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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No. 464 of 2005

Samaliya Ram, S/o Beer Singh Dewangan, Aged about 55 years, Cultivator and Resident of village Navagaon, Tahsil Kurud, Distt. Dhamtari, Chhattisgarh

---- Appellant/plaintiff

Versus

1. Kusum Bai, D/o Pardeshi Ram Gond, Aged about 46 years.
2. Geeta Bai, D/o Pardeshi Ram, Aged about 36 years,

   Both are resident of Jhunia Para, Kanker, Tahsil and Distt. Kanker (C.G.)
3. Sub-Divisional Officer, Patan, Office situated at Patan, Distt. Durg (C.G.)
4. State of Chhattisgarh, Through Collector Durg, office situated at Durg (C.G.)

---- Respondents/defendants

For Appellant/plaintiff	:	Mr. Praveen Dhurandhar, Advocate.
For Respondents No. 1 & 2	:	Mr. Ramesh Kumar Sharma, Advocate.
For Respondents No. 3 & 4	:	Mr. Akash Pandey, Panel Lawyer.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment On Board

15/07/2019

(1) The substantial question of law involved, formulated and to be answered in this plaintiff's second appeal states as under:

> " Whether the First Appellate Court is justified in holding that Suhawan Bai was not competent to execute Will (Ex.P-1) in favour of plaintiff without permission of Collector under Section 165 - (6) of the Chhattisgarh Land

Revenue Code, 1959 ?

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

(2) The appellant/plaintiff – Samaliya Ram instituted a civil suit for declaration that he is the title holder of the whole disputed land and the order passed by the Sub Divisional Officer is illegal and, therefore, he is entitled for decree of possession and permanent injunction. He claimed title on the basis of Will executed by Suhawan Bai on 23.7.1984 vide Ex.P-1, as she was admittedly the owner of the suit property.

(3) Defendants No. 1 & 2, by filing written statement, claimed the entire property/land stating that Suhawan Bai, being the aboriginal Tribe, had no right to execute the Will (Ex.P-1) keeping in view the provisions contained in Section 165 (6) of the Chhattisgarh Land Revenue Code, 1959 (henceforth "Code, 1959").

(4) The trial Court, by its judgment & decree dated 24.02.2004, decreed the suit holding that Suhawan Bai could have executed a Will with regard to ½ share of the suit property and, therefore, the plaintiff is entitled for the suit property to the extent of ½ share on the basis of Will (Ex.P-1).

(5) Defendants No. 1 & 2 preferred first appeal there-against. The First Appellate Court allowed the appeal holding that Suhawan Bai, being the member of aboriginal tribe, could not have executed the will in favour of plaintiff in light of provisions contained in Section 165 (6) of the Code, 1959. Now, this second appeal under Section 100 of the CPC has been preferred by the appellant/plaintiff, in which, substantial question of law has been formulated and set-out in the opening paragraph of this judgment.

(6) Shri Praveen Dhurandhar, learned counsel appearing for the appellant/plaintiff would submit that the Will is not a transfer of property within the meaning of Section 5 of the Transfer of Property Act, 1882 (henceforth “Act of 1882”) and, therefore, for execution of Will, permission of Collector under Section 165 (6) of the Code, 1959 is not required at all and, therefore, learned first appellate Court committed grave legal error in holding so and granting appeal filed by defendants No. 1 & 2.

(7) On the other hand, learned counsel appearing for respondents No. 1 & 2 would support the impugned judgment & decree.

(8) I have heard learned counsel appearing for the parties and considered their rival submissions made hereinabove and went through the record with utmost circumspection.

(9) The question for consideration is whether Suhawan Bai was competent to execute the Will (Ex.P-1) in favour of the plaintiff without permission of the Collector as required under Section 165 (6) of the Code, 1959, which states as under :-

> “[(6) Notwithstanding anything contained in sub-section (1) the right of Bhumiswami belonging to a tribe which has been declared to be an aboriginal tribe by the State Government by a notification in that behalf, for the whole or part of the area to which this Code applies shall-
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> (i) in such areas as are predominately inhabited by aboriginal tribes and from such date as the State Government may, by notification, specify, not be transferred nor it shall be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe in the area specified in the notification;
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>> (ii) in areas other than those specified in the notification under clause (I), not to be transferred or be transferable either by way of sale or otherwise or as a consequence of transaction of loan to a person not belonging to such tribe

> without the permission of a Revenue Officer not below the rank of Collector, given for reasons to be recorded in writing.
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> **Explanation**.- For the purposes of this sub-section the expression "otherwise" shall not include lease."

(10) The provision of sub-section (6) supersede the right of transfer of any interest in land conferred on a Bhoomiswami by sub-section (1). But the provisions of this sub-section apply only to such Bhoomiswami who belong to a tribe, which is declared to be aboriginal tribe by the State Government by a notification in that behalf. Such notification may be for the whole or for the part of the area to which this Code applies.

(11) The transfer of property is defined under Section 5 of the Transfer of Property Act, 1882, which states as under :-

> "**5. "Transfer of property" defined . -** In the following sections "transfer of property" means an act by which a living person conveys, in present or in future, to one or more other living persons, or to himself, [or to himself] and one or more other living persons; and "to transfer property" is to perform such act."

(12) The question whether bequeathing Will as defined under Section 2(h) of the Succession Act, 1925 is transfer of property under Section 5 of the Transfer of Property Act, 1882 came up for consideration before the Division Bench of the Karnataka High Court in the matter of **<u>N. Ramaiah v. Nagaraj S.</u>**[1], in which R.V. Raveendran, J. [as then His Lordship was] had considered the issue and held that bequest by Will is not a transfer of property. Paragraphs 11 & 12 of the report state as under:-

> "**11.** Transfer of Property Act, 1882 ("TP Act" for short) deals with transfers intervivos, that is, the act of a living person, conveying a property in present or in future, to one or more living persons. The provisions of TP Act are inapplicable to testamentary successions which are governed by Indian SuccessionAct, 1925.

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1 AIR 2001 Karnataka 395

> Section 2(h) of the Indian Succession Act defines. 'Will" as the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."
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> **12.** The differences between a transfer and a Will are well recognized. A transfer is a conveyance of an existing property by one living person to another (that is transfer intervivos). On the other had, a Will does not involve any transfer, nor effect any transfer intervivos, but is a legal expression of the wishes and intention of a person in regard to his properties which he desires to be carried into effect after his death. In other words, a Will regulates succession and provides for succession as declared by it (testamentary succession) instead of succession as per personal law (non-testamentary succession). The concept of transfer by a living person is wholly alien to a Will. When a person makes a will, he provides for testamentary succession and does not transfer any property. While a transfer is irrevocable and comes into effect either immediately or on the happening of a specified contingency, a Will is revocable and comes into operation only after the death of the testator. Thus to treat a devise under a will as a transfer of an existing property in future, is contrary to all known principles relating to transfer of property and testamentary succession."

(13) Thereafter, the Supreme Court in the matter of **Suraj Lamp and Industries Private Limited (2) through Director v. State of Haryana and another**[2] has clearly held that Will is not a transfer inter vivos. Paragraph 22 of the report states as under :-

> "**22.** A will is the testament of the testator. It is a posthumous disposition of the estate of the testator directing distribution of his estate upon his death. It is not a transfer inter vivos. The two essential characteristics of a will are that it is intended to come into effect only after the death of the testator and is revocable at any time during the lifetime of the testator. It is said that so long as the testator is alive, a will is not worth the paper on which it is written, as the testator can at any time revoke it. If the testator, who is not married, marries after making the will, by operation of law, the will stands revoked. (See Sections 69 and 70 of the Succession Act, 1925.) Registration of a will does not make it any more effective."

(14) Applying the principle of law laid down by the Supreme Court in the matter of **Suraj Lam and Industries Private Limited (2) through Director** (supra) in the facts of the present case, it is quite vivid that Will is not a transfer of property within the meaning

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2 (2012) 1 SCC 656

of Section 5 of the TP Act, 1882, therefore, for bequeathing the property by way of Will, provisions contained in Section 165 (6) of the Code, 1959 would not be attracted and permission of Collector is not required at all and, therefore, learned first appellate Court is absolutely unjustified in holding so and setting aside the decree granted in favour of the plaintiff.

(15) Resultantly, judgment and decree passed by the first appellate Court are set aside and judgment and decree passed by the trial Court are restored. The second appeal is consequently, allowed and the plaintiff's suit stands decreed with no order as to cost(s).

(16) A decree be drawn-up accordingly.

Sd/-

(Sanjay K. Agrawal)
Judge

D/-