

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No.212 of 2009

Devi Prasad, S/o Asharam Mishra, aged about 40 years, R/o
Thethwarpara, Rajnandgaon, District Rajnandgaon (C.G.)

---- Appellant

Versus

1. Smt. Bena Bai, Wd/o late Jhaduprasad Mishra, aged about 45 years,
2. Ravi Kumar, S/o Jhaduprasad Mishra, aged about 28 years,
3. Suraj Kumar, S/o Jhaduprasad Mishra, aged about 12 years, minor
through guardian mother Smt. Bena Bai.

All R/o Village Bhodiya, Tahsil & District Rajnandgaon (C.G.)

4. Umabai, W/o Baldev Dubey, aged about 32 years, R/o Gopalpur, Tahsil
& District Rajnandgaon (C.G.)
5. Padmabai, W/o Lalit Kumar Sharma, aged about 24 years, R/o Village
Mokhla, Tahsil and District Rajnandgaon (C.G.)
6. Ashok Kumar, S/o Ramsanehi Mishra, aged about 27 years,
7. Ashwani Kumar, S/o Ramsanehi Mishra, aged about 23 years,

No. 6 & 7 are R/o Bramhanpara, Rajnandgaon, Tahsil & District
Rajnandgaon (C.G.)

8. State of Chhattisgarh, Through Collector, Rajnandgaon, District
Rajnandgaon (C.G.)

---- Respondents

For Appellant / Defendant No.1: -

Mr. Gyan Prakash Shukla, Advocate appears on behalf of
Mr. Anup Majumdar, Advocate.

For Respondent No.8 / State: -

Mr. Mateen Siddiqui, Deputy Advocate General.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board

05/08/2020

1. Proceedings of this matter have been taken-up through video conferencing.
2. Heard on admission and formulation of substantial question of law in the second appeal preferred by defendant No.1.
3. By the impugned judgment, the first appellate Court has allowed the appeal and decreed the suit of the plaintiffs by setting aside the judgment & decree of the trial Court.
4. Mr. Gyan Prakash Shukla, Advocate, appearing on behalf of Mr. Anup Majumdar, counsel for the appellant herein / defendant No.1, would submit that the first appellate Court is absolutely unjustified in decreeing the suit of the plaintiffs by holding that the Will deed executed by Radha Bai in favour of defendant No.1, dated 3-4-1968 vide Ex.P-2, is not proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, by recording a finding which is perverse to the record and defendant No.1 being the sole heir of Radha Bai being her husband's brother's son, is entitled to succeed the property of Radha Bai, and as such, the appeal involves substantial question of law for determination and it be admitted for final hearing.
5. Late Shri Balbhadra Prasad had three sons namely, Ramdayal, Kapilnath and Shrikrishna Prasad. The plaintiffs are successors-in-interest of Ramdayal and S. Prasad, whereas the dispute relates to the property of Kapilnath inherited by her sole daughter Radha Bai. It is the case of the plaintiffs that Radha Bai died issue-less and after her death, defendant No.1, on the strength of Will deed Ex.P-2, got his name mutated in the revenue records and also dispossessed the plaintiffs over the suit land and therefore the plaintiffs are entitled for declaration of title and decree for

recovery of possession. Defendant No.1 setup the plea of execution of Will by Radha Bai in his favour on 3-4-1968 (Ex.P-2/Ex.D-1) and prayed for dismissal of suit. The trial Court dismissed the suit holding that the Will (Ex.P-2/Ex.D-1) is a valid document in the eye of law and on appeal being preferred by the plaintiffs, the first appellate Court reversed the judgment & decree of the trial Court and held that the Will has not been proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872, as one of the witnesses Darbariram (PW-2) has not supported due execution and attestation of Will, whereas Bahur Singh – another attesting witness, has not been examined, it has not been stated whether he is available or not for examination and even otherwise, by the aid of Section 71 of the Evidence Act, 1872, other witnesses examined have even not proved due execution and attestation of Will, and set aside the judgment & decree of the trial Court and decreed the suit in favour of the plaintiffs holding that Radha Bai's property be given to the heirs of Radha Bai's father who are the plaintiffs herein against which this second appeal has been preferred.

6. The main dispute is execution of Will executed by Radha Bai in favour of defendant No.1, as Radha Bai was the sole title holder of the suit property. Defendant No.1 claimed the suit property by way of Will Ex.D-1, but one attesting witness of the Will namely, Darbariram (PW-2) was examined in his behalf who has not supported the Will and another witness Bahur Singh was not examined. The first appellate Court has clearly recorded a finding that defendant No.1 has not adduced any evidence as to why another attesting witness of the Will namely, Bahur

Singh was not examined before the trial Court. Other witness B.K. Shukla (DW-2), Record Keeper, Office of the Sub Registrar, Rajnandgaon has also not supported the case of defendant No.1.

7. The Supreme Court in the matter of Janki Narayan Bhoir v. Narayan Namdeo Kadam¹ has held that under Section 63(c) of the Succession Act, 1925, the provision of attestation of Will by two or more persons is mandatory. It has further been held that in case only one of the two attesting witnesses was examined, but he failed to prove the execution of Will and the other attesting witness, though available, has not been examined, mandatory requirements of Section 63(c) of the Succession Act, 1925 and Section 68 of the Evidence Act, 1872 are not satisfied and Section 71 of the Evidence Act, which provides that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence, is not attracted in the circumstances.
8. In the instant case, definitely, one attesting witness Darbariram (PW-2) has not supported the case of defendant No.1 and he was examined on behalf of the plaintiffs, but there is no reason and no evidence has been brought on record about his unavailability and therefore execution of Will has not been proved in accordance with Section 63(c) of the Succession Act, 1925 read with Section 68 of the Evidence Act, 1872. Even otherwise, B.K. Shukla (DW-2), Record Keeper, Office of the Sub Registrar, Rajnandgaon, by virtue of Section 71 of the Evidence Act, 1872, has also not proved attestation and execution of the Will. The plaintiffs who are definitely the heirs of Radha Bai's father, would inherit

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the property left by Radha Bai which by virtue of Section 15(1)(c) of the Hindu Succession Act, 1956, in preference of defendant No.1, is Radha Bai's brother's sons. As such, the first appellate Court is justified in granting decree in favour of the plaintiffs by setting aside the judgment & decree of the trial Court which is neither perverse nor contrary to the record. I do not find any ground to admit the second appeal by formulating substantial question of law for determination. The second appeal deserves to be and is accordingly dismissed *in limine* without notice to the other side. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

Soma