

HIGH COURT OF CHHATTISGARH, BILASPUR**S.A No.616 of 2016**

Shamnath S/o Late Gujru, Aged About 58 Years R/o Village Vipatpur,
Post Duldula, Tahsil Kunkuri, District Jashpur, Chhattisgarh
(Plaintiff)

---- Appellants

Versus

1. Balram (Dead) Through Lrs. Leelmani S/o Divya Ram, Aged About 40 Years Caste Chik, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh
2. Bhawani Bai D/o Divya Ram Aged About 38 Years W/o Sukhram, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh, Presently R/o Gamhariya Jashpur, Tahsil And District Jashpur, Chhattisgarh
3. Meenu Bai D/o Divya Ram, Aged About 28 Years Caste Cheek, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh, Presently Residing At Village Gamhariya Jashpur, Tahsil And District Jashpur, Chhattisgarh
4. Kaushilya Devi Wd/o Jagmohan, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh
5. Vaidnath Ram S/o Late Jagmohan, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh
6. Ushamani D/o Late Jagmohan, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh
7. Aruna S/o Late Jagmohan, R/o Village Tangartoli, Tahsil Duldula, District Jashpur, Chhattisgarh
8. Smt. Sundri Devi W/o Divyaram, Caste Chik, R/o Village Tongritoli (Vipatpur), Tahsil Kunkuri, District Jashpur, Chhattisgarh, Presently Residing At Kalyan Ashram Jashpur Nagar, District Jashpur, Chhattisgarh
9. State Of Chhattisgarh, Through The Collector, Jashpur, District Jashpur, Chhattisgarh
10. Rajuram Dani S/o Ramchandra Dani, Aged About 24 Years R/o Vipatpur, Tahsil Kunkuri, District Jashpur, Chhattisgarh
11. Sumant Dani S/o Ramchandra Dani, Aged About 20 Years R/o Vipatpur, Tahsil Kunkuri, District Jashpur, Chhattisgarh(Defendants)

-----Respondents

For Appellant:

Shri HB Agrawal, Sr. Advocate along with
Shri JK Saxena, Advocate.

For Respondents No.9:

Shri Vijay Bahadur Singh, Panel Lawyer.

Single Bench: Hon'ble Shri Sanjay Agrawal, J
Order On Board

11.07.2017

1. This is the Plaintiff's Second Appeal preferred under Section 100 of the Code of Civil Procedure, 1908 against the judgment and decree dated 4.10.2016 passed by the Additional District Judge, Kunkuri, Distt. Jashpur in Civil Appeal No.17-A/2009 by which the lower appellate Court, while affirming the judgment and decree dated 24.06.2008 passed by the Civil Judge, Class-II, Kunkuri in Civil Suit No.27-A/2008, has dismissed the Appeal.
2. The undisputed facts of the case are that Plaintiff-Shamnath instituted a suit for declaration of title on the basis of Will deed dated 15.03.1997 and also claiming that order passed by the Sub-Divisional Officer, Kunkuri on 02.06.1999 in Revenue Appeal No.45/A-6/1996-97 be declared as null and void by submitting *inter alia* that one Padwaram, the owner of the property in question described in Plaint Schedule-A had no issue, therefore, executed the said Will on 15.3.1997 in his favour. It is pleaded further that by virtue of the said Will, he acquired his right, title and interest with regard to the said suit property as mentioned in Plaint Schedule-A. It is pleaded further that the revenue papers have also been mutated in his name vide order dated 6.12.1996, however, it was reversed in Appeal by the Sub Divisional Officer in Revenue Appeal Case No.45/A-6/96-97 on 2.6.1999. Therefore, the Plaintiff has been constrained to institute the suit in the instant nature.
3. The Defendants have contested the aforesaid claim by denying very specifically the due execution, attestation and validity of the alleged Will purported to have been executed by said Padwaram, the husband of Defendant No.2-Budhni Bai.
4. In support, the Plaintiff has examined as many as 4 witnesses while the

Defendants have also examined 4 witnesses.

5. The trial Court, after considering the evidence led by the parties, has come to the conclusion that the said suit as framed and instituted beyond the period of 3 years after the death of Padwaram, who expired on 30.8.1999 and/or also 3 years after passing of the order dated 2.6.1999 by the Sub Divisional Officer is apparently barred by time. It held further that the Will dated 15.3.1997 cannot be upheld as Padwaram, the executor of it was not the exclusive owner of the suit property at the time of its execution. As a consequence, the trial Court has dismissed the Plaintiff's claim.

6. The aforesaid findings of the trial Court have been affirmed further by the lower appellate Court in an Appeal preferred by the Plaintiff.

7. Being aggrieved, the Plaintiff has preferred this Appeal. Shri HB Agrawal, learned Senior Advocate for the Appellant submits that the judgment and decree as passed by the Courts below disbelieving the Will are apparently contrary to law. He submits that the reasonings with regard to the validity of Will by disbelieving the same have not been properly considered by the Courts below. He submits further that once the said document (Will deed) has been exhibited at the time of evidence, it cannot be ignored thereafter and therefore ought to have upheld its validity. He submits that the Courts below have erred further in holding that the suit is barred by time, as the suit was instituted based on title, therefore, the reasonings as assigned by the trial Court as well as by the lower appellate Court in this regard cannot be held to be valid.

8. I have heard learned Counsel for the Appellant and perused the entire record carefully.

9. Perusal of the entire Plaint averments would reveal that the Plaintiff's entire case is based upon the Will deed (Ex.P-1) purported to have been

executed by one Padwaram on 15.3.1997 in his favour. It is the settled principles of law that the propounder of the Will has to prove its validity strictly in accordance with the provisions prescribed under Section 68 of the Indian Evidence Act. The said provision relevant for the purpose is reproduced herein 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 specifically denied.]”

10. According to the aforesaid provision, the alleged document (Will deed), which is required to be attested by law, cannot be taken into consideration in evidence unless and until one of its attesting witnesses is examined for proving the due execution and attestation of the said document. Perusal of the record would show further that one Isenath, who was examined as Plaintiff witness No.3 has stated in paragraph-5 of his statement that he was the witness of the alleged Will deed. However, a bare perusal of the particular document (Will deed), marked as Ex.P-1 would however reveal very specifically that the said witness cannot be held to be an attesting witness of the said document as he was the witness only with regard to purchasing of the said stamp-paper, which was purchased on 6.3.1997. He put his signature marked as 'A' to 'A' in the back side of the said document. The document was

therefore purchased undisputedly on 6.3.1997 but it was executed on 15.3.1997 and at that time, this witness was not present. Therefore, this witness cannot be held to be the attesting witness of this document. None of the witnesses have stated anywhere that the attesting witnesses of this document are not alive, therefore, under such circumstances, it cannot be presumed that none of the attesting witnesses are not alive. Having failed to examine any of the attesting witnesses, the due execution, attestation and validity of the alleged Will (Ex.P-1) cannot be upheld. Although, I am not satisfied with the reasonings assigned by the trial Court as well as by the lower appellate Court by disbelieving the same as the reasonings so assigned are irrelevant. As far as the findings of the Court below that the suit is barred by time cannot be held to be sustainable as the suit was filed based on title therefore, the findings of the Courts below that the suit is barred by time cannot, therefore be upheld. Since the entire claim of the Plaintiff was based upon that particular document (Ex.P-1) which was not found to be duly proved, therefore, under such circumstances, the Plaintiff cannot be held to be the owner of the property in question by virtue of the said document.

11. In view of above discussions, I do not find any question of law, much less the substantial questions of law which arise for determination in this Appeal. Accordingly, the Appeal being devoid of merits is hereby dismissed at the admission stage itself. There shall be no order as to costs.

Sd/-
(Sanjay Agrawal)
JUDGE