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HIGH COURT OF CHHATTISGARH, BILASPUR

Second Appeal No.513 of 2014

Judgment reserved on: 25-6-2021

Judgment delivered on: 1-7-2021

Digambar @ Dholiya Basohar, aged about 40 years, S/o late Sewak Singh Lodhi, R/o Village Bandhi, Tahsil Lormi, District Mungeli (C.G.) at present R/o in front of Science College, Dabripara, Bilaspur (C.G.)

(Defendant)
---- Appellant

Versus

1. Maheshwari, aged about 33 years, Wd/o late Deepak Singh, R/o Village Bandhi, Tahsil Lormi, District Mungeli (C.G.)

2. Ujala, aged about 12 years, S/o late Deepak Singh, Caste Lodhi.

3. Prakash, aged about 10 years, S/o late Deepak Singh,

   Respondent No.2 & 3 are minor represented through mother Maheshwari, Wd/o late Deepak Singh, Caste Lodhi, R/o Village Bandhi, Tahsil Lormi, District Mungeli (C.G.)

4. Pushpa Bai, aged about 39 years, D/o late Sewak Singh, Caste Lodhi, R/o Village Bandhi, Tahsil Lormi, District Mungeli (C.G.)
   (Plaintiffs)

5. State of Chhattisgarh, Through Collector, Bilaspur (C.G.) (Now Collector – Mungeli)
   (Defendant)
   ---- Respondents

For Appellant / Defendant No.1: -
Mr. Shrawan Kumar Chandel, Advocate.
For Respondents No.1 to 4 / Plaintiffs: -
Dr. Shailesh Ahuja, Advocate.
For Respondent No.5 / State: -
Mr. Ravi Kumar Bhagat, Deputy Govt. Advocate.

Hon'ble Shri Justice Sanjay K. Agrawal

C.A.V. Judgment

1. This second appeal preferred by defendant No.1 was admitted for hearing by order dated 1-4-2015 on the following substantial question of law:-

> "Whether, the first appellate Court rightly reverse well reasoned finding of the trial Court on the basis of Section 58 of the Evidence Act, in which plaintiff admitted that property is self earned property of Sewak Singh and also admitted execution of will?"

(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 situated at Village Bandhi, Tahsil Lormi, Distt. Mungeli, total area 8.05 acres, was originally held by one Sevak Singh. Sevak Singh had two sons namely, Digambar @ Dholiya Basohar – defendant No.1 and Deepak Singh – husband of plaintiff No.1 and father of plaintiffs No.2 & 3. Sevak Singh had one daughter also namely, Pushpa who is plaintiff No.4.

3. It is the case of the plaintiffs that Sevak Singh had 24.30 acres of land in his name out of which he had sold 8.29 acres during his lifetime and 16.01 acres remained. Sevak Singh died on 1-5-1979 making a Will of the said land in favour of defendant No.1 on 3-1-1977 and thereafter he died. On the strength of the said Will, the name of defendant No.1 came to be recorded in the revenue records with regard to 16.01 acres. It is the further case of the plaintiffs that though formal Will was made in favour of defendant No.1 by Sevak Singh, but the predecessor-in-title of the plaintiffs namely, Deepak Singh and defendant No.1, both, had half and half share in the suit property left by Sevak Singh i.e. 16.01 acres, however, only 8.05 acres of land has been given by defendant No.1 to Deepak Singh – husband of plaintiff No.1 and father of plaintiffs No.2 & 3 of which plaintiff No.1 remained in possession and 7 acres has already been alienated by defendant No.1. Taking advantage of the helplessness of the plaintiffs, defendant No.1 is trying to dispossess them over the suit land by

harvesting the crop. It was also said that Sevak Singh could not have executed Will in favour of defendant No.1 and plaintiffs No.1 to 3 are entitled for half share in the property i.e. 8.05 acres, though plaintiff No.4 has been joined as party, but she does not want to take any share in the property.

4. Resisting the suit, defendant No.1 filed written statement stating inter alia that the suit land has been bequeathed by Sevak Singh in his favour by Will dated 3-1-1977 and as such, there is no partition between Deepak Singh and defendant No.1 and no such share has been given to the plaintiffs and therefore the plaintiffs's suit deserves to be dismissed.

5. It is pertinent to mention here that defendant No.1 though claimed the suit land by way of Will dated 3-1-1977 allegedly executed by Sevak Singh in his favour, but the said Will was never produced and proved by defendant No.1 in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872, during the course of trial.

6. The trial Court upon appreciation of oral and documentary evidence available on record dismissed the suit holding that defendant No.1 is in possession of the suit land pursuant to the Will executed by Sevak Singh in his favour on 3-1-1977. Feeling aggrieved against the judgment & decree of the trial Court, the plaintiffs preferred first appeal before the first appellate Court and the first appellate Court by its impugned judgment & decree allowed the appeal and decreed the suit of the plaintiffs holding that Will dated 3-1-1977 executed by Sevak Singh in favour of defendant No.1, has not been produced and proved in accordance

with law. The first appellate Court further held that since defendant No.1 had already alienated 7 acres of land, the plaintiffs are entitled for decree of 8.05 acres and accordingly granted decree in favour of the plaintiffs which has been called in question in this second appeal by defendant No.1 in which substantial question of law has been formulated and which has been set-out in the opening paragraph of this judgment for the sake of completeness.

7. Mr. Shrawan Kumar Chandel, learned counsel appearing for the appellant herein / defendant No.1, would submit that the first appellate Court has clearly erred in holding that the plaintiffs are entitled for decree of 8.05 acres and further erred in holding that defendant No.1 had already alienated 7 acres of land which fell in his share and remaining 8.05 acres fell in the share of Deepak Singh which the plaintiffs are entitled, as such, the impugned judgment & decree deserve to be set aside and the instant second appeal deserves to be allowed.

8. Dr. Shailesh Ahuja, learned counsel appearing for the plaintiffs / respondents No.1 to 4 herein, would submit that the first appellate Court has rightly held that the Will allegedly executed by Sevak Singh in favour of defendant No.1 was never produced and proved in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872. Even if the plaintiffs have made averment with regard to making of Will, but they have never admitted due execution and attestation of Will in accordance with law, therefore, the trial Court has clearly erred in holding that admitted facts need not be proved. The plaintiffs have never admitted execution and

attestation of Will by Sevak Singh, rather Sevak Singh had no right to make Will of the entire 16.01 acres of land in favour of defendant No.1. Since defendant No.1 had already alienated 7 acres of land which has fallen in his share and which he had already admitted in his evidence, the first appellate Court is right in holding that the plaintiffs are entitled for 8.05 acres of land, as such, the second appeal preferred by defendant No.1 deserves to be dismissed.

9. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.

10. The suit property admittedly belongs to Sevak Singh and he had sold 8.29 acres of land during his lifetime, remaining 16.01 acres of land left. According to the plaintiffs, Sevak Singh had executed Will in favour of defendant No.1 on 3-1-1977 and thereafter, husband of plaintiff No.1 Deepak Singh was born i.e. after execution of Will in favour of defendant No.1. According to the plaintiffs, Will was executed by Sevak Singh to save the property and not to give share to daughter so that property may not be given in partition to heirs of his first wife and to secure the interest of sons and daughters of his second wife / plaintiffs herein.

11. Defendant No.1 claimed that Sevak Singh executed Will of the entire 16.01 acres of land in his favour, therefore, he has become title holder and possession holder of the suit land which the trial Court accepted also, but the first appellate Court did not accept and reversed the decree of the trial Court holding that defendant No.1 though claimed the suit property by way of Will allegedly

executed by Sevak Singh in his favour on 3-1-1977, but the said Will was never brought on record by defendant No.1 to demonstrate the said fact of Will having been executed in his favour and thereafter, could have proved the Will in accordance with Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872.

12. The principles which govern the proving of a Will are well settled. (See **H. Venkatachala Iyengar v. B.N. Thimmajamma**[1], **Rani Purnima Devi v. Khagendra Narayan Dev**[2], **Inder Bala Bose v. Manindra Chandra Bose**[3], **Smt. Jaswant Kaur v. Smt Amrit Kaur and others**[4], **Surendra Pal and others v. Dr. (Mrs.) Saraswati Arora and another**[5], **Yumnam Ongbi Tampha Ibema Devi v. Yumnam Joykumar Singh and others**[6], **Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others**[7] and **Ramesh Verma (dead) Through Legal Representatives v. Lajesh Saxena (dead) by Legal Representatives and another**[8].)

13. The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by Section 63 of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872.

14. In **H. Venkatachala Iyengar** (supra), the Supreme Court has clearly held with regard to proof of Will by observing as under: -

1 AIR 1959 SC 443
2 AIR 1962 SC 567
3 AIR 1982 SC 133
4 (1977) 1 SCC 369
5 (1974) 2 SCC 600
6 (2009) 4 SCC 780
7 (2015) 8 SCC 615
8 (2017) 1 SCC 257

> "The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, reference must inevitably be made to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. Under Sec. 67, if a document is alleged to be signed by any person, the signature of the said person must be proved to be in his handwriting, and for proving such a hand-writing under Secs. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant of Section 68. Evidence Act deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribed the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of Law. ..."

15. As such, the provisions prescribed under Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872 are mandatory and unless the prescribed requirement are satisfied, the Will cannot be said to be proved by merely making pleading in the plaint.

16. Their Lordships of the Supreme Court in the matter of **S.R. Srinivasa and others v. S. Padmavathamma**[9] laid down the mode and manner of proof of Will and summarised the legal position thereof and also summarised the legal position with regard to admissions and evidentiary value thereof and held that mere admission about making of Will does not amount to admission of due execution and genuineness of Will, and observed as under: -

> "48. Examined on the basis of the law stated above we are unable to agree with the High Court that there was no need for independent proof of the will, in view of the admissions made in OS No. 233 of 1998 and the evidence of PW1. In fact there is no admission except that Puttathayamma had executed a will bequeathing only the immovable properties belonging to her in

9 (2010) 5 SCC 274

> favour of Indiramma. The first appellate court, in our opinion, correctly observed that the aforesaid admission is only about the making of the will and not the genuineness of the will. …
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> 49. In view of the above we are of the opinion that the High Court committed an error in setting aside the well-considered finding of the first appellate court. The statements contained in the plaint as well as in the evidence of PW 1 would not amount to admissions with regard to the due execution and genuineness of the will dated 18-6-1974."

17. From the aforesaid legal analysis, it is quite vivid that defendant No.1 was required to produce the original Will and ought to have proved the same in accordance with Section 63(c) of the Indian Succession Act, 1925 read with Section 68 of the Indian Evidence Act, 1872, as the plaintiffs have only admitted about making of Will and mere admission about making of Will does not amount to due execution and attestation of Will. Therefore, the first appellate Court is absolutely justified in holding that the Will was required to be proved in accordance with law which defendant No.1 apparently and miserably failed to produce and prove the same, as such, the finding of the first appellate Court in that regard holding that in absence of production of Will and its proof, due execution and attestation of Will is not proved, deserves to be and is hereby accepted and is hereby affirmed.

18. The next question would be, whether defendant No.1 in his statement before the Court in cross-examination para 11 has clearly admitted that out of 16.01 acres of land, he had already sold 7 acres and 9 acres is outstanding, though he has refuted that 1.45 acres of land remains in his share. The fact remains that out of 16.01 acres of land, he had already sold 7 acres and he is entitled to only 1.45 acres of land, rest of the land 8.05 acres, which according to the plaintiffs has been given to them on

partition, has rightly been held by the first appellate Court to be owned by the plaintiffs. As such, the first appellate Court has rightly held that the plaintiffs are entitled for 8.05 acres of land, as defendant No.1 had already sold his 7 acres of land. The finding recorded by the first appellate Court is strictly in accordance with law and I do not find any perversity or illegality in the said finding. The substantial question of law is answered accordingly.

19. In the result, the second appeal is dismissed affirming the judgment & decree of the first appellate Court. No order to cost(s).

20. Decree be drawn-up accordingly.

Sd/-
(Sanjay K. Agrawal)
Judge

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