

HIGH COURT OF CHHATTISGARH, BILASPUR

Judgment reserved on 3-5-2019

Judgment delivered on 21-06-2019

FA No. 143 of 2007

- Omkar Nath Tiwari S/o Khedu Lal Tiwari R/o Vill Gangajal, Tah - Nawagarh, Distt Janjgir- Champa Presently r/o.village - Kadar, Tah - Bilha, Distt Bilaspur C.G.

---- Appellant

Versus

1. Ramphal Tiwari through The Collector, Distt Janjgir - Champa C.G.
2. State Of C.G. through The Collector, Distt Janjgir - Champa C.G.

---- Respondents

For appellant : Mr. Ravindra Agrawal, Advocate

For respondent No.1 : Mr. Ram Kumar Tiwari, Advocate.

For respondent No.2/ : Mrs. Shubha Shrivatava, P.L.
State

SB: Hon'ble Shri Justice Ram Prasanna Sharma

CAV JUDGMENT

1) This appeal is preferred under Section 96 of the Code of Civil Procedure, 1908 against the judgment/decreed dated 29-9-2007 passed by 2nd Additional District Judge (FTC), Janjgir, Dist. Janjgir-Champa (CG) in Civil No. 8-A/2007 wherein the said court dismissed the suit filed by the appellant/plaintiff for partition of land, house mentioned in Schedule A & B of the plaint and for getting half

share over the entire property situated at village Gangajal, Revenue Circle and Tahsil Nawagarh, Dist. Janjgir-Champa.

2) Suit filed by the appellant/plaintiff is for partition and separate possession of his half share of the suit land and house and half share of the other articles stating that the appellant and respondent No.1 are real brothers, the suit property belongs to their father namely Khedulal Tiwari. The suit properties are the ancestral and undivided properties of the parties. In the month of June and July 2005 when the appellant asked for partition, the respondent No.1 refused to give any share to the appellant that is why suit was filed. As per respondent No.1, his father Khedulal executed a Will in his favour on 6-5-1971, therefore, appellant is not entitled for any share in the suit property. After hearing both sides, the trial Court dismissed the suit.

3) Learned counsel for the appellant would submit as under:

- i) Admittedly, property in question is ancestral property and appellant and respondent No.1 are real brothers, therefore, both will succeed property of their father and each will get half share over the entire property.
- ii) The respondent No.1 has based his sole right over the property on a Will alleged to be executed by his father on 6-5-1971., but will is not proved as per legal provisions of Section 63(C) of the Indian Succession Act, 1925, Section 68 of the Indian Evidence

Act, 1872, therefore, in absence of proof of will, the appellant is entitled to get half share of the property.

- lii) The respondent No.1 examined scribe of will document but no attesting witness has been examined by him, therefore, finding of the trial Court is perverse. There is no other document which confers absolute title on respondent No.1, therefore, finding of the trial court is liable to be set aside.

4) On the other hand, learned counsel for respondent No.1 would submit that Will is not challenged by the appellant and hence it is proved document. Scribe of the will namely Mohanlal Tiwari is examined to prove the will, therefore, other witnesses are not required for proving the same. Finding arrived at by the trial Court is based on proper marshaling of the evidence which is not liable to be interfered with.

5) I have heard learned counsel for the parties and perused the record in which judgment and decree has been passed.

6) Appellant Omkar Nath Tiwari himself examined as PW/1 and produced documents Ex.P/1 and P/2. As per version of this witness, property mentioned in Schedule-A of the plaint is mentioned in record of right Ex.P/1 and ancestral property of his father and it is also mentioned in Schedule -B of the plaint. From

the record Ex.P/1 it appears that name of the appellant is recorded as share-holder of the property mentioned in Schedule-A and respondent No.1 is also recorded as share-holder. As per record only two persons i.e., appellant and respondent No.1 are owners of the property and no other person is recorded as owner of the property. From the oral and documentary evidence, it is proved by the appellant that the property in question is ancestral property and the appellant and respondent No.1 both are share-holders. Accordingly each will get half share in the property.

7) To substantiate the pleading of respondent No.1 Ramphal Tiwari, he examined himself as DW/1, Mohanlal Tande (DW/2) and Gulatu (DW/3). Though Ramphal Tiwari (DW/1) deposed that the appellant already took ornaments, paddy and other articles in excess of his share, but version of this witness is not substantiated by any of the witness as to how much ornaments, paddy and other articles were given to him in his share. No one deposed on behalf of respondent No.1 that partition of the property in question took place at any time, therefore, property in question is unpartitioned. Respondent No.1 based his title on Will executed by his father on 6-5-1971. it is produced as Ex.D/1 and in the said document, scribe Mohanlal and attesting witnesses are Mohitlal and Kaushal Respondent No.1 admitted before the trial Court that both attesting

witnesses are alive but no attesting witnesses has been examined by respondent No.1.

8) In the matter of **Janki Narayan Bhoir vs. Narayan Namdeo Kadam, reported in (2003) 2 SCC 91**, it is held by Hon'ble Supreme Court that scribe cannot be treated as an attesting witness. The law laid down by Hon'ble the Supreme Court may be mentioned as under:

“The requirements of due execution of a will is its attestation by two or more witnesses which is mandatory.

[Section 68](#) of the Evidence Act speaks of as to how a document required by law to be attested can be proved. According to the said Section, a document required by law to be attested 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 an evidence. It flows from this Section that if there be an attesting witness alive capable of giving evidence and subject to the process of the Court, has to be necessarily examined before the document required by law to be attested can be used in an evidence. On a combined reading of [Section 63](#) of the Succession Act with [Section 68](#) of the Evidence Act, it appears that a person propounding the will has got to

prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by clause (c) of [Section 63](#) of the Succession Act. It is true that [Section 68](#) of Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the Will as envisaged in [Section 63](#). Although [Section 63](#) of the Succession Act requires that a will has to be attested at least by two witnesses, [Section 68](#) of the Evidence Act provides that a document, which is required by law to be attested, shall not be used as evidence until one attesting witness at least has been examined for the purpose of proving its due execution if such witness is alive and capable of giving evidence and subject to the process of the Court. In a way, [Section 68](#) gives a concession to those who want to prove and establish a will in a Court of law by examining at least one attesting witness even though will has to be attested at least by two witnesses mandatorily under [Section 63](#) of the Succession Act. But what is significant and to be noted is that that one attesting witness examined should be in a position to prove the execution of a will. To put in other words, if one attesting witness can

prove execution of the will in terms of clause (c) of [Section 63](#), viz., attestation by two attesting witnesses in the manner contemplated therein, the examination of other attesting witness can be dispensed with. The one attesting witness examined, in his evidence has to satisfy the attestation of a will by him and the other attesting witness in order to prove there was due execution of the will. If the attesting witness examined besides his attestation does not, in his evidence, satisfy the requirements of attestation of the will by other witness also it falls short of attestation of will at least by two witnesses for the simple reason that the execution of the will does not merely mean the signing of it by the testator but it means fulfilling and proof of all the formalities required under [Section 63](#) of the Succession Act. Where one attesting witness examined to prove the will under [Section 68](#) of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects. Where one attesting witness is examined and he fails to prove the attestation of the will by the other witness there will be deficiency in meeting the mandatory requirements of [Section 68](#) of the Evidence Act.”

9) In the present case, both attesting witnesses are alive as per version of respondent No.1 but no one was examined by him before the trial court to prove the Will (Ex.D/1). In absence of any of the attesting witnesses, the mandatory requirement of proving of the Will is not satisfied, and therefore, will was not to be considered, but the same is considered by the trial Court which is not permissible under the law. When Will is not proved, succession will go as non- testamentary succession. The appellant is entitled for half share in the property. Argument advanced on behalf of the respondent No.1 is not sustainable. The judgment/decreed passed by the trial Court is hereby set aside.

10) Accordingly, decree is passed in favour of appellant and against the respondent No.1 as under:

- (i) The appeal is allowed. Appellant is entitled for half share in the land Ex.P/1 and half share of the house which is mentioned in Schedule B of the plaint. Ex.P/1 and Schedule-B shall be part of the decree. Partition of land mentioned in Ex.P/1 shall be done by the Revenue Authorities having jurisdiction. Partition of house shall be done by the Commissioner appointed by the Executing Court and it shall be partitioned in meets and bounds within three months by the Executing Court from

the date of presentation of execution application.

- (ii) Parties to bear their own costs.
- (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