

(2006) 08 CHH CK 0018
In the Chhattisgarh High Court
Case No : Second Appeal No. 378 of 1996

Omkar Prasad (dead through Lrs.)	Vs	APPELLANT
Bhoodhar Prasad and Others		RESPONDENT

Date of Decision : 30-08-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 100
Evidence Act, 1872 — Section 45, 47, 67, 68
Hindu Succession Act, 1956 — Section 14, 14(1), 15
Hindu Womens Right to Property Act, 1937 — Section 3(2)
Succession Act, 1925 — Section 59, 63

Citation : (2006) 3 CGLJ 568

Hon'ble Judges : Sunil Kumar Sinha, J

Bench : Division Bench

Advocate : Sanjay K. Agrawal, H.S. Patel and Saurabh Sharma, for the Appellant; Sanjay S. Agrawal, for Respondent No. 1, Akhil Agrawal, Panel Lawyer for State, for the Respondent

Final Decision : Allowed

Judgement

Sunil Kumar Sinha, J.—This is the Plaintiff's second appeal filed u/s 100 of CPC against the judgment and decree dated 11.3.1996 passed by the Additional Judge to the Court of District Judge, Bilaspur, Sakti, in Civil Appeal No. 26-A/94 arising out of judgment and decree dated 20.10.1994 passed in Civil Suit No. 19-A/88 by the Civil Judge, Class-H, Sakti, District-Bilaspur (CG). The Plaintiff lost in both the Courts.

2. This appeal was admitted for hearing on 31.7.1996 on the following substantial questions of law:

1. Whether on the facts and in the circumstances of the case the courts below were justified in holding that Subhadrabai would succeed to the property of her father-in-law ?

(as corrected by order dated 17.8.2006)

2. Whether on the facts and in the circumstances of the case Tarabai widow of Niranjana Prasad would acquire limited rights under Hindu Women's Rights to the Property Act, 1937 when admittedly Niranjana Prasad died in 1945 and the Act was made applicable in the erstwhile State in the year 1949?

3. Whether on the facts and in the circumstances of the case the execution and attestation of the will is proved by legal evidence and whether the findings recorded by the courts below that the will is genuine is perverse and contrary to record and is liable to be interfered with in this second appeal ?

3. The brief facts are that the suit lands described in Schedule-A and Schedule-B of the plaint were the properties belonging to one Kunj Ram. The pedigree described in the plaint is as follows:

Kunj Ram (dead)

S/1 Niranjana Prasad (dead 1945) S/2 Paras Ram

Tara Bai (widow) (dead 1961) Omkar Prasad (Plaintiff)

Narendra Prasad (son) (dead 1940)

Subhadra Bai (widow) (dead 1987)

As shown in the pedigree, Kunj Ram was having two sons namely Niranjana Prasad and Paras Ram. Niranjana Prasad died in the year 1945. Tara Bai, his widow died - in the year 1961. Narendra Prasad was the pre-deceased son of the Niranjana Prasad, who died in the year 1940. Subhadra Bai, who was the widow of predeceased son, Narendra Prasad, died in the year 1987. The plaint allegations are that after the death of Niranjana Prasad, the suit lands including the suit house was succeeded by his brother Paras Ram excluding the rights and interest of Tara Bai and Subhadra Bai, as according to Wajib-ul arz of Sakti State, the widows of the deceased ryot were having no right or interest in the properties of their husband. It is also alleged that since these widows were not in possession of the suit properties, and the properties were in exclusive physical possession of the Plaintiff, therefore, after merger of the Sakti State in the year 1948, the Plaintiff alone became the owner of the property. The cause of action arose when Defendant No. 1 claimed his right and ownership in the suit properties on the basis of a will-deed dated 13.01.1987 (Ex-D/17) said to have been executed by Subhadra Bai in his favour. The Plaintiff filed suit for declaration of title and permanent injunction in relation to the properties described in Schedule-A and Schedule-B of the plaint.

4. A written statement was filed denying the contention of the Plaintiff. It was pleaded that after the death of Niranjana Prasad, his widow namely Tara Bai and thereafter the widow of his predeceased son namely Subhadra Bai succeeded to the estate of the deceased and they remained in possession thereof. They had limited interest in the said property. Later on, their limited interest ripen into full interest and thereafter in the year 1987, a will-deed dated 31.1.87 was executed

by Subhadra Bai in favour of Defendant No. 1 and the Defendant No. 1 became the owner of the properties under the Will, therefore, a decree for declaration and permanent injunction in relation of entire property can not be passed.

5. The trial Court dismissed the suit holding that according to Sakti State Wajib-ul arz, the widows were having rights in the property of their husband, therefore, in the year 1945, after the death of Niranj an Prasad, the Plaintiff alone had not succeeded the entire property. It was also held that the lands in question were in joint possession among the widow of Niranj an Prasad and the widow of his pre-deceased son along with Plaintiff. The Will (Ex-D/17) was held to be validly executed by Subhadra Bai in favour of the Defendant-Bhoodhar Prasad.

6. Against the aforesaid judgment and decree passed by the trial Court, the Plaintiff filed the first appeal before the lower appellate Court This appeal was also dismissed holding that after the death of Niranj an Prasad, the limited interest of his widow and the widow of his pre-deceased son ripen into absolute interest by virtue of Section 14 of The Hindu Succession Act, 1956 and the will-deed was validly executed by Subhadra Bai in favour of Defendant No. 1. It is against this judgment and decree, passed by the lower appellate Court, the Plaintiff had filed this second appeal.

7. On question of law No. 1 & 2, learned Counsel for the Appellants argued that since on the date of death of Niranj an Prasad, Hindu Women's Rights to Property Act, 1937 was not in force in this area and the Land Tenure Order 1949 also came at a later point of time, widows in the family shall get no right in the interest of the deceased. He also argued that even if the Act of 1937 is made applicable, at-least Subhadra Bai gets no interest on account of property being a joint family property.

8. On the contrary, learned Counsel for the Respondent argued that as per Wajib-ul arz of Sakti State, the widow of the deceased ryot gets an interest in the property of her husband and as an effect of she being in possession of the property through out, her interest ripen into full ownership which ultimately was succeeded by Subhadra Bai, who was the widow of his predeceased son.

9. So far as the rights of Smt. Tara Bai is concerned, on the date of death of her husband, i.e., in the year 1945 Sakti State Wajib-ul arz was in force. It comes in Clause 4 that on account of death of ryot his holding shall descend to his sons and if the sons are not there then to his grand sons in equal shares and if there has been a partition and the deceased ryot was in possession of his separate property then the son or the grand son who was living with him jointly at the time of his death will be entitled to such holding and if the father was living along with more than one sons and a dispute arises in this regard among the sons, the same shall be decided by the Court of State. It further provides that in default of such heirs the holding will descend to his widow and in her absence to the other widows of the family that means to the widows of the pre-deceased son or to the widows of the sons of the pre-deceased son. For further devolution, certain other

provisions are also there. Therefore, it will be clear that according to the said Wajib-ul arz of Sakti State, in the first instance, the ryot land, under the said clause, devolves on lineal male descendents and in the second instance it devolves upon the widow of the deceased and if the widow is not alive then to the other heirs referred to above. In the present case, admittedly, on the date of death of ryot Niranjana Prasad in the year 1945, the widow namely Tara Bai was alive and in the said situation, the holding has devolved on her by virtue of above provisions.

10. So far as the rights under the provisions of Hindu Women's Right to Property Act 1937 are concerned, it has been decided by a catena decisions of various High Courts that when a Hindu governed by the Mitakshara dies, having at the time of his death an interest in a joint family property, as an effect of the Act, the widow is put in place of the deceased husband and the undefined and fluctuating interest of the husband in the joint family property vests in her which the husband himself had at the time of his death. In fact the widow gets, under Sub-section (2) of Section 3 of the said Act of 1937, the same interest in the property as the deceased himself had. This is subject to fluctuation by births and deaths which is a normal incident of the interest which a Hindu governed by Mitakshara has in his joint family property during his life-time. Since his widow takes the same interest in the joint family property which her husband had at the time of his death, it must be of the same nature and character, subject to such limitations as have been expressly or by necessary intendment placed upon it by the Act. If the interest of the husband in the joint family property is a fluctuating interest, the widow too obtains in the property a like interest. There is nothing in the Act to show that the widow takes in the joint family property the defined and divided interest of her husband as if he had separated from the joint family at the time of his death. Please see *Bhondur Ganpat Kirad and Ors. v. Ramdayal Govindram Kirad and Anr.* 1959 MPLJ 1173; *Gurudayal Ramprashad Kurmi and Anr. v. Sarju* AIR 1952 Nag. 43; *Baburao v. Savitribai* ILR 1952 Nag. 578; *Hanuman Narayan and Anr. v. Tulsabai Narayan* AIR 1956 Nag. 63; *Ramchandra Raghunathdasji Bhangde v. Ramgopal Raghunathdasji and Ors.* AIR 1956 Nag. 228; *Tukaram Raghoji v. Mst. Gangi and Ors.* AIR 1957 Nag. 28 ; *Bhagobai Vs. Bhaiyalal and Others*, ; *Bhagwant Amar Singh Teli Vs. Mt. Manmati and Another*, ; *Laxman Gopal v. Gangabai w/o Sadashiv and Anr.* AIR 1955 M.B. 138 ; *Nagappa Narayan Shetti Vs. Mukambe Venkatraman Shetti*, ; *Jonnagadla Seethamma and Another Vs. Jonnagadla Veerana Chetty and Others*, ; *Parappa alias Hanumanthappa and Another Vs. Nagamma and Others*, ; *Kallian Rai Vs. Kashi Nath*, ; *Sabujpari and Another Vs. Satrugan Isser and Others*, ; *Nanda Kishore Naik Vs. Sukti Dibya and Others*, ; *Harekrishna Das and Another Vs. Jujesthi Panda and Others*, ; *Keluni Dei and Another Vs. Jagabandhu Naik and Others*, .

11. Now the question arises as to whether the Act of 1937 will be applicable in this case, as held by the first appellate Court, and the widow of Niranjana Prasad will get interest according to the said Act or according to any other law for the

time being in force. The Hindu Women's Rights to Property Act 1937 though enacted on 14th of April 1937 was not applicable to this area till the year 1949. Another law namely Central Provinces States Land Tenure Order, 1949 came into force thereafter. Clause 3 of the said order provided that the interest of a ryot in his holding shall on his death pass by inheritance or survivorship in accordance with his personal law. This order was extended to the area comprised with the States specified in the first Schedule of this order. Sakti State is also included in the first schedule to this order. Therefore, it is clear that in this area till the year 1949, neither the Act of 1937 nor the Land Tenure Order 1949 was in force and the provisions of both these laws were not applicable at the time of death of Niranj an Prasad which took place in the year 1945. Hence the second question is answered in the manner that in the facts and circumstances of this case, Tara Bai, widow of Niranj an Prasad would not acquire any right under Hindu Women's Rights to Property Act 1937 because admittedly, this Act was not operative in the area of Sakti State till the death of Niranj an Prasad in the year 1945 as the same was made applicable in the erstwhile State in the year 1949. In the facts and circumstances of this case, it is held that in absence of any other statutory provision prevailing for succession, Tara Bai, as stated earlier, succeeded the interest of her husband in the joint family property on the basis of Clause 4 of Wajib-ul arz, Sakti State and she remained alive till the year 1961.

12. Even otherwise also, it is clearly admitted by the Plaintiff in para 5 of the plaint that after the death of Niranj an Prasad in the year 1945 though he was holding the physical possession of the suit properties but he was also maintaining the widow of Niranj an Prasad namely Tara Bai. This admission clearly goes to show that this widow was getting maintenance out of the properties of Schedule A & B of the plaint through out, in her life time and in the said scenario in the family, during her life time, The Hindu Succession Act, 1956 came into force. Sub-section (1) of Section 14 of this Act provides that any property possessed by a female Hindu, whether acquired before or after the commencement of this Act, shall be held by her as full owner thereof and not as a limited owner. Explanation to this sub-section defines the property which includes both movable and immovable property acquired by a female Hindu by inheritance or devise, or at a partition, or in lieu of maintenance or arrears of maintenance, or by gift from any person, whether a relative or not, before, at or after her marriage, or by her own skill or exertion, or by purchase or by prescription, or in any other manner whatsoever, and also any such property held by her as stridhana immediately before the commencement of this Act.

13. What would amount to "possessed" has been a question before the Courts since long back. In the matter of Gummalapura Taggina Matada Kotturuswami v. Setra Veervva and Ors. 1959 MPLJ 662 the Apex Court held that the word "possessed" in Section 14 is used in broad sense and in the context means the state of owning or having in one's hands or power. The Apex Court affirmed the view taken by the Calcutta High Court in Gostha Behari Bera and Others Vs. Haridas Samanta and Others, that the opening words "property possessed by a

female Hindu" obviously mean that, to come within the purview of the section, the property must be in the possession of the female concerned at the date of the commencement of the Act. They clearly contemplate the female's possession when the Act came into force. That possession might have been either actual or constructive or in any form recognized by law, but unless the female Hindu, whose limited estate in the disputed property is claimed to have been transformed into absolute estate under this particular section, was at least in such possession, taking the word "possession" in its widest connotation, when the Act came into force, the section would not apply.

14. In *Mangal Singh and Ors. v. Smt. Rattno (dead) by her Legal Representatives and Anr.* AIR 1967 SC 1786, the Apex Court again held that the use of the expression "possessed by" instead of the expression "in possession of, in Section 14(1) was intended to enlarge the meaning of this expression. It is commonly known in English language that a property is said to be possessed by a person, if he is its owner, even though he may, for the time being, be out of actual possession or even constructive possession. The expression used in Section 14(1) of the Act was intended to cover cases of possession in law also, where lands may have descended to a female Hindu and she has not actually entered into them. It would, of course cover the other cases of actual or constructive possession. On the language of Section 14(1), therefore, this provision will become applicable to any property which is owned by a female Hindu, even though she is not in actual, physical or constructive possession of that property.

The relevant date, on which the female Hindu should be possessed of the property in dispute, must be the date on which the question of applying the provision of Section 14(1) arises. If, on that date, when the provisions of this section are sought to be applied, the property is possessed by a female Hindu, it would be held that she is full owner of it and not merely a limited owner. Such a question may arise in her? own lifetime, or may arise subsequently when succession to her property opens on her death.

The "Expression "possessed by" is not intended to apply to a case of mere possession without title, and the legislature intended this provision for cases where the Hindu female possesses the right of ownership of the property in question. Even mere physical possession of the property without the right of ownership will not attract the provisions of this section. The section will, however, not apply at all to cases where the Hindu female may have parted with her rights so as to place herself in a position where she could, in no manner exercise her rights of ownership in that property any longer.

15. Hence, it is clear that the properties in Schedule A & B of the plaint shall be held to be and deemed to be possessed by Smt. Tara Bai and since she continued to be in possession till the year 1956, she became the owner of the property, to the extent of her share, after commencement of this Act and on her death in the year 1961, it shall be devolved under the provisions of Section 15 of the Hindu Succession Act 1956 and on such devolution, a widow of the predeceased son

namely Subhadra Bai, will inherit the property being the only heir of her husband namely Niranj an Prasad. Therefore, it is held that in the facts and circumstances of this case, the courts below were justified in holding that Subhadra Bai would succeed to the property of her father-in-law. However, it shall not be in accordance with the provisions of the Act of 1937 or under any other law, but, in accordance with the devolution and line of succession, referred to above, and in this manner, questions No. 1 & 2 are answered accordingly and it is held that after the death of Tara Bai, Subhadra Bai succeeded the entire property of her father-in-law so as to be her competent to make a disposition of the same according to her choice.

16. Now the question about execution and attestation of the will is being considered. Learned Counsel for the Appellants argued that the execution and due attestation of will have not been proved. He referred to the decision rendered in the matter of Girja Datt Singh Vs. Gangotri Datt Singh, . It has been held by the Supreme Court in this matter that in order, to prove the due attestation of the will the propounder of will has to prove that the two witnesses saw the testator, sign the will and they themselves signed the same in the presence of the testator. The submission of learned Counsel for the Appellants was that in this case it has not been proved that the testator signed before each of the attesting witnesses and these attesting witnesses signed the will in the presence of the testator. He also argued that the testator died just on the second day after execution of the will, which is also a suspicious circumstance in this case.

17. On the other hand, learned Counsel for the Respondent placed reliance on the decision of M.P. High Court Illyas and Others Vs. Badshah alias Kamla, . In the said judgment the M.P High Court said that atleast one attesting witness should be examined and he should speak not only about testator's signature but also that each of attesting witnesses has signed will in presence of the testator. He also placed reliance on a decision of the Himachal Pradesh High Court Smt. Punni Vs. Sumer Chand and Others, . According to this decision, it comes that it is not necessary that both the attesting witnesses be present simultaneously at the time of putting their signatures but the requirement is that each of the attesting witnesses must have seen the testator, sign or affix his mark to the Will or has received from the testator a personal acknowledgment of his signature or mark on the will. It also says that there is also an additional requirement that each of the attesting witnesses shall also sign the will in the presence of the testator.

18. The law in relation to the proof of valid execution of the will is almost well settled. It has been held by the Apex Court in the matter of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, that 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. u/s 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 handwriting under Sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 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 prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Sections 59 and 63 of the Indian Succession Act are also relevant. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribed by Section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters. It has been further held by the Apex Court that the propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will.

19. Following the above decision, the Apex Court further held in the matter of Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, , that in cases where the execution of a will is surrounded in suspicion, its proof ceases to be a simple lis between the Plaintiff and the Defendant. What, generally, is an adversary proceeding becomes in such cases a matter of the court's conscience and then the true question which arises for consideration is whether the evidence led by the propounder of the will is such as to satisfy the conscience of the court that the will was duly executed by the testator. It is impossible to reach such satisfaction unless the party which sets up the will offers a cogent and convincing explanation of the suspicious circumstances surrounding the making of the will.

20. It was again held by the Apex Court in the matter of Janki Narayan Bhoir Vs. Narayan Namdeo Kadam, , that on a combined reading of Section 63 of the Succession Act with Section 68 of the Evidence Act, it appears that a person propounding the will has got to prove that the will was duly and validly executed. That cannot be done by simply proving that the signature on the will was that of the testator but must also prove that attestations were also made properly as required by Clause (c) of Section 63 of the Succession Act. The Apex Court further held that it is true that Section 68 of the Evidence Act does not say that both or all the attesting witnesses must be examined. But at least one attesting witness has to be called for proving due execution of the will as envisaged in Section 63.

21. In the instant case, the will Ex.D. 17 is said to be scribed by Nand Kumar Pandey, Advocate (D.W.5). There are two attesting witnesses namely Ved Prakash Sharma (D.W.3) and Kishore Kumar Sharma (D.W.4). It comes in the evidence of scribe that he had drafted the will at the instance of the testator on 13.1.1987. This was drafted at Raipur. Ex.D. 17 is a typed document. This witness says that this document was got typed in one Typing Institute namely Pansari Institute. He further stated that one day prior to the date of execution, he had made an application to the Registrar for visiting the house of Subhadra Bai. He has categorically stated that he had not met the testator on 12.01.1987 and application for calling the Registrar at house was made on the instructions of the attesting witness namely Ved Prakash Sharma (D.W.3). Ved Prakash Sharma who is an attesting witness only states that he had signed the will dated 13.1.1987 as a witness and the testator had also signed the will. Except this, he has stated no more. The other attesting witness namely Kishore Kumar Sharma (D. W.4) stated that the testator made her signature in his presence at place "B to B" in the document and he signed the document at place "C to C" in two pages. One peculiar thing which he has stated comes in para 2 of his cross-examination that when he was called and he reached to the place of execution, he saw that the document Ex.D-17 was being typed there and the Registrar was also present. If this statement is admitted, it would show that in fact, the document was typed in the house where the testator was residing and the same was typed in the presence of Registrar and after typing, the other formalities of attestation and execution were done. This statement of attesting witness clearly goes against the statement of scribe who says that the will was typed in a typing institute known as Pansari Institute and then it was taken to the house where the testator was staying and the execution took place. It transpires from the evidence of both the attesting witness and the scribe that the propounder of the will could not prove that the two attesting witnesses saw the testator, signed the will and they themselves signed the same in the presence of the testator. This is apart from suspicious circumstance which is discussed earlier regarding place of typing etc., of the alleged will. In the facts and circumstances of this case, it does not satisfy my conscience for holding that the will was duly executed by the testator. Accordingly, I hold that the execution and attestation of the will is not proved by legal evidence and the findings recorded by the courts below that the will is genuine, is perverse and contrary to the record and is liable to be set aside in this appeal.

22. In the result, the appeal is allowed. The judgment and decree passed by the two Courts below are set aside. The Plaintiffs' suit for declaration and permanent injunction is decreed. The Plaintiffs (L.Rs) are declared to be the owner of the properties described in Schedule A & B of the plaint. The Defendants are restrained from interfering with the possession of the Plaintiff(s) in the suit properties. The Respondent No. 1 shall bear the costs of the Plaintiff(s) throughout including the cost incurred in this second appeal.