

**IN THE HIGH COURT OF MADHYA PRADESH
AT GWALIOR**

BEFORE

HON'BLE SMT. JUSTICE SUNITA YADAV

SECOND APPEAL No. 900 of 2006

BETWEEN:-

**GHAN SHYAM S/O RAGHUVVEER , AGED ABOUT 35
YEARS, OCCUPATION: LABOURER NEAR FAKIRA
MASJID, OLD SHIVPURI, DISTT. SHIVPURI (MADHYA
PRADESH)**

.....APPELLANT

(BY MR. D.K.AGARWAL - ADVOCATE)

AND

**KALI CHARAN S/O CHINTOO LAL DHOBI (DIED)
THROUGH LEGAL REPRESENTATIVES**

- a. GANESH RAM RAJAK S/O LATE SHRI
KALI CHARAN RAJAK, AGED ABOUT 31
YEARS, OCCUPATION: WASHHERMAN, R/O
BADA BAZAR, OLD SHIVPURI, FAKIRI
MASJID, NEAR JAIN MANDIR, SHIVPURI
(MADHYA PRADESH)**
- b. SMT. BSANTI D/O LATE SHRI KALI
CHARAN RAJAK, AGED ABOUT 34
YEARS, OCCUPATION: WASHHERMAN, R/O
BADA BAZAR, OLD SHIVPURI, FAKIRI
MASJID, NEAR JAIN MANDIR, SHIVPURI
(MADHYA PRADESH)**

.....RESPONDENTS

(BY MR. SURESH AGRAWAL - ADVOCATE)

Whether approved for reporting :

Reserved for Judgment on :- 08/08/2023

J U D G M E N T
(Passed on 22/08/2023)

Present second appeal under Section 100 of CPC has been filed against the judgment and decree dated 20.09.2006 passed by Fourth Additional District Judge (Fast Track), District Shivpuri (M.P.) in Civil Appeal No.18-A/2006 affirming the judgment and decree dated 29.03.2006 passed by the Third Civil Judge, Class-II, Shivpuri in Civil Suit No.21-A/2005 by which the suit of respondent/plaintiff was decreed.

2. Factual matrix of the case, in brief, are that the plaintiff/respondent instituted the Civil Suit seeking recovery of possession of suit property.

3. In the plaint, it was averred that Chintulal, the father of plaintiff Kalicharan purchased the suit property on 28.09.1953 by a registered sale deed. After obtaining the permission of the Municipal

Council in the year 1971, he constructed a house on this property (hereinafter referred to as the suit house). It was also averred that Fodalia (grandfather of plaintiff) had two sons Chintulal and Rajore. Respondent/Plaintiff Kalicharan and Raghuveer are the sons of Chintulal. Appellant/defendant Ghanshyam is the son of Raghuveer who (Raghuveer) was adopted by his uncle Rajore and is still in possession of Rajore's properties. Chintulal executed a registered Will on 20.04.1976 in favour of the plaintiff Kalicharan. After the death of his father, the plaintiff Kalicharan is in possession of the suit house purchased on 28.09.1953.

4. It is further pleaded that about four years ago, the defendant, who is the nephew of plaintiff and son of Raghuveer, came to Shivpuri and on his request the plaintiff accommodated him in two rooms in the suit house and, since then, the defendant is residing in these two rooms with the permission of the plaintiff. On 15.06.2005, the plaintiff asked the defendant to vacate the rooms occupied by him. However, the defendant refused to vacate these rooms.

Thereafter a notice was sent to the defendant on 28.06.2005, which was replied by him on false, fabricated, baseless and concocted grounds. Therefore, plaintiff has filed the present civil suit against the defendant seeking relief of recovery of possession.

5. The defendant filed his written statement on 16.09.2005 contending that the suit house was purchased by the father of Chintulal i.e. Fodalia on 28.09.1953 in the name of his son Chintulal, therefore, the house purchased by the grandfather of defendant is an ancestral property. It was also averred that the defendant is residing in this house since his birth and in the year 1998 got rooms and kitchen constructed in it.

6. It was also pleaded that Chintulal S/o Fodalia died on 20.02.1976, and therefore, the registered *Will* alleged to have been executed on 20.04.1976 is a forged document. It was also pleaded that the suit house was constructed in the year of 1971 with the joint investment of Chintu Lal and Raghuveer. The defendant completed his education at Shivpuri while residing in the same house. The suit

is filed on false grounds, therefore is liable to be dismissed.

7. On the basis of the aforesaid pleadings, the learned Trial Court framed as many as four issues in the matter and parties led evidence to prove the said issues in their favour. The learned Trial Court after appreciation of the evidence made available on record, vide its judgment and decree dated 29.03.2006 allowed the suit filed by the plaintiff/respondent.

8. Being aggrieved by the aforesaid judgment of the trial court, the appellant/defendant preferred First Civil Appeal No.18-A/2006 before the Lower Appellate Court which was also dismissed by affirming the judgment and decree passed by the learned Trial Court, therefore, appellant/defendant has occasion to file this second appeal under Section 100 of C.P.C.

9. Assailing the findings recorded by the learned courts below, learned counsel for appellant/defendant submits that the learned courts below committed error of law while raising presumption under Section 90 of the Evidence Act regarding execution of the

Will (Ex. P-1). The suit was filed on 29.08.2005, whereas, the *Will* was executed on 20.04.1976, 30 years were not completed on the date of filing of the suit. It has been further argued that the burden of proof was wrongly shifted on the defendant to prove that testator of will Chintulal died in the year 1976. The document (Ex. P-1), alleged to have been executed by old, infirm and illiterate person, is required to be proved in accordance with the law as laid down in the case of **A.I.R. 1963 S.C. 1203, A.I.R. 2003 S.C. 4351 and A.I.R. 1992 M.P.** The plaintiff failed to prove execution of *Will* in accordance with the law. Hence, the learned Courts below erred in holding that the execution of the Will was proved. In such circumstance this appeal be allowed and the judgment and decree of learned courts below be set aside.

10. On the other hand, learned counsel for the respondent/plaintiff supported the impugned judgment and decree passed by the courts below and prayed for dismissal of the instant appeal being bereft of merit and substance. It is

further argued that the appellant-defendant has utterly failed to prove that he has become the owner of the disputed property by the operation of law. Therefore, the appeal be dismissed.

11. Heard the counsel for parties and perused the record.
12. This appeal has been **admitted** for final hearing on the following substantial questions of law:-

"1. Whether, the first Appellate Court in para 23 and 24 of its judgment misdirected itself by wrongly passing onus to prove on the defendant despite the propounder/ plaintiff having not proved the will in a manner prescribed in (2005) 2 SCC 784, Shir J.B. And others V/s. Jaya Raja Shetti and others and (2003) 12 SCC 35 Bhagat Ram and another V/s. Suresh and others?.

2. Whether, in view of law laid down in Ganga Ram and others V/s. Shivalingaich (2005) 6 SCC 359, the learned Trial Court in para 15 of the judgment recorded illegal findings and incorrectly applied the provisions of Section 90 of the Evidence Act.?

3. Whether, in a suit filed on 29/08/2005, the Registered Will executed on 20/04/1976, the presumption under Section 90 of the Evidence Act can be raised even before completion of 30 years on the date of the filing of the suit?

4. Whether, in view of law laid down in

Madhu Sudan Das V/s. Narayani Bai AIR 1983 SC 114, the lower Appellate Court, in para 27 of the impugned judgment committed error of law, while rejecting evidence of Mangi Lal (DW/4) only on the ground of relationship with the defendant ?."

13. The plaintiffs examined himself as PW/2 and deposed before the learned trial Court and three witnesses i.e. Ram Singh Shakya/ (PW/1), Jagdish Prasad/(PW/3) and Ram Das Rajak/(PW/4) were also examined to prove the case.

14. On the other hand the appellant/defendant examined himself as (DW/3), Thakurl Lal Thakuri as (DW/1), Mumtaz Khan as (DW/2), Mangil Lal as (DW-4), Surendra Singh as (DW/5) and Ramesh Kumar Kushwah as (DW/6) in his favour and also filed documents i.e. *Will* dated 20.04.1976 (Ex.P/1), Registered sale deed (Ex.P/2), Map of the disputed property (Ex.P/5), Certificate of Municipal Council, Shivpuri (Ex.P/4), notice sent to appellant/defendant-Ghanshyam- (Ex. P/8) and reply to the notice given by appellant (Ex.P/9).

15. The undisputed facts between the parties are that Fodalia was the father of Chintulal. Fodalia had two sons Chintulal and Rajore. Respondent/Plaintiff Kalicharan and Raghuveer are the sons of Chintulal. Appellant/defendant Ghanshyam is the son of Raghuveer and Raghuveer was adopted by his uncle Rajore.

16. The respondent/plaintiff has claimed his title over the suit property on the grounds of Law of Natural Succession as well as through the factum of a *Will* said to be executed by his father Chintulal in his favour. As per the case of plaintiff his father was the sole owner of suit property which was purchased through the registered sale-deed. Undisputedly, the registered sale deed (Ex.-P/2) by which the suit property was purchased is in favour of Chintulal. The appellant has failed to adduce any cogent and reliable evidence to prove that it was Fodalia, the father of Chintulal, who provided fund to purchase the suit property. The statement of appellant-defendant about the fund being provided by Fodalia is based on hearsay evidence as he was not even born at the

time of execution of sale-deed. Thus the learned courts below have not erred to hold that the suit property is the self acquired property of Chintulal, father of respondent/plaintiff.

17. The document Ex.P/8 is a notice sent on behalf of respondent/plaintiff to appellant/defendant in which it was mentioned that father of plaintiff were two brothers i.e. Chintulal and Rajore and appellant-defendant's father i.e. Raghuveer was adopted by Rajore. Thereafter, he started living with Rajore. The reply of the said notice was given by appellant/defendant vide Ex.P/9 and in reply the above mentioned facts were admitted. In the light of aforesaid admissions, learned courts below have rightly held that Raghuveer who is the father of defendant/appellant had no right over the suit property as he was adopted by his uncle Rajore and therefore, even on the basis of process of succession, appellant-defendant who is the son of Raghuveer has no right over the suit property. In such circumstance, respondent/plaintiff is found to be the sole owner of the disputed property being the son of Chintulal

on the basis of Law of Natural Succession.

18. The plaintiff/respondent also claimed his title over the suit property on the basis of registered *Will* (Ex.P/1) allegedly executed by Chintulal in his favour. Learned counsel for the appellant, citing the case of **Bhagat Ram and Anr. Vs. Suresh and Ors., (2003) 12 SCC 35** argued that the courts below have erred in believing the *Will* only on account of its having registered. However, a plain reading of the judgments of learned courts below indicates that the Will is found to be proved not only on the ground of having registered but also on the basis of the evidence of attesting witnesses of the Will.

19. Learned counsel for the appellant cited the cases of **Ramesh Verma and Ors. Vs. Smt. Lajesh Saxena and others, AIR 1998 MP 46, Mt. Kesharbai and Anr. Vs. Moti and Anr., 1988 MPJR HC 16, Kashibai W/o Lachiram and Anr Vs. Parwatibai W/o Lachiram and Others, (1995) 6 SCC 213** and further argued that the attesting witness Jagdish Prasad (PW/3) has failed to state that the testator put his thumb impression before him and therefore, the

execution of Will has wrongly found to be proved by the courts below.

20. The perusal of statement of the Plaintiff witness Ram Singh Shakya (PW/1) who is the record keeper of the office of Registrar reveals that the registration of said Will was done before him.

21. Jagdish Prasad (PW/3) has also corroborated the evidence of PW/1 and stated that at the time of execution of *Will*, Chintulal was alive and had died after one year from execution of the Will. Jagdish Prasad (PW/3) has further stated that on 20.04.1976, Chintulal had executed the Will in favour of respondent/plaintiff in the presence of this witness as well as PW/4. At the time of execution of Will, Chintulal was hale and healthy. He signed the will and thereafter other witness Sunderlal (since dead) also signed before him. However, this attesting witness has not said that the testator Chintulal put thumb impression on the will before him.

22. Section 63 of the Indian Succession Act, 1925 the mode of proving a will are reads as below:

“63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare,¹² [or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:—

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(c) The Will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the Will or has seen some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgement of his signature or mark, or the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.”

23. Section 3 of the Transfer of Property Act defines, the word

"attested", as follows:

'attested' in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has been the executant sign or affix his mark to the instrument, or has seen some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or

mark or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

24. Section 68 of the Indian Evidence Act provides for proof of execution of document required by law to be attested. It runs as follows ;

"68. Proof of execution of document required by law to be attested -- If a document, is required by law to be attested, it shall not be used as evidence until 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....."

25. Thus, in the light of the provisions mentioned above it is clear that the will has to be proved in the manner provided therein. A will has to be proved like any other document except to the special requirement of attestation prescribed by Section 63 of the Indian Succession Act. In order to prove due attestation of the will the testator of the will has to prove that two or more witnesses each of whom has seen the executant sign and they themselves signed in the presence of the testator.

26. However, in the case in hand attesting witness Jagdish Prasad (PW/3) has not stated that testator Chintulal put his thumb impression on the Will before this witness. Therefore, in the light of above mentioned provisions the execution of Will is not found to be proved in accordance with law and learned courts below erred in holding that will is proved in accordance with law.

27. The learned Courts below have also committed error of law while raising presumption under Section 90 of the Evidence Act regarding execution of the Will (Ex. P-1). The suit was filed on 29.08.2005, whereas, the Will was executed on 20.04.1976, 30 years were not completed on the date of filing of the suit, therefore, the presumption under Section 90 of Evidence Act, could not have been raised otherwise also as discussed above a will has to be proved in accordance with the provisions of Section 63 of the Indian Succession Act and Section 68 of the Indian Evidence Act

28. The evidence of DW-4 Mangilal Rajak does not gather confidence about the alleged construction by the appellant on the

suit house as there is no documentary evidence i.e. permission from competent authority, vouchers etc. to prove the purchase of construction material. Therefore, the learned courts below rightly discarded his evidence however, the reason of his being a relative for disbelieving his evidence is not appropriate.

29. In view of the above discussion it is apparent that the plaintiff/respondent has though failed to prove the execution of *Will* as prescribed by law but successfully proved his title over the suit property on the basis of Law of Natural Succession. Appellant/defendant claimed that his possession over suit property is a legal possession on the basis of his title, however, he utterly failed to prove his title. Consequently, the courts below rightly passed the decree for recovery of possession against the appellant-defendant who is living in the suit property unauthorizedly.

30. In view of the above discussions, the answers to substantial questions of law are affirmative. However, as discussed above the respondent/plaintiff has successfully proved his ownership over the

suit property on the basis of Law of Natural Succession and it is also proved that possession of appellant/defendant on the property is not authorised or legal, therefore, the impugned decree passed in favour of respondent/ plaintiff for recovery of possession needs no interference and is found to be in accordance with law.

31. Thus, this appeal fails and hereby **dismissed**.

(Sunita Yadav)
Judge