment on Issue No.7. However, in Para-26 learned first appellate Court had affirmed the finding recorded by learned trial Court on Issue No.1 and 7 recording that trial Court has not committed any error in deciding Issue No.1 and 7 to be not proved. Issue No.7 formed by trial Court is ‘whether Dashmat Bai has executed Will dated 3.11.1995 in favour of plaintiff No.2 and defendant No.15 and 16 of the land owned and possessed by her’. When once finding recorded by trial Court

on Issue No.7 is affirmed by learned first appellate Court, then the observation made in para-25 will have no relevance.

32. Learned First Appellate Court recorded in categorical terms that it is not clear from the Will Ex.P-5 that it has been executed in respect of the suit property situated in village Kamrid as it does not contain details of the properties referred to in it and thus genuineness of the Will dated 3.11.1995 is surrounded with suspicion. It is well settled that mere execution of Will, thus, by producing scribe or attesting witness or proving genuineness of testator's signature or thumb impressions by themselves is not sufficient to establish validity of Will unless suspicious circumstances, usual or special, are ruled out and the courts' conscience is satisfied not only on execution but about its authenticity. In the instant case, the circumstances brought on record create great suspicions which has not been removed by the plaintiffs to establish that the Will in question is genuine and was executed by the testatrix as per law.

33. As discussed above, one of the beneficiaries of the Will, who was impleaded as defendant No.16- Kapil has denied the execution of Will. Testatrix was an illiterate lady about 98 years of age, there is no evidence that the Will was read over and explained to her. One of the beneficiaries, plaintiff No.2 was present while execution of Will, as admitted by PW-1. All

the above are suspicious circumstances which were not properly met and explained by the plaintiffs' witnesses.

34. There is no force in the submission of learned counsel for appellants that suspicious circumstances as to the genuineness of Will have not been pleaded by the defendants in their written statements. When prime consideration of learned trial Court while deciding Issue No.7 was with regard to valid execution of Will and its prove as required under Section 63 (c) of the Act of 1925 read with Section 68 of the Evidence Act, to which learned trial Court has found that valid execution of Will has not been proved and the finding recorded by trial Court on Issue No.7 has been affirmed by learned first appellate Court in Para-26 of its judgment, the ground raised by learned counsel for appellants that suspicious circumstances have not bee pleaded by defendants and therefore, plaintiffs cannot be called upon to prove such fact, is not having much importance in the facts and circumstances of the case.

35. Hon'ble Supreme Court in its various decisions has made it clear that a second appeal can be dismissed at the admission stage without formulation of substantial question of law if none arises in a given case. In case of ***C. Doddanarayana Reddy (Dead) by L.Rs. and Ors. Vs. C. Jayarama Reddy (Dead)***

by L.Rs. and Ors. (2020) 4 SCC 659, Hon'ble Supreme Court has observed and concluded thus:-

> *"25. The question as to whether a substantial question of law arises, has been a subject-matter of interpretation by this Court. In the judgment in Karnataka Board of Wakf v. Anjuman-E-Ismail Madris-Un-Niswan13, it was held that findings of the fact could not have been interfered within the second appeal. This Court held as under: (SCC pp. 347-48, paras 12-15)*
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> > *"12. This Court had repeatedly held that the power of the High Court to interfere in second appeal under Section 100 CPC is limited solely to decide a substantial question of law, if at all the same arises in the case. It has deprecated the practice of the High Court routinely interfering in pure findings of fact reached by the courts below without coming to the conclusion that the said finding of fact is either perverse or not based on material on record.*
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> > *13. In Ramanuja Naidu v. Vs. Kanniah Naidu (1996) 3 SCC 392, this Court held : (SCC 393)*
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> > > *'It is now well settled that concurrent findings of fact of trial court and first appellate court cannot be interfered with by the High Court in exercise of its jurisdiction under Section 100 of the Civil Procedure Code. The Single Judge of the High Court totally misconceived his jurisdiction in deciding the second appeal under Section 100 of the Code in the way he did.'.*
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> > *14. In Navaneethammal v. Arjuna Chetty (1996) 6 SCC 166, this Court held: (SCC p. 166)*

> *'Interference with the concurrent findings of the courts below by the High Court under Section 100 CPC must be avoided unless warranted by compelling reasons. In any case, the High Court is not expected to reappreciate the evidence just to replace the findings of the lower courts. ... Even assuming that another view is possible on a reappreciation of the same evidence, that should not have been done by the High Court as it cannot be said that the view taken by the first appellate court was based on no material.'*

15. And again in Taliparamba Education Society v. Moothedath c Mallisseri Illath M.N. (1997) 4 SCC 484, this Court held: (SCC p. 486, para 5)

> *'5.... The High Court was grossly in error in trenching upon the appreciation of evidence under Section 100 CPC and recording reverse finding of fact, which is impermissible.' "*

29. The learned High Court has not satisfied the tests laid down in the aforesaid judgments. Both the courts, the trial court and the learned first appellate court, have examined the school leaving certificate and returned a finding that the date of birth does not stand proved from such certificate. May be the High Court could have taken a different view acting as a trial court but once,two courts have returned a finding which is not based upon any misreading of material documents, nor is recorded against any provision of law, and neither can it be said that any Judge acting judicially and reasonably could not have reached such a finding, then, the High Court cannot be said to have erred. Resultantly, no substantial

question of law arose for consideration before the High Court.

30. Thus, we find that the High Court erred in law in interfering with the finding of fact recorded by the trial court as affirmed by the first appellate court. The findings of fact cannot be interfered with in a second appeal unless, the findings are perverse. The High Court could not have interfered with the findings of fact."

36. In case of ***State of Rajasthan and Ors. Vs. Shiv Dayal and Ors. (2019) 8 SCC 637*** Hon'ble Supreme Court has observed and concluded thus:-

"16. When any concurrent finding of fact is assailed in second appeal, the appellant is entitled to point out that it is bad in law because it was recorded dehors the pleadings or it was based on no evidence or it was based on misreading of material documentary evidence or it was recorded against any provision of law and lastly, the decision is one which no Judge acting judicially could reasonably have reached. (See observation made by learned Judge, Vivian Bose, J., as his Lordship then was a Judge of the Nagpur High Court in Rajeshwar Vishwanath Mamidwar Vs. Dashrath Narayan Chilwelkar [Rajeshwar Vishwanath Mamidwar Vs. Dashrath Narayan Chilwelkar, 1942 SCC OnLine MP 26 : AIR 1943 Nag 117].

17. In our opinion, if any one or more ground, as mentioned above, is made out in an appropriate case on the basis of the pleading and evidence, such ground will constitute substantial question of law within the meaning of Section 100 of the Code."

37. In the instant case, in the light of the above discussion and decisions of Hon'ble Supreme Court, this Court is of the view that no substantial question of law much less the question proposed as substantial question of law by the appellants herein in the memorandum of grounds of appeal arise. Hence, appeal is dismissed in limine.

38. Decree be drawn accordingly.

Sd/-
(Parth Prateem Sahu)
Judge

roshan/-