

IN THE HIGH COURT OF TRIPURA
AGARTALA

RSA NO.10 OF 2010

- 1. Sri Sajal Kumar Das,
son of Sri Monoranjana Das
- 2. Sri Monoranjana Das,
son of late Sridama Das
- all are residents of Vill. South Chandrapur,
P.S. R.K. Pur, Udaipur, District South Tripura.

.....Appellants

- Vs -

Smt. Sadhana Das,
wife of Sri Dhananjaya Das,
resident of Vill. Krishnanagar (Subhashnagar),
P.S. Samarganj (Manubazar),
Sabroom, District South Tripura.

..... Respondent

B E F O R E
THE HON'BLE MR. JUSTICE S. TALAPATRA

For the appellants : Mr. G.S. Bhattacharji, Advocate

For the respondent : Mr. H. Laskar, Advocate

Date of hearing & order : 27.02.2015

Whether fit for reporting	:	Yes	No
		√	

JUDGMENT & ORDER (ORAL)

Heard Mr. G.S. Bhattacharji, learned counsel, appearing for the appellants as well as Mr. H. Laskar, learned counsel appearing for the respondent.

2. This is an appeal under Section 100 of the CPC, questioning the legality of the concurrent finding as returned by the judgment dated 23.12.2009 delivered in Title Appeal No.09/2009 by the District Judge, South Tripura, Udaipur, affirming the judgment dated 31.03.2009 delivered in T.S.(P) No.11/2008 by the Civil Judge, Sr. Division, South Tripura, Udaipur.

3. The substantial question that has been formulated at the time of admitting this appeal by the order dated 02.07.2010, reads as under :

“Whether the learned court below committed error by failing to consider the Exbt.-4 i.e. the death certificate of Laxmi Rani Das, mother of the plaintiff and thereby deciding the suit on the basis of the Exbt.-C i.e. the WILL executed by late Bashanta Kumar Sukla Das.”

4. Briefly stated, the essential facts are as under :

The plaintiff-appellants filed the title suit for partition of the joint property described in the schedule appended to the plaint. The plaintiffs are the legal heirs of Laxmi Rani Das, the daughter of Bashanta Kumar Sukla Das, who died on 17.05.1991

and Subhasini Das, widow of Bashanta Kumar Das, died on 23.07.2005. After death of Bashanta Kumar Das and his widow, namely Subhasini Das, the plaintiffs (the appellants herein), filed a suit in the court of the Civil Judge, Sr. Division, South Tripura, Udaipur, being Title Suit (P) No.13/2006 for partition of the suit. It has been admitted in the plaint that the said suit was dismissed for default on 11.04.2007, but the suit was also not restored. Again the plaintiff-appellants filed a fresh suit, being Title Suit (P) No.11/2008 in the court of the Civil Judge, Sr. Division, South Tripura, Udaipur, contending that the principle of *res judicata* would not operate against the subsequent suit as no finding has been returned on the issues so settled in the previous suit.

5. On allegation that the defendant has not been taking any action for partition of the suit land, the suit for partition has been filed by the plaintiff-appellants. The plaintiffs claimed 50% of share of the entire suit land. The defendant, by filing the written statement, has questioned the maintainability of the suit as well as for serious suppression of the material facts and non-joinder of the necessary parties. According to the defendant, the plaintiffs do not have right, title and interest over the suit land and he has contended in para 9 of the written statement as under :

“9. That as admitted by the plaintiffs in their plaint in paragraph-7 that the plaintiffs filed title suit (partition) No.13/2006 which was dismissed for default on 11/4/2007 at the stage of evidence. The answering Defendant has filed Written statement on 06.03.2007 in the previous suit bearing No.T.S.(partition) No.13/2006 and

the answering defendant stated in her written statement that Basanta Kumar Sukla Das made a registered Will on 6.5.1987 bequeathing the entire suit property to the three sons of the answering defendant namely (i) Sri Sajal Kumar Das, (ii) Sri Raj Kumar Das, (iii) Sri Ashim Das absolutely who became the joint owners of the suit property after the death of the original owner Basanta Kumar Sukla Das, but on 25/6/1993 A.D. the one son of the answering defendant- Raj Kumar Das died and the said Raj Kumar Das was unmarried and after the death of Raj Kumar Das the Defendant and her sons namely Sri Kajal Kumar Das and Sri Ashim Das have been in possession jointly of the suit land. So, the plaintiffs were aware of the above mentioned facts earlier.

6. The defendant has categorically disputed the pleading that Laxmi Rani Das died on 24.12.1991. He has asserted that Bashanta Kumar Das died on 17.05.1991, whereas his second daughter Laxmi Rani Das died in the year 1973, predeceasing Bashanta Kuamr Das, her father. By the will, Bashanta Kmar Das bequeathed the suit property to Kajal Kumar Das, Raj Kumar Das and Asim Das. However, certain contingent rights were reserved for his wife, but it has been categorically noted that after his death all right relating to the suit property would devolve to those three sons. In the suit, Kajal Kumar Das, Raj Kumar Das and Asim Das were not impleaded. It is found that, in the previous suit, being Title Suit (Partition) No.13/2006 in the court of the Civil Judge, Sr. Division, South Tripura, Udaipur, the defendant by filing the written statement, had categorically disclosed as under :

“13(b) Basanta Kumar Sukladas made a registered Will on 6.5.1987 bequeathing the entire suit property to the three sons of the defendant

namely (i) Shri Kajal Kr. Das, (ii) Shri Raj Kumar Das and (iii) Shri Asim Das absolutely who become the joint owners of the suit property after the death of the original owner Basanta Kumar Sukladas."

7. The said Will or its execution has not been challenged by the plaintiffs nor the beneficiaries of the said registered will dated 06.05.1987 (Exbt.C) was impleaded in the suit at all. The trial court framed the following issues and recorded the evidence led by the plaintiffs and the defendant.

- (1) Whether the suit is maintainable in its present form & nature?**
- (2) Whether the properties are brought in hotchpotch for partition.**
- (3) What are the quantum of immovable properties for partition among the parties?**
- (4) What are the respective shares of the plaintiffs and defendant over the suit land?**
- (5) What relief/reliefs the parties are entitled to?**

8. Both the plaintiffs examined themselves and in addition thereto, they adduced one Manik Das (PW.3). They admitted in the evidence Khatian No.352 (Exbt.1) relating to the suit land, revenue receipt of the suit land (Exbt.2), death certificate of Basanta Kr. Sukla Das (Exbt.3), death certificate of Laxmi Rani Das, the mother of the plaintiffs (Exbt.4), death certificate of Subashi Bala Das (Exbt.5) and the survival certificate of Laxmi Rani Das, issued by the Sub-Divisional Magistrate, Udaipur, South Tripura.

9. The defendant has examined herself and in addition thereto, examined Harendra Kumar Das (DW.2), Smt. Bijay Laxmi Shil (DW.3) and Baikuntha Kumar Das (DW.4) and exhibited few documents, namely certified copy of the written statement of the previous suit (Exbt.A), signature of Harendra Kumar Das in the Will (Exbt.B), registered Will executed by Basanta Kumar Sukla Das (Exbt.C), signature of Baikuntha Kumar Das in the Will executed by Basanta Kumar Sukla Das as attesting witness (Exbt.D).

10. After appreciating the evidence, the trial court has observed that :

"The plaintiffs in the pleadings had no challenge regarding the existence of Will. The plaintiffs No.1 had knowledge as we discussed earlier about the existence of the Will. The plaintiffs took the plea of validity of the Will by citing different case laws that the Will is under various suspicious circumstances surrounding the execution of the Will and burden of proof on the subject matter is on the beneficiary of the Will to remove any such circumstances and referred the following case laws : No.1) 2007 AIR SCW 3886, 2) AIR SCW 3741, 3) 2008 AIR SCW 3310. But it is a funny thing that the plaintiffs have not made the beneficiary of the Will as necessary party and in the pleadings have not challenged the validity of the Will having knowledge of the existence of such Will. As the Will has not been challenged in the pleadings of the plaintiffs and in confining the pleading of the suit, we are to say on reserve view the sons of the defendant are testimonial successor of the suit property. In summing of the decision of these issues, we are to say in the pretext of Issue No.1 and Addl. Issue No.1 that the suit is not maintainable in its present form and nature and in regard Additional Issue No.2 we are to conclude that in the absence of challenging the Will in the pleadings of the plaintiff having knowledge of the existence of the Will in favour of the sons of the defendants, the son of the

defendants are the testimonial successor of the suit property."

It has been further observed that –

"In absence of the pleadings by the plaintiffs having knowledge relating to the existence and validity of the Will relating to the suit properties, it is to be resolved that the suit properties under title of the beneficiary of the Will and the plaintiffs have no immovable property for partition with the defendant.

Thus the suit has been dismissed.

11. Being aggrieved, the appellants herein filed the appeal under Section 96 of the CPC in the court of the District Judge, South Tripura, Udaipur, being Title Appeal No.9/2009, but the said appeal was dismissed by the impugned judgment dated 23.12.2009, which affirmed the finding of the trial court, by observing that :

"In civil cases, plaintiff has to prove his own case and the failure on the part of the defendant, plaintiff would not succeed automatically. In the instant case, the plaintiffs seek to establish their title to the suit property through inheritance but that cannot be established ignoring the "Will" (Exbt.C) that stands as an insurmountable obstacle in his way which otherwise bind him, though not a party. Plaintiffs had the knowledge about existence of such will as not a party. Plaintiffs had the knowledge about existence of such will as it is revealed from written statement of T.S.(P)13/2006 (Exbt.A) but the plaintiffs did not bring any suit for cancellation of such instrument (Exbt.C) and therefore, that will stand good and binding on the plaintiffs. The plaintiffs based their claim stating that the suit property was the joint family property but unless and until the "Will" (Exbt.C) in question is cancelled, the plaintiffs can not get the relief, as prayed for.

DW-2, Shri Harendra Kumar Das; DW-3, Smti Bijay Laxmi Shil and DW-4, Shri Baikuntha Kumar Das were examined to prove the will (Exbt.C) and the evidence of these witnesses satisfies, in my opinion, the requirements to prove a will.

10) Considering all the facts and circumstances of the case and upon the evidence on record as discussed above, I find that the judgment passed by the learned court below is perfectly legal and therefore, it cannot be interfered in this appeal.”

12. Mr. G.S. Bhattacharji, learned counsel appearing for the appellants, has submitted that in the recital of the Will, it has been stated by the testator that Laxmi Rani Das was dead at the time of execution and his son, Sajal Kumar Das, the plaintiff-appellant No.1, was provided with a sum of ₹6,000. But, that statement made in the Will (Exbt.C) is in conflict with the statement recorded in Exbt.4, the death certificate issued by the Registrar of Birth & Death, the S.D.O., Matabari R.D. Block, Udaipur, South Tripura. On the basis of that certificate, the survival certificate dated 14.06.2006 was issued. Mr. Bhattacharji, learned counsel has placed heavy reliance on the said death certificate (Exbt.4). For purpose of reference, Exbt.4 is extracted hereunder :

“This is to certify that the following information has been taken from the original record of death which is the register for (Local Area) Chandrapur Village of Tahsil Matabari of District South of State Tripura.

Name	LATE LAXMI RANI DAS
	W/o Manoranjan Das
Sex	Female
Date of Death	24/12/1991
Place of Death	Chandrapur village
Registration No.	15(Fifteen)
Date of Registration	29/10/05

Sd/- illegible
Date 29/10/05
Registrar of Birth & Death
Chandrapur Village G/P
Udaipur, South Tripura

Sd/- illegible
29/11/05
Signature of issuing
authority
Seal
Sd/- illegible
29.11.05
Addl. Dist. Registrar,
Birth & Death,
S.D.O. Matabari, R.D. Block
Udaipur, South Tripura"

13. Mr. Bhattacharji, learned counsel appearing for the appellants, has submitted that Laxmi Rani Das, the mother of the plaintiff-appellant No.1 died on 24.12.1991, whereas Basanta Kr. Sukla Das died non 17.05.1991 as would be evident from Exbt.3. As such, the execution of the Will is visited by suspicious circumstances and hence the Will cannot be acted upon. Mr. Bhattacharji, learned counsel, has further submitted that the death certificate is a copy of a public document within the meaning of Section 74 of the Evidence Act, 1872, inasmuch as the document is of the public officer. Hence within the meaning of Section 65(e) of the Evidence Act, this document is the secondary evidence relating to the public documents. He has further submitted that, if the contents of the said document is read, the Will, which is a private document would be overshadowed, but both the courts below did not read the contents properly. He has also relied on a decision of the apex court in **Tukaram S. Dighole Vs. Manikrao Shivaji Kokate**, reported in **(2010) 4 SCC 329**, where it has been held that :

18. Chapter V of the Evidence Act deals with documentary evidence. Section 61 thereof lays down that :

"61. Proof of contents of documents.- The contents of documents may be proved either by primary or by secondary evidence."

As per Section 62 of the Evidence Act, primary evidence means the document itself produced for the inspection of the court. Section 63 categorises five kinds of secondary evidence. Section 64 lays down that documents must be proved by primary evidence except in the cases mentioned in the following Sections, To put the matter briefly, the general rule is that secondary evidence is not admissible until the non-production of primary evidence is satisfactorily proved. However, clause (e) of Section 65, which enumerates the cases in which secondary evidence relating to documents may be given, carves out an exception to the extent that when the original document is a "public document" secondary evidence is admissible even though the original document is still in existence and available. [Emphasis supplied]

Mr. Bhattacharji, learned counsel, has thus contended that Exbt.4 document is admissible even though the original document is still in existence and available.

14. No doubt, the document (Exbt.4) is an admissible document, but whether the entry in the said document, which is in conflict with the contents of the Will (Exbt.C) can simply be read when the document itself says that the information has been taken from the original record of death, which is the register for local area. Admittedly, the original record of death was not produced and no officer who certified the said information to have been taken from the original records of death, has been examined by the plaintiffs. So far the contents of a document is concerned, if

the document is admitted, the contents may be deemed to have been admitted, but for having leave to lead secondary evidence, the foundation must be laid and the court must exercise its jurisdiction to examine the foundation whether such permission would be granted to a party to lay the secondary evidence on the records. The apex court, in **The Roman Catholic Mission etc. Vs. The State of Madras & Anr.**, reported in **AIR 1966 SC 1457**, has enunciated the law as under :

"The originals were not produced at any time nor was any foundation laid for the establishment of the right to give secondary evidence. The High Court rejected them and it was plainly right in so deciding." [Emphasis supplied]

15. It is apparent that there had been no endeavour from the part of the plaintiffs to bring the original record by summoning the public officer or its representation for production of such record. In the circumstances, when a date of death is under controversy, unless the reliable evidence is led, it cannot be said that the plaintiffs have discharged their onus to prove the pleadings and hence by not relying on that document (Ext.4), both the courts below did not commit any illegality. Apart that, the plaintiffs preferred not to challenge the registered Will (Exbt.C), by dint of which their right of inheritance was extinguished and thus no court can declare the plaintiffs' right over the suit land by way of inheritance and against the testamentary rights of the sons of the defendant as created by the said registered Will. Moreover, the beneficiaries of the Will were not impleaded in the suit. Unless the

Will is declared invalid or cancelled, the plaintiffs cannot claim any right by way of inheretence. Moreover, when the Will and its execution has been proved by the defendant, following the requirement of Section 68 of the Indian Evidence Act, 1872, no adverse presumption on the basis of so called suspicious circumstances can be taken by any court.

16. Having held so, this court is constrained to hold that this appeal is devoid of merit and accordingly the appeal is dismissed.

Draw the decree accordingly. Send down the LCRs.

JUDGE

ROY