

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.160 of 2007

Shiv Prasad, aged 49 years, S/o Shri Hemdas, caste Jogi, R/o Village Mahora, P.S. Gaurela, Tehsil Pendraroad, District Bilaspur (C.G.)
 (Defendant/Respondent)
 ---- Appellant

Versus

Jaideo, aged 28 years, S/o Shri Ram Niranjana, caste Jogi, R/o Village Mahora, P.S. Gaurela, Tehsil Pendraroad, District Bilaspur (C.G.)
 (Plaintiff/Appellant)
 ---- Respondent

For Appellant: Mr. Somnath Verma, Advocate.
 For Respondent: None present though served.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

03/10/2019

1. The appeal was admitted on the following substantial questions of law:-

“(1) Whether the first appellate Court is justified in holding that the plaintiff Jaideo being nephew of Chuniya Bai shall get half share i.e. 0.6 dismil land from Khasra No.244/1 area 0.12 acre?

(2) Whether the appellant is entitled to succeed to the entire land of Khasra No.244/1 being the nephew of Bhagwan Das?”

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

2. The suit property including Khasra No.244/1, area 0.12 acre, was originally held by Bhagwandas, though jointly recorded in the name of Bhagwandas and Shiv Prasad. Bhagwandas died issue-less and his wife Chuniya Bai executed a Will on 26-6-1983 in favour of the plaintiff with regard to the suit land except Khasra No.244/1, area 0.12 acre.

The plaintiff filed suit for declaration of title and for declaring the mutation in favour of the defendant as void in which the defendant set up a plea that Chuniya Bai died on 10-5-1999 and the plaintiff is Chuniya Bai's nephew (brother's son) and he will not inherit the suit property, rather he (defendant) being the heir of Chuniya Bai's husband, would succeed the property, particularly Khasra No.244/1 which has not been included in the Will, as such, the suit deserves to be dismissed.

3. The trial Court dismissed the suit after having held that the plaintiff has failed to establish his case which the first appellate Court interfered with and held that the plaintiff has proved the execution and attestation of Will Ex.P-3 by Chuniya Bai in favour of the plaintiff and further held that the plaintiff is Chuniya Bai's brother's son and therefore he would also inherit half portion of Chuniya Bai's property i.e. Khasra No.244/1, area 0.12 acre, against which this second appeal has been preferred by the defendant only questioning the part of the finding of the first appellate Court whereby the first appellate Court has held the plaintiff to inherit half share in Khasra No.244/1, in which the substantial questions of law have been formulated which have been set-out in the opening paragraph of this judgment.
4. Learned counsel for the appellant / defendant would submit that once the plaintiff has succeeded in claiming the property by way of Will, he cannot take inconsistent stand and cannot succeed as heir also in view of the provisions of Section 15(1)(b) of the Hindu Succession Act in which the property would revert to the heirs of husband and the defendant being heir of husband of Chuniya Bai would succeed Khasra No.244/1 which has not been included in the Will.
5. None appeared for the plaintiff / appellant, though served.

6. I have heard learned counsel for the appellant / defendant and considered his submissions made herein-above and also went through the record with utmost circumspection.
7. Admittedly, the first appellate Court has held the plaintiff to be entitled on the basis of Will Ex.P-3 duly executed by Chuniya Bai in his favour and granted decree which the defendant is not disputing, the only question is, whether, the first appellate Court is justified in holding that the plaintiff would also succeed Khasra No.244/1 which has not been included in the Will executed by Chuniya Bai in favour of the plaintiff.
8. Admittedly, the plaintiff being brother's son of Chuniya Bai is not heir of Chuniya Bai in view of Section 15(1) of the Hindu Succession Act and the property would revert to the heirs of husband of Chuniya Bai. The defendant being son of Chuniya Bai's husband's brother i.e. Shiv Prasad, he would succeed the suit property – Khasra No.244/1 which has not been made subject matter of Will by Chuniya Bai. Therefore, the first appellate Court is unjustified in holding that the plaintiff would also inherit Khasra No.244/1 which has not been included in the Will. As such, the judgment & decree of the first appellate Court is modified and para 1 of the decree that the plaintiff is also entitled for 0.6 decimal of land is hereby set aside and the plaintiff's suit to that extent would stand dismissed. Rest of the decree would remain intact. The substantial questions of law are answered accordingly and the appeal is allowed in part leaving the parties to bear their own costs.

Sd/-
(Sanjay K. Agrawal)
Judge