

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No. 88 of 2003

1. Kishore Kumar, S/o. Late Natthulal Sharma, Aged About 38 Years, Occupation Blacksmith.
 2. Sanatkumar, S/o. Late Natthulal, Aged About 38 Years, Occupation Blacksmith.
- Both are R/o. Gudakhu Line, Rajnandgaon, Chhattisgarh.

---- Appellants

Versus

1. Shitla Prasad (Dead) Through LRs :
 - 1(1). Phuljhar Bai, W/o. Late Shitla Prasad, Aged About 57 Years.
 - 1(2). Kumari Tarabai, D/o. Late Shitla Prasad, Aged About 40 Years.
 - 1(3). Saraswati, D/o. Late Shitla Prasad, Aged About 35 Years.
 - 1(4). Dheeraj, S/o. Late Shitla Prasad, Aged About 22 Years.

All R/o. Shukrawari Bazar, Behind Municipal Hospital, Gudhiyari, Raipur, District Raipur, Chhattisgarh
2. State of Chhattisgarh, Through Collector, Rajnandgaon, District Rajnandgaon, Chhattisgarh.

---- Respondents

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| For Appellants | : | Mr. H.B.Agrawal, Sr. Advocate with Smt. Itu Rani Mukharjee, Advocate |
| For Respondent No.1 | : | No representation despite several pass over & call. |
| For Respondent No.2 | : | Mr. D.R.Minj, Dy. Govt. Advocate |
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Hon'ble Shri Justice Goutam Bhaduri

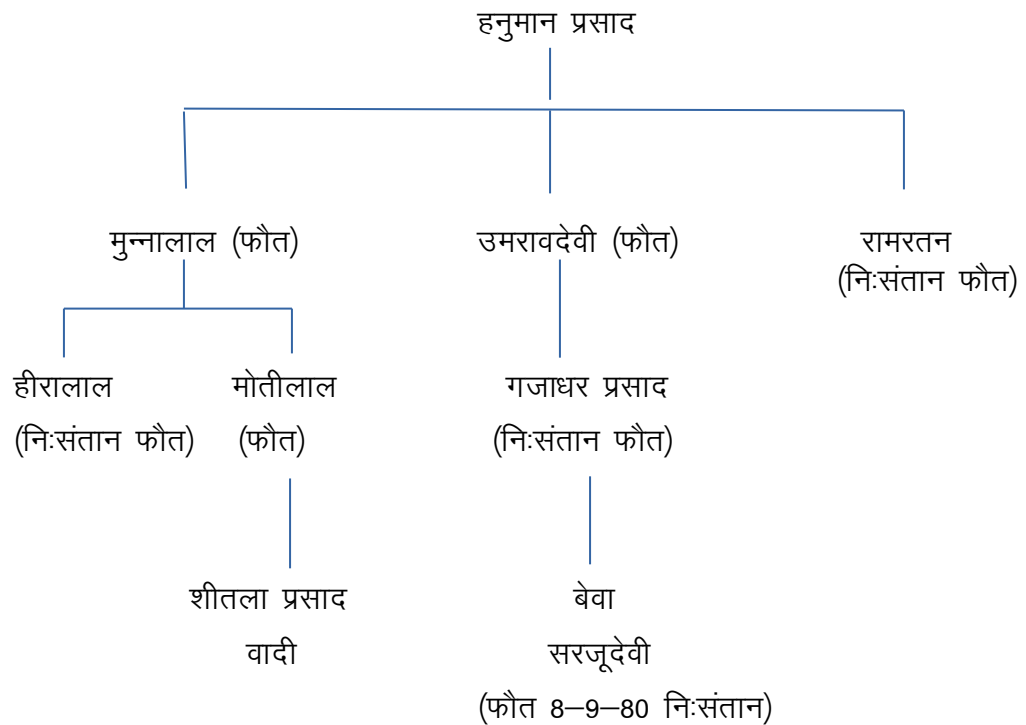
Judgment On Board

27.11.2018

Heard

1. The instant appeal is against the judgment and decree dated 17.04.2003 passed in Civil Suit No.15-A/1999 whereby the learned Court below has passed a decree in favour of the plaintiff holding that he is entitled to half of the share of the suit property i.e. the land & house, for which the suit was filed.

2. Brief facts are that a suit was filed by one Shitla Prasad, Son of Motilal showing the following family tree in the plaint.



3. It was stated that Hanuman Prasad had three sons Munnalal, Ramsayak & Ramratan. Ramsayak wife name was Umraodevi and his son was Gajadhar Prasad, whose wife was Sarjudevi, both died issue less. The plaintiff Shitla Prasad claimed through descendant of Motilal & Munnalal. It was stated that the house at Gudakhu Line, Rajnandgaon, situates over Plot No.150, Sheet No.48 of 123 sq.mtr, which is a double storied house. The plaintiff Shitla Prasad claimed that it was an ancestral house and the relation in between Sarjudevi & plaintiff was that of Aunt & Nephew. Sarjudevi also died issue less, therefore, the plaintiff claimed that the entire property was devolved on the surviving plaintiff/legal heir of Shitla Prasad. It was stated that the defendant Kishor Kumar & Sanat Kumar on 26.04.1998 by alluring and by committing fraud got a WILL executed in their favour. It was stated that the said WILL was got executed by calling the Registrar at the residence. The plaintiff further stated that Sarjudevi before her

death came to Raipur, however, she did not disclose anything about the execution of the WILL. Further the plaintiff stated that had Sarjudevi would have hale & hearty, the Registrar would not have been called in the house to get the WILL executed. The plaintiff stated that since the plaintiff was employed at Raipur, he settled down there, however, he continued his relation with Sarjudevi. On the alternate, the plaintiff claimed that the defendants developed a fiduciary relation as they were the neighbour and got the WILL executed in their favour and even if it is held that Sarjudevi have right, she would be entitled to make WILL of half portion of the suit house. The plaintiff further stated that the WILL being outcome of the fraud would not be binding on the plaintiff, as such, the WILL dated 26.04.1998 was claimed to be declared as void. The plaintiff further pleaded for possession of the suit house as it was stated that on the basis of the WILL, the defendants had taken over the possession of the suit house.

4. The defendants Kishor Kumar & Sanat Kumar contended that the property was self acquired property of Gajadhar Prasad, husband of Sarjudevi. It was stated that Gajadhar Prasad was enjoying the property as sole and exclusive owner and was possession since 1963 and further a lease was also granted in his name from the State. The defendants further stated that Gajadhar Prasad died issue less, therefore, the entire property devolved on his widow Sarjudevi. The defendants further stated that Sarjudevi became old and infirm though she was not able to move freely but she was able to understand and give directions and used to discharge her daily work herself. It is stated that because of the nursing and service extended to her by the defendants, she was very much impressed and for that reason in her whole senses on 26.04.1998

she called one Advocate Anish Ahmad and got the WILL executed and registered in their favour. The defendants stated that even the last rituals were carried out by the defendants and also in the family function of the defendants, Kanyadan of their sister's daughter was done by Sarjudevi. It was stated that after the WILL and death of Sarjudevi they became the owner of the property to the exclusion of others. Therefore, dismissal of the suit was prayed for.

5. On the basis of the pleadings of the parties, the Court framed initially eight issues. Subsequently, two additional issues were framed. The Court came to a conclusion that the WILL dated 26.04.1988 was a valid one, however, it held that Sarjudevi was only entitled to bequeath the property to the extent of half share. Therefore, the decree was passed in favour of the plaintiff that he is entitled to half of the share. Whereas by holding the WILL as valid half of the share was given to the defendants. The Court further held that the plaintiff is entitled to the possession of half share. The said judgment and decree is under challenge by the defendants Kishor Kumar & Sanat Kumar. Shitla Prasad during the pendency of the appeal died, as such, four of the legal heirs were brought on record.
6. Learned counsel for the appellant would submit that the finding of the Court below is completely erroneous, as the Court without any reason has held that the property was a joint Hindu family property. It is contended that the Court failed to look into the documents which shows that the suit property exclusively belonged to Gajadhar Prasad which was proved by documentary evidence and the lease deed, which shows the sole name of

Gajadhar Prasad in respect of the suit property. He further submits that without any evidence on record that the suit property was belonged to Hanuman Prasad, the finding of the Court below that the property was a joint Hindu family property was completely erroneous. With respect to the WILL dated 26.04.1988, the counsel submits that the finding that the WILL is in favour has not been under challenge and no cross appeal has also been filed; therefore, the statement with the finding requires to be set aside.

7. The case was partly heard in the earlier week, no appearance was made on behalf of the respondents. Subsequently, again it was heard on Monday and was passed over for the second day, however, no representation has been made despite repeated call and pass over on behalf of the respondents.
8. I have heard learned counsel for the appellant on merits. Perused the record of the Court below.
9. The learned Court below has held the WILL Ex.D-1(c) dated 26.04.1988 to be valid. Ex.D-1(c) which is a registered WILL executed by Sarjudevi in favour of both the defendants/ appellants herein. Since no cross appeal has been filed against such finding, therefore, the Court is not required to go into merits to adjudicate the authenticity of the WILL. No representation and argument are also been advanced challenging the statement of the witnesses. The only question therefore remains for adjudication as to whether the property which was bequeathed by Sarjudevi in favour of the defendants/appellants was/is an exclusive property of testator or not ?
10. The plaintiff Shitla Prasad was examined as PW-1. According to his statement, the suit property was property of Hanuman Prasad

the great grand-father of the plaintiff. He stated that in the house, his grandfather and other brothers were residing and after death of Hiralal his Uncle (Bade Pita), he stated that his father shifted to Raipur and he was serving there. The father of the plaintiff Shitla Prasad is Motilal. He stated that it came to their notice that Sarjudevi died and thereafter defendants No.1 & 2 had taken over the property and when they demanded the possession it was denied. The witness further stated that the property was situated at Rajnandgaon and he used to visit from Raipur to Rajnandgaon to look after Sarjudevi. The maintenance khasra has been filed by the plaintiff from 1960 to 1964 Ex.P-1. Perusal of Ex.P-1 shows that property was of Juni Hatri Ward No.4, Plot No.971 area was 0.02 and the description of the plot is shown as house. Name of the holder was shown as Ramsayak. Further the entry column shows that name of Gajadhar Prasad, S/o. Ramsayak and Umraodevi, W/o. Ramsayak recorded. Further it shows that after death of Ramsayak the property devolved on Gajadhar Prasad. Perusal of Ex.P-1 and comparison of the plaint shows that the suit property was described as a mutated in Sheet No.48, Plot No.150 area 123 sq.mtr. and is of Gudakhu Line, Rajnandgaon whereas the plaintiff on which the property has been claimed on the basis of Ex.P-1 is shown to be at Juni Hatri, Ward No.4 of different plot bearing No.971. How this entry is one and same and how Ex.P-1 is in respect of suit property is not clear.

11. During the cross examination, the plaintiff was confronted with certain document though it has been stated that initially the property belong to Hanuman Prasad and after his death it came to Munnalal, Ramsayak & Ramratan but no document is on record to support such fact. Ex.D-1 is a map of the house which appears to

be quite old and endorsement is on that the permission was granted by the Municipal Council to Gajadhar Prasad and address is of Gudakhu Line, Rajnandgaon. It do not show that any other names were mutated. Likewise, document Ex.D-2 is some electricity demand note issued in name of Gajadhar Prasad on 09.11.1957. Ex.D-3 likewise is a document of electricity department showing payment of money on 24.10.1957 issued in name of Gajadhar of Gudakhu Line. Likewise Ex.D-4, Ex.D-5, Ex.D-6, Ex.D-7, Ex.D-8, Ex.D-9, Ex.D-10, Ex.D-11, Ex.D-12, Ex.D-13, Ex.D-14, Ex.D-15 & Ex.D-16, which are from 1968 to 1976 issued by the Municipal Council/ Corporation shows that the property receipts were in name of Gajadhar Prasad. These documents are more than 30 years of old, therefore, authenticity and presumption of correctness leans in favour of same to be genuine and are produced from the lawful custody. As per the plaintiff himself, he admitted those documents but those documents right from 1957 do not show that the name of other brothers were recorded in respect of the suit house in question.

12. The document Ex.D-17 is a renewal of Nazaul lease issued on 08.02.1984. Perusal of same would show that the lease of the suit house of Sheet No.48, Plot No.150 admeasuring 123 sq.mtr. i.e. suit property was renewed in favour of Sarjudevi, W/o. Gajadhar Prasad. The defendant DW-3 has proved those documents and stated that the suit house was in name of Sarjudevi. The plaintiff only on the basis of Ex.P-1 claimed the property was of joint Hindu family property belonged to Hanuman Prasad, the great grand father, but no document is on record to show that the suit property of Plot No.150, Sheet No.48 of Gudakhu Line at any time was recorded in name of Hanuman Prasad. The plaintiff if was

sanguine of the fact that the property belonged exclusively to Hanuman Prasad, some document should have been placed on record so as to overcome the documentary evidence of Ex.D-2 to D-17. In absence of such evidence, only because of the fact that the WILL was executed by Sarjudevi in favour of the appellants/defendants they were not related, the presumption cannot be drawn that the property was joint Hindu family property over which Sarjudevi did not have any right to execute.

13. On the contrary, the last document D-17 shows that the lease was granted in faour of Sarjudevi by the State on 08.02.1984. Only on the basis of the family tree, the finding of the trial Court is that it was a joint family property the same cannot be upheld. There is no evidence on record to admit those facts. Therefore, after closed scrutiny of the entire evidence since the finding of WILL is not under challenge, I am of the opinion that the finding of the Court below that the property was joint Hindu family property wherein Sarjudevi had only half of the share cannot be sustained.
14. In the result, the judgment and decree of the Court below to the extent that only half of the property belonged to Sarjudevi is set aside. It is held that Sarjudevi had an absolute right to bequeath the property as a whole which was done by the WILL dated 26.04.1998 in favour of the defendants to be authentic.
15. The appeal is allowed to the above extent. No order as to cost.

Sd/-
(Goutam Bhaduri)
Judge