

HIGH COURT OF CHHATTISGARH, BILASPUR**Second Appeal No.32 of 2010**

Ramji S/o Noharoo, Caste Gada, aged about 30 years,
R/o Village Markatola/Mayana, Tahsil Charama, District
Kanker (CG)

----- Appellant/Defendant No.1

Versus

1. Arjunram, adopted son of Roop Singh, Caste Gada, aged
50 years, R/o Village Markatola/Mayana, Tahsil
Charama, District Kanker (CG)

----- Plaintiff

2. State of Chhattisgarh, through the Collector, Kanker,
District Kanker (CG)

----- Respondents

For Appellant/Defendant No.1:

Mr. Anand Kumar Gupta, Advocate

For Respondent No.1/Plaintiff:

Mr. Vineet Kumar Pandey, Advocate

For Respondent No.2/State:

Mr. Ravi Bhagat, Dy. G.A.

Hon'ble Shri Justice Sanjay K. Agrawal

Judgment on Board

17/02/2021

1. The substantial questions of law involved, formulated
and to be answered in this second appeal preferred by
the appellant/defendant No.1 are as under:-

"1. Whether the first appellate Court was
justified in holding that plaintiff Arjunram
is the adopted son of Roop Singh by recording
a perverse finding ?

2. Whether the first appellate Court was
justified in holding that defendant No.1 has
failed to prove the due execution and

attestation of the Will dated 03/03/1992 executed by Roop Singh's daughter Sugantin Bai in his favour by recording a perverse finding, especially since the original copy of the Will was not produced before the trial Court ?"

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

2. The suit property was originally held by one Roop Singh. He had one daughter Sugantin Bai. Plaintiff-Arjun Ram claimed that he is adopted son of Roop Singh and by Ex.P-1 Roop Singh is said to have expressed his desire that the suit property be enjoyed by the plaintiff as well as his daughter Sugantin Bai after his death. However, defendant No.1-Ramji claimed the suit property by way of Will executed by Sugantan Bai, daughter of Roop Singh in his favour on 3.3.1992 (Ex.D-1).
3. The trial Court upon appreciation of oral and documentary evidence available on record, by its judgment and decree dated 27.01.2006, dismissed the suit of the plaintiff holding that the fact of adoption of the plaintiff by Roop Singh is not established as per oral and documentary evidence available on record, however, the trial Court found

the Will of Sugantan Bai in favour of defendant No.1-Ramji established. On appeal being preferred by the plaintiff, the first appellate Court allowed the appeal and held that the plaintiff is adopted son of Roop Singh and since copy of original Will dated 3.3.1992 has not been produced by Sugantan Bai before the trial Court, therefore, Will is not established. Questioning the judgment and decree of the first appellate Court, this second appeal under Section 100 of the CPC has been filed by the appellant/defendant No.1, in which two substantial questions of law have been formulated, which have been set-out in the opening paragraph of this judgment for sake of completeness.

4. Mr. Anand Kumar Gupta, learned counsel for the appellant/defendant No.1, would submit as under:

(i) That, finding of the first appellate Court that plaintiff-Arjun Ram is adopted son of Roop Singh is contrary to oral and documentary evidence available on record and therefore, it is liable to be set-aside.

(ii) That, certified copy of Will (Ex.P-1) is admissible in evidence and merely because mode of proof was irregular and insufficient, objection as to the mode of proof falls within procedural law and since the plaintiff did not take any objection at the time of admission of

Will and it was taken on Court record under Order 13 Rule 3 of the CPC and certified copy of Will has been marked as an exhibit under Order 13 Rule 3 of the CPC and therefore, merely on the basis of non-production of original Will and for not laying foundation for secondary evidence, the first appellate Court could not have been entertained such objection in light of principle of law laid down by their Lordships of the Supreme Court in the matter of **Dayamathi Bai (Smt) v. K.M.Shaffi**¹, as such, the judgment and decree of the first appellate Court deserves to be set-aside by answering the substantial questions of law in favour of defendant No.1 and against the plaintiff.

5. Per Contra, Mr.Vineet Kuamr Pandey, learned counsel for respondent No.1/plaintiff, would submit that the first appellate Court has rightly found proved that the plaintiff is adopted son of Roop Singh. He would further submit that the first appellate Court has rightly held that since defendant No.1 did not lay any foundation for leading secondary evidence under Section 65 of the Evidence Act, therefore, the Will was inadmissible in evidence and it has rightly been held to be not proved by the first appellate Court, as such, the judgment and decree of the first appellate Court deserves to be maintained by dismissing the

1 (2004) 7 SCC 107

appeal.

6. I have heard learned counsel appearing for the parties, considered their rival submissions made hereinabove and also went through the records with utmost circumspection.

Answer to substantial question of law No.1:-

7. The suit property as noticed hereinabove was originally held by Roop Singh. The plaintiff claimed the suit property by way of adoption by Roop Singh. He filed adoption deed (Ex.P-1).

8. A careful perusal of adoption deed (Ex.P-1) would show that Roop Singh has simply stated that after his death the suit property be enjoyed by his daughter Sugantin Bai and plaintiff Arjun Ram as well, as such, there is no fact of adoption incorporated in the said document (Ex.P-1) and there is no other documentary evidence on record to establish the plea of adoption.

9. Now coming to oral evidence available on record. In para-9, the trial Court after appreciating oral evidence on record has recorded that the plaintiff, who also stood as plaintiff witness No.2, in his cross-examination has admitted that he used to write his father's name as Ramsai, natural father and he has not produced any documentary evidence to hold that he is known by his adoptive father Roop Singh or known

in the society as Arjun Ram, Son of Roop Singh, as such, on the basis of oral evidence, the trial Court has rightly recorded a finding that the plaintiff is not adopted son of Roop Singh, but the first appellate Court without meeting with the reasonings of the trial Court, in para-14 relying upon the document dated 9.11.2001, which was filed along with application under Order 41 Rule 27 of the CPC and further relying upon Ex.P-1 held that the plaintiff is adopted son of Roop Singh. The above-stated finding recorded by the first appellate Court in this regard is absolutely perverse as Ex.P-1 does not record the fact of adoption. There is no other evidence on record to hold so and application under Order 41 Rule 27 of the CPC was taken on record abruptly by the first appellate Court and without requiring the plaintiff to prove the said document and without providing an opportunity to the appellant/defendant to adduce evidence in rebuttal, the said document was allowed in mid-way after hearing of appeal on merits at the time of judgment, as such, the first appellate Court is absolutely unjustified in holding that the plaintiff is adopted son of Roop Singh. Such a finding is perverse to record and is hereby set-aside.

Answer to substantial question of law No.2:-

10. The Will dated 3.3.1992 (Ex.D-1) executed by Sugantin Bai in favour of defendant No.1 was found established by the trial Court as attesting witnesses were examined, but it appears from the record that original Will was not brought on record, but certified copy of the Will was brought on record and it was not objected at the time of admission of Will on record and it was allowed to be marked as an exhibit.

11. It is the case of the plaintiff that no steps were taken by defendant No.1 for producing the original Will and it has not been proved that original Will has been lost as original Will was available with defendant No.1 and no foundation was laid for adducing secondary evidence, therefore, certified copy of the Will was not admissible in evidence.

12. The Supreme Court in the matter of Dayamathi Bai (supra) has clearly held that objection must be taken at the time of admission and such objection will not be allowed at a later stage. It was observed 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 13 Rule 3 of the Code of Civil Procedure).....

14. To the same effect is the judgment of the Privy Council in the case of Gopal Das v. Thakurji² in which it has been held that when the objection to the mode of proof is not taken, the party cannot lie by until the case comes before a court of appeal and then complain for the first time of the mode of proof. That when the objection to be taken is not that the document is in itself inadmissible but that the mode of proof was irregular, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. Similarly, in *Sarkar on Evidence*, 15th Edn., p. 1084, it has been stated that where copies of the documents are admitted without objection in the trial court, no objection to their admissibility can be taken afterwards in the court of appeal. When a party gives in evidence a certified copy, without proving the circumstances entitling him to give secondary evidence, objection must be taken at the time of admission and such objection will not be allowed at a later stage.

15. In the present case, when the plaintiff submitted a certified copy of the sale deed (Ext.P-1) in evidence and when the sale deed was taken on record and marked as an exhibit, the appellant did not raise any objection. Even execution of Ext.-P2 was not challenged. In the circumstances, it was not open to the appellant to object to the mode of proof before the lower appellate Court. If the objection had been taken at the trial stage, the plaintiff could have met it by calling for the original sale deed which was on record in collateral proceedings. But as there was no objection from the appellant, the sale deed dated 14-11-1944 was marked as Ext.P-1 and it was admitted to the record without objection."

13. Reverting to the facts of the present case in the
light of principle of law laid down by the Supreme

Court in the above-stated judgment (supra), it is quite vivid that defendant No.1 has submitted certified copy of Will (Ex.D-1) in evidence and when the said Will was taken on record and marked as an exhibit, the plaintiff did not raise any objection and even the execution of the said document was not challenged. If the objection would have taken in trial stage, the plaintiff could have filed the original Will on record. However, no such objection was raised and document was admitted to the record without objection. However, at the time of final hearing of civil suit, such an objection was raised, but at that time, the stage of taking objection has already lapsed and therefore, the trial Court rightly rejected that objection.

14. Following the principle of law laid down by the Supreme Court in Dayamathi Bai (supra), it is held that finding of the first appellate Court that since original Will has not been produced by defendant No.1, the Will is not proved in accordance with law is a finding not in accordance with law. Accordingly, the said finding is hereby set-aside.

15. Consequently, the impugned judgment and decree passed by the first appellate Court is hereby set-aside and that of the trial Court is hereby restored

by answering the substantial questions of law in favour of defendant No.1 and against the plaintiff.

16. The second appeal is allowed to the extent indicated hereinabove leaving the parties to bear their own cost(s).

17. A appellate decree be drawn-up accordingly.

Sd/-

(Sanjay K.Agrawal)
Judge

B/-