

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.40 of 2007Judgment reserved on: 20/11/2019Judgment delivered on: 20/12/2019

Sukhdeo Prasad, aged at present about 60 years, S/o
 Shri Narbada Prasad, Caste Brahmin, R/o Village
 Gorakhpur, Tehsil Pendraroad, District Bilaspur (C.G.)
 (Defendant/Respondent)
 --- Appellant

Versus

1. Smt. Savitri Bai, aged 35 years, W/o Shri Shivmurat
 Prasad Chaturvedi, R/o Village Dewargaon, Tehsil
 Pendraroad, District Bilaspur (C.G.)
 (Plaintiff/Appellant)
2. State of Chhattisgarh, through the Collector, Bilaspur
 (C.G.)
 (Formal defendant)
 ---- Respondents

For Appellant: Mr. Somnath Verma and Ms. Ritu
 Alfred, Advocates.
 For Respondent No.1: None present.
 For Respondent No.2/State: -
 Mr. Ravi Kumar Bhagat, Dy. Govt. Adv.

Hon'ble Shri Justice Sanjay K. AgrawalC.A.V. Judgment

1. This second appeal preferred by the appellant/
 defendant was admitted for hearing on the following
 substantial questions of law :-

"1. Whether the lower appellate Court was
 justified in disbelieving the registered Will
 dated 17/12/87 and accepting the Will dated
 27/1/89 which is an unregistered instrument?

2. Whether the finding arrived at by the lower appellate Court in the light of the evidence that has come on record is a perverse finding ?

(For the sake of convenience, parties would be referred hereinafter as per their status shown and ranking given in the suit before the trial Court.)

2. The suit property was originally held by plaintiff's father Sonilal. Admittedly, the first wife of Sonilal died and he is said to have remarried with Purniya Bai. The plaintiff is daughter of Sonilal out of his wedlock with his first wife. Plaintiff – Savitri Bai filed a civil suit stating *inter-alia* that her father had executed an unregistered Will deed dated 27/01/1989 (Ex.P/11) in her favour thereby, she had become the title-holder of the suit property and alienation made by Purniya Bai in favour of the defendant – Sukhdeo Prasad on 02/09/1992 is null and void as Purniya Bai had no right/title over the suit property as the Will deed dated 17/12/1987 (Ex.P/9) executed by plaintiff's father – Sonilal in favour of Purniya Bai has already been superseded by the Will deed dated 27/01/1989 (Ex. P/11) executed by Sonilal in plaintiff's favour, therefore, she is entitled for decree for declaration of title and possession.
3. Defendant-Sukhdev filed his written statement and denied the averments made in the plaint stating inter-

alia that the plaintiff is not entitled for any relief, as such, the suit deserves to be dismissed.

4. The trial Court after appreciating oral and documentary evidence available on record, by its judgment and decree dated 24.4.2001 dismissed the suit holding that plaintiff has failed to prove the Will deed dated 27/01/1989 (Ex.P/11) executed by her father. On appeal being preferred by the plaintiff, learned first appellate Court reversed the judgment and decree of the trial Court and decreed the suit of the plaintiff holding that Will deed dated 17/12/1987 executed by plaintiff's father in favour of Purniya Bai has already been superseded by the Will deed 27/01/1989 (Ex.P/11) executed by him in plaintiff's favour. Challenging the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been preferred by the appellant/defendant in which two substantial questions of law have been formulated and set out in the opening paragraph of this judgment.

5. Mr. Somnath Verma, learned counsel for the appellant/defendant would submit that execution and attestation of Will dated 27/01/1989 (Ex.P/11) has not been proved by the plaintiff and therefore, the first appellate Court has committed jurisdictional error in granting decree in favour of the plaintiff. He would further submit that attesting witness Dhaniram though has

examined, but has failed to prove the Will in accordance with law particularly, with reference to Section 63 (c) of the Succession Act, 1925 read with Section 68 of the Evidence of Act, 1872. He would also submit that Purniya Bai is the second wife of Sonilal as he married with her after death of his first wife and bequeathed the suit property in her favour by Will dated 17/12/1987 and on the strength of Will, she has rightly alienated the suit property in favour of the defendant – Sukhdeo Prasad. Therefore, the judgment and decree of the first appellate Court deserves to be set aside and that of the trial Court be restored.

6. None appears for the respondent/plaintiff, though served.
7. I have heard learned counsel for the appellant/defendant, considered their submissions made hereinabove and also went through the records with utmost circumspection.
8. Sonilal, the original holder of the property, firstly said to have executed a registered Will in favour of Purniya Bai on 17.12.1987 (Ex.P/9), which is said to have been revoked by Will dated 27.1.1989 (Ex.P/11) executed by Sonilal in favour of his daughter i.e. the plaintiff herein. The trial Court has disbelieved the Will executed by Sonilal in favour of the plaintiff, whereas the first appellate Court has reversed the

said finding and held that the Will executed by Sonilal in favour of the plaintiff is the last will stating that the earlier Will Ex.P-9 has been revoked by Sonilal and therefore the Will Ex.P-11 is the last Will of testator Sonilal.

9. Section 70 of the Indian Succession Act, 1925 deals with revocation of Will which states as under: -

"70. Revocation of unprivileged Will or codicil.—No unprivileged Will or codicil, nor any part thereof, shall be revoked otherwise than by marriage, or by another Will or codicil, or by some writing declaring an intention to revoke the same and executed in the manner in which an unprivileged Will is hereinbefore required to be executed, or by the burning, tearing or otherwise destroying the same by the testator or by some person in his presence and by his direction with the intention of revoking the same."

10. From the aforesaid analysis, it is quite vivid that a revocation of a Will can be brought about in the following way :

(i) by operation of law,

(ii) by writing,

and this can be done in one of two ways :

(a) by another Will or codicil duly executed,
or

(b) by some other writing containing a declaration of an intention to revoke, and observing the formalities required for the execution of an unprivileged Will,

(iii) without writing, by destruction—

(a) by burning, or

(b) by tearing, or

(c) by otherwise destroying the Will.

11. A testator can revoke his Will by the execution of a later Will or codicil. But the mere fact of making a subsequent testamentary paper does not work a total revocation of a prior one, unless the latter expressly or in effect revokes the former, or the two be incapable of standing together. Swinburne says, that 'no man can die with two testaments'. The burden of proving revocation is on the party who sets up the plea and in order that the loss of a Will may raise a presumption of revocation, it must be proved that the Will was not in existence at the time of the testator's death.

12. In the instant case, it is the case of the plaintiff that testator of the Will Sonilal has revoked the Will in favour of Purniya Bai by expressly mentioning in the subsequent Will on 27-1-1989 (Ex.P-11). Revocation of earlier Will by subsequent Will is permissible under Section 70 of the Indian Succession Act, 1925.

13. A careful perusal of Ex.P-11 would show that testator of the Will Sonilal has expressly revoked the earlier Will by Ex.P-11 and the reason has also been assigned

to hold that Purniya Bai was earlier serving him, but now, she is not serving him and therefore he, out of the service being rendered by his daughter Savitri Bai, has executed a second Will in favour of the plaintiff i.e. his daughter in presence of attesting witnesses and it has also been scribed by Pt. Ramkrishna Tiwari. Ramkrishna Tiwari (PW-3) and Dhaniram (PW-4), both, have been examined to prove that the earlier Will has been revoked by Sonilal. In paragraph 4 of the written statement, defendant No.1, who is the purchaser from Purniya Bai, has simply stated that Sonilal has not executed any Will in favour of the plaintiff and if any Will has been executed, it is forged and fabricated, by making specific denial.

14. Order 6 Rule 4 of the CPC clearly warrants that in all cases in which the allegation of any misrepresentation, fraud, breach of trust, willful default, or undue influence is there, the necessary particulars are required to be stated in the pleadings.
15. The Supreme Court in the matter of Govindbhai Chhotabhai Patel and others v. Patel Ramanbhai Mathurbhai¹ has held that where the appellants went to trial on the basis of fabrication of gift deed, the appellants have admitted the execution of the gift

1 AIR 2019 SC 4822

deed but alleged the same to be forged or fabricated, however, the appellants have not been able to prove any forgery in the execution of the gift deed.

16. The principles which govern the proving of a will are well settled; (See H. Venkatachala Iyengar v. B.N.Thimmajamma² and Rani Purnima Devi v. Khagendra Narayan Dev³) and followed by the Constitution Bench of the Supreme Court in the matter of Shashi Kumar Banerjee and others v. Subodh Kumar Banerjee since deceased and after him his legal representatives and others⁴, in which Their Lordships have clearly held that the mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by Section 63 of the Indian Succession Act, 1925. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. It was further held that where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the

2 AIR 1959 SC 443

3 AIR 1962 SC 567

4 AIR 1964 SC 529

caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. It was also held that the suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence.

17. As such, in the instant case, though defendant No.1 who is third party and is not the person in whose favour the Will was executed and who is the purchaser from Purniya Bai, has simply stated that the Will is forged and fabricated, but there are no particulars of fraud etc., in terms of Order 6 Rule 4 of the CPC in making the Will. Therefore, in line with the

decision of the Supreme Court in Govindbhai Chhotabhai Patel (supra), in the instant case also, the fact of Will having been executed in favour of the plaintiff is not seriously disputed, except saying that it is forged and fabricated, but it is absolutely missing as stated above.

18. In the instant case, the plaintiff had already made a statement before the Court that the Will in favour of Purniya Bai has been revoked and second Will has been executed in her favour which has not been seriously disputed and the Will in favour of Purniya Bai has been proved to have been revoked by the plaintiff. Likewise, scribe of the Will Pt. Ramkrishna Tiwari has also been examined as PW-3. He has stated before the Court that the Will Ex.P-11 was prepared at the instance of testator Sonilal and firstly, he signed the Will and thereafter, testator signed the Will and thereafter, the attesting witnesses namely Dhaniram, Rajaram & Ramnarayan signed the Will. Attesting witness Dhaniram has also been examined as PW-4 and he has proved his attestation in the Will Ex.P-11. No question with regard to attestation and execution of Will has been asked from Dhaniram (PW-4) — attesting witness, whereas it ought to have been asked from the said witness with regard to attestation of will. Apart from this, once revocation of Will is proved, the Will in favour of

Purniya Bai goes and the plaintiff being the natural daughter of Sonilal, would succeed the property of her father, as it is admittedly, the property of her father. Even otherwise, the first appellate Court has given sufficient and detailed & valid reasons for accepting due execution and attestation of will in favour of the plaintiff and found the Will in favour of the plaintiff to be proved strictly in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 which is neither perverse nor contrary to the record. The substantial questions of law are answered accordingly.

19. Consequently, the second appeal being without substance is liable to be and is hereby dismissed leaving the parties to bear their own cost(s).

20. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge