
(2012) 02 CHH CK 0021
In the Chhattisgarh High Court
Case No : F.A. No. 168 of 1998

Chandra Kumar and Others

APPELLANT

Vs

Aswani Kumar and Others

RESPONDENT

Date of Decision : 28-02-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 96
Evidence Act, 1872 — Section 63, 68
Succession Act, 1925 — Section 63

Citation : (2012) 2 CG.L.R.W. 34

Hon'ble Judges : Nawal Kishore Agarwal, J

Bench : Division Bench

Advocate : Sanjay Shyam Agrawal, for the Appellant; Prafull N. Bharat, for the Respondent Nos. 1 to 6, for the Respondent

Final Decision : Allowed

Judgement

Nawal Kishore Agarwal, J.—This is defendants' first appeal u/s 96 of the CPC (for brevity "the C.P.C.") against the judgment and decree dated 24-12-1997 passed in Civil Suit No. 7-A/1994 by the 2nd Additional District Judge, Bilaspur whereby and whereunder the plaintiffs' suit has been decreed. During the pendency of the appeal, appellant No. 1-Smt. Triveni @ Rita Sharma and respondents No. 7 have died and since their legal representatives were already on record, their names were deleted from the memo of appeal.

3. Facts of the case in brief are as under:-

(i) The respondents/plaintiffs filed a civil suit for declaration of their half share, joint possession, permanent injunction and for declaration of will deed dated 4-1-1990 (Ex. D. 1) as illegal, suspicious, unauthorized and not binding on them.

(ii) The suit property is the house situated at Gondpara and land bearing Kh. No. 13 area 2.22 acres situated at village Binjhouri.

(iii) Late Vishnu Datt Tiwari had two wives, i.e., Dhela Bai and Bodhin Bai. From

Dhela Bai, one son Ghurau Prasad Sharma was born, of whom, plaintiffs No. 1 to 6 are children and plaintiff No. 7 is widow. From Bodhin Bai, one son Ghanshyam Prasad Sharma and two daughters-Smt. Kachara & Smt. Sushila Bai were born. Smt. Dhela Bai and her son Ghurau Prasad Sharma are pre-deceased Vishnu Datt Tiwari. Bodhin Bai died in the year 1993. Triveni Bai and Kachara Bai died during the pendency of the instant appeal.

(iv) According to the plaintiffs, the suit property was ancestral property of the parties. The will deed (Ex. D. 1) is forged, fabricated, suspicious and also without authority and they are entitled for its half share.

(v) The case of the defendants is that the suit property was self earned property of late Vishnu Datt Tiwari, who executed the will deed (Ex. D. 1) in favour of his wife Bodhin Bai and her daughter-in-law Smt. Triveni @ Rita Sharma. Smt. Bodhin Bai also executed a will deed in favour of Smt. Triveni @ Rita Sharma and pursuant to above will deed, after death of Vishnu Datt Tiwari and Bodhin Bai, Smt. Triveni @ Rita Sharma became its sole owner and the suit is liable to be dismissed.

(vi) The Trial Court framed following issues: (vii) The plaintiffs examined 4 witnesses. Defendants also examined 5 witnesses including propounder Smt. Rita Sharma (D.W. 1), attesting witness Ram Khilawan Pandey (D.W. 2), Yogesh Shukla, record keeper of Sub-Registrar Office, Bilaspur (D.W. 4) and the Scribe Shri Y.P. Singh, Advocate (D.W. 5)

(viii) The trial Court held: the suit property was purchased by late Vishnu Datt Tiwari; defendants failed to prove, suit property as self-acquired property of late Vishnu Datt Tiwari; the suit property appears to be purchased from the income of joint family property; will deed (Ex. D.1) is suspicious and also without authority of law since property is joint family property; and decreed the plaintiffs' suit. Hence, this appeal.

3. Shri Sanjay Shyam Agrawal, learned counsel appearing for the appellants would submit: property cannot be presumed to be joint family property merely because of existence of joint family; burden to prove the property to be joint property lies on a person who asserts so; in order to prove the family possessed sufficient nucleus with the aid of which joint family property could be acquired, then presumption would be that the property is of joint family and onus would shift on the person claiming it to be self-acquired property. Drawing attention towards the plaint averments, he would further submit: there is no pleading that the suit property was purchased with the aid of joint family funds and also no documentary or oral evidence was adduced in support of the above contention and the trial Court has erred in holding the suit property was purchased from joint family funds. For this reliance has been placed upon the judgment of Supreme Court in the case of AIR 2003 3800 (SC) Placing reliance upon the judgment of Supreme Court in the case of Sridevi and Others Vs. Jayaraja Shetty and Others, and Savithri and Others Vs. Karthyayani Amma and Others, 1, it was

further contended, there is no iota of evidence suggesting will is shrouded by the well founded suspicious circumstances and/or is otherwise invalid. Even nothing has been said by the plaintiffs in the evidence regarding existence of such circumstances and the learned trial Court has erred in holding the will as invalid.

4. On the other hand, Shri Prafull N. Bharat, learned counsel appearing for respondents No. 1 to 6, placing reliance upon the judgment of Supreme Court in the case of Ramchandra Rambux Vs. Champabai and Others, , Gorantla Thataiah Vs. Thotakura Venkata Subbaiah and Others, , Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, Babu Singh and Others Vs. Ram Sahai @ Ram Singh, , Lalitaben Jayantilal Popat Vs. Pragnaben Jamnadas Kataria and Others, , would submit: the will is shrouded by following unnatural and suspicious circumstances:

(i) as per propounder Triveni Bai @ Rita Sharma, the will was notarized in the Court premises whereas as per the statement of attesting witness Ram Khilawan Pandey (D.W. 2) and Scribe Y.P. Singh (D.W. 5), the will was notarized/executed in the office of Yogesh Pratap Singh, Advocate;

(ii) propounder Smt. Rita Sharma herself took prominent part in execution of the will, which conferred her substantial benefits;

(iii) other legal representatives were disinherited for without any rhyme or reason;

(iv) late Vishnu Datt Tiwari was not competent to execute the will due to his infirmity and old age and was also not of sound and disposing state of mind.

It was further contended, late Vishnu Datt Tiwari never earned anything in his lifetime, and therefore, he was not having any funds of his own to purchase the suit property, thus, the learned trial Court has rightly come to conclusion that property was purchased from the income of joint family property and that late Vishnu Datt Tiwari was also not authorised to execute the will with respect to entire property in favour of his daughter-in-law late Smt. Triveni Bai @ Rita Sharma and has rightly dismissed the suit.

5. I have heard learned counsel for the parties, perused the record of the Court below including judgment and decree impugned.

6. The real controversy in the instant case revolves around the question whether the suit property is joint family property or self-acquired property of late Vishnu Datt Tiwari and whether the will deed (Ex. D. 1) is legally executed will or was without authority and also surrounded by such suspicious and unnatural circumstances, which makes it invalid and not genuine?

Whether the suit property is joint family property or self-acquired property of late Vishnu Datt Tiwari ?

7. It is the case of the plaintiffs that the land of suit house was gifted by the queen of Pandariya Smt. Mankunwari, to father of Vishnu Datt Tiwari, i.e., Shriniwas Tiwari and in the alternative, if it is found, the suit property was

purchased from the income of ancestral property, then also plaintiffs are entitled for half share. Therefore, neither there is specific plea with regard to nature and character of the property being ancestral property nor with respect to the fact that the suit property was purchased from the income of ancestral property, i.e., from joint family property.

8. The case of the appellants/defendants is that the entire ancestral property had already been partitioned between the parties by late Vishnu Datt Tiwari and since then parties are in cultivating possession over their respective shares, but the suit house was purchased by late Vishnu Datt Tiwari vide registered sale deed dated 24-4-1935 for a sale consideration of Rs. 3400/- from Gahreshwar Prasad Mishra, Bhaveshwar Prasad Mishra, Badri Vishal Mishra and Shri Dwarika Prasad Mishra, i.e., previous owners of the suit house and the suit land of village Binjhoura was purchased vide sale deed dated 22-4-1953 and the suit property was self-acquired property of late Vishnu Datt Tiwari.

9. The defendants/appellants, by filing the relevant sale deeds (Ex. D-3 and D-6), have proved the fact that the suit property was purchased by late Vishnu Datt Tiwari and was not the property gifted by the queen of Pandariya to late Shrinivas Tiwari, i.e., father of Vishnu Datt Tiwari.

10. It is trite law that there is no presumption of a property being joint family property only on account of existence of a joint Hindu family. The one who asserts has to prove that the property is a joint family property. If, however, the person so asserting proves that there was nucleus with which the joint family property could be acquired, there would be presumption of the property being joint and the onus would shift on the person who claims it to be self-acquired property to prove that he purchased the property with his own funds and not out of income of joint family property.

11. The Supreme Court, in the case of D.S. Lakshmaiah and another v. L. Balasubramanyam and another (supra), has observed in para 11 of its judgment as under:

In Mudi Gowda Gowdappa Sankh Vs. Ram Chandra Ravagowda Sankh, noticing the observations of Sir John Beaumont in AIR 1947 189 (Privy Council) it was reiterated by the Supreme Court that the burden of proving that any particular property is joint family property in the first instance is upon the person who claims it to be so. But if the possession of a nucleus of the joint family property is either admitted or proved, any acquisition made by a member of the joint family is presumed to be joint family property. This is however, subject to the limitation that the joint family property must be such as with its aid the property in question could have been acquired. It is only after the possession of an adequate nucleus is shown, that the onus shifts on to the person who claims the property as self-acquisition to affirmatively make out that the property was acquired without any aid from the family estate. We are unable to accept the contention of the learned counsel for the respondents that the aforesaid later

observations have been made without reasons or that the Privy Council's decision does not hold so. The observation that only after possession of adequate nucleus is shown that the onus shifts also gets support from *Shrinivas Krishnarao Kango Vs. Narayan Devji Kango and Others*, where, while considering the question of shifting of burden, it has been held that the important thing to consider is the income which the nucleus yields.

12. In the instant case, there is no specific pleading in the plaint that the suit property was purchased with the aid of joint family funds and also plaintiffs did not adduce any cogent and clinching evidence, documentary or oral, in support of the above contention raised. Indisputably, the plaintiffs and defendants are residing separately. Plaintiffs also could not bring on record any material showing the nature and character of the suit property as joint Hindu family property. On the contrary, the defendants/appellants, by filing relevant documents (Ex. D. 3 and D. 6) have proved the fact that the suit property was purchased by late Vishnu Datt Tiwari. It is also an admitted fact that late Vishnu Datt Tiwari was working as Bhandari with the Pandariya Jamindar/King and certainly was having sufficient income of purchasing the suit property. The trial Court, therefore, went wrong in putting the burden upon the defendants to prove the property as self-acquired property of late Vishnu Datt Tiwari, as held by the Supreme Court in *U.S. Lakshmaiha and another v. L. Balasubramanyam and another* (supra) and in holding the suit property as joint family property and not as self-acquired property of late Vishnu Datt Tiwari.

Whether the will deed (Ex. P.1) is legally executed will or was without authority and also surrounded by such suspicious and unnatural circumstances, which makes it invalid and not genuine ?

13. Section 63 of the Indian Succession Act, 1925 (for short "the Act of 1925") lays down the mode and manner of execution of an unprivileged Will. Section 68 of the Indian Evidence Act, 1872 (henceforth "the Act of 1872") postulates the mode, manner and proof of execution of document, which is required by law to be attested. It in unequivocal terms states that execution of Will must be proved at least by one attesting witness, if an attesting witness is alive and subject to the process of the court and capable of giving evidence. Will being a document has to be proved by primary evidence except when the Court permits a document to be proved by leading secondary evidence.

14. The burden of proof that the Will has been validly executed in terms of Section 63 of the Act of 1925 and is a genuine document is on the propounder. The propounder is further required to remove the suspicion by leading sufficient and cogent evidence, if there exists any. However, if a defence of fraud, coercion or undue influence is raised, the burden would be on the caveator. Subject to above, proof of a Will does not ordinarily differ from that of proving any other document.

15. The Supreme Court, in the case of *H. Venkatachala Iyengar Vs. B.N.*

Thimmajamma and Others, has dealt with the subject regarding the mode of proof of will elaborately which has been consistently relied upon by the Supreme Court in its subsequent pronouncements including Ramachandra Rambux v. Champabai and others (supra) and Smt. Jaswant Kaur v. Smt. Amrit Kaur and others (supra). The Hon"ble Supreme Court, in the above cases, has summarized the position of law on the subject as under:

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

2. Since section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 63 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive and subject to the process of the court and capable of giving evidence.

3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5. It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious

circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6. If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.

16. The Supreme Court, in the case of Lalitaben Jayantilal Popat v. Pragnaben Jamnadas Kataria and others (supra), has substantially reiterated the same position of law as laid down by it in the case of H. Venkatachala Iyengar v. B.N. Thimmajamma and others (supra) as under:

...It is trite law that execution of a will must be held to have been proved not only when the statutory requirements for proving the will are satisfied but the will is also found to be ordinarily free from suspicious circumstances. When such evidences are brought on record, the court may take aid of the presumptive evidences also.

17. Further, the Supreme Court, in the case of Madhukar D. Shende Vs. Tarabai Aba Shedage, , by drawing distinction between mere suspicion and well founded suspicion, has observed in paragraphs 8 and 9 as under:

8. The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers. What was told by Baron Alderson to the Jury in R. v. Hodge 1838, 2 Lewis CC 227 may be apposite to some extent:

The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete.

The conscience of the court has to be satisfied by the propounder of will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a will provided that there is something unnatural or suspicious about the will. The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict positive or negative.

9. It is well-settled that one who propounds a will must establish the competence of the testator to make the will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the will in the manner contemplated "by law. The contestant opposing the will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance.

18. Reverting to the facts of the case, the plaintiffs have not discharged their burden to prove the will as forged, fabricated or obtained by undue influence. As held earlier in precedent paragraphs that the suit property is not ancestral property, which is the main ground of attack of the plaintiffs regarding invalidity of the will, therefore, it cannot be said that late Vishnu Datt Tiwari had executed the will without any authority.

19. Now, I shall examine whether or not the will is shrouded by well founded suspicious and unnatural circumstances, which makes the will invalid and not genuine ?

20. P.W. 1 Godavari Bai and P.W. 2 Ashok Kumar have not stated anything in the examination-in-chief regarding execution of will. P.W. 1 Godavari Bai, in her cross-examination para-9 has stated: Ghanshyam Prasad Sharma was maintaining Vishnu Datt Tiwari and Bodhin Bai till his life time and after his death defendants maintained late Vishnu Datt Tiwari. Defendants have also performed last rites of Vishnu Datt Tiwari. In para 10, she deposed that she does not know about the execution of the will deed by Vishnu Datt Tiwari in the name of Bodhin Bai and Smt. Rita Sharma and also by Bodhin Bai in the name of Smt. Rita Sharma.

21. P.W. 2 Ashok Kumar, in his cross-examination para 7, has stated, he does not

know about execution of the will deed by Vishnu Datt Tiwari in favour of Bodhin Bai and Smt. Rita Sharma. If the will deed was executed, then certainly the same must have been executed of his share. He further admitted, Vishnu Datt Tiwari was working as Bhandari and was known as Bhandari Maharaj.

22. On the other hand, Smt. Rita Sharma (D.W. 1) has denied the suggestion that testator Vishnu Datt Tiwari was ill at the time of execution of the will and was not in sound and disposing state of mind and will was got executed without his knowledge. However, she has stated that will was notarized in the Kachhari. D.W. 2 Ramkhilawan, the attesting witness, duly proved the will. Surprisingly, only one suggestion was given to him that the will was not executed in the house of Yogesh Pratap Singh, Advocate, but was executed in the Kacchhari. In the cross-examination, nothing more was suggested by the plaintiffs to dispute due execution and genuineness of the will.

23. Scribe D.W. 4 Y.P. Singh has deposed that he knows Vishnu Datt Tiwari, he came to his office for execution of will and the will was drafted and also signed by him. Vishnu Datt Tiwari signed in front of him. The will was notarized in his office. The testator was in sound and disposing state of mind at the time of execution of will and the will deed was read over to him. Surprisingly, again only one suggestion that has been given that the will was executed in the District Court premises, which he has denied.

24. The attesting witness as well as the scribe had duly stated, the will was notarized in the office of Scribe Y.P. Singh, Advocate. In the instant case, the plaintiffs have not doubted the execution of will by testator and its attestation and also its drafting by the scribe Y.P. Singh, Advocate. Their main case was that the testator was not authorised to execute the will with respect to entire property. The law of evidence does not permit the conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict-positive or negative, as held by the Supreme Court in the case of *Madhukar D. Shende v. Tarabai Aba Shedage* (supra).

25. Mere presence of propounder at the time of the execution of the will cannot be termed as her taking prominent part in execution of the will, making it suspicious. A common man, who has not stepped up the Court premises, can easily commit mistake in deeming the office of Advocate as Kachhari, and therefore, merely because the propounder has stated the will was notarized in the Kachhari would not make it invalid or suspicious.

Admittedly, late Vishnu Datt Tiwari was being maintained by Ghanshyam Prasad Sharma and after his death, the defendants maintained Vishnu Datt Tiwari till his life, who had also performed his last rites. One of the beneficiaries Bodhin Bai was wife of late Vishnu Datt Tiwari and another Smt. Triveni Bai @ Rita Sharma was his daughter-in-law, therefore, execution of the will by late Vishnu Datt

Tiwari in their favour, cannot be doubted on the ground that the plaintiffs have disinherited from the suit property, especially, in a case, the plaintiffs have already allotted share in the ancestral property.

26. By applying the ratio of law laid down by the Supreme Court in the case referred hereinabove in the facts and circumstances of the case, in my considered opinion, the will does not appear to be surrounded by well founded suspicious circumstances so as to make it invalid. Suspicion alone cannot form the foundation of a judicial verdict positive or negative and certainly, the learned trial Court, without considering the evidence and material on record, in its proper perspective, had wrongly held the will as not valid. Further, the learned trial Court, while recording findings on issue Nos. 8 & 9, has also wrongly held the suit property as ancestral property. The above findings recorded by the trial Court are not sustainable in law.

27. For the reasons stated hereinabove, the appeal is allowed. The judgment and decree of the trial Court, being not sustainable in law, is liable to be and is hereby set aside. Consequently, plaintiffs' suit stands dismissed.

28. No order as to costs. A decree be drawn accordingly.