

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.143 of 2007

Gopal Prasad, S/o Jhit Ram, caste Dhuri, aged about 61 years, R/o Village Takhatpur, Tahsil Takhatpur, District Bilaspur (C.G.)

(Plaintiff)

---- Appellant

Versus

1. Laxmin Bai, D/o Chhannu Lal, aged about 57 years, R/o Takhatpur, Tahsil Takhatpur, District Bilaspur (C.G.)

2. Viplav Mazoomdar, S/o Khagendra Nath Mazoomdar, aged about 40 years, R/o Takhatpur, Tahsil Takhatpur, District Bilaspur (C.G.)

3. State of Chhattisgarh, through Collector, Bilaspur (C.G.)
(Defendants)
---- Respondents

For Appellant: Mr. Amit Kumar, Advocate.

For Respondents No.1 and 2: -

Mr. Rajendra Kumar Patel, Advocate.

For Respondent No.3/State: -

Mr. Aakash Pandey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

16/12/2019

1. This second appeal preferred by the plaintiff (appellant) was admitted on the following substantial question of law: -

“Whether both the Courts below were not justified in holding the will as genuine document?”

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

2. Plaintiff Gopal Prasad filed suit that the suit property is held jointly by him and his brother – Banshilal, but defendant No.1 is claiming the suit property by way of will allegedly executed by Banshilal on 19-10-1995 (Ex.D-1) in her favour, whereas, Banshilal has never

executed will. Defendant No.1 while filing written statement setup the will in her favour and also thereafter it has come to the notice that defendant No.1 had already sold the suit land in favour of defendant No.3 on 19-5-2003, as such, the plaintiff is not entitled for the relief. The plaintiff sought amendment questioning the sale, but the trial Court only permitted to bring the subsequent purchaser – defendant No.3 on record, but other part of amendment was refused by order dated 19-1-2005. The trial Court found the will proved in favour of defendant No.1 by Banshilal holding her to be the property holder which was upheld by the first appellate Court against which this appeal has been preferred in which substantial question of law has been framed which has been set-out in the opening paragraph of this judgment.

3. Mr. Amit Kumar, learned counsel appearing for the appellant herein / plaintiff, would submit that the will by Banshilal in favour of defendant No.1 was required to be established by proving at least one of the attesting witnesses in view of Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 which defendant No.1 filed affidavit on oath of Suresh Thakur – one of the attesting witnesses, under Order 18 Rule 4 of the CPC, but he was not examined in the Court as the plaintiff did not have the opportunity to cross-examine him, as defendant No.1 abruptly on 4-4-2006 declared her evidence as closed, therefore, cross-examination of Suresh Thakur could not be conducted and his affidavit under Order 18 Rule 4 of the CPC cannot be said to be “evidence” within the meaning of Section 3 of the Evidence Act, 1872 and therefore in absence of the examination of the attesting

witness, the will cannot be said to have been proved. He relied upon the decision of the Supreme Court in the matter of Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others¹ and a decision of the Bombay High Court in the matter of Bank of India v. M/s. Allibhoy Mohammed and others².

4. Mr. Rajendra Kumar Patel, learned counsel appearing for respondents No.1 & 2 herein / defendants No.1 & 3, would submit that defendant No.1 had already sold the property to defendant No.3 and the plaintiff's amendment to question the sale has already been rejected and therefore the sale made in favour of defendant No.3 is not under challenge, as the application for amendment has already been rejected.
5. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
6. It is well settled law that will has to be proved in accordance with Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872 which provides 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. (See Janaki Narayan Bhoir v. Narayan Namdeo Kadam³.)
7. Admittedly, in this case, one of the attesting witnesses Suresh Thakur was available on the date of evidence, as his affidavit under

1 (2009) 4 SCC 780

2 AIR 2008 Bombay 81

3 AIR 2003 SC 761

Order 18 Rule 4 of the CPC was filed and defendant No.1 also submitted affidavit on oath of Suresh Thakur to prove the Will, but on 4-4-2006, defendant No.1 declared her evidence closed and did not examine said Suresh Thakur on her behalf, thereby, the plaintiff did not have the opportunity to cross-examine him. As such, the deponent did not enter the witness box to confirm that the contents of the affidavit are as per his say and the affidavit is under his signature and this statement being made on oath to be recorded by following the procedure prescribed under Rule 2 / Rule 5 of Order 18 of the CPC. (See **Bank of India** (supra) affirmed by the Supreme Court in the matter of **Ameer Trading Corporation v. Shapoorji Data Processing Ltd.**⁴.)

8. As such, in absence of examination of attesting witness Suresh Thakur, the will is not proved in accordance with Section 63 of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872. Therefore, in absence of examination of the attesting witness, both the Courts below have committed legal error in holding that execution and attestation of the will executed by Banshilal in favour of defendant No.1, is duly proved. The finding recorded by both the Courts are hereby set-aside, with regard to the will.
9. Now, the question is what relief the plaintiff is entitled for?
10. It is already on record that defendant No.1 had already sold the suit property in favour of defendant No.3 on 19-5-2003, but the amendment in that respect has already been rejected on 19-1-2005 by the trial Court, as such, the sale made by defendant No.1 in

4 (2004) 1 SCC 702

favour of defendant No.3 is not under challenge.

11. In view of the above, it is only declared that the will executed by Banshilal is not proved in accordance with law and defendant No.1 was not the title holder of the suit property. However, the plaintiff will be at liberty to proceed in accordance with law to challenge the sale made by defendant No.1 in favour of defendant No.3. Thus, the substantial question of law is answered accordingly and the second appeal is disposed of with the aforesaid observation leaving the parties to bear their own cost(s).

12. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

Soma