

Division 20

Single Bench

IN THE HIGH COURT OF JUDICATURE AT BILASPUR (C.G.)FIRST APPEAL NO. 4 /2011APPELLANT

: ADAM ALI AGED ABOUT 56 YRS

DEFENDENT NO.1

S/O IBRAHIM BHAI BOHRA

R/O SAKIN JUNI LINE, BILASPUR
CHHATTISGARH.VERSUSRESPONDENTSPLANTIFF

1. ALTAF HUSSAIN AGED 70 YEARS

S/O MAHBOOB ALI

R/O SAKIN NAWAPARA, RAJIM

TAH-ABHANPUR,

DISTT:RAIPUR(C.G.)

RESPONDENTDEFENDENT NO.2

2. MOHSIN ALI AGED 50 YEARS

S/O RAJABBHAI DAWAWALA

R/O SAKIN JUNI LINE BILASPUR

RESPONDENTDEFENDENT NO.3

3. MOOLCHAND KHANDLWAL

AGED 70 YEARS

S/O CHIRANJEEV LAL

KHANDLWAL

R/O SAKIN GOLE BAZAR

NEELKAMAL HOTEL,

GOLE BAZAR, BILASPUR (C.G.)

RESPONDENTDEFENDENT NO.4

4. MOHD. RAFEEQ BUKHARI AGED

30 YEARS,

S/O GAFFAR BHAI BUKHARI

R/O BUKHARI ENTERPRISES

LINK ROAD, BILASPUR (C.G.)

RESPONDENTDEFENDENT NO.5

5. MUNICIPAL CORPORATION

BILASPUR

THROUGH : COMMISSIONER

BILASPUR (C.G.)

FIRST APPEAL UNDER SECTION 96 OF THE
CIVIL PROCEDURE CODE.

2A. Smt. Farida Vanak, aged 55 years

D/o Late Shri Mohsin Ali

2B. Munira Vanak D/o Late Shri Mohsin Ali

aged 30 years

2C. Must Nazeer Vanak aged 35 years

S/o Late Shri Mohsin ali .

All R/o Medical Complex , Telipara

Bilaspur , Distt. Bilaspur (C.G.)

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Smt. Farida Vanak
D/o Late Shri Mohsin Ali
4/5/11

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Munira Vanak
D/o Late Shri Mohsin Ali
4/5/11

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AGAINST THE JUDGEMENT AND DECREE
PASSED BY 9TH ADDITIONAL DISTRICT JUDGE,
BILASPUR (F.T.C.) IN CIVIL SUIT NO. 20A/2004.
DECREEING THE SUIT FOR POSSESSION OF
THE SUIT HOUSE ON 15/12/2010.

HIGH COURT OF CHHATTISGARH AT BILASPUR

Coram: HON'BLE MR.T.P.SHARMA &
HON'BLE MR.I.S.UBOWEJA, JJ.

First Appeal No.4 of 2011

Appellant

Adam Ali

Versus

Respondents

Altaf Hussain and others

And

First Appeal No.49 of 2012

Appellant

Altaf Hussain

Versus

Respondents

Adam Ali and others

JUDGMENT FOR CONSIDERATION

Sd/-
T.P. Sharma
Judge

Hon'ble Mr.I.S.Uboweja, J. I Agree

Sd/-
Inder Singh Uboweja
Judge

POST FOR PRONOUNCEMENT OF THE JUDGMENT ON: 22/12/2014

Sd/-
T.P. Sharma
Judge

HIGH COURT OF CHHATTISGARH AT BILASPUR

**Coram: HON'BLE MR.T.P.SHARMA &
HON'BLE MR.I.S.UBOWEJA, JJ.**

First Appeal No.4 of 2011

Appellant

Adam Ali

Versus

Respondents

1. Altaf Hussain
2. Mohsin Ali (died)
2A. Smt.Farida Vanak
2B. Munira Vanak
2C. Must Nazeer Vanak
3. Moolchand Khandelwal
4. Mohd.Rafeeq Bukhari (deleted)
5. Municipal Corporation, Bilaspur

And

First Appeal No.49 of 2012

Appellant

Altaf Hussain

Versus

Respondents

1. Adam Ali
2. Mohsin Ali (died)
2A. Smt.Farida Vanak
2B. Munira Vanak
2C. Must Nazeer Vanak
3. Moolchand Khandellal
4. Municipal Corporation, Bilaspur

(FIRST APPEALS UNDER SECTION 96 OF THE CPC)

Mr.Shri Kumar Agrawal, Senior Advocate with Mr.Anand Kumar Gupta, counsel for appellant in F.A.No.4 of 2011 and for respondent No.1 in F.A.No.49 of 2012.

Mr.K.A.Ansari, Senior Advocate with Mr.Devesh Kumar Kela, counsel for Altaf Hussain.

Ms Pushpa Dwivedi, counsel appears on behalf of Mr.Ashutosh Singh Kachhawahha, counsel for Municipal Corporation, Bilaspur.

None present for other respondents.

JUDGMENT(Delivered on 22nd December, 2014)

The following judgment of the Court was delivered by **T.P.Sharma, J:-**

1. F.A.No.4 of 2011 filed by appellant/defendant No.1 Adam Ali and F.A.No.49 of 2012 filed by appellant/plaintiff Altaf Hussain against the judgment and decree dated 15.12.2010 passed by the 9th Additional District Judge (F.T.C.), Bilaspur, in Civil Suit No.20A/2004, whereby the trial Court has partially decreed the suit for declaration of title, permanent injunction and possession in favour of plaintiff-Altaf Hussain are being disposed of by this common judgment.
2. As per plaint allegation, parties are governed by Sunni Law. One Karam Hussain was owner of the shops, house and godown situate at Bilaspur shown in plaint having one daughter namely Nafis Akhtar, wife of plaintiff Altaf Hussain. Defendant Adam Ali was brought up by Karam Hussain and was residing with Karam Hussain since he was aged about one year, Karam Hussain solemnized his marriage and he was working under Karam Hussain as servant. By taking benefit of oldness and illness of Karam Hussain, defendant Adam Ali succeeded in getting his signature upon blank stamp paper and subsequently same was forged as will dated 25.4.84 with a view to debar the daughter of Karam Hussain from her right of inheritance. After death of Karam Hussain, his only daughter Nafis Akhtar inherited the property left by Karam Hussain and came into possession. Aadam Ali was clever person and by taking benefit of position of Nafis Akhtar, who was parda nasin, defendant Adam Ali deposited Rs.20,000-20,000/- in a fixed deposit in the name of Nafis Akhtar and also succeeded in adding his name. He has also lodged false report against Nafis Akhtar on 12.7.85 and succeeded in getting one consent letter in his favour relating to alleged will executed by her father. Substantially on the ground that defendant Aadam Ali, who was servant of deceased Karam Hussain and Karam Hussain has not executed any will deed in his favour and Nafis Akhtar has not consented the will in accordance with Muslim law, suit for declaration of title, permanent injunction, possession and mesne profit was filed by Nafis Akhtar, daughter of Karam Hussain on 27.6.87.
3. By filing written statement, defendant Adam Ali has denied the adverse allegation and has pleaded that he was brought by Karam Hussain, Karam

Hussain was treating him like son, he solemnized his marriage like son and Municipal Corporation has lease out the shops to this defendant vide registered lease deed on 17.7.86. On 25.4.84 Karam Hussain has executed will deed of the property in favour of defendant Adam Ali and daughter of Karam Hussain namely Nafis Akhtar never came into possession and she was residing with plaintiff Altaf Hussain. She herself has executed consent letter on 20.7.85 and consented for will executed by her father after receiving an amount of Rs.40,000/-, although after death of Nafis Akhtar, Altaf Hussain is entitled to inherit the property left by her wife, but the property in dispute is not owned or possessed by original plaintiff Nafis Akhtar and present defendant Adam Ali is only owner and occupier of the property. During pendency of suit, Altaf Ali was impleaded as legal representative of Nafis Akhtar.

4. Respondent-Municipal Corporation, Bilaspur has filed separate written statement.

5. After providing opportunity of hearing to the parties, the trial Court partially decreed the suit in favour of plaintiff Altaf Hussain and passed the following decree:-

"1. वादी अल्ताफ हुसैन वरद पत्र के साथ संलग्न अर्जुयूबी अ से वरिद मकान नंबर-12/1 वाड नं-4 जिसके उत्तर से हॉ 10 का मकान, दखिल से आम सहक, पूर्व से आम सहक तथा अर्जुयूबी व से वरिद मकान मय कुआ रीट नंबर-27 से प्लॉट नंबर 110/2 रकबा 1740 प्लॉट नंबर - 110/3 रकबा 1504 जुमला नंबर-2 रकबा 3244 का खामी है।

2. वादग्रस्त दुकान व गोदाम के सम्बन्ध से वादी का दावा अस्वीकार किया जाता है।

3. वादी अर्जुबीष कस्टोका-1 से वरिद वादग्रस्त संपत्ति का कब्जा प्राप्त करने का अधिकारी है।

4. प्रतिवादी क01 वादग्रस्त मकान का कब्जा निर्णय दिनांक से 2 माह के भीतर वादी को सौंपे।

5. प्रतिवादी क01 खर्च या अपने एवन्टों या चौकरी के माध्यम से वादी के खर्च से हस्तक्षेप करने से ख्याली रूप से निषेधित किया जाता है।

6. प्रकरण की परिस्थितियों को देखते हुए उभयपक्ष अपना अपना वाद व्यय वहन करेंगे।

7. अधिवक्ता शुल्क नियमानुसार गणना की जाकर उसे वाद व्यय में जोड़ा जावे।”

6. We have heard learned counsel for the parties, perused the judgment & decree impugned and record of the trial Court.

7. Mr. Shri Kumar Agrawal, learned Senior Advocate along with Mr. Anand Kumar Gupta, counsel for the appellant in F.A.No.4 of 2011 and for respondent No.1 in F.A.No.49 of 2012 has vehemently argued that property in question was owned by Karam Hussain, Nafisa Akhtar was his daughter, defendant Adam Ali was brought up by Karam Hussain, Aadam Ali was assisting Karam Hussain in his business and he was also partner in his business. On 25.4.84 in presence of witnesses Karam Hussain has executed will deed Ex.D/3 in favour of defendant Adam Ali in which condition No.3 was mentioned that Adam Ali will pay Rs.40,000/- in FDR in the name of his daughter Nafis. After death of Karam Hussain Aadam Ali has deposited Rs.40,000/- in FDR in the name of Nafis Akhtar. As per clause 190 of the Mohammedan Law, Karam Hussain was competent to dispose of his property by will to stranger to the extent of one-third, he was also competent to dispose of his entire property by will to stranger with the consent of his heirs after his death (testator).

8. Learned Senior Advocate has further argued that after death of Karam Hussain, his only heir Nafis Akhtar has given consent in writing on 20.7.85 vide registered consent letter Ex.D/1. Learned Senior Advocate placed reliance of Ex.D/13 i.e. suit filed by original plaintiff Smt. Nafis Akhtar and plaintiff Altaf Hussain against defendant-Adam Ali for declaration and permanent injunction before the 3rd Civil Judge Class-II, Bilaspur in Civil Suit No.15A/95, which was returned vide Ex.P/16 on the ground of jurisdiction. Thereafter original plaintiff Nafis Akhtar has amended her plaint relating to the fact that she has never consented, which was hopelessly time barred. Learned Senior Advocate has also argued that suit as filed was time barred.

9. On the other hand, Mr. K.A. Ansari, Senior Advocate with Mr. Devesh Kumar Kela, counsel appearing for respondent No.1 in F.A.No.4 of 2011 and for the appellant in F.A.No.49 of 2012 has vehemently argued that undisputedly

original plaintiff Nafis Akhtar was sole heir of Karam Hussain, who died on 29.3.1985, defendant-Aadam Ali is not heir of Karam Hussain, he was brought up by Karam Hussain and he was servant, therefore, Mohammedan Law does not permit him to inherit the property left by Karam Hussain, after death of Nafis Akhtar, plaintiff Altaf Hussain has inherited the property of Nafis Akhtar i.e. plaintiff Altaf Hussain is sole surviving heir of deceased Karam Hussain and is entitled to inherit the property shown in plaint. By committing forgery defendant Adam Ali has succeeded in getting one document in the style of will as Ex.D/3 in his name, which was not executed on 25.4.1984, although he succeeded in getting signature of Karam Hussain upon blank stamp paper which has been subsequently prepared and under force and pressure of other respondents, defendant Adam Ali has obtained signature of plaintiff Altaf Hussain and his wife Nafis Akhtar upon the alleged consent letter Ex.D/1. Plaintiff Altaf Hussain and his wife have not consented voluntarily. In absence of proof of lawful and due execution of will and in absence of consent of Nafis Akhtar after death of testator, defendant Adam Ali did not become owner of the property in question.

10. Defendant Adam Ali has not shared in establishing the shops owned by Karam Hussain and this is not the question of only inheritance of immovable property, but also the question of inheritance of credibility of business left by Karam Hussain. Learned Senior Advocate has further argued that as per evidence of defendant Adam Ali, he was not having personal knowledge of the will, will has not been executed before him and he came into possession of will latter on. His witness Mohsin Ali (DW-2) has deposed that Karam Hussain has executed will Ex.D/3 before him and they have signed on will Ex.D/3 before Karam Hussain. He has also deposed that Ex.D/1 was executed by plaintiff Altaf Hussain and his wife before him, but in his cross-examination, he has not approved his evidence given in chief. His evidence alone is not sufficient to prove the fact that Karam Hussain has executed will Ex.D/3 and Nafis Akhtar & Altaf Hussain have executed Ex.D/1 as consent letter. In absence of such document, defendant Adam Ali is not having any right or title over the property.

11. Learned Senior Advocate placed reliance in the matter of **Rani Purnima Debi and another v. Kumar Khagendra Narayan Beb and another**¹ in which the Supreme Court has held that surrounding circumstances at the time of execution makes the will suspicious. Learned Senior Advocate further placed reliance in the matter of **Ram Piari v. Bhagwant and others**² in which the Supreme Court has held that in absence of proof of genuine will and signature, will cannot be acted upon. Learned Senior Advocate also placed reliance in the matter of **H.Venkatachala Iyengar v. B.N.Thimmajamma and others**³ in which the Supreme Court has held that in absence of cogent evidence, will cannot be considered as duly and validly executed. Learned counsel relied upon **Gurdial Kaur and others v. Kartar Kaur and others**⁴ in which the Supreme Court has held that only registration of will is not sufficient to dispel suspicion regarding validity of will. Learned Senior Advocate further placed reliance in the matter of **Gorantla Thataiah v. Thotakura Venkata Subbaiah and others**⁵ in which the Supreme Court has held that propounder taking prominent part, in execution of and receiving benefit regarding scrutiny of evidence of execution and sound disposing state of mind of testator is not legal and lawful execution of will. Learned Senior Advocate further placed reliance in the matter of **Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee since deceased and after him his legal representatives and others**⁶ in which the Supreme Court has held that will must be proved by attesting witnesses in terms of Section 63 of the Succession Act.

12. In the present case, by adducing documentary and ocular evidence, both the parties have admitted the existence of will Ex.D/3 and consent letter Ex.D/1. Plaintiff Altaf Hussain has admitted the signature of Karam Hussain upon will Ex.D/3, but has denied the execution of will. As per his evidence, defendant Adam Ali succeeded in getting signature of Karam Hussain upon blank stamp paper and after his death he has forged the document Ex.D/3. He has also pleaded and deposed that alleged consent letter Ex.D/1 has been obtained by Adam Ali under pressure, fear and force.

¹AIR 1962 SC 567

²AIR 1999 SC 1742

³AIR 1959 SC 443

⁴AIR 1998 SC 2861

⁵AIR 1968 SC 1332

⁶AIR 1964 SC 529

13. Clause 190 of the Mohammedan Law reads thus:-

"190. Extent of bequeathable property.-A Mohammedan is not entitled to dispose of his property (which would otherwise devolve on his heirs under Mohammedan law) by will in favour of a person who is not a heir, in excess of one-third except in the following cases:

- (1) where subject to the provisions of any law for the time being in force, such excess is permitted by a valid custom;
- (2) where there are no heirs of the testator;
- (3) where the heirs existing at the time of the testator's death, consent to such bequest after his death;
- (4) where the only heir is the husband or the wife and the bequest of such excess does not affect his or her share."

14. As per clause 190 of the Mohammedan Law, a Mohammedan is competent to bequest his property to stranger to the extent of one-third without consent of his or here heir. As per sub-clause (3) of Clause 190 of the Mohammedan Law, a Mohammedan is also competent to bequest his entire property on the basis of consent of heirs existing at the time of death of testator, after his death, to stranger.

15. Much stress has been given by plaintiff Altaf Hussain relating to forgery of will, but the fact remain that the plaintiff has admitted the signature of Karam Hussain upon will Ex.D/3. As per para 9 of the plaint, on 19.7.1985, defendant Adam Ali has deposited Rs.20,000-20,000/- in FDR in the name of original plaintiff Nafis Akhtar, although it is further pleaded that by taking benefit of parda nasin defendant Adam Ali also succeeded in adding his name, but the fact remain that Rs.40,000/- has deposited in FDR in the name of Nafis Akhtar, which was within her knowledge and was the condition No.3 of will Ex.D/3. Execution of consent Ex.D/1 has also not been denied by plaintiff Altaf Hussain which contents the factum of deposit of Rs.40, 000/- and factum of will executed in favour of defendant Adam Ali.

16. The plaintiff has tried to explain the circumstance in which the aforesaid document was executed and as per his case, it was executed under pressure, fear and force, it was not voluntarily execution by consent. Original plaintiff Nafis Akhtar and plaintiff Altaf Hussain have firstly filed civil suit for declaration and permanent injunction against defendant Adam Ali on 27.6.1987, in which they have not pleaded anything about the alleged

consent and circumstances for execution of consent letter, first time it was pleaded by amendment in the year 2002, although the plaintiff was having definite knowledge of alleged document and circumstances of consent. She has not refused an amount of Rs.40,000/- deposited in FDR in her favour in compliance of will Ex.D/3. As per evidence of plaintiff Altaf Hussain, at the time of execution of consent letter Ex.D/1, they were under fear, but at the time of filing of first civil suit in the year 1986, at least plaintiff Altaf Hussain and his wife Nafis Akhtar were not under fear, but reason best known to them, they have not pleaded the aforesaid fact in their plaint filed on 27.9.1987.

17. Ex.D/1 clearly discloses the execution of will by Karam Hussain and consent of his daughter Nafis Akhtar. The consent by heir after death of testator may be implied or expressed and it is not required to give the consent in writing. Conduct of heirs is material.
18. Documentary evidence, conduct of the plaintiff, the fact that the plaintiff has not pleaded relating to circumstance in which the consent letter was executed in his pleading and accepting FDR consequent to will are sufficient to infer that original plaintiff Nafis Akhtar and plaintiff Altaf Hussain have consented the will after death of testator, which also proved the due and valid execution of will Ex.D/3 by Karam Hussain in favour of defendant Adam Ali.
19. As held by the Supreme Court in the matters of **Rani Purnima Debi, Ram Piari, H.Venkatachala, Gurdial Kaur, Gorantla Thataiah, Shashi Kumar Banerjee** (supra), will is required to be proved beyond suspicion and only registration of will is not sufficient to infer the due and lawful execution. In the present case, execution of will has been admitted by plaintiff Altaf Hussain vide consent letter Ex.D/1, the plaintiff has acted upon the will by receiving FDR of Rs.40,000/- and he has given valid consent. These circumstances are sufficient to establish the fact that Karam Hussain has executed the will Ex.D/3 voluntarily and in fit state of mind.
20. The plaint allegation, execution of consent Ex.D/1 by heir of Karam Hussain, conduct of heir of Karam Hussain and plaintiff Altaf Hussain were sufficient to deny the claim of plaintiff Altaf Hussain, but by the judgment and decree impugned the trial Court has not considered the aforesaid facts and conduct of the parties relating to consent and thereby partially decreed the suit in

favour of plaintiff Altaf Hussain by ignoring the law relating to will and consent applicable in Mohammedan Law and thereby committed illegality.

21. Consequently, F.A.No.4 of 2011 deserves to be and is hereby allowed, F.A.No.49 of 2012 is liable to be and is hereby dismissed and consequent to suit filed on behalf of Altaf Hussain is liable to be and is hereby dismissed.

22. Parties shall bear the cost of appeal.

23. Advocate fee, if certified, as per schedule.

24. Decree be drawn up accordingly.

Sd/-
T.P. Sharma
Judge

Sd/-
Inder Singh Uboweja
Judge

