

AFR**HIGH COURT OF CHHATTISGARH, BILASPUR****Second Appeal No. 201 of 2006**

Pannalal Swarnkar, S/o. Gendlal Swarnkar, Aged About 60 Years, R/o. Ward No.30, Brahman Para, Durg, District Durg, Chhattisgarh.

---- Appellant**Versus**

Rajkumar Soni (Rajkumar Tailors), Aged About 43 Years, S/o. Late Shri Gendlal, R/o. Ward No.30, Brahman Para, Durg, District Durg, Chhattisgarh.

---- Respondent

For Appellant : Mr. Manoj Paranjpe & Mr. Bharat Sharma, Advocates

For Respondent : Mr. B.P. Sharma & Ms. Anuja Sharma, Advocates

Hon'ble Shri Justice Goutam Bhaduri**C.A.V. Judgment****(Delivered on : 04.02.2020)**

1. The instant second appeal arises out of the judgment & decree dated 03.01.2006 passed in Civil Appeal No.08-A/2005 by the Fifth Additional District Judge, Durg. By the said judgment, the judgment & decree dated 31.03.2003 passed in Civil Suit No.75-A/2001 by the Eighth Civil Judge, Class-II, Durg was affirmed.
2. In the instant appeal is by the plaintiff/appellant. The case of the plaintiff was that the respondent and plaintiff are real brother. In the year 1990, the father of the plaintiff namely Gendlal had given a part of his house by way of partition to the son plaintiff and thereafter, he is in possession of house till date. Subsequently, the respondent, who is brother, has disconnected the electricity and had installed a different meter. It was pleaded that the defendant/respondent also got his name mutated in respect of house on the

ground that the house has been bequeathed to him by his father. Further pleaded with respect to the mutation of the name, the objection though was raised before the municipal and other revenue authorities i.e. Nazul but the name of the respondent was recorded. The plaintiff/appellant pleaded that during the life-time of his father, the plaintiff /appellant used to look after him and after his death the entire rituals were also carried out by him. Alleging that the respondent always take the shelter of fabricated document and lies get a Will prepared by fraud on 14.01.1994 by his father Gendlal in favour of Rajkumar Soni, therefore, in order to set side the Will, the civil suit was filed.

3. The respondent denied the averments of the plaint and stated that late father Gendlal have never executed any partition. It was further stated that the plaintiff is not in possession of the suit house. Further pleaded that the father, Gendlal Soni, has executed a registered Will on 14.01.1994 and on the basis of the Will, after his death, the mutation of the name in respect of the house was recorded. Likewise in Nazul records, name of the respondent is recorded. Rest of the averments were denied.
4. The trial Court on the basis of the pleadings framed four issues and in respect of the averments of partition, it was held that after partition, the house was not given to the plaintiff /appellant. The main question with respect to Will, the finding was recorded that the Will is not outcome of fraud. Rest of the averments with respect to the court fees and relief, they are not of much significance. Against that dismissal of judgment and decree when the appeal was preferred, the appellate Court too, affirm the order

of the trial Court. Thereafter, while admitting the appeal, the following substantial question of law was framed.

“Whether in the facts and circumstances of this case, a valid execution and attestation of Will dated 14.01.1994 (Ex.D/1) has not been established and the Courts below were not justified in dismissing the suit of the plaintiff based on successory rights ?”

5. Learned counsel for the appellant would submit that one attesting witness Dinesh Kumar Mishra was examined as DW-2 and the statement of the propounder of Will i.e. DW-1 Rajkumar Soni, the respondent and the statement of DW-3 Harekrishna Tiwari, who drafted the Will are contradictory to each other. Referring to the statement of DW-2, it was stated that Gendlal, according to him, the Will was prepared in the office of Harekrishna Tiwari, the Advocate, at the instance of Gendlal Soni, the father and it was given to Gendlal Soni by Advocate and before him the Will was read over. It is stated therefore the propounder had played an active roll in preparation of Will. The counsel further referred to the fact that according to this witness the Will was executed on a stamp paper and not on the plain paper, therefore, the serious contradiction exists.
6. It is contended that examination of Ex.D-1 would show that it is not on the stamp paper. Much emphasis was made that according to DW-2, the Will was not written on the ordinary paper whereas the Will would show that it was not on stamp paper and it was on the ordinary paper. It is stated that when the person of the line of succession i.e. the plaintiff has been deprived and no reason has been assigned, then the execution of the Will becomes doubtful. Referring to the statement of DW-1, the respondent, in whose

favour the propounder of the Will was made, it is stated that the Will though was executed in the year 1991 but it was first time came to notice in the year 1994 and no explanation has been given. It is contended that the mother was also dependent on deceased and why she was deprived of the right, it is also not clear. In respect of the credibility of DW-3, the Advocate, who drafted the Will, it is stated that the Advocate could not be examined as a witness in same case and when there are two attesting witnesses then examination of one witness would also create a doubt. It is also contended that the attesting witness appeared before the Court without even the summons.

7. Reliance was placed in (2019) 8 SCC 637, AIR 1959 SC 443 and (1990) 3 SCC 364. Referring to (2019) 8 SCC 637, learned counsel for the appellant would submit that concurrent finding of fact can always be coupled with the fact. Relying on AIR 1959 SC 443 and (1990) 3 SCC 364, it is stated that when other heirs are eliminated then it creates doubt about the existence and would submit that under the circumstances, both the finding of Court below are bad in law, which requires to be set aside.
8. Per contra, learned counsel for the respondent would submit there is two concurrent finding of fact about the Will is on record. Referring to statement of DW-1, the counsel would submit the father and mother was residing with the defendant and as per the statement of DW-2 unless and until the desire is disclosed to witness, the prior meeting of mind would not take place therefore in this case, the executor along with the witness went to office of the Advocate which has been proved by the attesting witness. It is stated the circumstances are very natural and no ambiguity can be

pointed out. Referring to the Will, it is stated even before the registration of the Will, enquiry was made by the Registrar wherein the admission of Will was made by the executor. Further, reliance was placed in (2002) 2 SCC 84 and (2005) 2 SC 784.

9. I have heard learned counsel appearing for the parties at length and perused the record and evidence.
10. The plaintiff came to Court with a case that the Will was an outcome of fraud as defendant was residing with his father Gendlal and got the Will executed. In support of these contentions when the pleading is examined, it shows that at para 19 of the plaint only it is pleaded that with prior planning and in faze manner the Will was got executed. At para 18, it is stated that only the respondent used to give food to the father that does not mean that he was looking after his father and when Gendlal was extremely ill, it was not informed and because of the inaction of the defendant the father died. If such statement are examined as against the provisions of Order 6 Rule 4 of C.P.C. when the fraud is pleaded then the particulars (with dates and items) would be necessary to be stated in the pleading, which is completely missing in plaint. In the written statement para 12 the defendant contended that the mother and father used to stay with the defendant alone. Staying with one of the son is not abnormal situation. The said pleading finds support with the statement of DW-1, para 1 wherein he states that the father used to stay with him till death. The said evidence and the pleading remains unrebutted in pleading or in cross examination.
11. Now coming to the statement of DW-2, Dinesh Kumar Mishra, he stated that when Gendlal Soni requested him, he went to the office

of Harekrishna Tiwari (DW-3), the Advocate and in the office the Will was prepared then at para 2 he stated that after preparation of the Will i.e. Ex.D-1, Advocate had given it to Gendlal Soni to read it. It is further deposed thereafter the Advocate himself had read it over to Gendlal Soni in his presence and Gendlal Soni after reading and after hearing the same accepted the contents of Will. At para 4, it is further stated that even when the Will (Ex.D-1) was registered, at that time, Gendlal Soni was asked by the Registrar whether he has read it or not ? in reply, he stated that he has read over the Will and is executing the Will in favour of his younger son Rajkumar Soni, the respondent.

12. The plaintiff Pannalal was not examined instead his power of attorney holder Mahesh Prasad Soni was examined as PW-1. Though the bare statement have been made that during the lifetime of his grand father, the possession of house was handed over but no document as to support the same is on record. He further stated that Gendlal Soni has not purchased the house. Only oral evidence exists for this. The plaintiff failed to prove any documentary evidence. Any purchase made by other person, it could have been proved by the plaintiff when he was asserting a fact as the burden of prove to discharge was on him, which he failed to prove.
13. With respect to the submission made by the appellant the contradiction exists about execution of the Will on the stamp paper or on the ordinary paper, to evaluated the same when the Ex.D-1 is examined and para 30 of the finding of the appellate Court is read, the reasoning as has been given by appellate Court appears to be sound and logical. The Will is executed on the water mark

paper and reasoning as has been given that the water mark papers are only available with the stamp vendors is also logical. So the DW-1 when has stated that the Will was executed on the stamp paper, the inference which has been drawn by the appellate Court is quite reasonable and no fault can be pointed out to accept that the DW-1 considered the paper of Will to be a stamp paper. The statement of DW-3 also affirms the fact who has drafted the Will and no reason exists as to why the evidence of those facts cannot be accepted.

14. With respect to examination of advocate as witness, Section 128 of the Indian Evidence Act, 1872 contemplates that privilege is not waived by volunteering evidence. It says that if any party to a suit gives evidence therein at his own instance or otherwise, he shall not be deemed to have consented thereby to such disclosure as is mentioned in section 126, and if any party to a suit or proceeding calls any such barrister, pleader, attorney or vakil as a witness, he shall be deemed to have consented to such disclosure only if he questions such barrister, attorney or vakil on matters which, but for such question, he would not be at liberty to disclose. Therefore the advocate who drafted the Will when examined at the instance of the concerned party itself and made disclosure of fact no illegality can be attributed. Another question argued by appellant that witness were examined by defendant without issuance of summons. In this regard when provisions of Order 16 Rule 1-A of C.P.C. is examined, it shows the Order do not creates a bar that without the issuance of summons a person cannot be called in Court and examined. Therefore, the contentions of the appellant that DW-3, being the advocate could not have deposed in Court on behalf of his client is misconceived. Likewise the person who is

present in a Court can be examined even if he comes without any summons. The plaintiff in this case failed to bring any material on record to disbelieve both the witness i.e. DW-2, the attesting witness and DW-3, the advocate who drafted the Will.

15. With respect to state of mind, the witness DW-1, DW-2 & DW-3 they have stated about the mental condition of the executor of the Will that he was in the sound capacity. The Supreme Court in case of ***Narinder Singh Rao V. Air Vice-Marshall Mahinder Singh Rao & Others*** reported in ***(2013) 9 SCC 425*** has laid down that the soundness of mind at the time of execution of the Will is a question of pertaining to fact and would not be a question of law.
16. Likewise, the Supreme Court in case of ***Sridevi & Others v. Jayaraja Shetty & Others*** reported in ***(2005) 2 SCC 784*** has laid down that the mode of proving of the Will is by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus.
17. In this case, the entire evidence and pleading do not disclose any suspicious circumstances or bring home any material defect to disown the statement of attesting witness DW-2. Much emphasis was laid on the issue of stamp paper and ordinary paper by projecting that there is discrepancy on the statement or there is inconsistency lies as to whether the Will was executed on stamp paper or ordinary paper, but those averments are without any proof rather circumstances and execution of Will on water mark paper support the cause of respondent. Therefore, suspicious

circumstances as stated is neither find place in pleading nor any evidence on behalf of the plaintiff have been led to prove the same. The reliance placed by appellant on the ratio of judgment is not of any dispute, but to attract those ratio the pleading and evidence should have been on record. As against this, when the Will Ex.D-1 is examined, it shows that it is in the water mark paper, therefore, the proposition of appellant about suspicious is completely misconceived.

18. The Supreme Court in case of ***Madhukar D. Shende v. Tarabai Aba Shedage*** reported in ***(2002) 2 SCC 85***, at para 9 held as under :

“9. It is well settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of “not proved” merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.”

19. When the facts and the finding of two Courts below are examined on the availability of the material on record, it shows that only opposition has been made by the plaintiff/appellant. The particular pleading with respect to fraud is missing, the pleading is too cryptic which do not satisfy the requirement of Order 6 Rule 4 of C.P.C. Besides the plaintiff has failed to prove any suspicion circumstances of execution of the registered Will Ex.D-1.
20. In view of the aforesaid facts and discussions, I am of the opinion that no substantial question of law arises for consideration in this appeal. Accordingly, the appeal fails and it is dismissed.

Sd/-
(Goutam Bhaduri)
Judge