

HIGH COURT OF CHHATTISGARH, BILASPUR

SA No.169 of 2002

1. Jabir Singh (Died) Through Lrs. Nil
 - 1(a). Dhan Singh, S/o Late Jabir Singh, Aged About 41 Years, R/o Village Mahuwa Tikra, Tahsil Ambikapur, District Surguja Chhattisgarh, District : Surguja (Ambikapur), Chhattisgarh
 - 1(b). Jayant Singh, S/o Late Jabir Singh, Aged About 36 Years, R/o Village Mahuwa Tikra, Tahsil Ambikapur, District Surguja Chhattisgarh, District : Surguja (Ambikapur), Chhattisgarh
 - 1(c). Anurup Singh S/o Late Jabir Singh Aged About 32 Years R/o Village Mahuwa Tikra, Tahsil Ambikapur, District Surguja Chhattisgarh, District : Surguja (Ambikapur), Chhattisgarh
 - 1(d). Sanatan Kunwar Wd/o Late Jabir Singh Aged About 70 Years R/o Village Mahuwa Tikra, Tahsil Ambikapur, District Surguja Chhattisgarh, District : Surguja (Ambikapur), Chhattisgarh
 - 1(e). Maghan Kunwar, W/o Devmani, Aged About 48 Years, D/o Late Jabir Singh, R/o Village Mahuwa Tikra, Tahsil Ambikapur, District Surguja Chhattisgarh, District : Surguja (Ambikapur), Chhattisgarh

---- Appellants/Plaintiffs

Versus

1. Mst. Dhankuar (Died) Through Lrs. Nil
 - 1(a). Ramashankar Singh, S/o Late Chandan Singh, Aged About 40 Years, R/o Village Kendai, Police Station And Tehsil Katghora, District Korba Chhattisgarh., District : Korba, Chhattisgarh
 - 1(b). Ramswareya Singh, S/o Late Chandan Singh, Aged About 35 Years R/o Village Kendai, Police Station And Tehsil Katghora, District Korba Chhattisgarh., District : Korba, Chhattisgarh
2. Madan Singh S/o Kalind Singh Caste - Kanwar, R/o Village Libra, Police Station And Teshil - Ambikapur, District Surguja Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh
3. Sadar Singh S/o Kalind Singh Caste - Kanwar, R/o Village Libra, Police Station And Teshil - Ambikapur, District Surguja Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh
4. Nanbaiya D/o Nathu Singh Caste - Kanwar, Resident Of Village - Parasapali, Police Station And Tehsil - Ambikapur, District Surugja Chhattisgarh., District : Surguja (Ambikapur), Chhattisgarh
5. Akaluj Singh @ Turbil S/o Mahaveer Singh Aged About 18 Years Caste - Kanwar, R/o Village - Libra, Police Station And Tehsil Ambikapur, District Surguja Chhattisgarh., District : Surguja

(Ambikapur), Chhattisgarh

6. Kunhartarbin @ Nanbaiya W/o Mahaveer Singh Caste - Kanwar, R/o Village - Libra, Police Station And Tehsil Ambikapur, District Surguja Chhattisgarh
7. State Of Chhattisgarh, Through Collector, Surguja Ambikapur., District: Surguja (Ambikapur), Chhattisgarh
8. Ram Das, S/o Babafar, Aged About 60 Years Caste - Kanwar, R/o Vilalge Koteya, Police Station And Tehsil Ambikapur, District Surguja Chhattisgarh
9. Dooja Bai, W/o Deepnath Singh, Aged About 50 Years Caste - Kanwar, R/o Village - Libra, Police Station And Tehsil - Ambikapur, District Surguja Chhattisgarh
10. Jalmati (Died) Through Lrs. Nil
10(a). Amarnath Singh, S/o Late Veerbhadar Singh, Aged About 55 Years, R/o Village Keshgawan, Police Station & Tahsil Lakhanpur, District Surguja (CG)
- 10(b). Kanhai Singh, S/o Shri Shivbharat Singh, Aged About 50 Years, R/o Village Keshgawan, Police Station & Tahsil Lakhanpur, District Surguja (CG)

--- Respondents/Defendants

For Appellants/ Plaintiffs	:	Mr. V.K. Pandey, Advocate
For Respondents/ Defendants No.2,3,8,9 &10	:	Mr. Ajay Kumar Pandey, Advocate
For State/Respondent No.7	:	Mr. Aditya Bharadwaj, Panel Lawyer

Hon'ble Shri Justice Manindra Mohan Shrivastava

Order On Board

25/07/2019

Heard.

1. This appeal is directed against impugned judgment and decree dated 02.01.2002 passed by the District Judge, Ambikapur, District Surguja in Civil Appeal No.133-A/1999, by which, the learned Lower Appellate Court has affirmed the judgment and decree of the learned Trial Court on 10.08.1989 in Civil Suit No.45-A/84 dismissing the plaintiffs' suit.

2. This appeal was admitted on following substantial question of law :

“Whether on the facts and in the circumstances of the case, the Court below committed an error of law in not granting relief to the plaintiff to the extent of share of Pawan Kunwar in accordance with finding arrived at para

17 of the judgment and decree ?”

3. The Appellant/plaintiff filed a suit seeking declaration of title and possession of the property in dispute as described Schedule-B on the pleadings inter alia that the property was originally settled in favour of Vijay Singh and Mahipat Singh. The appellant was adopted as son by Mahipat Singh. Mahipat Singh had only two daughters namely: Dhankunwar and Indrakunwar and no son. Further pleading was that Vijay Singh was survived by his son Nathu Singh, who died leaving behind his wife widow Pawankunwar and daughter Nanbaiya. According to the plaintiff, the parties belong to “Kanwar (कंवर)” tribe and in that tribe community, the provision of Hindu Succession Act, 1956 are not applicable but their own customary laws of succession under which daughters are not entitled to any share in the property of their father. Further, pleading was that later on, Pawankunwar had gifted the disputed property shown in Schedule-B by way of registered gift deed dated 07.05.1965 in favour of plaintiff Jabir Singh and defendant Mahaveer Singh (father of defendant No. 6 and husband of defendant No. 7). It was further pleaded that Mahaveer Singh relinquished his share in favour of Jabir Singh, the plaintiff. On such pleadings, the plaintiff claimed that as daughters of Mahipat Singh and Nathu Singh were not entitled to succeed to the ancestral property under the Customary Law of succession applicable to “Kanwar (कंवर)” tribe community and as the plaintiff was taken in adoption by Mahipat Singh as his son and further Pawankunwar having executed gift deed in favour of Jabir Singh and Mahaveer Singh relinquished his share, the plaintiff acquired valid title in respect of 13.44 acres of land.

4. The plaintiff's claim was denied by the defendants on the pleadings that the daughters were also entitled to succession to succeed and receive share under the laws of succession applicable to the parties; there was no valid adoption of plaintiff Jabir Singh by Mahipat Singh and that the Bakshishnama (gift deed) was got written by Pawankunwar by playing fraud and mischief and it was incapable of transferring any valid title or interest in favour of the plaintiff. It was also denied that there was any relinquishment by Mahaveer Singh in favour of plaintiff. Learned trial Court framed as many as 10 issues. The learned Trial Court having recorded that there was no valid adoption, daughters were also entitled to inherit the property of their father and that in the absence of proof of any relinquishment by Mahaveer Singh in favour of plaintiff, the plaintiff was not entitled to any relief and the suit was dismissed.

5. Learned Lower Appellate Court also affirmed the judgment of the trial

Court dismissing the appeal.

6. Learned counsel for the appellant argued that both the Courts below in their judgments have recorded a finding that gift deed to the extent of share of Pawankunwar was valid. He would argue that even if it is held that the plaintiff failed to prove valid relinquishment of share by Mahaveer Singh in favour of plaintiff, in any case, by virtue of registered gift deed, the plaintiff would be entitled to at least half of the share to which Pawankunwar was held entitled by both the Courts below. According to him, learned Courts below have clearly held that Pawan Kunwar was entitled to $\frac{1}{4}$ th share in the disputed property. Therefore, to that extent, gift would be valid. It is further submitted that by gift deed, she could only gift 3.11 acres divided by and as the plaintiff would be taking the gifted property in equal share with Mahaveer Singh, he would be entitled to the extent of 1.69 acres. Atleast, to that extent, learned Courts below ought to have decreed the suit of the plaintiff.

7. On the other hand, learned counsel for the respondent would argue that, though, the learned Trial Court as well as learned Appellate Court both have held that Pawankunwar was entitled to only $\frac{1}{4}$ th share in the property, the observations that gift deed would be valid to the extent of her share, would not come to the aid of the plaintiff because the learned Courts below have also held that the property being undivided one, no gift could be validly made of an undivided share. Learned counsel for the respondent would further argue that the law required a gift deed to be attested by at least two witnesses. Therefore, in view of provision contained in Section 68 of the Evidence Act, 1872 (for short "the Act of 1872"), the gift deed is required to be proved by at least one attesting witness. He would submit that, though, one of attesting witnesses Dariyarram (PW-4) may have supported the case of the plaintiff by proving that he had attested the gift deed made by Pawankunwar in favour of Jabir Singh and Mahaveer Singh, the other attesting witness, Amritram, examined as Defendant Witness (DW-6), has completely denied any such attestation made by him or even his presence in any such transaction. Therefore, the plaintiff could not claim even on the basis of bakshishnama.

8. I have heard learned counsel for the parties and perused the record.

9. In view of the question of law framed by this Court earlier, it has to be seen whether in view of the findings recorded by learned Appellate Court in para-17, the plaintiff/appellant is entitled to any relief.

10. The Courts below have recorded concurrent finding of fact, which is not assailed herein, that the plaintiff has failed to prove valid adoption as son of Mahipat Singh. Further, learned Courts below have also recorded concurrent finding that the Hindu Succession Act is applicable and the daughters are also entitled to inheritance. Learned Courts below have also held that Pawankunwar was entitled to 1/4th share in the property.

11. After going through the judgment passed by learned Courts below, I find that in para-17 of its judgment, learned Lower Appellate Court has held that Pawankunwar was only entitled to 1/4th share and any gift made by her would be valid to the extent of 1/4th of her share. This is an affirmative finding of the learned Lower Appellate Court affirming finding of the learned trial Court on this aspect.

12. However, at the same time, a contradictory finding has also been recorded by the learned Courts below that as the property was undivided, it could not be gifted. This finding of the learned Courts below is patently illegal on the face of provision contained in Section 44 of the Transfer of Property Act, 1882 which reads as under :

S. 44. Transfer by one co-owner—Where one of two or more co-owners of immoveable property legally competent in that behalf transfers his share of such property or any interest therein, the transferee acquires as to such share or interest, and so far as is necessary to give, effect to the transfer, the transferor's right to joint possession or other common or part enjoyment of the property, and to enforce a partition of the same, but subject to the conditions and liabilities affecting at the date of the transfer, the share or interest so transferred.

Where the transferee of a share of a dwelling-house belonging to an undivided family is not a member of the family, nothing in this section shall be deemed to entitle him to joint possession or other common or part enjoyment of the house.

There is nothing in the said provision or any other provision of Transfer of Property Act or any disability attached under any other law for the time being in force that undivided share in immovable property could not be transferred by way of gift.

13. Submission of learned counsel for the respondents that the plaintiff has failed to prove due execution of gift deed as one of the attesting witness has not supported, does not merit acceptance.

14. Firstly, because in the present case, the defendants have not

specifically denied execution of the gift deed. In para 6 of the plaint, the plaintiff has clearly averred that Pawan Kunwar executed a gift deed in respect of the property in dispute in favour of the plaintiff and Mahaveer Singh. In reply to this, what has been stated in para 6 of written statement is not a denial of execution of the gift deed but of its validity by stating that Pawan Kunwar had no authority to gift the property and further that such gift deed was got executed from Pawan Kunwar by playing fraud and misleading her. Such pleading cannot be said to be denial of execution but only a denial to the effect that the document was incapable of having any legal effect or transfer any valid title and/ or interest in favour of the donee.

15. Section 123 of the Transfer of Property Act provides as to how transfer by gift could be effected. It reads as below :

“S.123. Transfer how effected -For the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument signed by or on behalf of the donor, and attested by at least two witnesses.

For the purpose of making a gift of movable property, the transfer may be effected either by a registered instrument signed as aforesaid or by delivery.

Such delivery may be made in the same way as goods sold may be delivered.”

16. Thus, the requirement of law is that transfer must be effected by registered instrument signed by or on behalf of the donor and attested by atleast two witnesses. In the present case, admittedly, the gift deed is registered one.

17. Section 68 of the Act of 1872 deals with requirement of proof of execution of document required by law to be attested. The provision being relevant is extracted herein below:

S.68. Proof of execution of document required by law to be attested.—If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

A rational and logical interpretation of the said provision would mean

that where a document is required by law to be attested, it cannot be used as evidence until atleast one attesting witness has been called for the purpose of proving its execution, if such witness be alive. However, proviso to the aforesaid provision carves out an exception that it shall not be necessary to call an attesting witness in proof of the execution of any document (not being a Will), which otherwise has been registered in accordance with the provision of the Registration Act, 1908 unless its execution by the person by whom it purports to have been executed is specifically denied.

18. In the present case, there was no occasion for the executant of the gift to deny execution of the gift deed because admittedly on the date of filing of the suit, Pawankunwar was not alive. However, it was open for the defendants to deny execution of the gift deed. When there is denial of execution by the executant, despite document having been registered, Will is required to be proved by atleast one attesting witness. As the executant of the document is not alive, the party who asserts and claim right on the basis of a document, will have to prove execution if execution is denied by the other party to the proceeding. In the present case, the defendants, as has been observed, herein above, did not deny execution of gift deed but the denial is of plaintiffs' claim on the ground that Pawankunwar had no right to gift the property and that such execution was not voluntarily but actuated by fraud misrepresentation etc. In the case of **Mt. Chandra Kali vs. Bhabhuti Prasad, AIR (30) 1943 Oudh 416**, it has been held that the word "specifically denied" means specifically denied by the parties against whom it is sought to be used and not only by executant. Where, therefore, a party against whom, the document is sought to be used denies its execution, even though executant does not do so, it is necessary to call attesting witness to prove it. In the case of **Vedachala Chettiar v. Ameena Bi Ammal And Ors., AIR (31) 1944 Madras 121**, it has been held that attacking document as sham and nominal transaction would not amount to specific denial of execution. The law requires not a mere denial but a specific denial meaning thereby that the denial must be in express terms. It should be definite and unambiguous. In the case of **Engineers (Overseas) Corporation Pvt. Ltd. and another v. West Bengal Financial Corporation and another, AIR 1986 Calcutta 132**; where the borrower did not specifically deny execution of the mortgage deed but only alleged that it was got prepared by coercion and undue influence and that it was not fully supported by consideration, it was held that the execution of the deed was admitted and therefore, it was

not required to be proved by atleast one of the attesting witnesses. Therefore, once the gift deed has been found to be registered and there is no specific denial of its execution, there will be no requirement of proving execution by calling one of the attesting witness to prove its execution, it being a case covered by proviso to Section 68 of the Evidence Act.

19. Otherwise, also this Court finds that one of the attesting witness Dariyarram (PW4) has clearly stated in favour of the plaintiff that Pawankunwar had called him and another person Amritlal in the office of the Registrar where the execution of the gift deed had taken place in the presence of the Registrar and Pawankunwar signed the document as also this witness. The arguments of the respondents that the other witness has not supported, will not create any doubt because this Court has found that as a matter of fact, there is no denial of execution of the document.

20. The plaintiff has failed to prove that Mahaveer Singh had relinquished his share which he got along with the plaintiff Jabir Singh by virtue of gift deed Ex.P/1. A mere oral assertion that Mahaveer Singh had relinquished his share in favour of the plaintiff would not confer any valid title on the plaintiff. The share held by Mahaveer Singh could be relinquished in favour of the plaintiff only by registered relinquished deed and not by oral assertion. Both the Courts below have recorded concurrent finding on this aspect.

21. In the result, this Court finds that in view of the finding recorded by learned Courts below that Pawankunwar had right to gift $\frac{1}{4}$ th of her share and in view of the finding of this Court that it was within the right of Pawankunwar to gift her undivided share and further that the plaintiff was entitled to take equal share with Mahaveer Singh, it has to be held that the plaintiff was entitled to decree atleast to the extent of $\frac{1}{8}$ th of 13.44 acres of land. This is so because Pawankunwar was entitled to $\frac{1}{4}$ th share in the aforesaid property and if that was gifted to plaintiff and Mahaveer Singh in equal share, the plaintiff would get only $\frac{1}{2}$ of it.

22 In the result, the substantial question of law is answered in the manner that the Courts below committed an error of law in not granting relief to the plaintiff to the extent of share of Pawankunwar. The plaintiff was entitled to $\frac{1}{8}$ th share in the disputed property admeasuring 13.44 acres as described in schedule-B of the plaint.

23. In the result, the impugned judgment and decree is set aside and the plaintiff's suit is partly decreed to the extent of 1/8th share in the disputed property admeasuring 13.44 described in schedule-B of the plaint. The plaintiff would also be entitled to get possession of his 1/8 share in the total extent of 13.44 acres shown in the schedule-B rateably in equal proportion from defendants No.1,4 & 5 namely: Dhankunwar, Nanbaiya and Akalu Singh @ Turbil.

24. Parties shall bear their respective costs.

25. Let appellate decree be accordingly drawn.

Sd/-

(Manindra Mohan Shrivastava)

Judge

Rekha