

HIGH COURT OF CHHATTISGARH, BILASPUR**FA No. 42 of 1996****Reserved on : 12.04.2019****Delivered on : 25.06.2019**

1. Ganesh Kumar Kaser, S/o Ramjeelal, aged about 40 years, R/o Azad Chowk, Rajnandgaon, Tahsil & District- Rajnandgaon (M.P.) (Now C.G.)
 2. Jagannath Kaser (Dead) Through Lrs.
 - 2 (a) Smt. Janakdulari, W/o Late Jagannath Kaser, aged about 60 years.
 - 2 (b) Sanjay Kaser, S/o Late Jagannath Kaser, aged about 42 years.
 - 2 (c) Sandeep Kaser, S/o Late Jagannath Kaser, aged about 40 years.
 - 2 (d) Sanjeev Kaser, S/o Late Jagannath Kaser, aged about 38 years.
- Respondents No. 2 (a) to 2 (d) are R/o Andi Road Ward No. 15, Daundi Lohara, District- Balod (C.G.) Pin No. 491771.

---- Appellants**Versus**

1. Smt. Mathura Bai (Dead) Through Lrs.
 - 1 (a) Kannilal Sao, aged about 76 years, S/o Late Samliya Sao.
 - 1 (b) Rajkumar, aged about 27 years, S/o Kannilal Sao.

Both are R/o Brahminpara, Rajnandgaon, Tahsil & District- Rajnandgaon (M.P.) (Now C.G.)
2. Smt. Malti Bai (Dead) Through Lrs.
 - 2 (a) Ram Kumar, S/o Late Malti Bai & Late Shri Nandan Kaser (Dead) through Lrs.
 - 2(a)(i) Dheeraj Hariharno, aged about 20 years, S/o Ram Kumar.
 - 2(a)(ii) Neha Hariharno, aged about 23 years, daughter of Ram Kumar.

Both are R/o Nandan Watch Center, Manav Mandir Chowk, Rajnandgaon, Tahsil & District- Rajnandgaon (C.G.)
 - 2 (b) Laxmi Kumar, S/o Late Malti Bai & Late Shri Nandan Kaser, aged about 42 years. R/o Diwanpara Rajnandgaon, Behind Ram Talkies, District- Rajnandgaon (C.G.)
 - 2 (c) Saroj, W/o Vijay Kumar, D/o Late Malti Bai, aged about 60 years, R/o Sector 7-A, Market Bhilai, Tahsil & District- Durg

(C.G.)

2 (d) Smt. Asha, W/o Laxminath, D/o Late Malti Bai, aged about 48 years, R/o Lilly Chowk, Raipur, Tahsil & District- Raipur (C.G.)

---- Respondents

For Appellants	:	Mr. Ravish Agrawal, Sr. Advocate with Mr. Hari Shankar Patel, Advocate.
For respondents	:	Mrs. Anju Ahuja, Advocate.

Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1. This first appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against judgment/ decree dated 20.01.1996 passed by First Additional District Judge, Rajnandgaon (M.P.) (Now C.G.) in Civil Suit No. 13A/1994, wherein the said court decreed the suit filed by original respondents namely Mathura Bai and Malti Bai for declaring their title in house situated at Brahminpara, Rajnandgaon (C.G.) (Part and partial of decree of the trial court) on the basis of will dated 07.05.1979 (Ex. P/4) and on the basis of possession and again, for injunction. It is further decreed that the will Ex. D/3 dated 11.06.1984 in favour of Ganesh Kaser and Jagannath Kaser is void and not binding on the said respondents/ plaintiffs and they deliver possession of two rooms to the respondents/ plaintiffs.
2. The property in question is house situated at Brahminpara, Rajnandgaon (C.G.) which is shown in Schedule-A of the plaint which is part and partial of decree of the trial court. As per pleading of the claimants (Mathura Bai & Malti Bai) side, the suit house was owned by Laxman Kaser and he gave the house to them because they were relatives of Late Laxman Kaser since the year 1969. For the said

house, a will (Ex. P/4) was executed by Laxman Kaser on 07.05.1979 in their favour. Laxman Kaser passed on 20.06.1984. He was not fit before his admission in hospital since 29.05.1984, therefore, he was unable to execute any document. The alleged will (Ex. D/3) dated 11.06.1984 in favour of Ganesh Kaser and Jagannath Kaser is forged document which does not confer any right on them and the same is not binding on claimants/ original plaintiffs.

3. At the time of illness of Laxman Kaser, two rooms in the said house was given to Ganesh Kaser and Jagannath Kaser which was not vacated by them after death of Laxman Kaser that is why the suit was filed which was decreed by the trial court. Against which, both the original respondents Ganesh Kaser and Jagannath Kaser preferred the appeal.
4. Learned counsel for the appellants submits as under:-
 - (i) Three witnesses namely Kannilal, Raghunandan Lal and Jivrakhan Singh are attesting witnesses in the alleged will dated 07.05.1979 (Ex. P/4) executed in favour of Mathura Bai and Malti Bai.
 - (ii) Kannilal and Raghunandan Lal have not examined and only Jivrakhan Singh (PW-3) was examined before the trial court, but there is no evidence that other attesting witnesses also signed in his presence, therefore, due execution and attestation as required under Section 63(c) of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872, is not proved.
 - (iii) The trial court recorded finding that Laxman Kaser admitted the will date 07.05.1979 as per notice dated 13.06.1984 (Ex. D/6) and

Ganesh Kaser (DW-1) admitted that he had knowledge about execution of will (Ex. P/4), therefore, the will Ex. P/4 is duly executed, is not sustainable because Ram Bharosa (PW-2) is not attesting witness and attesting witness namely Jivrakhan Singh (PW-3) has not proved due attestation as per legal provision of the act.

(iv) Admission regarding will is only with respect to making of the will and not genuineness of the will, therefore, the will cannot acted upon on the basis of admission of making of the will.

(v) Laxman Kaser revoked earlier will (Ex. P/4) by subsequent will dated 11.06.1984 (Ex. D/3). Ex. D/6 dated 13.06.1984 is notice by Laxman Kaser to original plaintiff and executed power of attorney dated 15.06.1984 (Ex. D/8) in favour of the appellants, therefore, the original respondents/ plaintiffs have no right over the property on the basis of will Ex.P/4.

(vi) The will (Ex. D/3) in favour of original appellant is proved by the attesting witnesses Govind Prasad (PW-5) and Santosh Kumar (DW-4).

(vii) The trial court has not considered evidence of Santosh Kumar (DW-4) and also not considered that Laxman Kaser was permitted to go out of the hospital as per Ex. D/5.

(viii) As per Ex. D/10 which is certificate of Dr. S.N. Sharma, Laxman Kaser was mentally and physically sound on 11.06.1984, therefore, finding arrived at by the trial court is not sustainable.

(ix) Mathura Bai and Malti Bai are not relatives of Laxman Kaser

and appellants namely Ganesh Kumar and Jagannath Kaser are legal heirs of Laxman Kaser being son of his brother Ramjee, therefore, they are successors of Laxman Kaser and they are entitled for property in question.

5. He placed reliance in the matter of **S.R. Srinivasa & others Vs. S. Padmavathamma**, reported in **(2010) 5 SCC 274**, **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam**, reported in **(2003) 2 SCC 91**, **Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria & others**, reported in **(2008) 15 SCC 365**, **Yumnam Ongbi Tampha Ibema Devi Vs. Yumnam Joykumar Singh & others**, reported in **(2009) 4 SCC 780**, **Mahesh Kumar (Dead) By Lrs. Vs. Vinod Kumar & others**, reported in **(2012) 4 SCC 387**, **Second Appeal No. 92 of 2001 (Shiv Narayan & others Vs. Jaimangal & others)** decided by this Court on **25.09.2018**, **Second Appeal No. 710 of 2003 (Ghanshyam & others Vs. Deepak Kumar Patnayak & others)** decided by this Court on **08.03.2019** & **S.A. No. 284 of 2003 (Dinesh Kumar Dubey & others Vs. Ayodhya Dubey & others)** decided by this Court on **12.10.2018**.
6. I have heard learned counsel for the parties and perused the record in which judgment and decree has been passed.
7. It is dispute regarding one house which is situated at Brahminpara, Rajnandgaon (C.G.). In the present case, two wills are in issue. The first will is alleged to be executed on 07.05.1979 (Ex. P/4) and the second will is alleged to be executed on 11.06.1984 (Ex. D/3) by Laxman Kaser.

8. First question for consideration before this Court is whether Mathura Bai and Malti Bai were relatives of Laxman Kaser or not. Appellant-Ganesh Kaser was examined as DW-1. He admitted (Para 7) that Malti Bai is daughter of sister of Laxman Kaser. It means, Malti Bai is niece of Laxman Kaser. He also admitted (Para 8) that Mathura Bai is also relative of Laxman Kaser. When there is admission from the appellants side that Malti Bai and Mathura Bai are relatives of Laxman Kaser and from the entire evidence, it is established that both were living in the house in question, it cannot be said that both were stranger. The house in question was given to them by Laxman Kaser which shows love and affection of Laxman Kaser towards them.
9. The first will was executed on 07.05.1979 by Laxman Kaser in favour of Mathura Bai and Malti Bai for the house in question. Three attesting witnesses are mentioned in the said will namely Kannilal, Raghunandan Lal and Jivrakhan Singh. Jivrakhan Singh (PW-3) proved attestation of will and deposed that it is executed by Laxman Kaser. Though two other attesting witnesses namely Kannilal and Raghunandan Lal have not been examined, but for using the document as evidence, one attesting witness was examined and examination of one attesting witness is mandate of law. As per law laid down in the matter of **Ramesh Verma (Dead) Through Legal Representatives Vs. Lajesh Saxena (Dead) By Legal Representatives & another**, reported in **(2017) 1 SCC, 257**.
10. As per version of attesting witness namely Jivrakhan Singh, Laxman Kaser was sound and disposing state of mind on the date of execution of will i.e. on 07.05.1979, it is proved by his evidence that

Laxman Kaser had understood nature and effect of disposition and put his signature to document on his own free will.

11. It is alleged that the second will was executed on 11.06.1984 (Ex. D/3). Vijay Kumar Sharma (PW-6) deposed before the trial court that Laxman Kaser was admitted in Government Hospital Rajnandgaon on 29.05.1984 at 9:00 p.m. and as per his bed head ticket, he was admitted upto 18.06.1984. From his evidence, it is established that Laxman Kaser was admitted in Government Hospital from 29.05.1984 to 18.06.1984 and he was not discharged in between as per record. Though, Dr. Satya Narayan Sharma (DW-2) deposed before the trial court that Laxman Kaser was permitted to go for one hour from the hospital, but the fact remains that when evidence of the witnesses establishes suspicious circumstances shrouded against will dated 11.06.1984 (Ex. D/3), the appellants were under obligation to clarify that Laxman Kaser was in sound and disposing state of mind on 11.06.1984 (Ex. D/3) when he was executed the alleged second will in their favour. Two attesting witnesses of the said will are Govind Prasad and Santosh Kumar. Govind Prasad was examined as PW-5 and he clearly stated in his statement that Laxman Kaser was not present at the time of execution of will dated 11.06.1984 (Ex. D/3). Though, Santosh Kumar (DW-3) deposed about execution of will by Laxman Kaser, but it is contradicted by other attesting witness Govind Prasad (PW-5).
12. When Govind Prasad (PW-5) deposed before the trial court that Laxman Kaser was not present at the time execution of said will and from statement of Vijay Kumar Sharma (PW-6), it is established that

Laxman Kaser was admitted in the hospital from 29.05.1984 to 18.06.1984, suspicious circumstances for second will is not dispelled out by the appellants, therefore, the appellants have no right over the property on the basis of said will.

13. The appellants have claimed over the property on the basis of succession, but no case on the basis of succession is pleaded before the trial court and the trial court has not framed any issue in this regard. When Laxman Kaser has executed will in favour of Mathura Bai and Malti Bai, the trial court is right in holding that the decree should be passed in their favour on the basis of will. Finding of the trial court is based on proper marshaling of evidence and the same does not warrant any interference of this Court. Argument advanced on behalf of the appellants is not sustainable and the case laws cited by learned counsel for the appellants are clearly distinguishable from the facts and circumstances of the present case. Accordingly, the appeal is liable to be dismissed.
14. The decree is passed against the appellants and in favour of the respondents- Mathura Bai/ legal representatives and Malti Bai/ legal representatives on the following terms and conditions:-
- (i) The appeal is dismissed with cost.
 - (ii) Parties to bear their own cost.
 - (iii) Pleaders' fee, if certified be calculated as per certificate or as per schedule whichever is less.
 - (iv) A decree be drawn accordingly.

Sd/-
(Ram Prasanna Sharma)
Judge