

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO.101 OF 2022

In the matter of an appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned 1st Additional District Judge, Baripada, Mayurbhanj in RFA No.10 of 2015 by confirming the judgment and decree passed by the learned Civil Judge (Senior Division), Baripada in Civil Suit No.473 of 2013.

Manoj Kumar Puthal

:::

Appellant.

-versus-

Surendra Puthal

:::

Respondent.

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

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For Appellant

:::

Mr. Niranjana Lenka,
Advocates.

For Respondent

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**CORAM:
MR. JUSTICE D.DASH**

DATE OF HEARING::15.11.2022, DATE OF JUDGMENT::25.11.2022

D.Dash, J. The Appellant by filing this Appeal under Section-100 of the Code of Civil Procedure 1908 (for short, 'the Code') has assailed the judgment and decree passed by the learned Additional District Judge, Baripada, Mayurbhanj in RFA No.10 of 2015.

By the same, the Appeal filed by the present Appellant under Section-96 of the Code in assailing the judgment and decree passed by the learned Civil Judge (Senior Division), Baripada in Civil Suit No.473

of 2013 has been dismissed and thereby, the result in the suit declaring the Will dated 01.10.2005, Ext.D as illegal has been confirmed.

The Respondent as the Plaintiff having filed the suit seeking for a declaration that the Will executed by Gajendra Puthal bequeathing the property in favour of present Appellant (Defendant) as illegal; the Trial Court had decreed the same and that has been upheld by the First Appellate Court.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Suit.

3. The case of the Plaintiff is that the Defendant is the son through his first wife namely, Anusaya. The Plaintiff having remarried after the death of his first wife has another son and daughter through the second one. The Defendant was in course of time became arrogant and was misguided by some notorious persons of the locality.

The land described in Schedule-A & B of the plaint belong to one Upendra Nath Das, who happens to be the maternal grandfather of the Plaintiff and his brother Gajendra. The Record of Right of the suit land stood in the name of his brother Gajendra. It had been so prepared erroneously when the fact remains that besides his brother, his mother with two brothers and sisters have been in possession of the dwelling house situated over the suit land. The Plaintiff's mother alone being

requested by said Upendra during his lifetime had come to Baripada and was staying with his father in order to take care of him. During the stay of the mother of the Plaintiff, he and his other brothers were born at Baripada and since then all the family members have been residing over the said house and possessing the suit land. It is said that taking advantage of the wrong recording of the suit land in the name of Gajendra Puthal in the Record of Right in the hal settlement, the Defendant fraudulently obtained the Will from Gajendra when Gajendra was not in fit state of health and also not in the sound disposing the state of mind. So, it is stated that the Will is invalid when it is surrounded by several suspicious circumstances. Besides the fact the Testator therein is not the exclusive owner of the suit land and the very dwelling house is covered under that Will. Therefore, it is said that Gajendra had no capacity to bequeath the property. It is also stated that persuading Gajendra to execute a deed of power attorney; such document nomenclatured as Will has been created at the behest of the Defendant.

4. The Defendant traversing the plaint averments has asserted that the land covered under the Will belong to that Testator-Upendra who is their maternal grandfather. It is stated that the property in question was gifted to Gajendra by the original recorded tenant, Upendra as Gajendra was a physically challenged person. He had constructed a house during his lifetime. It is asserted that Gajendra out of his free Will and volition

had executed the Will bequeathing his property in favour of the Defendant and that Will has been duly executed by the Testator as per law and registered. It is stated that the Will is free from any suspicious circumstances.

5. The Trial Court having framed five(5) issues. The crucial issue i.e. the issue no.3 with regard to the validity and sustainability of the Will has been answered against the Defendant and it has thus finally been held to be invalid. Practically, the answer to this issue has led to the dismissal of the suit.

The First Appellate Court has affirmed this finding.

6. Learned Counsel for the Appellant submitted that when the execution of the Will and its registration were under challenge, the Courts below ought not to have repelled the claim of the Defendant on the basis of that Will by saying that said Will Ext.D has not been proved. He further submitted that the finding of the Courts below on the issue holding the Will to be invalid by relying upon some suspicious circumstances surrounding the Will which are said to have not been repelled by the Defendant is the outcome of perverse appreciation of evidence. He, therefore, urged for admission of this Appeal to answer the above as the substantial question of law.

7. Keeping in view the submission made, I have carefully read the judgments passed by the Courts below.

It has to be taken note of that Will in question having been executed by the Testator as the resident of the District Mayurbhanj in respect of properties in the said District; probate is not mandatory to be obtained to stake title over the property covered under the Will as the bar contained under section-213 of the Indian Succession Act does not come in respect of such Wills to operate. However, when a person either claims his title on the basis of that Will and there said Will is called in question by the adversary in that suit or proceeding; said person being the beneficiary under the Will is under legal obligation to prove the Will as a Will strictly as required under section-68 of the Evidence Act read with section-63 of the Indian Succession Act. Similarly, when said Will is challenged by a suitor in filing a suit, the Defendant being the beneficiary under the Will is required to prove that un-probated Will as a Will, keeping in view the provisions of section-68 of the Evidence Act read with section-63 of the Indian Succession Act.

Therefore, in the present suit, the Defendant was under the legal obligation as aforesaid to prove the Will whereunder he claims that the Testator, Gajendra Puthal had bequeathed the properties in his favour in accordance with the above said provisions of law.

On going through the evidence on record, it is seen that the Defendant has not at all proved the Will in consonance with the provision of section-68 of the Evidence Act read with section-63 of the Indian Succession Act by examining any of the attesting witness in establishing that there was due attestation which is the most essential requirement as per law. While not taking steps for examination of the attesting witness, it has also not been explained as to why that was not resorted to and if so how was it not at all possible on the part of the Defendant to do so by stating the reasons standing to acceptance. Furthermore, the Advocate who has given the certificate on the Will has also not come to the witness box on behalf of the Defendant to prove the fact that said Will had been drafted by him under the instruction of the Testator and placed before the Testator for being so executed and he did so in his presence as also in presence of the attesting witnesses. The certificate given by the said advocate is also silent about the presence of the attesting witnesses at that time when the Testator signed and most interestingly, the executants, Gajendra having put his LTI as the executor; the Defendant has signed thereon as the Testator which too is enough to adversely view the execution of the Will.

So, here, when the Will has not been proved on facts and in accordance with law; without going to touch upon those answers of the Courts below on the other issues framed in the suit, this Court is of the

considered view that the finding on the invalidity of the Will as held by the Courts below firmly stands on the ground which is enough to sustain the decree passed by the Trial Court which has been confirmed in the First Appeal.

For the aforesaid discussion and reasons, this Court finds no force in the submission of the learned Counsel for the Appellant (Defendant) that there surfaces any such substantial question of law for being answered in this Appeal, meriting its admission.

8. The Appeal is accordingly dismissed. However, in the peculiar facts and circumstances, no order as to cost is passed.

**(D. Dash),
Judge.**

Narayan