GOPAL SWAROOP
v.
KRISHNA MURARI MANGAL & ORS.
(Civil Appeal No. 6801 of 2003)

NOVEMBER 25, 2010

[MARKANDEY KATJU AND T.S. THAKUR, JJ.]

Succession Act, 1925; s.63 – Execution of Will – Essential requirements to prove – Discussed – In the instant case, deposition of the attesting witness proved that the testator had executed Will in favour of the propounder and had signed and affixed his signature in his presence – The signature of the testator was appropriately placed in the Will – Deposition of attesting witness was that he alongwith the other attesting witness was present at the time the testator affixed his signature on the Will and the two witnesses signed the Will in the presence of the testator—Requirements of s.63 were fulfilled – Trial court and Single Judge of High Court had concurrently held that the execution of Will was satisfactorily proved – Division Bench of High Court erred in reversing that finding – Evidence Act, 1872 – s.68 – Will – Appeal.

Evidence Act, 1872: s. 68 – Held: Where the document sought to be proved is required to be attested, the same cannot be let in evidence unless atleast one of the attesting witnesses has been called for proving the attestations, if any such attesting witness is alive and capable of giving evidence – Deeds and documents – Witness – Attesting witness – Succession Act, 1925 – s.63.

Appeal: Letters Patent appeal – Power of Letters Patent Bench hearing a second appeal to interfere with the order passed by single judge – Held: Letters Patent Bench will be slow in interfering with the concurrent finding of fact recorded by trial court and single judge in the first appeal – However,

A *court may interfere where the finding is demonstrably erroneous, irrational or perverse.*

Respondent no.1 filed a suit for partition of the joint family property. Defendant no.1, the father of the plaintiff was the 'karta' of the joint family. He died during the B pendency of the suit. The appellant set up a Will purportedly executed by defendant no.1 whereby he devolved his share upon the appellant. The suit was decreed by the trial court. The trial court also found that the Will set up by the appellant was duly proved and that C in terms thereof the property left by defendant no.1 would devolve upon the appellant.

The Single Judge of the High Court affirmed the findings of the trial court. Respondent no.1 filed Letters D Patent Appeal. The Division Bench of the High Court partly allowed the appeal and held that the execution of the Will was not proved in as much as the solitary witness DW-2 did not prove that the testator had signed the Will in the presence of the second witness and that the E second witness had signed the Will as the attesting witness. The instant appeal was filed challenging the order of High Court.

Allowing the appeal, the Court

F **HELD: 1. In a Letters Patent Appeal arising out of an order passed by a Single Judge, the Division Bench of the High Court hearing a civil second appeal would not re-appreciate the evidence to record a finding of fact. That is because the Single Judge cannot himself do so in the G light of the limitations placed upon the court by Section 100, C.P.C. That may not, however, be true when the Single Judge passes an order in a first appeal filed before him. Even when the finding of fact recorded by the Single Judge may affirm the finding recorded by the trial court,**

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there is no express bar to the examination of any such finding by the Division Bench of the High Court hearing the Letters Patent Appeal. Even in the absence of any legal bar to the examination of a finding of fact, a Letters Patent Bench will be slow in interfering with the concurrent finding of fact recorded by the trial court and the Single Judge in the first appeal. The court may interfere where the finding is demonstrably erroneous in that it is either irrational a perverse being without any evidence. The jurisdiction exercised by the court being discretionary ought to be exercised along judicial lines. [Para 9] [220-F-H; 221-A]

Smt. Asha Devi v. Dukhi Sao and Anr. **1974 (2) SCC 492;** *B. Venkatamuni v. C.J. Ayodhya Ram Singh and Ors.* **(2006) 13 SCC 449 - relied on.**

2.1. The trial court and the Single Judge of the High Court had, in the instant case, concurrently held that the execution of the Will was satisfactorily proved. The Letters Patent Bench had, however, reversed that finding primarily on the ground that the execution of the Will was not proved in terms of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act. It is evident that in cases where the document sought to be proved is required by law to be attested, the same cannot be let in evidence unless at least one of the attesting witnesses has been called for the purpose of proving the attestation, if any such attesting witness is alive and capable of giving evidence and is subject to the process of the Court. Section 63 of the Indian Succession Act deals with execution of unprivileged Wills and, inter alia, provides that every testator except those mentioned in the said provision shall execute his will according the rules stipulated therein. From a conjoint reading of the two provision, it is evident that a Will is required to be attested

A **by two or more witnesses each of whom has seen the testator signing or affixing his mark on the Will or has been other person signing the Will in the presence and by the testator or has received from the testator a personal acknowledgment of the signature or mark or his B signature or the signature of such other person and that each of the witnesses has signed the Will in the presence of the testator. Section 68 of the Evidence Act is against the use of a Will in evidence unless one attesting witness has been examined to prove the execution. A careful C analysis of the provisions of Section 63 would show that proof of execution of a Will would require four aspects to be proved; (1) The testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of D the testator. (2) The signature or mark of the testator or the signature of the persons signing for him is so placed as to appear that the same was intended thereby to give effect to the writing as a Will (3) The Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some E other person signing the Will in the presence and by the direction of the testator of has received from testator a personal acknowledgement of the signature of mark or the signature of each other person. (4) Each of the witnesses has signed the Will in the presence of the F Testator. [Paras 10-13] [221-C-G-H; 222-A-G-H; 223-A-G]**

Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh & Ors. **1994 (5) SCC 135;** *Seth Chand (since dead) now by L.Rs. v. Smt. Kamla Kunwar and Ors.* **1976 (4)** G **SCC 554;** *Janki Narayan Bhoir v. Narayan Namdeo Kadam* **2003 (2) SCC 91;** *Gurdev Kaur and Ors. v. Kaki and Ors.* **2007 (1) SCC 546;** *Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Ors.* **2009 (4) SCC 780;** *Rur Singh (dead) Through LRs. and Ors. v. Bachan Kaur* **2009**

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(11) SCC 1; ***Anil Kak v. Kumari Sharada Raje and Ors.*** **2008 (7) SCC 695, relied on.** A

2.2. The requirements stipulated in Section 63 were satisfied in the instant case by the appellant-propounder of the Will. It is not disputed that one of the witnesses DW-2 was summoned and examined as witness. The deposition of DW-2 clearly proved that the testator had executed a Will in favour of the appellant and had signed and affixed his signature in his presence. The trial court and the single Judge of the High Court had concurrently held that the Will had been signed by the testator in the presence of the attesting witnesses. The signature of the testator appeared at the right hand bottom part of the Will. The placement of the signature on the document was, therefore, appropriate and clearly suggestive of the fact that the document was intended to be given effect to as a Will. DW-2 had in clear and unambiguous stated that not only he but the other attesting witness to the Will was also present at the time the testator affixed his signature on the Will. The said statement was not questioned in cross-examination nor was any suggestion made to the effect that while DW-2 was present, the second attesting witnesses was not so present at the time the Will was signed by the testator. As a matter of fact, the witness made a categoric statement that the second witness met the testator in the court and was taken along and that not only at the time of signing of the Will by the testator, but even before the Registrar, the second witness was present in person. A careful and proper reading of the deposition of DW-2 showed that the two attesting witnesses had seen the testator signing or affixing his mark on the Will and the attesting witnesses also signed the Will in the presence of the testator. Thus, all the four requirements prescribed in Section 63 of the Indian Succession Act stood firmly established. In that view of the matter, the Division Bench of the High Court fell in

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A error in holding that the requirement of Section 63 of the Indian Succession Act was not satisfied in the instant case. In the matter of proof of documents as in the case of the proof of Wills, it is idle to expect proof with mathematical certainty. The test to be applied always is B the test of satisfaction of a prudent mind in such matters. Applying that test to the case at hand, there is no doubt that the Will in question was a duly registered document and was not surrounded by any suspicious circumstances of any kind and in proved to have been C duly and properly executed. [Paras 13-17] [223-B; 224-E-F; 225-A-D; 225-E-H]

H. Venkatachala Iyengar v. B.N. Thimmajamma AIR 1959 SC 443 relied on.

D Case Law Reference:

1974 (2) SCC 492	relied on	Para 9
(2006) 13 SCC 449	relied on	Para 9
1994 (5) SCC 135	relied on	Para 14
1976 (4) SCC 554	relied on	Para 14
2003 (2) SCC 91	relied on	Para 14
2007 (1) SCC 546	relied on	Para 14
2009 (4) SCC 780	relied on	Para 14
2009 (11) SCC 1	relied on	Para 14
2008 (7) SCC 695	relied on	Para 14
AIR 1959 SC 443	relied on	Para 17

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CIVIL APPELLATE JURISDICTION : Civil Appeal No. 6801 of 2003.

H From the Judgment & Order dated 4.3.2002 of the High

Court of Madhya Pradesh, Jabalpur, Bench at Gwalior Letters Patent Appeal No. 75 of 1994.

S.K. Dubey, Niraj Sharma, Vikrant Singh Bais, Sumit Kumar Sharma for the Appellant.

Sushil Kumar Jain, Puneet Jain, Pratibha Jain, Shankar Divate for the Respondents.

The Judgment of the Court was delivered by

T.S. THAKUR, J. 1. This appeal by special leave arises out of a judgment and order dated 4th March, 2002 passed by a Division Bench of the High Court of Madhya Pradesh at Jabalpur, Gwalior Bench, whereby Letters Patent Appeal No.75/1994 has been allowed in part and the judgment and decree passed by the First Appellate Court modified.

2. The facts giving rise to the filing of a suit for partition and separate possession by the plaintiff-respondent no.1 in this appeal have been set out in the judgment under appeal hence do not bear repetition. All that need be stated is that respondent no.1 the plaintiff in the suit claimed partition of what was described by him as joint family property with his father Shri Panna Lal-defendant no.1 as the 'Karta' of the joint family. During the pendency of the suit Shri Panna Lal died giving rise to an additional issue as regards the devolution of the property left behind by him including his share in the joint family property. The appellant set up a Will allegedly executed by Shri Panna Lal according to which the share of the deceased testator was to devolve exclusively upon the former. The suit filed by the respondent was eventually decreed by the Trial Court holding plaintiff-respondent no.1 entitled to 1/5th share in the joint family property and the goodwill of the joint family business. The Court also found that the Will set up by the appellant herein had been duly proved and that in terms thereof the property left behind by Shri Panna Lal would devolve exclusively upon the appellant.

3. Both the parties filed appeals which were heard by a

A learned Single Judge of the High Court of Madhya Pradesh who formulated the following two questions for determination and finally dismissed the appeal by his orders dated 26.9.1994:

B (1) Whether the plaintiff took a sum of Rs.21,000/- out of share in the capital of the defendants as alleged or it was taken by him as his share in the capital, house and other properties as claimed by the defendants?

C (2) Whether the plaintiff has got any share in the joint property if any in dispute and if so to what extent?

4. In so far as question no.1 is concerned, the learned Single Judge affirmed the finding recorded by the Trial Court D that the plaintiff had taken his share in the capital and interest etc. and not his share in the house and the other properties. The finding of the Trial Court that the plaintiff had a share in the goodwill of the family business was also affirmed.

5. Even in regard to the second question the findings E recorded by the Trial Court was affirmed. The High Court held that the service of a notice by the plaintiff about his intention to separate had brought about a division in joint family shares and that the plaintiff was entitled to have his share in the property in the joint family ascertained and partitioned. The High Court F noted that while the plaintiff and his brothers had 1/5th share each, the plaintiff's claim for a larger share on account of the death of his father and devolution of the latter's estate upon all the brothers by succession had to be seen in the light of the Will propounded by defendant-appellant Gopal Swaroop. The G High Court then proceeded to discuss the evidence relating to the execution of the Will by Shri Panna Lal including the deposition of DW-2 Shri Vilas Tikhe in support thereof and recorded a finding that the execution of the Will had been satisfactorily established. The High Court also rejected the H contention that there were any suspicious circumstances

surrounding the Will which the High Court noted was a registered document. The High Court in conclusion held that the plaintiff had 1/5th share in the house in question and the goodwill of the business and affirmed the finding of the Trial Court to the effect that the plaintiff had 1/8th share in the jewellery items and the amount representing the share of Saraswatibai held in deposit in the firm.

6. Dissatisfied with the view taken by the learned Single Judge respondent no.1 preferred Letters Patent Appeal No.75/1994 before a Division Bench of the High Court which was allowed in part and the judgment and decree passed by the Courts below modified. The Division Bench held that the execution of the Will by Shri Panna Lal had not been proved in as much as the solitary witness DW-2 Vilas Tikhe did not prove that Shri Panna Lal had signed the Will in the presence of Manoj Kumar and that Manoj Kumar had also singed the Will as a witness. The High Court accordingly held that while the appellant-plaintiff and defendants 2 and 3 will get 1/4th plus 1/32nd i.e. 9/32nd share each in the joint family property the rest will go to the other legal heirs of Ghanshyamdas and Shyam Sunder and daughters of the deceased Panna Lal. The High Court also directed the partition of immovable properties with 9/32nd share each to the branch of Ghanshyamdas and Shyam Sunder and three sisters of the plaintiff-appellant herein.

7. We have heard learned counsel for the parties at considerable length. The only question that was debated before us is whether execution of the Will propounded by the defendant-appellant before the Trial Court had been satisfactorily proved. On behalf of the appellant it was contended that the Division Bench was in error in reversing the concurrent findings of fact recorded by the Trial Court and the Single Judge to the effect that the execution of the Will stood satisfactorily proved. Reliance was also placed by learned counsel for the appellant upon the testimony of DW-2 Vilas Tikhe one of the attesting witnesses to the Will to contend that

A the deposition of the said witness had sufficiently proved the execution of the Will in question in compliance with the provisions of Section 63 of the Indian Succession Act. It was argued that the deposition of DW-2 Vilas Tikhe had not been properly appreciated by the High Court in the Letters Patent B Appeal and a hyper technical view taken while holding that the said deposition was insufficient to prove the execution of the Will in accordance with law.

8. Mr. Sushil Kumar Jain, counsel appearing for the respondent contended that proof of a document purporting to C be a Will had to satisfy the requirements of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act which requirements had not, according to the learned counsel been satisfied in the instant case. It was contended by the learned counsel that the mere fact that the Will was a D registered document did not mean that proof regarding its execution in accordance with the provisions of law could be dispensed with.

9. In a Letters Patent Appeal arising out of an order E passed by a Single Judge hearing a civil second appeal the Division Bench of the High Court would not re-appreciate the evidence to record a finding of fact. That is because the Single Judge cannot himself do so in the light of the limitations placed upon the Court by Section 100 of the C.P.C. That may not, F however, be true when the Single Judge passes an order in a First Appeal filed before him. Even when the finding of fact recorded by the Single Judge may affirm the finding recorded by the Trial Court, there is no express bar to the examination of any such finding by the Division Bench of the High Court G hearing the Letters Patent Appeal. Having said so, we must hasten to add that even in the absence of any legal bar to the examination of a finding of fact, a Letters Patent Bench will be slow in interfering with the concurrent finding of fact recorded by the Trial Court and the Single Judge in the first appeal. The Court may interfere where the finding is demonstrably

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erroneous in that it is either irrational or *perverse* being without any evidence. The jurisdiction exercised by the Court being discretionary ought to be exercised along judicial lines. (See *Smt. Asha Devi v. Dukhi Sao and Anr.* 1974 (2) SCC 492 and *B. Venkatamuni v. C.J. Ayodhya Ram Singh and Ors.* (2006) 13 SCC 449.

10. The Trial Court and the Single Judge of the High Court had, in the present case, concurrently held the execution of the Will to have been satisfactorily proved. The Letters Patent Bench has, however, reversed that finding primarily on the ground that the execution of the Will is not proved in terms of Section 68 of the Evidence Act read with Section 63 of the Indian Succession Act. Section 68 of the Evidence Act reads 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 not 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 specially denied."

11. It is evident that in cases where the document sought to be proved is required by law to be attested, the same cannot let be in evidence unless at least one of the attesting witnesses has been called for the purpose of proving the attestation, if any such attesting witness is alive and capable of giving evidence and is subject to the process of the Court. Section 63 of the Indian Succession Act deals with execution of unprivileged

A Wills and, *inter alia*, provides that every Testator except those mentioned in the said provision shall execute his Will according to the rules stipulated therein. It reads:

> "*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:—
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> (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.
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> (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 acknowledgment of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary."

12. From a conjoint reading of the two provisions extracted above it is evident that a Will is required to be attested by two or more witnesses each of whom has seen the Testator signing or affixing his mark on the Will or has seen some other person signing the Will in the presence and by the direction of the Testator or has received from the Testator a personal acknowledgment of the signature or mark or his signature or the signature of such other person and that each of the

witnesses has signed the Will in the presence of the Testator. Section 68 of the Evidence Act is against the use of a Will in evidence unless one attesting witness has been examined to prove the execution.

13. The question, however, is whether the Will propounded by the appellant and purporting to have been attested by two witnesses, namely, Manoj Kumar and Vilas Tikhe has been validly proved. It is not disputed that one of the said witnesses namely, Vilas Tikhe has been summoned and examined as a witness. What is to be seen is whether the examination of the said witness satisfies the requirements of Section 63 of the Succession Act (supra). A careful analysis of the provisions of Section 63 would show that proof of execution of a Will would require the following aspects to be proved:

(1) That the Testator has signed or affixed his mark to the Will or the Will has been signed by some other person in the presence and under the direction of the Testator.

(2) The signature or mark of the Testator or the signature of the persons signing for him is so placed has to appear that the same was intended thereby to give effect to the writing as a Will.

(3) That the Will has been attested by two or more witnesses each one of whom has signed or affixed his mark to the Will or has been seen by some other person signing the Will in the presence and by the direction of the Testator or has received from Testator a personal acknowledgement of the signature or mark or the signature of each other person.

(4) That each of the witnesses has singed the Will in the presence of the Testator.

14. The decisions of this Court in *Bhagwan Kaur W/o Bachan Singh v. Kartar Kaur W/o Bachan Singh & Ors.* 1994 (5) SCC 135, *Seth Beni Chand (since dead) now by L.Rs. v.*

A *Smt. Kamla Kunwar and Ors.* 1976 (4) SCC 554, *Janki Narayan Bhoir v. Narayan Namdeo Kadam* 2003 (2) SCC 91, *Gurdev Kaur and Ors. v. Kaki and Ors.* 2007 (1) SCC 546, *Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and Ors.,* 2009 (4) SCC 780, *Rur Singh (dead) Through* B *LRs. and Ors. v. Bachan Kaur,* 2009 (11) SCC 1 and *Anil Kak v. Kumari Sharada Raje and Ors.* 2008 (7) SCC 695 recognize and reiterate the requirements enumerated above to be essential for the proof of execution of an unprivileged Will like the one at hand. It is, therefore, not necessary to burden C this judgment by a detailed reference of the facts relevant to each one of these pronouncements and the precise contention that was urged and determined in those cases. All that needs to be examined is whether the requirements stipulated in Section 63 and distinctively enumerated above have been D satisfied in the instant case by the appellant propounder of the Will. Our answer to that question is in the affirmative. The deposition of Shri Vilas Tikhe clearly proves that Panna Lal had executed a Will in favour of the appellant, Gopal Swaroop and had signed and affixed his signature in his presence. The Trial Court and the High Court have concurrently held that the Will E had been signed by the Testator in the presence of the attesting witnesses. First and the foremost requirement prescribed under Section 63 of the Indian Succession Act, 1925 is, therefore, clearly satisfied.

F 15. Coming then to the second requirement namely, the placement of the signature of the Testator on the Will, we find that the signature of the Testator appear at the right hand bottom part of the Will. The placement of the signature on the document is, therefore, appropriate and clearly suggestive of the fact that G the document was intended to be given effect to as a Will. We must also mention that no argument was advanced by learned counsel for the respondent on the requirement of an appropriate placement of the signature of the Testator on the document.

H 16. 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. The deposition of Shri Vilas Tikhe in our opinion satisfies this requirement also in as much as the witness has in clear and unambiguous terms stated that not only he but Shri Manoj, the other attesting witness to the Will was also present at the time the Testator affixed his signature on the Will. It is noteworthy that, the above statement has not been questioned in cross-examination nor any suggestion made to the effect that while Shri Vilas Tikhe, the witness may have been present, Manoj was not so present at the time the Will was signed by the Testator. As a matter of fact, the witness has made a categoric statement that Manoj met the Testator in the Court and was taken along and that not only at the time of signing of the Will by the Testator, but even before the Registrar, Manoj Kumar was present in person. The witness has while answering a question in cross-examination specifically stated that Manoj was present even at the time the witness signed the Will in question.

17. On a careful and proper reading of the deposition of Shri Vilas Tikhe DW-2, we are satisfied that the requirement of attestation of the Will by two witnesses each of whom has seen the Testator signing or affixing his mark has been satisfied in the present case. So also the fourth requirement that the attesting witnesses sign the Will in the presence of the Testator stands firmly established. In that view of the matter, the Division Bench of the High Court fell in error in holding that the requirement of Section 63 of the Indian Succession Act had not been satisfied in the instant case. As was observed by this Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma* AIR 1959 SC 443, in the matter of proof of documents as in the case of the proof of Wills, it is idle to expect proof with mathematical certainty. The test to be applied always is the test of satisfaction of a prudent mind in such matters. Applying that test to the case at hand we have no manner of doubt that the

A Will executed by Shri Panna Lal which is a duly registered document is not surrounded by any suspicious circumstances of any kind and is proved to have been duly and properly executed.

B 18. In the result, this appeal succeeds and is hereby allowed. The impugned judgment and order passed by the Division Bench of the High Court of Madhya Pradesh at Jabalpur, Gwalior Bench, is set aside and the judgment and order passed by the learned Single Judge of that Court is restored. The parties shall bear their own costs.

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D.G. Appeals allowed.