Lalitaben Jayantilal Popat vs Pragnaben Jamnadas Kataria & Ors on 19 December, 2008

Equivalent citations: AIR 2009 SUPREME COURT 1389, 2008 (15) SCC 365, 2009 AIR SCW 828, 2009 (3) AIR JHAR R 510, (2009) 1 ALLMR 985 (SC), (2009) 1 CLR 450 (SC), (2009) 1 MARRILJ 381, (2009) 2 CAL HN 41, 2009 (1) ALL MR 985, 2009 (1) CLR 450, 2009 (1) SCALE 328, (2009) 3 MAD LW 925, 2009 (1) MARR LJ 381, (2009) 1 HINDULR 1, (2009) 1 CIVILCOURTC 324, (2009) 1 ORISSA LR 170, (2009) 1 SCALE 328, (2009) 2 CIVLJ 886, (2009) 2 GUJ LR 1700, (2009) 107 REVDEC 425, (2009) 2 ANDHLD 19, (2009) 1 RECCIVR 715, (2009) 1 ICC 515, (2009) 1 WLC(SC)CVL 638, (2009) 1 UC 441, (2009) 76 ALL LR 516, (2009) 2 ALL RENTCAS 428, (2009) 2 ALL WC 1289

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Bench: Cyriac Joseph, S.B. Sinha

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 7434 OF 2008
(Arising out of SLP (C) No.17161 of 2006)

Lalitaben Jayantilal Popat ... Appellant

Versus

Pragnaben Jamnadas Kataria & Ors. ... Respondents

JUDGMENT

S.B. Sinha, J.

1. Leave granted.

2. This appeal is directed against the judgment and order dated 26.6.2006 passed in FA No.110 of 2000 and FA No.124 of 2000 by the High Court of Gujarat at Ahmedabad dismissing appeals filed

against a common judgment and order dated 23.2.2000 passed by the learned Civil Judge (SD) Rajkot allowing the Civil Miscellaneous Application No.25 of 1996 and dismissing the Civil Miscellaneous Application 26 of 2006.

3. One Purshottam Manji Thakrar was the owner of the property. He purported to have executed a Will on or about 15.4.1978 in favour of the respondents. He left behind his two sons (Jamnadas and Jayantilal) and two daughters (Kasturben and Lalita - appellants herein).

Purshottam Manji Thakrar died on 30.11.1984. His wife had predeceased him. Jamnadas died leaving behind his wife, Jasumati (Respondent No.3) and two daughters, Pragna and Bina (Respondent Nos.1 and 2 respectively). Jayantilal died issueless. He was a divorcee. He purported to have executed two Wills; one on 31.1.1995 propounded by the appellant and the other on 18.6.1995 propounded by respondents. Kasturben died on 19.12.1995.

4. Respondents filed an application for grant of probate of the Will dated 18.6.1995. On the other hand, appellant filed an application for grant of probate in respect of the Will dated 31.1.1995.

The learned District Judge granted probate in respect of the Will dated 18.6.1995 propounded by the respondents and dismissed the application for grant of probate in respect of the Will dated 31.1.1995 executed by Jayantilal.

5. Two appeals were preferred thereagainst. By reason of the impugned judgment, the High Court dismissed the said appeals.

Although all the three aforesaid Wills, i.e., one dated 15.4.1978 executed by Purshottam Manji Thakrar in favour of the respondents, as also two Wills executed by Jayantilal dated 31.1.1995 and 18.6.1995 were in question, this Court by an order dated 2.11.2006, issued a limited notice directing :

> "In view of the decision of this Court in Janki Narayan Bhoir v. Narayan Namdeo Kadam, (2003 (2) SCC 91), issue notice only on the question as to whether the Will dated 18.6.1995 was legally proved."

6. Mr. Jay Savla, learned counsel appearing on behalf of appellant, would submit that a Will, having regard to the provisions contained in Section 63(c) of the Indian Succession Act, is required to be attested by two or more witnesses and furthermore, although in terms of Section 68 of the Indian Evidence Act it is permissible to examine one witness, who must testify to prove valid execution and attestation of the Will, i.e., both the witnesses have signed in the presence of the testator or the testator has either signed in presence of one or acknowledged his signature before the other. It was contended that as in this case, the said legal requirements had not been complied with, the Will in question cannot be said to have been proved. Strong reliance in this behalf has been placed on Janki Narayan Bhoir (supra) and Benga Behera & Anr. v. Braja Kishore Nanda & Ors. [2007 (7) SCALE 228].

It was urged that a large number of suspicious circumstances surrounding the execution of the Will by the testator having not been explained by respondent, the Will cannot be said to have been legally proved. These, according to the learned counsel, are:

> "Respondent Nos.1 and 2 had filed suit for partition claiming 1/3rd share on the basis of the Will of grand father Shri Parshottam Kataria dated 15th April, 1978 and in the alternative under succession claiming 1/9th share against deceased Jayantilal Kataria being Suit No.119/1989. Testator had opposed the suit amongst other grounds and in the written statement of the testator, it was averred that Parshottam Kataria had in fact made last Will dated 19th November, 1983. In the reply dated 10th January, 2006, to Public Notice, no mention of Will.
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> In the said proceedings, on 1st January, 1996, in the application for deletion of deceased, Respondents categorically averred that such Jayantilal Kataria had not executed any Will. Further an application dated 4th March, 1996 was filed for impleadment in the proceeding filed by deceased Testator against the tenant for eviction, it was reiterated that Jayantilal Kataria had not left any Will.
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> In the examination-in-chief, in the Petition for probate under Section 276 filed on 8th July, 1996, no explanation about the statement made in the earlier proceedings to the effect that Testator had died intestate.
>
> By the alleged Will, the entire property has been bequeathed to Respondents who are not Class-I legal heirs to the exclusion of Petitioner, Smt. Lalitaben Popat.
>
> Deceased is resident of Rajkot whereas Respondents were residing at Mumbai. Petitioner being younger sister was nursing the deceased and the relationship was very cordial."

It was contended that the District Judge as also the High Court having failed and/or neglected to deal therewith, the impugned judgment cannot be sustained. Strong reliance in this behalf has been placed on Ram Piari v. Bhagwant & Ors. [(1990) 1 SCR 813]; Smt. Guro v. Atma Singh & Ors. [(1992) 2 SCR 30]; Rambai Padmakar Patil (dead) v. Rukminibai Vishnu Vekhande & Ors. [(2003) 8 SCC 537]; B. Venkatamjni v. Ayodhya Ram Singh & Ors. [2006 (11) SCALE 148].

7. Mr. Adarsh Priyadarshi, learned counsel appearing on behalf of respondent, on the other hand, would contend:

> (a) Law does not require that a Will must be proved by two attesting witnesses.
>
> (b) In ascertaining the genuineness of the Will, the only requirement being that the Court must satisfy its conscience and as in this case all the courts have arrived at a concurrent finding of fact, this Court should not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

(c) Section 63(c) of the Indian Succession Act does not envisage direct proof of execution of the Will.

8. The law in regard to proof of a valid Will is now well settled.

It has to be proved not only by proving the signature of the executor but it should be found to be free from any suspicious circumstances. Section 63(c) of the Indian Succession Act reads as under :

"Section 63.--Execution of unprivileged Wills

--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules :-

(a) and (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 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."

9. Indisputably, the said provision is mandatory in nature. A Will is required to be attested by two or more witnesses.

Section 68 of the Evidence Act provides that the propounder must prove execution and attestation of the Will by examining at least one of the attesting witnesses.

What is meant by the word `attestation' is defined in Section 3 of the Transfer of Property Act which reads as under :

Section 3.--Interpretation-clause--In this Act, unless there is something repugnant in the subject or context,-

XXX XXX XXX "attested", in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of

attestation shall be necessary."

10. Indisputably, the Will in question was marked as Exhibit 44. It bears the signature of one Mavaji Viraji in Gujrati language and one Ranjit Singh in English. Respondents, in order to prove execution of the Will, examined Ranjit Singh alone. He was working in the agricultural Department of the State at Gondal in the District of Rajkot. On the date of execution of the Will, he was at his place of work. The testator was a resident of Jetpur. The Will admittedly was executed at Jetpur. Attestation of the Will admittedly had taken place only at Jetpur.

Ranjit Singh, in his deposition stated :

> "I know Janyatilal Purshottam Kataria. I also know Purshottam Manaji Kataria and Jamandas Purshottam Kataria. Jamnadas and Jayantilal are sons of Purshottam Majaji. I have relation with whole family for the last many years. I used to go to ask for the health, if any member is sick. The said Will mark 42/1 is the original Will executed by Jayantilal Purshottam Kataria. Original Will is executed upon the stamp paper worth of Rs.10/-. The name of Jayantilal Purshotam is upon the stamp paper as purchaser. I am shown the signature of Jayantilal Purshottam in the Will. I identify that this signature is of Jayantilal Purshottam himself. This signature is put in my presence, the signature of two witnesses are also there in the Will dated 18.5.95. From those one signature is of Mavnjibhai Virjibhai and other is of myself i.e. Ranjit Singh. I produced the said Will which is produced at exhibit-44. Jayantilal had called me at the time of Will which is of movable and immoveable properties. At the time of the execution of this Will, Jayantibhai was conscious and well position. He executed this Will by his wish, not under the pressure of any."

In cross-examination, he stated:

> "I do Government service in Gondal. I do my service in Agriculture department. I am at Gondal for the last 4 years. On 9.5.1996, I was at Gondal. It is not true that my signature is obtained in Gondal. When I went to Jetpur, I have signed in the Will at Jetpur. On that day I went Jetpur after putting my report for leave. I was called at Jetpur. First I was informed therefore I went prior to the week of the execution of Will. I was informed. I directly went to Jayantibhai. It is true that this original Will was already prepared in that Will I signed. Jayantibhai had also signed in my presence, when I signed. At that time we two and one old man was there to whom I know by face. Rest I do not know."

11. The Will was in Gujarati. It was typed one. Who scribed the Will is not known. Who typed the same is also not known. Signature of Ranjit Singh is at Serial No.2 of the column of the witnesses. Paragraph 8 of the Will makes an interesting reading which is reproduced hereinbelow :

> "At Jetpur my trusted Vaisnav friend Mavaji Virjabhai whose support I have received in my religious life, I have trusted upon him. Therefore, his signature as witness is

done and he has to see that my heirs may receive my property according to Will."

This Will or `vasihat nama' is my last Will and I have not executed any Will or `vasihat nama' except this. If it is, it is to be considered as cancelled. In this way if my life may complete, this Will be considered the last Will.

I have executed this Will or vasihat nama with my pleasure, keeping the life permanent, good health, after realize and thinking, according to the voice of my soul and I have signed before two witnesses. For that I have signed under this and both witnesses have put their own signature."

12. A perusal of the Will shows that the said Mavajibhai Virajibhai was made an executor of the Will. The Will, however, has been produced from the custody of Ranjit Singh. How he came in custody of Will has not been explained. The recital that no other Will had been executed appears to have been made as if the executor was not sure thereabout. The Will is supposed to have been executed in presence of both the witnesses. A declaration is made by the testator that he had signed before both the witnesses and only before him both the witnesses had put their signatures.

Ranjit Singh does not say so. He was alone with the testator. According to him, the testator had already put his signature. Jayantilal, the testator of the said Will had signed in his presence. It is, thus, evident that at that point of time Mavajibhai Virajibhai had not put his signature on the Will as an attesting witness. Still his name appears at Serial No.1. An old man only according to the said witness was present when the testator executed the Will. Who was that old man is not known. Certainly he is not Mavajibhai Virajibhai.

It has, therefore, not been proved that both the attesting witnesses either attested the Will in presence of each other or the testator had acknowledged his signature in presence of the other witnesses.

13. The learned counsel, however, has drawn our attention to the statement made in the counter affidavit that the said Mavajibhai Virajibhai had expired on 2.5.1996. It was, however, very fairly stated that the said fact had not been brought on record before the courts below. We, therefore, are not in a position to accept the said contention raised before us for the first time.

14. Mr. Priyadarshi has drawn our attention to a decision of this Court in Joyce Primrose Prestor (Mrs) (Nee Vas) v. Vera Marie Vas (Ms) & Ors. [(1996) 9 SCC 324]. In that case, the Will was a `Holograph Will'. The writings of the testatrix was proved.

The question which arose for consideration therein before this Court was as to whether the Will was surrounded by suspicious circumstances.

This Court noticed a passage from the `Laws of Will in India and Pakistan, by Mantha Ramamurthi, at pages 81-82, which reads as under :

> "If a will appears on the face of it to have been duly executed and attested in accordance with the requirements of the Act, the maxim "omni a proe sumuntur rite esse acta," applies, unless it is clearly proved by the attesting witnesses that the Will is not in fact duly executed. The Court of Probate has long been accustomed to give great weight to the presumption of due execution arising from the regularity ex facie of the testamentary paper produced where no suspicion of fraud has occurred.
>
> The maxim "omni a Proe sumuntur rite esse acta"

is an expression in a short form, of a reasonable probability, and of the propriety in point of law on acting on such probability. The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established. In Blake v. Knight Sir Herbert Jenner Fusty observed Is it absolutely necessary to have positive affirmative testimony by the subscribed witnesses that the Will was actually signed in their presence, or actually acknowledged in their presence? Is it absolutely necessary, under all circumstances that the witnesses should concur in stating that these acts took place? Or is it absolutely necessary, where the witnesses will not swear positively, that the Court should pronounce against the validity of the will. I think these are not absolute requisites to the validity of the will. Consequently, "where the evidence of attesting witnesses is vague or doubtful or even conflicting the Court may take into consideration the circumstances of the case and judge from them collectively whether the requirements of the Statute were complied with; in other words the Court may, on consideration of other evidence or of the whole circumstances of the case, come to the conclusion that their recollection is at fault, that their evidence is of a suspicious character, or that they were willfully misleading the Court, and accordingly disregard their testimony and pronounce in favour of the will."

(Emphasis supplied) This Court held that a greater degree of presumption arises in the case of `holograph Wills' The said finding was arrived at as the writing of the Will and signature of the testator were admitted; there was also due and proper attestation in accordance with the relevant statutory provisions. This Court held that no suspicious circumstances appeared on the face of the instrument and it was found to be moderate and rational.

Whether a Will is surrounded by suspicious circumstances or not is essentially a question of fact.

We have noticed hereinbefore that there was a large number of suspicious circumstances in the instant case. We have also pointed out that suspicious circumstances appear on the face of the Will.

Inferences of suspicious circumstances must be drawn having regard to the evidence of Ranjit Singh.

Even the statutory requirements for proof of the Will have not been complied with. It is a trite law that execution of a Will must be held to have been proved not only when the statutory requirements for proving the Will are satisfied but the Will is also found to be ordinarily free from suspicious circumstances. When such evidences are brought on record, the Court may take aid of the presumptive evidences also.

15. Reliance has also been placed by Mr. Priyadarshi on a decision of this Court in Ramabai Padmakar Patil (Dead) through LRs. & Ors. v. Rukminibai Vishnu Vekhande & Ors. [(2003) 8 SCC 537]. In that case itself, this Court held :

> "Before we advert to the submissions made by the learned counsel for the parties, it will be useful to briefly notice the legal position regarding acceptance and proof of a Will. Section 63 of the Indian Succession Act deals with execution of unprivileged Wills. It lays down that 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. It further lays down 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 or has seen some other person sign the Will, in the presence and on the direction of the testator and each of the witnesses shall sign the Will in the presence of the testator. Section 68 of the Evidence Act mandates examination of one attesting witness in proof of a Will, whether registered or not."

It was furthermore held :

> "In P.P.K. Gopalan Nambiar v. P.P.K. Balakrishnan Nambiar it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind."

The said decision, therefore, is of no assistance to us.

16. The question which, thus, arises for consideration is as to whether execution of the Will has been proved. In our opinion, it has not been.

The requirements for proving a Will have been laid down in a large number of decisions. We would, however, refer to only a few of them.

In Janki Narayan Bhoir (supra), while dealing with the question elaborately, this Court held :

> "8. To say will has been duly executed the requirement mentioned in Clauses (a), (b) and (c) of Section 63 of the Succession Act are to be complied with i.e., (a) the testator has to sign or affix his mark to the will, or it has got to be signed by some other person in his presence and by his direction; (b) that the signature or mark of the testator, or the signature of the person signing at his direction, has to appear at a place form which it could appear that by that mark or signature the document is intended to have effect as a will; (c) the most important point with which we are presently concerned in this appeal, is that the will has to be attested by two or more witnesses and each of these witnesses must have seen the testator sign or affix his mark to the Will, or must have seen some other person sign the Will in the presence and by the direction of the testator, or must have received from the testator a

personal acknowledgement of signature or mark, or of the signature of such other person, and each of the witnesses has to sign the Will in the presence of the testator.

9. It is thus clear that one of the requirements of due execution of will is its attestation by two or more witnesses which is mandatory.

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 does 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 attestation 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."

(Emphasis supplied) Following the said decision, as also the other decisions in Benga Behera (Supra), this Court held:

> "21. It was also not necessary for the appellants to confront him with his signature in the Xeroxed copy of the Will, inasmuch as the same had not appeared in the certified copy. Execution of a Will must conform to the requirement of Section 63 of the Succession Act, in terms whereof a Will must be attested by two or more witnesses. Execution of a Will, therefore, can only be proved in terms of clause (c) of Section 63 when at least one of the two witnesses proves the attestation. A Will is required to be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will. Section 68 of the Evidence Act provides for the requirements for proof of execution of the Will. In terms of said provision, at least one attesting witness has to be examined to prove execution of a Will."

Yet again, recently in Anil Kak v. Kumari Sharada Raje & Ors. [(2008) 6 SCALE 597], it was opined :

> "40. Whereas execution of any other document can be proved by proving the writings of the document or the contents of it as also the execution thereof, in the event there exists suspicious circumstances the party seeking to obtain probate and/ or letters of administration with a copy of the Will annexed must also adduce evidence to the satisfaction of the court before it can be accepted as genuine.
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> 41. As an order granting probate is a judgment in rem, the court must also satisfy its conscience before it passes an order.
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> It may be true that deprivation of a due share by the natural heir by itself may not be held to be a suspicious circumstance but it is one of the factors which is taken into consideration by the courts before granting probate of a Will.
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> Unlike other documents, even animus attestandi is a necessary ingredient for proving the attestation."

In Babu Singh & Ors. v. Ram Sahai @ Ram Singh [2008 (7) SCALE 743], this Court, inter alia, referring to Apoline D'Souza v. John D'Souza [(2007) 7 SCC 225] and B. Venkatamuni v. C.J. Ayodhya Ram Singh & Ors. [(2006) 13 SCC 249] held that the question as to whether due attestation has been established or not will depend upon the fact situation in each case.

17. For the reasons aforementioned, the impugned judgment cannot be sustained. It is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of this case, there shall be no order as to costs.

.....J. [S.B. Sinha] .....J. [Cyriac Joseph] New Delhi;

December 19, 2008