

HIGH COURT OF CHHATTISGARH, BILASPURSecond Appeal No. 388 of 2008Judgment reserved on 04.11.2020Judgment delivered on 04.01.2021

Premsheela, D/o Man Sai, aged about 39 years, R/o village Sanna, Tahsil Bagicha, District Jashpur (C.G.)

----- Appellant/Plaintiff

Versus

1. Prasanna Kumari (since deceased) through LRs:-

- A. Sunil Minj, aged about 45 years,
- B. Sandeep Minj, son of Sunil Minj, aged about 24 years,
- C. Vimla Minj, daughter of Sunil Ming, aged about 22 years,
- D. Vimita Minj, daughter of Sunil Minj, aged about 20 years,
- E. Manisha Minj, daughter of Sunil Minj, aged about 18 years,

All are resident of at & Post Sanna, Tehsil Bagicha, District Jashpur, Chhattisgarh

- 2. Jatro, D/o late Bandhan, aged about 39 years, R/o village -Sanna, (Saranatoli), Tahsil Bagicha, District Jashpur (C.G.)
- 3. Khrist Pyari, D/o Admon, mother Fabiyola, R/o village - Saraitoli, at present residing at village - Aasta (Khedar), Post Champa, Tahsil - Bagicha, District Jashpur (C.G.)
- 4. State of Chhattisgarh, through Collector, Jashpur Nagar, District Jashpur (C.G.)

----- Respondents/defendants

For Appellant

: Mr. J.K. Shastri, Advocate.

For LR's of respondent No. 1

: Ms. Binu Sharma, Advocate.

For Respondent No. 3

: Ms. Sareena Khan, Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment [C.A.V.]

(1) The appellant's/plaintiff second appeal was admitted for hearing on 6.3.2020 by formulating two substantial questions of law :-

"1. Whether both the courts below were justified in holding that Will (Ex.D-2) has been proved in accordance with law without there being any foundation laid for adducing secondary evidence under Section 65 of the Indian Evidence Act, 1872 ?

"2. Whether both the courts below were justified in holding that Will (Ex.D-2) dated 16.06.1992 executed by late Dasri in favour of defendants No. 1 & 2 namely Tarshila & Prasanna Kumar, respectively has been proved in accordance with law, by recording finding which is perverse and contrary to the record ?

(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) The suit property was held by one Mansai. He had four daughters namely Phabialo, Premsheela, Tarsheela & Prasannkumari. Plaintiff No. 1- Khistpyari is the daughter of Phabialo whereas plaintiff No. 2- Premsheela is the daughter of Mansai and defendants No. 1 and 2 namely Tarsheela & Prasanna Kumari are also the daughters of Mansai. The dispute relates to the property left by wife of Mansai namely Dasri. It is a case of the

plaintiffs that mother of plaintiffs namely Dashri allegedly executed a Will dated 16.6.1992 (Ex.D-2) in favour of defendants No. 1 & 2, which is a forged Will and they have also right, title and interest in the suit property mentioned in Schedule 'A' & 'B' of the plaint, being the daughters of Dashri, therefore, their title be declared in the suit property and they also be declared to be the joint possession holder of the suit land.

(3) Defendants No. 1 & 2 filed their written statement and denied the fact that Will (Ex.D-2) is forged. It was further pleaded that on the basis of the Will, their lands have also been recorded in the revenue records, as such, they are title holder of the suit land, as such, suit is liable to be dismissed.

(4) The trial Court, after appreciation of oral & documentary evidence available on record, dismissed the suit holding that Will (Ex.D-2) is not forged and fabricated document. On appeal being preferred by the plaintiffs, first appellate Court has affirmed the judgment & decree of the trial Court and dismissed the appeal of the plaintiffs, resulting into filing of the second appeal, in which two substantial questions of law have been formulated and set out in the opening paragraphs of the judgment for the sake of completeness.

(5) Mr. J.K. Shastri, learned counsel appearing for the

appellants/plaintiffs would submit that plaintiffs have not laid secondary evidence for not filing the original copy of the Will (Ex.D-2) and in absence of original copy of the Will/in absence of laying foundation for leading secondary evidence under Section 65 of the Evidence Act, Will (Ex.D-2) is not admissible in evidence. He would further submit that the execution and attestation of the Will (Ex.D-2) has not been proved in accordance with Section 68 of the Indian Evidence Act read with 63 of the Succession Act, 1923. He would rely upon the decision of the Supreme Court in the matter of Roman Catholic Mission v. State of Madras and another¹ in support of his case.

(6) Ms. Binu Sharma, Advocate appearing on behalf of respondents No. 1 & 2 would submit that the plaintiffs did not raise any question when the Will(Ex.D-2) was sought to be marked as exhibit and, therefore, no objection could be taken later on, that too, at this stage i.e appellate stage. She would rely upon decision of the Supreme Court in the matter of Dayamathi Bai v. K.M. Shaffi² in support of her case. She would further submit that though the Will (Ex.D-2) was branded as a forged Will but in express terms neither its execution was denied nor the attestation of Will (Ex.D-2) was successfully questioned and, therefore, Section 68 of the

1 AIR 1966 SC 1457

2 AIR 2004 SC 4082

Evidence Act would not attract as the defendants No. 1 & 2 have examined one of the attesting witnesses namely Devchand (DW-2), who has proved the execution and attestation of the Will (Ex.D-2), as such, second appeal deserves to be dismissed.

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

Answer to substantial question of Law No. 1

(8) Defendants have filed certified copy of the Will, which has been marked as Ex.D-2 dated 16.06.1992.

(9) True it is that the original Will (Ex.D-2) has not been filed and no foundation has been laid for leading the secondary evidence. But the fact remains that at the time when certified copy of the Will (Ex.D-2) was marked as an exhibit, no objection was raised by the plaintiffs before the trial Court and the said Will was also not challenged on that score before the first appellate Court by taking this plea.

(10) Now, before this Court the plea has been raised that since no foundation has been laid for secondary evidence, therefore, Will (Ex.D-2) is inadmissible in evidence and it has to be excluded from consideration.

(11) It is well settled law that any objection as to the proof of document has to be taken at the stage of marking of the documents before the trial Court under Order 13 Rule 4 of the Code of Civil Procedure, 1973, if no objection is raised, it cannot be permitted to be raised at any stage subsequently at the same court or before the appellate Court.

(12) In the matter of Dayamathi Bai (Supra), their Lordships of the Supreme Court has held that objection as to the mode of proof alleging same to be irregular or insufficient has to be taken at the time of marking the said document as an exhibit and the objection taken by the party as to the mode of proof before the lower appellate court is not sustainable holding that certified copy of the sale deed is admissible in evidence. Relevant paragraph of the report states as under :-

"13. We do not find merit in this civil appeal. In the present case the objection was not that the certified copy of Ex.P-1 is in itself inadmissible, but that the mode of proof was irregular and insufficient. Objection as to the mode of proof falls within procedural law. Therefore, such objections could be waived. They have to be taken before the document is marked as an exhibit and admitted to the record (See: Order XIII

Rule 3 of Code of Civil Procedure). This aspect has been brought out succinctly in the judgment of this Court in R.V.E. Venkatachala Gounder v. Arulmigu Viswesaraswami & V.P. Temple & Another³ to which one of us, Bhan, J., was a party vide para 20.

(13) Since in the instant case, when the certified copy of the Will was marked as an Exhibit D-2 during course of trial and evidence, the plaintiff/appellant did not raise any objection and allowed the certified copy to be marked as exhibit before the trial Court and no question was raised before the first appellate Court regarding non production of original copy of Will. Now, before the second appellate Court, this point cannot be permitted to be raised as the plaintiffs failed to raise the said plea either at the stage of marking the said document before the trial Court under Order 13 Rule 4 of the CPC or before the first appellate court, as such, the substantial question of law No. 1 is answered against the plaintiffs and in favour of the defendants.

Answer to substantial Question of law No. 2

(14) The Will (Ex.D-2) has been executed by Dasri in favour of his two daughters (defendants No. 1 & 2) excluding her other two daughters i.e. mother of

³ (2003) 8 SCC 752

plaintiff No. 1 and mother of plaintiff No. 2, which was sought to be challenged by these two plaintiffs branding the Will as forged Will. The plaintiffs, apart from branding the Will as a forged will, simply pleaded in paragraph 8 of the plaint that defendants No. 1 & 2 got executed the forged Will in their favour and thereafter got the revenue records mutated in their names, except this, there is no pleading in the entire plaint specifically denying the execution or attestation of the Will. In the affidavit filed under Order 18 Rule 4 CPC, the plaintiff No. 2 has stated that her mother was very old and she was unable to move and defendants No. 1 & 2 got the forged Will executed in their favour. She has admitted in the cross-examination that mutation proceedings, the names of defendant No. 1 & 2 have been recorded and appeal filed by them has been dismissed.

(15) Plaintiffs' witness – Jogiram Nageshia (PW-2) in paragraph 5 of his statement has clearly admitted that the Dasri had given the entire land to defendants No. 1 and 2 and has not given any of the land to mother of plaintiff No. 1 and plaintiff No.2 and they are in possession over the suit land by cultivating the same. Except this, there is no evidence brought on record on behalf of the plaintiffs to question the execution and attestation of the Will.

(16) Defendant No. 1- Prasanna Kumari, who was examined as DW-1, no question was suggested to her regarding execution and attestation of the Will (Ex.D-2) except in paragraph 4, suggestion was put to her that the forged Will has been got executed by her, which she has denied.

(17) Likewise, attesting witness - Devchand (DW-2) has clearly stated that he has seen the attesting witness of the Will and the Will was signed by Dashri Bai in his presence and the second witness Iliyas. In his cross-examination, the only suggestion put to this attesting witness is that Dasri Bai has not executed the Will and some other woman has made thumb impression on the Will (Ex.D-2), which is said to be the Will executed by Dasri Bai, which has been refuted by attesting witness - Devchand, as such, there is absolutely no evidence to invalidate the execution and attestation of Will (Ex.D-2) by Dasri Bai in favour of defendants No. 1 & 2.

(18) The Supreme Court in the matter of **H.H. Maharaja Bhanu Prakash Singh v. Tika Yogendra Chandra**⁴ has held that when no specific denial as to genuineness or of signature of testatrix or of the attesting witness, Will cannot be held to be the suspicious document.

(19) The Supreme Court in the matter of **Muddasani Venkata Narsaiah (Dead) through legal representatives v.**

4 1989 Supp (1) SCC 16

Muddasani Sarojana⁵ has considered the decision of Nagpur High Court in the matter of Kuwarlal Amritlal v. Rekhlal Koduram⁶ and has held that when attestation is not specifically challenged and the witness is not cross-examined regarding details of the attestation, it is sufficient for him to say that document was attested. It was further held that if other side wants to challenge that statement, it is duty quite apart from raising a pleading to cross-examine the witness along those lines.

(20) Reverting to the facts of the case in light of principles of law laid down by the Supreme Court in afore-cited cases (supra), it is quite vivid that in the present case firstly plaintiffs did not specifically deny the execution of the Will by Dashri Bai in favour of defendants No. 1 & 2 except vague assertion that Will executed is a forged document and further even the attestation was not specifically challenged in pleading by the plaintiffs, which is apparent from the fact that no cross-examination was made on behalf of the plaintiffs, defendants and their witnesses *qua* attestation of Will. It was imperative on the part of the plaintiffs/appellants to specifically deny the execution and attestation of Will and to shift burden on propounder of the Will to establish that Will was duly executed and duly attested in accordance with Section 68 of the Indian

5 (2016) 12 SCC 288

6 AIR 1950 Nag 60

Evidence Act read with Section 63 of the Succession Act, 1923, as such, both the courts below have concurrently and rightly held that plaintiffs are not entitled for the reliefs claimed in the plaint and the Will (Ex.D-2) executed by Dashri in favour of defendants No. 1 & 2 is a duly executed Will in accordance with law.

(21) The last submission of learned counsel appearing for the plaintiffs would be that that there is no reason for Dashri Bai to bequeath the entire property in favour her two daughters (defendants No. 1 & 2) and deprive her two daughters i.e. mother of plaintiff No.1 and plaintiff No. 2 to the ancestral property, as such, that makes the Will (Ex.D-2) suspicious. This issue is no longer *res integra*, it has been held by Supreme Court in the matter of Rabindra Nath Mukherjee and another v. Panchanan Banerjee (Dead)⁷ that deprivation of the natural heirs by the testatrix should not raise any suspicion, because the whole idea behind execution of will is to interfere with the normal line of succession and natural heirs would be debarred in every case of will; of course, it may be in some cases they are fully debarred and in others only partially.

(22) Considering the submissions made by learned counsel for the appellants from either of the angles, the irresistible and inescapable conclusion would be that

7 AIR 1995 SC 1684

there is no illegality or perversity in the findings recorded by two courts below *qua* the execution and attestation of the Will (Ex.D-2), as such, the first appellate Court is absolutely justified in affirming the judgment & decree of the trial Court dismissing the suit.

(23) Resultantly, the second appeal, being devoid of merit, is liable to be and is hereby dismissed leaving the parties to bear their own costs.

(24) Appellate decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

D/-

