

**NAFR**

**HIGH COURT OF CHHATTISGARH, BILASPUR**

**Judgment Reserved on : 15.03.2019**

**Judgment Delivered on : 16/05/2019**

**S.A. No. 346 of 2002**

1. Smt. Dulari Bai (now dead) through : LRs.
  - a). Salil Kumar Mishra, aged about 30 years, S/o. Shri Prakash Narayan Mishra, Agriculturist, R/o. Village – Kunwan, Tah. Navagarh, District – Durg (C.G.)
  - b). Aman, aged about 11 years, S/o. Shri Salil Kumar Mishra, (Minor) : through natural guardian father Shri Salil Kumar Mishra, presently residing at Village – Kunwan, P.S. & Tahsil – Navagarh, District – Durg (C.G.)

**---- Appellants**

**Versus**

1. Umesh Kumar, aged about 45 years, S/o. Shri Bhairoprasad,
  2. Suresh Kumar, aged about 41 years, S/o. Shri Bhairoprasad
- Both are R/o. Village – Andhiyarkhor, Tahsil – Nawagarh, District – Durg (C.G.)
3. State of Chhattisgarh, Through : District Collector, District – Durg (C.G.)

**-----Respondents**

**AND**

**S.A. No. 255 of 2003**

1. Umesh Kumar, aged about 45 years, S/o. Shri Bhairo Prasad, R/o. Village – Andhiyarkhor, Tahsil – Nawagarh, District – Durg (C.G.). Presently R/o. Bhatapara, District – Raipur (C.G.)
2. Suresh Kumar, aged about 40 years, S/o. Shri Bhairo Prasad, R/o. Village – Andhiyarkhor, Tahsil – Nawagarh, District – Durg (C.G.). Presently R/o. Songanga Awasiya Parisar, Seepat Road, Bilaspur (C.G.)

**---- Appellants**

**Versus**

1. Smt. Dulari Bai (now dead) through : LR's.
  - 1.a). Aman Kumar, S/o. Shri Anil Kumar Mishra, aged about 21 years,
  - 1.b) Salil Kumar Mishra, S/o. Shri Prakash Narayan Mishra, aged about 41 years,  
Both R/o. Village – Kunwan, Tah. Navagarh, District – Durg  
(Now Bemetara) (C.G.).
2. State of Chhattisgarh, Through : Collector, District – Durg (C.G.).

**-----Respondents**

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**In S.A. No.346/2002**

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|---------------------------|-------------------------------------------------------------------------------|
| For Appellants            | : Mr. P.K.C. Tiwari, Sr. Advocate with<br>Mr. Shashibhushan Tiwari, Advocates |
| For Respondents No.1 & 2  | : Mr. Rajeev Shrivastava with<br>Mr. Malay Shrivastava, Advocates             |
| For Respondent No.3/State | : Mr. Himanshu Kumar Sharma, P.L.                                             |

**In S.A. No.255 /2003**

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|-------------------------------|-------------------------------------------------------------------------------|
| For Appellants                | : Mr. Rajeev Shrivastava with<br>Mr. Malay Shrivastava, Advocates             |
| For Respondent No.1 (a) & (b) | : Mr. P.K.C. Tiwari, Sr. Advocate with<br>Mr. Shashibhushan Tiwari, Advocates |
| For Respondent No.2/State     | : Mr. Himanshu Kumar Sharma, P.L.                                             |
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**Hon'ble Shri Justice Rajendra Chandra Singh Samant**

**C A V JUDGMENT**

**16/05/2019**

1. Both the appeals are heard and decided together by this common judgment as they are arising out of the impugned judgment and decree dated 07.08.2002, passed by the Additional District and Sessions Judge, Bemetara, District – Durg, in Civil Appeal No.105-A/2002 and in Civil Appeal No. 108-A/2002 respectively, whereby

the judgment and decree passed by the learned Court below on 31.01.1997, in Civil Suit No.62-A of 1994 was confirmed.

2. The appellants in S.A. No.346/2002 shall be referred to as appellants and the appellants in S.A. 255/2003 shall be referred to as respondents.
3. Plaintiff – Dulari Bai now dead and represented through legal representatives has pleaded in the plaint before the trial Court, that suit property as mentioned in the schedule of the plaint was ancestral property of her husband – Hari Prasad. After death of Hari Prasad on 25.11.1988, the plaintiff became the sole successor of the suit property. The husband of plaintiff – Hari Prasad was mentally unsound since 1975, till the date he died. On June, 1992 plaintiff came to know that names of defendants/respondents have been entered in the records of rights in a fraudulent manner, by obtaining signature of the plaintiff by deceit jointly, with the plaintiff. Plaintiff had never submitted any application for jointly recording the names of defendants No.1 and 2 in the record of rights and neither any rights were transferred in favour of the defendants No.1 and 2. Therefore, she has prayed for declaration of title over the suit property, along with relief of permanent injunction against the respondent No.1 and 2 and in the alternative relief of possession was also prayed for along with mesne profit.
4. Respondents/defendants No.1 and 2 filed their written statement, denying the pleadings of the plaintiff, that the plaintiff was the sole successor of the deceased Hari Prasad. They have denied that Hari

Prasad was ever mentally unsound. It is specifically pleaded that Hari Prasad had by a registered Will dated 29.08.1986 had expressed his wish, that suit property be inherited by respondent No.1 and 2 after his death and the right of the plaintiff was limited to enjoyment of the property only, restricting her from making any transfer of the suit property. Therefore, she had only the right of maintenance. It is denied that mutation in the record has been affected in fraudulent manner. On the other hand, it is stated that plaintiff herself was willing party in the said mutation. It is stated that the plaintiff has under the influence of her brother – Prakash Narayan Mishra and has filed the suit without any basis. Therefore, the plaintiff has no right to claim over the suit property as the plaintiff had no title on the same. The Will executed by Hari Prasad is binding on the plaintiff, therefore, plaintiff is not entitled for any relief as claimed by her.

5. Counter case has also been filed by the respondent No.1 and 2 praying for relief of declaration that the plaintiff is limited owner of the property in question and permanent injunction be issued against her to restrain her from transferring the suit property.
6. Trial Court in its judgment and decree dated 31.01.1997, has held that it is not proved that the plaintiff is the sole successor of the deceased Hari Prasad. It was further held that Will dated 29.08.1986 was forged and on that basis finding was given, that no such condition was made in the Will that the plaintiff will be limited owner of the suit property. Therefore, she was not restricted in any

manner. However, it was also held that the name of the respondents No.1 and 2 was illegally entered in the revenue records was not proved. On the basis of these findings, the suit and the counter claim both were dismissed.

7. The judgment and decree of the trial Court was challenged before the First Appellate Court by the appellant as well as by the defendants. The First Appellate Court by the impugned judgment and decree dated 07.08.2002 has held that the trial Court has not committed any error in holding that respondents have failed to prove the execution of disputed Will. The finding of the trial Court that mutation in record has been made in a fraudulent manner in connivance with the revenue officer has not been proved and it was also held that neither the appellant nor the respondents were entitled for any relief and both the appeals filed by the plaintiff and the defendants were dismissed and decree was drawn accordingly.
8. It is submitted by the learned counsel for the appellants, that the impugned judgment and decree of the First Appellate Court and the trial Court both are erroneous and without proper appreciation of evidence brought by the plaintiff. The documents filed by the plaintiff were not given any consideration, therefore, serious error has been committed. One of the ground of the dismissal of the suit of the plaintiff was this, that the plaintiff had admitted in her deposition that suit property is in possession of one Bhairo Prasad and he was not made a party in the suit, whereas, the Bhairo Prasad was the person, who was power of attorney holder of the plaintiff and hence,

her representative. No ground was raised in defence by the defendants regarding non-joinder of the Bhairo Prasad, therefore, the plaintiff had proved her case that she was the sole title holder of the property. Therefore, the appeal be allowed and decree be passed in favour of the appellants.

9. In reply, counsel for the respondents have firstly objected that legal representative of Dulari Bai, who have been made a party in this appeal have claimed their entitlement on the basis of the Will, therefore, enquiry is required under Order 22 Rule -5 of C.P.C., before deciding any claim in their favour. The case of the respondent No.1 and 2 is very clear as they derived title on the basis of the Will of Hari Prasad in which the plaintiff Dulari Bai was given restricted rights. It is submitted that on merits, the plaintiff has no case. Respondent No.1 and 2 are the recorded owners of the property, regarding which there is concurrent finding of the two Courts below. It is argued in support of counter claim that respondent No.1 and 2 are entitled for relief of declaration and injunction. Therefore, the Second Appeal No. 346/2002 filed by the plaintiff be dismissed and the Second Appeal No.255/2003 filed by the defendants/respondent No.1 and 2 be decreed in their favour.
10. In reply, counsel for the appellant in S.A. 346/2002 submits that subsequent Will, which has been executed by Dulari Bai in favour of legal representatives, who are now party to this appeal, can not be challenged at this stage. No objection was raised by the respondent when the legal representative was impleaded and incorporated as

party. Therefore, the right to challenge the Will in faour of the legal representative of Dulari Bai is separate cause of action.

11. I have heard the learned counsel for the parties at length and perused the record of the Courts below.
12. Firstly, the objection raised by the respondents is taken up for consideration.
13. Order 22 Rule 5 of C.P.C. provides where a question arises as to whether any person is or is not the legal representative of a deceased plaintiff or a deceased defendant, such question shall be determined by the Court and in the proviso clause, it is further provided that, where such question arises before an Appellate Court, that Court may, before determining the question, direct any subordinate Court to try the question and to return the records together with evidence, if any recorded at such trial, its findings and reasons therefore, and the Appellate Court may take the same into consideration in determining the question.
14. The order of impleadment of legal representative of the deceased appellant – Dulari Bai was passed by this Court on 07.05.2010. Respondents have given appearance in this case by filing Vakalatnama on 07.07.2014, whereas, the application for making inquiry under Order 22 Rule 5 of C.P.C. has been filed on 11.03.2019, after sufficient delay when the case was to be taken up for final hearing.

15. In the application, it is submitted that legal representatives of Dulari Bai are claiming their entitlement on the basis of the Will dated 22.11.2001 executed by Dulari Bai. As Dulari Bai had no right to execute Will dated 22.11.2001, therefore, the legal representative of plaintiff Dulari Bai have no entitlement to prosecute this appeal. Thus the question raised by the respondents in the application under Order 22 Rule 5 is limited to the entitlement of Dulari Bai for executing a Will in favour of the legal representative and not that such Will was not executed, or is fraudulent.

Therefore, the start line of provision of Order 22 Rule 5 of C.P.C., which says that “where a question arises as to whether any person is or is not the legal representative of the deceased plaintiff” is not at all an issue here, for the simple reason that respondents have not raised any question on the point of entitlement of the appellants, their question is based on validity of execution of Will. Any question based on validity can not be determined under Order 22 Rule 5 of C.P.C. Therefore, the objection raised is without any substance, which is rejected and both the appeals are taken up for decision.

16. The Second Appeal No. 346/2002 was admitted for hearing and the following substantial questions of law were framed by this Court :-

“(1) Whether the Courts below erred in dismissing the suit despite this finding that appellant was rightful owner of the disputed property?

(2) Whether non-joinder of the possessor of land in dispute could have been made a ground for dismissal of the suit or appeal ?

17. The Second Appeal No. 255/2003 was admitted for hearing and the following substantial question of law was framed by this Court :-

“Whether the appellants/defendants had proved the will according to law and the evidence of the same has been ignored by the trial Court as well as the First Appellate Court”

18. The first question in S.A. No.346/2002 is dealt with.
19. It is concurrent finding of both the Courts below, that the plaintiff Dulari Bai and respondent No.1 and 2/defendants are joint owners of the disputed property. Dulari Bai (P.W.-1) had made only oral statement that disputed property was of sole possession and title of her husband Hari Prasad and it was similarly orally supported by Prakash Narayan (P.W.-2). Not a single document was produced before the trial Court to confirm and corroborate this statement. There was no denial on the part of the plaintiff that on the date of filing suit, the property was jointly recorded in the name of the plaintiff Dulari Bai and respondent No.1 and 2. Therefore, the entry of the names of respondent No.1 and 2/defendants in the records are rightful or wrongful could not have been determined in absence of the documentary evidence. The production of which would have made it clear, as to what was the basis of making entries in favour of the respondent No.1 and 2. Although it was pleaded by the defendants, that their names found place in record of rights after execution of Will by deceased Hari Prasad, even then the question remained unanswered that Hari Prasad was the sole owner of the said property in absence of production of documents to that effect. Therefore, the plaintiff had failed to discharge her burden in showing

that respondents had altogether no claim over the property in dispute. No documents of the previous entries of the mutation of the records have been produced by the defendants' side, however, Suresh Kumar (D.W.-1) has made statement that his and his brother's name was entered in the records of right after the death of Hari Prasad, but that statement has not been further clarified as to what was the basis that his name was entered therein. On the contrary, he has made statement in cross-examination that no application was filed by him for mutation on the basis of the Will executed by Hari Prasad. Ferha (D.W.-2) has been examined as witness of Will executed by Hari Prasad.

20. Substantial question of law in S.A. No.255/2003 also needs consideration simultaneously. The statement regarding execution of Will have been made by Suresh Kumar (D.W.-1) and Ferha (D.W.-2), that will was executed in his favour by deceased Hari Prasad of which he was a witness. He has stated about affixing his signature in the document Ex.D-1 as attesting witness. His statement has remained unrebutted in cross-examination. Daiuram Namdev (D.W.-3) is the scribe of the document Ex.D-1, as he is document writer. He has stated that Ex.D-1 was typed on the instructions of Hari Prasad and Dulari Bai. He has also stated that Hari Prasad himself has made statement that he is the owner of the property, but he and his wife both want to Will it in favour of the respondents. His statement has also remained unrebutted in cross-examination.

21. Trial Court has elaborately discussed the evidence of Ferha (D.W.-2) and come to this conclusion that Will was executed by Hari Prasad under some influences regarding, which there is no such statement or admission made by any of the witness. The ground of opposition of the plaintiff was only to that extent that Hari Prasad was mentally unsound thus was unable to execute a Will, regarding which no evidence was brought to establish the mental unsoundness of the deceased Hari Prasad.
22. The First Appellate Court has also discussed the evidence in the same fashion and came to the conclusion similar to the trial Court. Both the Courts below have clearly ignored the provisions of Section 68 of the Evidence Act, in which it is clearly provided that 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.
23. Therefore, the respondents/defendants in this case have successfully brought evidence as per requirement of Section 68 of the Evidence Act. Therefore, the finding of both the Courts below regarding execution of Will (Ex.D-1) is erroneous and against the provisions of law, therefore, that needs to be interfered with in this second appeal. On the basis of this finding, the question No.1 in S.A. No.346/2002 is answered in negative and substantial question of law in S.A. No.255/2003 is answered in positive.

24. Despite the absence of documentary proof regarding the sole entitlement of Hari Prasad over the suit land, for the reasons that it has not been disputed by both the parties that the deceased Hari Prasad was the owner of the said suit property, the Will executed by him, which has been proved by the defendant's side in accordance with law has to be taken in consideration. The presence of Dulari Bai in the same document as one of the executent has no consequence, as she was not the person entitled to execute the Will, therefore, her presence and her affixing thumb impression on the Will can be regarded only as consent in the execution of Will by her husband in favour of respondent No.1 and 2 for the simple reason that she can not be regarded as executor of Will in any respect under any provisions of law.
25. The second question of law in S.A. No.346/2002 is dealt with.
26. There is no pleading made by the plaintiff that suit land was in possession of one Bhairo Prasad, neither it was pleading of the defendants. Only on the basis of one admission made by Dulari Bai (P.W.-1) in her cross-examination, it could not have been held that the said Bhairo Prasad was an essential party in this case for complete adjudication of the dispute between the parties. Rather than that the plaintiff had prayed for relief for permanent injunction and in the alternative relief for possession from the respondents/ defendants and not from anybody else, therefore, in absence of specific pleadings and only on the basis of some admission made in deposition by the plaintiff, it can not be said that the said Bhairo

Prasad was essential party, therefore, the finding on this point could not have been made the ground for dismissal of the suit or appeal.

27. However, on the basis of the finding in the second appeal and other finding of the Court below, which are not disputed, the conclusion is drawn in second appeal. The respondent No.1 and 2 had established by production of legal proof that they were the persons, having right to inherit the property of the deceased Hari Prasad on the basis of the Will dated 29.08.1986, which has been found proved, therefore, the claim made by the plaintiff/appellants of being the sole owner of the suit property fails and they are not found entitled to get any relief in their case.

28. In a result, S.A. No.346/2002 is dismissed. However, S.A. No.255/2003 is allowed. Relief is granted in favour of respondents/defendants as follows :-

(1) It is declared that respondent No.1 and 2 have the right to inherit the suit property of deceased Hari Prasad on the basis of Will dated 29.08.1986 (Ex.D-1).

(2) No order as to costs.

Decree be drawn accordingly.

**Sd/-**  
**(Rajendra Chandra Singh Samant)**  
Judge