

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR**Judgment reserved on 20.3.2019****Judgment delivered on 02.5.2019****First Appeal No.210 of 2000**

Om Prakash Shukla, Dead Through Lrs.

1. Vandana Shukla, D/o. Late Om Prakash Shukla, aged about 28 years,
2. Varsha Shukla, D/o. Late Om Prakash Shukla, aged about 25 years,
3. Rashmi Shukla, D/o. Late Om Prakash Shukla, aged about 21years,
4. Ajay Shukla, S/o. Late Om Prakash Shukla, aged about 19 years,
5. Anjali Shukla, D/o. Late Om Prakash Shukla, aged about 14 years, Minor through her legal guardian sister applicant No.1 Vandana Shukla D/o. Late Om Prakash Shukla

All are R/o. In front of Anand Lodge, Indira Ward, PS City Kotwali, Civil and Revenue District Jagdalpur (CG)

---- Appellants**Versus**

1. Ramkrishna Tiwari, Aged about 30 years, S/o. Sheshnarayan Tiwari,
2. Shri Krishnakant Shukla, aged about 60 years, son of late Chandrashekhar Shukla
3. Shri Surya Prakash Shukla, aged about 35 years, S/o. Krishnakant Shukla,
4. Shri Chanda Prakash Shukla, aged about 30 years, S/o. Krishnakant Shukla
5. Smt. Asha Devi, aged about 35 years, Wd/o Madhav Prakash Shukla
6. Pradeep Kumar, aged about 10 years, S/o. Late Madhav Prakash Shula through legal guardian mother Asha Devi
7. Kumari Ranu, aged about 6 years, D/o. Late Madhav Prakash Shula through legal guardian mother Asha Devi

All are R/o. Indira Ward, Jagdalpur, Distt. Bastar (CG)

---Respondents

For Appellants : Smt. Hamida Siddique, Shri Sumit Singh and Ku. Rashmi Sen, Advocates.
For respondents 1, 5, 6 & 7 : Shri Bhaskar Payashi, Advocate
For respondents 2, 3 & 4: Shri Prafull N Bharat, Advocate

Hon'ble Shri Justice Ram Prasanna Sharma

CAV Judgment

1. This appeal is preferred against judgment and decree dated 11.02.2000 passed by Third Additional District Judge, Bastar at Jagdalpur, Madhya Pradesh (Now Chhattisgarh) in a Civil Suit No.2A/1997 wherein the said Court dismissed the suit filed by original appellant/plaintiff Om Praksh Shukla against respondents/defendants for eviction from the shop situated in Survey No.106-107/2 area about 500 sq. ft. at Main Road/Gurudwara Road, Jagdalpur (CG) and for possession.

2. Admittedly, the property was owned by late Radhekant Shukla, who was the father of Omprakash Shukla and Madhav Prakash Shukla. Radhekant Shukla executed will dated 02.11.1991 (Ex-D/14) and by this will he allotted certain property to Madhav Prakash Shukla and some property to Om Prakash Shukla. It is alleged by the appellant that the will was executed under the opinion of one Asha Devi, who is the wife of Madhav Prakash Shukla. After execution of the will, Om Prakash Shukla filed suit against his father but the same was withdrawn by him as his father insisted him to take back the suit. Thereafter Radhekant Shukla fell ill and he was taken care by Om Prakash

Shukla, thereafter Radhekant Shukla executed a second will (Ex-P/1) dated 19.7.1994 and two shops which are the subject matter of the suit were given to Om Prakash Shukla which were in possession of Madhav Prakash Shukla by earlier will dated 02.01.1991. On the basis of the second will said Om Prakash Shukla filed suit for eviction against respondents who were in possession of the two shops as tenant but the same was dismissed by the trial Court on the ground that no will was executed in favour of Om Prakash by Radhekant Shukla.

3. Learned counsel for the appellant submits as under:

(i) Though original second will dated 19.7.1994 was not produced before the trial Court, it was proved by the evidence of Alok Kumar Dubey (PW-1) and Jai Prakash Jha (PW-4) that second will was executed by Radhekant Shukla and the said will was produced in the proceedings before revenue Court where the will was returned to Madhav Prakash but Om Prakash was unable to take it back. Therefore, rejection of application for secondary evidence regarding second will is not proper.

(ii) Second will was not required to be registered as per Section 18 of the Registration Act, 1908 and the trial Court ought to have given affirmative finding regarding will in favour of Om Prakash. The trial Court erred in considering the relationship between father Radhekant Shukla and son Om Prakash Shukla that their relation were bitter but the suit was filed by Om Prakash Shukla against his father because it was necessary to make him

party in the suit. When appellant Om Prakash had taken care of his father during his illness second will was executed and there is nothing to discard the said will. Therefore, finding of the trial court is liable to be set aside.

4. On the other hand, learned counsel for the respondents submits as under:

(i) Original will was not produced before the trial Court which was executed in favour of Om Prakash Shukla and permission on secondary evidence regarding will is refused by the trial Court, therefore, will is not proved.

(ii) Om Prakash Shukla/legal representatives are not entitled for any relief on the basis of second will.

(iii) From the evidence of Shesh Narayan (DW-7) and D. Verma (DW-4) and other relevant documents it is established that the will was executed in favour of Madhav Prakash Shukla and Om Prakash Shukla who were two sons of Radhekant Shukla and shops in question were given to Madhav Prakash Shukla.

(iv) As the execution of second will is not established, Om Prakash Shukla/his legal representatives are not entitled for relief in relation to shops which were given to Madhav Prakash Shukla, therefore, finding of the trial Court is not liable to be interfered with invoking the jurisdiction of appeal.

5. Heard learned counsel for the parties and perused the records.

6. First question for consideration before this Court is whether the will (Ex-D/14) is executed by Radhekant Shukla in favour of Madhav Prakash Shukla and Om Prakash Shukla. Will (Ex-D/14) is a registered will executed on 02.01.1991. Persons namely Ravi Shankar and Shesh Narayan are two attesting witnesses of the said will and D. Verma is ascribe of the said will. Shesh Narayan (DW-7) deposed before the trial Court that the will (Ex-D/14) is executed in their presence in the office of the Registrar. He clearly deposed that Radhekant Shukla signed in his presence and thereafter he and other attesting witnesses have signed on the said will and the will was registered in the office of the registrar. Version of this witness is supported by ascribe D. Verma. There is nothing on their cross-examination which creates doubt regarding execution of the said will. From the entire evidence, it is established that the will was executed by Radhekant Shukla as per Ex-D/14 by which he gave his property to both his sons Om Prakash Shukla and Madhav Prakash Shukla. Shops in questions were given to Madhav Prakash Shukla as per the contents of the will.

7. The trial Court evaluated the entire evidence and recorded finding that execution of the will (Ex-D/14) is proved to the satisfaction of the Court. After reassessment of the entire evidence, this Court has no reason to take a contrary view. The other will is not produced before the trial Court. Application for secondary evidence is also rejected by the trial Court vide order

dated 08.01.1999. Names of Alok Kumar Dubey (PW-1) and Sudhesh Kumar are mentioned as attesting witnesses in the said will. Alok Dubey (PW-1) deposed before the trial Court that will was executed in the office of Shri Jai Prakash Jha, Advocate at about 9.30-10.00 am. Jai Prakash Jha (PW-4) deposed that said will was executed in the court therefore, version of this witness is contrary regarding place of execution of the will (Ex-P/1)

8. Now the point for consideration before this Court is whether the will (Ex-P/1) is proved by the evidence of Alok Dubey (PW-1) who is said to be the attesting witness. Jai Prakash Jha (PW-4) is ascribe of the will. In the matter of **Jaswant Kaur vs. Amrit Kaur and others**, reported in **(1997) 1 SCC 369**, it is held that in the cases where the execution of a will is shrouded in suspicion, its proof ceases to be a simple lis between the plaintiff and the defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

9. In the present case, version of Alok Dubey (PW-1) and Jai Prakash Jha (PW-4) is contrary in nature regarding place of

execution of the will, therefore, it should be examined on the basis of circumstances prevailing at the time of the execution of the alleged will. In the first will it is not a case where the father had deprived his second son totally from inheritance. The property has been distributed between both sons which is mentioned in the will itself. First will is registered will which is proved by attesting witnesses and therefore, the same is not under any suspicious circumstances. The second will which was not produced before the trial Court is suspicious because witnesses are stating differently regarding place of execution of the will. It is alleged by the appellant's side that the second will was executed by Radhekant Shukla due to service rendered by Om Prakash Shukla during his illness, but there is no record to show that Om Prakash Shukla paid any sum regarding treatment to his father Radhekant Shukla. Therefore, arguments advanced on behalf of the appellant that the second will was executed because of service of Om Prakash subsequent to first will is not substantiated by any cogent evidence. There was no occasion to change the view of Radhekant Shukla after first will.

10. The trial Court elaborately discussed the entire evidence and recorded finding that the appellants are not able to discharge the onus regarding suspicious circumstances of second will. After reassessing the entire evidence, this Court has no reason to record a contrary finding. Arguments advanced on behalf of the appellants is not sustainable.

11. Accordingly, the decree is passed in favour of the respondents and against the appellants as under:

- (i) The appeal is dismissed with cost.
- (ii) The appellants to bear cost of the respondents throughout.
- (iii) Pleader's fee, if certified be calculated as per certificate or as per schedule whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)

JUDGE