

NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

First Appeal No. 310 of 2019

1. Veenu Jain, S/o late Balwant Rai Jain, aged about 63 years, resident of house no. 63, Motilal Nehru Nagar Bhilai, Tehsil and District Durg (C.G.)
2. Smt. Neetu Jain (Jivarajaka), D/o late Balwant Rai Jain, aged about 54, W/o Shri Gopal Jivarajaka, resident of A-15, Asova Village Asola, near Shani Temple, New Delhi.
3. Smt. Rachana Jain, W/o Veenu Jain, aged about 60 years, resident of house no. 63, Motilal Nehru Nagar Bhilai, Tehsil and district Durg (C.G.)

---- Appellants/plaintiffs

Versus

Public in general (any person have any objection).

---- Respondents

For Appellants	: Dr.N.K. Shukla, Senior Advocate with Ms. Deepa Jha & Ms. Rashika Soni, Advocate.
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Hon'ble Shri Justice Narendra Kumar Vyas

Order On Board

09.12.2021

1. Appellants/plaintiffs have filed the instant first appeal assailing the judgment & decree dated 25.01.2019 passed by Vth Additional Civil Judge, Class-II, Durg (C.G.) in Civil Suit No. 31-A/15, by which, suit filed by the appellants/plaintiffs for declaring the Will dated 04.02.2014 as valid and enforceable under the law has been dismissed.
2. Brief facts as projected in the plaint filed before the trial Court, are that the appellants No. 1 & 2 are son and daughter of deceased Balwant Rai Jain whereas appellant No. 3 is daughter-in-law of deceased Balwant Rai Jain. Late Balwant Rai Jain has executed un-registered Will on 04.02.2014, by which, appellant No. 1 – Veenu Jain and his wife i.e. appellant No. 3 – Smt.

Rachana Jain appointed joint executors of the said Will, after death of wife of late Balwant Rai Jain namely Smt. Anandwati Jain, the property will be disbursed as per the conditions mentioned in the Will.

3. Learned trial Court has registered a Civil Suit No. 31-A/15 public in General was arrayed as party defendant in the suit, who have any objection for filing the instant Suit. Learned trial Court has directed for issuance of notice through paper publication but no one appeared on behalf of the public at large and no one has raised any objection to grant relief as prayed for in the suit therefore, the respondents were proceeded *Ex-parte*
4. Appellant No.1 has been examined himself but inadvertently he could not examined as attesting witnesses to prove un-registered Will dated 04.02.2014.
5. The trial Court, vide its impugned judgment & decree dated 25.01.2019, has dismissed the suit filed by the appellants/plaintiffs holding that plaintiffs have failed to prove due execution and attestation of Will dated 04.02.2014 by Late Shri Balwant Rai Jain in accordance with Section 63(c) of Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. Against which, instant first appeal under Section 96 of the CPC has been preferred by the appellants/plaintiffs challenging the same.
6. Learned Senior Counsel appearing for the appellants/plaintiffs while filing an application under Order 41 Rule 27 of the CPC, would submit that he has filed additional affidavit of the witness namely Dr. Vishesh Kothari, who has duly attested the Will dated 04.02.2014 and was attesting witness of the Will.
7. I have heard learned counsel appearing for the appellants/plaintiffs and perused the judgment & decree of the trial Court as well as material available on record.
8. Record of the case would show that the appellants have directly

filed the present appeal under Section 96 of the CPC before this Court whereas the appellants should have filed the appeal under Section 96 of CPC before the learned District Judge, Durg, therefore, the present appeal itself is not maintainable before this Court.

9. Considering this jurisdictional issue the learned Sr. Advocate for the appellants seeks permission of this Court to withdraw the appeal and would also submit that delay in filing the appeal may kindly be condoned.
10. Prayer made by learned Senior Counsel appears to be just and proper.
11. Record of the case would also show that the first appeal has wrongly been filed before this Court on 02.07.2019 whereas the judgment and decree has been passed by the learned Trial Court on 25.01.2019 and appellants applied for copy of the order on 02.03.2019. As per Office note the appeal was filed within limitation. The appeal is pending before this Court since 02.07.2019 till today.
12. Since the learned counsel for the appellant wants to withdraw the appeal, the period spent before this Court from 02.07.2019 till today i.e. 09.12.2021, deserves to be excluded for computing the period of limitation. If the appellants prefer first appeal within a period of 30 days from the date of receipt of certified copy of this order before the first appellate Court, the limitation period, which has already expired or spent, will not come in the way of deciding the first appeal on merits, the First appellate Court is directed to decide first appeal on merits in accordance with law without insisting for delay in filing the first appeal.
13. It is made clear that this Court has not expressed any opinion on the merits of the case and the first appellate Court shall decide the first appeal on its own merit in accordance with law.
14. With the aforesaid directions & observations, the first appeal

stands disposed of.

15. The certified copy of the impugned judgment & decree be returned to the counsel for the appellants, after furnishing an attested photocopy thereof.

Sd/-
(Narendra Kumar Vyas)
Judge

Amita