

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 25-02-2019

Judgment delivered on 29-03-2019

FA No. 146 of 2003

Ku. Chandrakala @ Chandrakanta Das, aged 32 years, adopted daughter of late Shri Goverdhan Das Vaishnav, occupation Landlord r/o. Bharmhanpara, Ward No.22, near Gandhi Chowk, Rajnandgaon (CG).

---- Appellant/plaintiff

Versus

Prakash Kankariya, aged 35 years, s/o. Peerchand Kankariya, r/o. Kamthi Line, Rajnandgaon (CG).

---- Respondent/defendant.

For appellant	:	Mr. Rajeev Shrivastava, Advocate.
For respondent	:	Mr. H.B. Agrawal, Sr. Advocate with Mr. Pankaj Agrawal, Advocate.

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. Heard on application filed under Order 41 Rule 27 of the Code of Civil Procedure, 1908.
2. By this application, the appellant seeks to file copy of the registration book to prove that there is signature of Prayag Das @ Goverdhan Das and no signature of Smt. Visakha Bai @ Ram Bai is there in the register.

3. During the pendency of the instant First Appeal, the son-in-law of the appellant filed an application before the Sub Registrar Rajnandgaon seeking the register book in which the entry with regard to registration of will dated 5-10-1973 was done and on receiving the copy of the registration book, the appellant came to know that the column of book number and deed number is blank. The document further reveals that only Prag Dasd alias Goverdhan Das has signed in the signature column of the register whereas the will was executed by Prayag Das alias Goverdhan Das and his wife Smt. Bisakha Bai alias Ram Bai. A copy of the register is filed herewith as Annexure A/1. As the appellant is not having the knowledge of the instant document and it is the son in law of the appellant who after due exercise and with his diligence came across the document which is very much necessary and relevant for the disposal of the instant appeal.

4. To decide the application Order 41 Ryule 27 of the Code of Civil Procedure may be read as under:

“The parties to an appeal shall not be entitled to produce additional evdience whether oral or documentary, in the Appellate Court. But if -

- (a) The Court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted, or

(aa) The party seeking produce additional evidence, establishes that notwithstanding the exercise of due diligence, such evidence was not within the knowledge of could not, after the exercise of due diligence, be produced by him at the time when the decree appealed against was passed, or

(b) The Appellate Court requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the Appellate court may allow such evidence or document to be produced, or witness to be examined.

5. It is not the business of the appellate court to supplement the expedience adduced by one party or the other in the lower court. Hence, in the absence of satisfactory reasons for the non production of the evidence in the trial court, additional evidence should not be admitted in appeal as a party guilty of remissness in the lower court is not entitled to the indulgence of being allowed to give further evidence under this Rule. So a party who had ample opportunity to produce certain evidence in the lower court but failed to do so or elected not to do so, cannot have it admitted in appeal.

6. The two tests for admissibility of additional evidence, is whether the appellate court is able to pronounce judgment on the material before it, without taking into consideration the additional evidence sought to be adduced. Such occasion would arise only if on examine the evidence, as it stands the court comes to the conclusion that some inherent lacuna or defects becomes apparent to the court. It is only for removing a lacuna in the evidence, that the appellate court is empowered to admit additional evidence. When a party failed to discharge its onus before the trial court, he is not entitled to a fresh opportunity to produce evidence.

7. The trial court has provided full opportunity to adduce evidence to the appellant but the parties have adduced evidence of attesting witnesses of the will before the trial Court, therefore, the evidence regarding will is already adduced before the trial court by both sides. It is not a case that this Court is not able to pronounce judgment without taking into consideration the additional evidence sought to be adduced. Accordingly, the application is liable to be and is hereby dismissed.

8. This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 7-4-2003 passed by the District Judge, Rajnandgaon (CG) in Civil Suit No. 11-A/1988 wherein the said court dismissed the suit

filed by the appellant and decreed counter claim and directed the appellant to deliver possession of room marked in the map attached with Schedule-A of the plaint to the respondent.

9. Goverdhan Das and Bisakha Bai were owners of a self acquired double storied house situated at Ward No.22, Bramhanpara, near Gandhi chowk, Rajnandgaon which is mentioned in the plaint and referred as suit house. In one part of the suit house appellant/plaintiff is residing whereas in other part of the suit house, tenants are residing and the appellant is receiving rent from tenants as owner. Goverdhan Das died some time in the year 1975 and Bisakha Bai died on 7-12-1981. Respondent/defendant gave notice to the tenants living therein that the defendant has become owner of the suit house by virtue of will executed by Goverdhan Das and Bisakha Bai. The alleged will was executed on 5-10-1973 and registered on 8-10-1973. The said will does not confer any title to the defendant as suit was filed by the appellant for declaring her as the owner of the property in question and injunction against the respondent in interfering with the possession of the appellant. As per version of the appellant, she is adopted daughter of late Goverdhan Das and Bisakha Bai, but the trial court answered the said issue in negative which is not in the fitness of evidence adduced by the appellant.

10. Learned counsel for the appellant would submit as under:

- i) The court below committed illegality in holding that the appellant is not adopted daughter of Goverdhan Das and Bisakha Bai.
- ii) The court below erred in law in holding that the reasons stated by the appellant for holding the will forged, illegal and inoperative are not acceptable.
- iii) Finding of the trial court that the appellant is not residing in the suit house since life time of Goverdhan Das is contrary to the material available on record.
- iv) The court below committed illegality in holding that induction of Usha Shrivastava as tenant by the appellant is not binding on the defendant./respondent.
- v) The trial Court committed illegality in holding that possession of the appellant of the suit house is unauthorised and

respondent is entitled to recover possession from her, therefore, finding of the trial Court is liable to be set aside.

11. On the other hand, learned counsel for the respondent would submit that the finding of the court below is based on proper marshalling of the evidence and same is not liable to be interfered with while invoking jurisdiction of the appeal.

12. I have heard learned counsel for the parties and perused the record of the court below including the judgment and decree.

13. Claim of the appellant is based on her adoption by late Goverdhan Das and Bisakha Bai in the year 1964. It is settled law that after adoption, the adoptive daughter becomes daughter of adoptive father and mother and her relation with natural father and mother comes to an end from the date of adoption and she is treated as daughter of adoptive family. In the present case, appellant herself admitted that in school register her father's name was mentioned as Jivrakhan Das who is her natural father (statement para 10). She further admitted that in voters' list also her father's name is mentioned as Jivrakhan Das. As per her statement, name of her father is written as Jivrakhan Das in school certificate and other documents. Again, she admitted that in one case related to Arjundas, she deposed that her father's

name is Jivrakhan Das. Suit was filed on 5-5-1988 before the trial Court in which her age was mentioned about 32 years. It means, her date of birth was in the year 1956 and at the time of adoption in the year 1964 she was about eight years old. In school register, Jivrakhan is mentioned as her father. Late Goverdhan Das and Bisakha Bai nowhere mentioned that they adopted the appellant as their daughter. Looking to the entire record, the trial court opined that adoption of appellant by late Goverdhan Das and Bisakha Bai is not established.

14. Jagannath Yadav (DW/4) and Gannalal Chandel (DW/3) are the attesting witnesses of the said will which was executed on 5-10-1963 and registered on 9-10-1963. Attesting witness Jagannath Yadav (DW/4) deposed before the trial court that will was executed in favour of respondent in his presence and in presence of second attesting witness namely Gannalal Chandel (DW/3) who signed in the said will. He further deposed that Goverdhan Das and Bisakha Bai were present at the time of execution of will and they signed in the will executed by them. From the evidence of attesting witnesses, it is established that will was executed in favour of respondent on 5-10-1973 and as per version of the appellant she was adopted in the year 1964. If Govekdhan Das and Bisakha Bai would have adopted the appellant as daughter, there was no reason to execute the will in

favour of respondent bypassing adoptive daughter. There is no mention in the will that the appellant is adopted by Goverdhan Das and Bisakha Bai which goes to show that no adoption of the appellant took place in the year 1964 or during life time of Goverdhan Das and Bisakha Bai.

15. Appellant pleaded that Bisakha Bai @ Ram Bai was sister of her father namely Jivrakhan but no family tree was shown in the plaint to establish as to how Bisakha Bai @ Ram Bai were real sister of Jivrakhan Das. In absence of pleading and evidence, it is not established before the trial court that even in absence of adoption, the appellant has right over the property of Goverdhan Das and Bisakha Bai as their distant relative. The will executed in favour of the respondent is a registered will which is proved by attesting witnesses. The will was executed on 5-10-1973 which was registered on 9-10-1973 which goes to show that Goverdhan Das and Bisakha Bai were firm prior to execute the will in favour of respondent and it is not a case of undue influence or fraud. Therefore, finding of the trial Court that will is not suspicious is based on material placed on record which is not liable to be substituted with contrary finding by this court. In all records, the appellant is shown to be daughter of her natural father Jivrakhan and she did not state anywhere regarding adoption before filing of the suit, therefore, law of estoppel comes into operation and she

will be stopped from saying that she is adopted daughter of Goverdhan Das and Bisakha Bai. The will was executed on 5-10-1973/9-10-1973 and for declaring the will as inoperative the suit must have been filed three years from the date of death of Bisakha Bai i.e.,1981. The suit was filed on 5-5-1988 which is barred by limitation. As the appellant is not adopted daughter of Goverdhan Das and Bisakha Bai, she cannot claim right over their property. The property in question is vested on respondent on the basis of will, therefore, she is not entitled for property in question and the trial court is right in granting decree against appellant for vacation of premises of Goverdhan Das and Bisakha Bai which is in possession of the appellant. In view of the evidence adduced by both sides, argument advanced on behalf of the appellant is not acceptable. Finding of the trial court is based on oral and documentary evidence adduced by both sides and same is not based on any irrelevant or extraneous material. After re-assessing the evidence, this court has no reason to substitute contrary finding. The appeal is liable to be dismissed.

16. Accordingly, decree is passed in favour of respondent and against the appellant as under:

- (i) The appeal is dismissed with cost.
- (ii) Appellant to bear the cost of respondent through out.

- (iii) Pleader's fee., if certified, be calculated
as per Schedule or as per certificate
whichever is less.
- (iv) A decree be drawn up accordingly.

Sd/-

(Ram Prasanna Sharma)
JUDGE

Raju