IN THE HIGH COURT OF MADHYA PRADESH
AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE DWARKA DHISH BANSAL

SECOND APPEAL NO. 1015 OF 2004

Between:-

1. SMT. RAMKALI (DEAD) BY LRS:-

1(a) ANAND KISHORE SHUKLA, AGED ABUT 51 YEARS, S/O RAM KISHORE SHUKLA, WARD NO.29, NEAR HAJARI CHAURAHA, PANDEN TOLD, HUZUR, REWA DISTRICT REWA.

2. BRIJKISHORE SHUKLA S/O SHRI RAMKISH SHUKLA, AGED ABOUT 41 YEARS,

3. SHYAMKISHORE SHUKLA, S/O SHRI RAMKISHORE SHUKLA, AGED ABOUT 37 YEARS,

4. KRISHNAKISHORE SHUKLA, S/O SHRI RAM KISHORE SHUKLA, AGED ABOUT 37 YEARS,

ALL ARE RESIDENT OF PANDENTOLA DISTRICT REWA (M.P.)

……..APPELLANTS

(BY SHRI SANKALP KOCHAR - ADVOCATE)

AND

1. SMT. MURITKUMARI (DEAD) BY LRS:-

(a) GOPAL KRISHAN PANDEY, S/O SRISHAN PRASAD PANDEY, AGED ABOUT 37 YEARS, R/O VILLAGE PAHARI, TEHSIL – BARA, DISTRICT ALLAHABAD (U.P.)

(b) SHYAM KRISHAN PANDEY, S/O KRISHAN PRASAD PANDEY, AGED ABOUT 40 YEARS, R/O VILLAGE PAHARI, TEHSIL – BARA, DISTRICT ALLAHABAD (U.P.)

2. MUS. SUKHARZUA (DEAD)

3. STATE OF M.P. THROUGH COLLECTOR, REWA (M.P.)

……...RESPONDENTS

(SHRI ASHOK LALWANI – ADVOCATE FOR L.RS OF RESPONDENT NO.1 AND SHRI AKHIL SINGH ADVOCATE FOR PROPOSED RESPONDENT ANIKET SINGH MENTIONED IN I.A. NO.13089/2013)

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Reserved on : 07.07.2022

Delivered on : 20.07.2022

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This appeal coming on for final hearing this day, the Court passed the following:

J U D G M E N T

1. This second appeal has been filed by the appellants/defendants challenging the judgment and decree dated 24.06.2004, passed by 6th Additional District Judge (Fast Track Court) Rewa in Civil Appeal No.43-A/04 whereby confirming the judgment and decree dated 28.01.2000, passed by 5th Civil Judge Class-II, Rewa, in Civil Suit No.225-A/1998 whereby the suit filed for declaration of 1/3rd share in the land survey no.204 area 0.85 acre situated in village (Mauja) Padra was decreed.

2. The facts in short are that, the land in question belonged to deceased-Vindheshwari Prasad, who was succeeded by his wife Mst. Sukhrajua (defendant 1) and two daughters Smt. Ramkali (defendant 2) and Smt. Murtikumari (plaintiff). The defendants 3-5 are sons of defendant 2-Smt. Ramkali. Vindheshwari Prasad died on 12.09.1988, leaving behind him the land survey No.204 area 0.85 acre, situated in Village (Mauja) Padra, Tehsil Huzur, Distrit Rewa. It is alleged in the plaint that after death of Vindheshwari Prasad, the plaintiff and defendants 1-2 are having 1/3rd share each and the defendants 3–6 or any other person have no right and Vindheshwari Prasad never executed any deed of

transfer/agreement or Will. It is also alleged in the plaint that the husband of defendant 2–Ramkali got a false and fabricated agreement (Ex.D-1) prepared and thereafter, got fabricated a Will (Ex.D-2) and on that basis tried to get the name of defendants 3–5 mutated over the land in question. On inter alia allegations, the plaintiff prayed for declaration that she is Bhoomiswami over 1/3rd share and in possession.

3. The defendants 2–5 filed written statement denying the plaint allegations and contended that Vindheshwari Prasad in his life time executed a Will on 23.08.1988 in favour of defendants 3-5 and after death of Vindheshwari Prasad, they are Bhoomiswami and in possession of the land in question. It was also contended that neither the plaintiff nor defendants 1–2 are owner or in possession and are not entitled for any declaration. It was also contended that the suit land is a residential plot in which two houses and boundary wall is constructed which are having value of about Rs.9 lacs. Accordingly, it was contended that the suit has not been valued properly and the learned Court has no pecuniary jurisdiction.

4. The defendant 1 also filed written statement admitting the plaint allegations and contended that Vindheshwari Prasad never executed any Will (Ex.D-2) in favour of defendants 3–5 nor executed any agreement/gift deed (Ex.D-1), which is a fabricated document. After death of Vindheshwari Prasad, his wife and two daughters i.e. plaintiff and defendants 1-2 are entitled to succeed his property.

5. The defendant 6–State despite service of summons, did not appear and was proceeded *exparte*.

6. The learned trial Court on the basis of pleadings of the parties framed as many as 8 issues and recorded evidence led by the parties. After

due consideration of the material available on record, learned trial Court held that the plaintiff and defendants 1-2 are Bhoomiswami and in joint possession of the land having 1/3rd share and it was held that the defendants 3–5 are not entitled to succeed the property on the basis of Will in question which has been found by learned Court to be a false and fabricated document. In para 32, the learned trial Court held that the plaintiff – Murtikumari and defendant-1 Smt. Sukhrajua are not in physical possession but the defendants 2–5 are in physical possession and at the end of the para, it was also held that the plaintiff and defendants 1-2 being co-owners, would be deemed to be in joint possession of the suit property. Accordingly, ignoring the Will and Gift deed of the favour of defendants 3–5, learned trial Court decreed the suit declaring the plaitiff to be shareholder of 1/3rd share. Upon filing civil appeal, learned first appellate Court affirmed the same, vide judgment and decree dated 24.06.2004.

7. Upon filing second appeal by defendants 2–4, it was admitted on 14.07.2014 on the following substantial questions of law.:-

> "1. Whether in view of the findings in para 32 of the impugned judgment passed by the trial Court holding possession of the appellants on the disputed property, in the lack of prayer of consequential relief of possession in the suit of the respondents filed for declaration, the same was rightly decreed by the trial court in view of proviso of Section 34 of the Specific Relief Act ?
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> 2. Whether in the lack of any prayer in the suit of the respondents for declaring the alleged Will (Ex. D-2) projected by the appellants to be forged, fabricated and ab initio void, the Court below have rightly declared such Will to be forged and fabricated document ?"

8. Learned counsel for the appellants submits that in view of the concurrent finding of fact that the plaintiff is not in physical possession of the land in question, her suit was not maintainable in view of provision contained under Section 34 of the Specific Relief Act. He further submits that because the plaintiff was aware about the execution of Will (Ex.D-2), she was bound to seek declaration about it and in absence of relief of declaration about the Will to be forged or fabricated document, the suit was not maintainable and in absence of such relief, learned Courts below have erred in holding so. He further submits that there being no prayer for relief of possession, the suit mere for declaration was not maintainable.

9. By pressing the application under Section 100 (5) of CPC filed on 29.06.2022, the counsel for appellants submits that the second appeal also involves additional substantial questions of law as follows:-

> "1. Whether the learned Courts below erred in holding that the will executed in favour of the defendants No.3 to 5 has not been proved in accordance with law ?
> 2. Whether in the absence of any handwriting expert report, the finding of the trial Court that the signatures of the testator are forged is based upon surmises and conjectures ?"

10. The counsel for appellants submits that the learned Courts below have wrongly held that the Will (Ex.D-2) has not been proved by defendants 3–5 whereas, the Will in question is a proven document and the learned Court below has committed mistake in making comparison of the signature without taking aid of the expert. Accordingly, he submits that the judgment and decree passed by learned Courts below are not sustainable. In support of his arguments, he placed reliance on the decisions in the case of *(i)* ***Venkataraja and others*** *vs.* ***Vidyane Doureradjaperumal (2014) 14 SCC 502;*** *(ii)* **Anil Rishi vs. Gurbaksh**

Singh (2006) 5 SCC 558; *(iii)* **Afsar Sheikh and another vs. Soleman Bibi and others (1976) 2 SCC 142;** *(iv)* ***Vinay Krishna vs. Keshav Chandra and another 1993 Supp (3) SCC 129;*** *(v)* ***Daulat Ram and others vs. Sodha and others (2005) 1 SCC 40*****;** (vi) ***Deokuer and another*** vs. ***Sheoprasad Singh and others AIR 1966 SC 359;*** *(vii)* ***Ram Saran and another vs. Smt. Ganga Devi (1973) 2 SCC 60*** *(viii)* ***Rangammal vs. Kuppuswami and another (2011) 12 SCC 220;*** *(ix)* ***Om Prakash Yadav and Anr.*** vs. ***Kanta Yadav & Ors (2018) 1 HLR 279;*** *(x)* ***John Guruprakasam vs. Yovel Nesan and others AIR 1979 Ker 96;*** (xi) ***Saudagar Singh vs. Pradip Narayan Singh 1918 (20) BOMLR509 (***Privy Council); (xii) ***Gian Chand vs. Krishen Singh and another AIR 1978 J&K 16;*** *(xiii)* ***Punjab Steel Corporation vs. M.S.T.C. Ltd. AIR 2001 P&H 331*****;** (xiv) ***Jamana Devi Vs. Rajendra Prasad Ji ILR (2013) MP 1004;*** *and* (xv) ***Saravanan Pillai vs. A.S. Mariappan and others 2001 SCC Online Mad 955.***

11. In reply, the learned counsel for the respondents submits that the suit property belonged to Vindheshwari Prasad and the plaintiff along with defendants 1-2 being the only class-I successors (Wife and two daughters) were entitled to succeed the property. As the Will has not been proved by defendants 3–5 and has also not been found proved by learned Courts below, therefore, no interference is warranted in the second appeal. He submits that vide paragraph 32 of impugned judgment itself, the plaintiff and defendants 1–2 have been found in joint possession, therefore, the plaintiff was not required to seek relief of possession and he further submits that the Will in question was propounded by the defendants 3–5, therefore, they were liable and bound to prove the Will in accordance with the law of evidence and in absence of proof of Will, nothing can be said in favour of the appellants. Learned counsel placed reliance on the decisions

in the case of *(i)* ***Janki Narayan Bhoir vs. Narayan Namdeo Kadam (2003) 2 SCC 91;*** *(ii)* ***Karbalai Begum vs. Mohd. Sayeed and another (1980) 4 SCC 396;*** *(iii)* ***Vidya Devi vs. Prem Prakash and others (1995) 4 SCC 496;*** *(iv)* ***Darshan Singh and others vs. Gujjar Singh and others (2002) 2 SCC 62;*** *(v)* ***MD. Mohammad Ali (Dead) by LRS. vs. Jagadish Kalita and others (2004) 1 SCC 271;*** *(vi)* ***Ajay Kumar Parmar vs. State of Rajasthan (2012) 12 SCC 406;*** *(vii)* ***Ram Prasad Rajak vs. Nand Kumar & Bros and another (1998) 6 SCC 748;*** *(viii)* ***Veerayee Ammal vs. Seeni Anmal (2002) 1 SCC 134;*** *(ix)* ***Ram Piari*** *vs.* ***Bhagwant and others AIR 1990 SC 1742;*** *(x)* ***Madhusudan Das vs. Smt. Narayani Bai and others AIR 1983 SC 114;*** (xi) ***Bhadri and another vs. Smt. Suma Devi and others AIR 2013 HP 4;*** (xii) ***Nathasingh Ratansingh Raghuvanshi vs. Jagannathsingh Maharajsingh Raghuvanshi 1994 M.P.L.J 209;*** *(xiii)* ***Govinda vs. Kanhai 1961 JLJ 1263;*** *(xiv)* ***Surinder Singh Ahluwalia vs. Smt. Pushpa Rani (1986) AllLJ 1056;*** and (xv) ***Mahendra Nath Bagchi vs. Tarak Chandra Sinha and others AIR 1932 Calcutta 504.*** Learned counsel submits that neither the plaintiff was required to seek declaration about the Will nor she was required to seek relief of possession because the property in question is an agriculture/revenue paying land and for seeking partition under Section 178 of the Madhya Pradesh Land Revenue Code, 1959 the relief of declaration of certain share in the property, is sufficient because in case of revenue paying land it is not the Civil Court which effects the partition, but partition has to be effected only by the Tahsildar and actual possession is given only after partition. Accordingly, he prays for dismissal of the appeal.

12. Heard learned counsel for the parties and perused the record.

Substantial question of law No.1:

13. Certainly, in para 32 of the impugned judgment passed by the learned trial Court, the defendants 2–5 were held to be in physical possession of the property in question but at the end of para 32 itself, the learned Court found the plaintiff and defendants 1 –2 to be co-owners and in possession of the land in question. It is well settled that every co-owner is deemed to be in possession of every inch of the land because possession of one co-owner is possession of all.

14. Hon'ble the Supreme Court has in the case of ***Vidya Devi*** (Supra) held that :

> "21. Normally, where the property is joint, co-sharers are the representatives of each other. The co-sharer who might be in possession of the joint property shall be deemed to be in possession on behalf of all the co-sharers. As such, it would be difficult to raise the plea of adverse possession by one co-sharer against the other. But if the co-sharer or the joint owner had been professing hostile title as against other co-sharers openly and to the knowledge of other joint owners, he can, provided the hostile title or possession has continued uninterruptedly for the whole period prescribed for recovery of possession, legitimately acquire title by adverse possession and can plead such title in defence to the claim for partition."

In the case of ***Darshan Singh*** (Supra) held that :-

> "9. In our view, the correct legal position is that possession of a property belonging to several co-sharers by one co-sharer shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that title of the other co-sharers was denied."

In the case of ***Md. Mohammad Ali*** (Supra) held that :-

> "25. Possession of a property belonging to several co-shares by one co-sharer, it is trite, shall be deemed that he possesses the property on behalf of the other co-sharers unless there has been a clear ouster by denying the title of other co-sharers and mutation in the revenue records in the name of one co-sharer would not amount to ouster unless there is a clear declaration that the title of the other co-sharers was denied and disputed. No such finding has been arrived at by the High Court."

15. Indisputably, after death of Vindheshwari Prasad, the plaintiff and defendants 1–2 are the only successors, and the defendant-2 was found to be in possession of the suit land along with plaintiff and defendant -1, hence there is no illegality in the findings arrived at by learned Courts below. Merely because of the fact that the plaintiff was married and was residing with her in-laws, cannot be a ground to say that she was out of possession of the property in question especially in the case when there is no plea of ouster taken by the appellants. As such the suit filed by plaintiff was very well maintainable and was rightly decreed by learned trial Court even in presence of Section 34 of the Specific Relief Act.

16. Recently in the case of ***Akkamma and others*** vs. ***Vemavathi and others (2021) 14 SCALE 293***, the Supreme Court considered previous judgments in the cases of Venkataraja and others (supra), Vinay Krishna (supra), Ram Saran and another (supra) and Anathula Sudhakar vs. P. Buchi Reddy (Dead) by Lrs and others and held as under:-

> "18. The High Court has proceeded on the footing that in the subject-suit, the original plaintiff must have had asked for relief for recovery of possession and not having asked so, they became disentitled to decree for declaration and possession. But as we have already observed, the proviso to Section 63 of the 1963 Act requires making prayers for declaration as well as consequential relief. In this case, if the relief on second count fails on merit, for that reason

alone the suit ought not to fail in view of aforesaid prohibition incorporated in Section 34 of the 1963 Act.

19. Having opined on the position of law incorporated in Section 34 of the 1963 Act, we shall again turn to the facts of the present case. The first suit was for perpetual injunction, in which the original plaintiff lost for failing to establish possession. In the second suit (the 1987 suit), reliefs were claimed for declaration based on allegation of subsequent disturbances and on that basis injunctive relief was asked for. The plaintiffs' claim for being in possession however failed. Thus, no injunction could be granted restraining the defendants from disturbing or interfering with the original plaintiffs' possession of the suit land. But as the Trial Court found ownership of the original plaintiff was proved, in our view the original plaintiff was entitled to declaration that he was the absolute owner of the suit property. There is no bar in granting such decree for declaration and such declaration could not be denied on the reasoning that no purpose would be served in giving such declaration. May be such declaratory decree would be non-executable in the facts of this case, but for that reason alone such declaration cannot be denied to the plaintiff. Affirmative finding has been given by the Trial Court as regards ownership of the original plaintiff over the subject-property. That finding has not been negated by the High Court, being the Court of First Appeal. In such circumstances, in our opinion, discretion in granting declaratory decree on ownership cannot be exercised by the Court to deny such relief on the sole ground that the original plaintiff has failed to establish his case on further or consequential relief.

20. In these circumstances, we sustain the judgment of the High Court that the plaintiffs were not entitled to injunctive relief as prayed for and also the rejection of the plaintiffs' plea for introduction of relief for possession. But at the same time, we set aside that part of the judgment by which

> it has been held that the plaintiffs were disentitled to declaration of ownership of the property. We accordingly hold that the plaintiffs are entitled to declaration that they are owners of the suit property and there shall be a decree to that effect.

17. In the identical set of facts and circumstances, this Court in the case of ***Karelal and others*** vs. ***Gyanbai and others AIR 2018 (NOC) 894*** has held as under:-

> "18. The matter can be ascertained from another angle also. In the present case, only the agricultural land is the disputed property. If the defendants had never challenged the rights and title of the plaintiffs, then there was no need for the plaintiffs to file a suit for declaration of title or even for partition. The plaintiffs could have filed an application under Section 178 of M.P. Land Revenue Code for partition of the agricultural land. Section 178 of M.P. Land Revenue Code, reads as under :-
>
> > "178. Partition of holding.-- (1) If in any holding, which has been assessed for purpose of agriculture under Section 59, there are more than one bhumiswami any such bhumiswami may apply to a Tahsildar for a partition of his share in the holding :
> >
> > > [Provided that if any question of title is raised the Tahsildar shall stay the proceeding before him for a period of three months to facilitate the institution of a civil suit for determination of the question of title.] 10[(1-A) If a civil suit is filed within the period specified in the proviso to sub-section (1), and stay order is obtained from the Civil Court, the Tahsildar shall stay his proceedings pending the decision of the Civil Court. If no civil suit is filed within the said period, he shall vacate the stay order and proceed to partition the holding in accordance with the entries in the record of rights.

(2) The Tahsildar, may, after hearing the co-tenure holders, divide the holding and apportion the assessment of the holding in accordance with the rules made under this Code.

[(3) x x x] [(4) x x x] [(5) x x x] Explanation I.--For purposes of this section any co-sharer of the holding of a bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding.

[Explanation II.-- x x x] [178-A. Partition of land in life time of bhumiswami.-- (1) Whenever a bhumiswami wishes to partition his agricultural land amongst the legal heirs during his life time, he may apply for partition to the Tahsildar.

(2) The Tahsildar may, after hearing the legal heirs, divide the holding and apportion the assessment of holding in accordance with the rules made under this Code.

19. Thus, where the question of title is not involved, the revenue authorities may partition the agricultural land amongst the co- sharers. Section 178(2) Explanation-I of M.P. Land Revenue Code, clearly provides that for the purposes of this Section, any co-sharer of the holding of a Bhumiswami who has obtained a declaration of his title in such holding from a competent Civil Court shall be deemed to be a co-tenure holder of such holding. Thus, even after obtaining the declaratory decree, the plaintiff may file an application under Section 178 of M.P. Land Revenue Code, for partition of the land. Even otherwise, in a case of partition, if the property in dispute is agricultural land, then the matter has to be referred to the revenue authorities for actual partition of the property by metes and bounds (Kindly see Judgment of the Supreme Court in the case of Shub Karan Bubna (Supra). Thus, in any eventuality, the actual partition has to be done by the revenue authorities. Further, when the principle of res judicata does not apply to the

> suit for partition, then, it cannot be said that unless and until, the actual partition by metes and bounds is claimed, the suit for declaration of title and permanent injunction is not maintainable. If the plaintiff is not interested in actual separation of the property, then he can not be non-suited only for the reasons, that he had not sought the relief for partition. Thus, in view of Section 178 of the M.P. Land Revenue Code, this Court is of the considered opinion, that the suit for declaration of title and permanent injunction by a co- sharer against the other co-sharers without seeking the further relief of partition, would be maintainable and cannot be dismissed in view of Section 34 and 42 of Specific Relief Act."

18. In view of aforesaid law laid down by Hon'ble Supreme Court and by this Court, I am of the view that the declaration of share could be made irrespective of Section 34 of the Specific Relief Act, especially in the case where the land is agriculture land. Record shows that the land in question is revenue paying land, therefore, even if there is some construction over it, the same would be considered as an agriculture land.

Substantial question of law No.2

19. The Will has been propounded by defendants 3-5, therefore, it was for them to prove the Will in question which has not been found proved by learned Courts below.

20. In the case of ***Anathula Sudhakar vs. P. Buchhi Reddy (2008) 4 SCC 594*** it has been held that-

> "14. We may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to plaintiff's title raises a cloud on the title of plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration, is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by

> documents, if a trespasser without any claim to title or an interloper without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration."

21. At this juncture the principle as enshrined in order 6 rule 13 CPC is also worth importance wherein it has been specifically laid down that any fact the burden of proving which does not lie on the party filing the pleading need not to plead about the same. This principle further supports the view that a will in favour of defendant is not required to be necessarily challenged by the plaintiff as the burden of proving the will always lies upon the propounder i.e. defendant in the present case. Similar conclusion can also be drawn from the provision of s.68 of the Evidence Act which distinguishes WILL from other documents by putting a Proviso which has the effect that admission of execution of other documents has the effect of proving of said documents but WILL is unaffected by any admission, as is governed by main part of the s.68 of Evidence Act.

22. If the preposition laid down by Hon'ble Apex Court in case of **Anathula Sudhakar** (Supra) is considered then it becomes apparent that a relief of declaration is required to be sought only when the defendant is able to establish any apparent defect in title of plaintiff. In the present case the defendant is sailing upon a document which is required to be proved by him and denial of plaintiff's title by the defendant on basis of said unproved fact or document cannot be said to be sufficient threat to title of plaintiff for which the plaintiff was required to sue for declaration of its title or for cancellation of said Will. As has been held by this Hon'ble Court in several cases that every threat does not have effect of raising cloud over title. Such a WILL is ineffective to create a threat. This preposition is also clear from the fact that even no mutation can be effected

on basis of said WILL unless and until the same is tested before the civil court on anvil of s.63 of Succession Act and s.68 of Evidence Act.

23. In the case of ***Banta Singh vs. Diwan Singh AIR 1929 Lahore 11*** it has been held:

> "3. It is, however, contended that he should have filed a suit for the cancellation of the will, and as he was entitled to that relief and as he omitted to claim it he was not entitled to sue for a mere declaration under the proviso to Section 42, Specific Relief Act. The question is not free from difficulty, but after careful consideration I have arrived at the conclusion that as the plaintiff questioned the genuineness of the will and also its validity he could ignore it and claim a declaration of title. From his point of view the alleged will was void and a declaration obtained by him would entitle him to claim possession of the disputed property by redemption from the mortgagee and formal possession from the tenants.
>
> 4. If a declaration is given to him he could without any further action against the defendant obtain effective domination over the property in suit. That being so it was not necessary for him to sue for cancellation of the will. I accept the appeal, set aside the decree of the Courts below and remand the case to the trial Court with directions to proceed with it in accordance with law. The Court-fee paid by the appellant in this Court and the Court of the District Judge shall be refunded to him and the other costs will abide the result."

24. Accordingly, in my considered opinion as the plaintiff has sought the relief of declaration of 1/3rd share, therefore, the relief of declaring the Will being smaller relief, must be deemed to be included in the relief of declaration of title already sought by plaintiff in the plaint, therefore, it cannot be said that the prayer in the suit for declaring the Will to be forged,

fabricated and ab initio void, was necessary. Therefore, the substantial question of law No.2 is also answered in favour of plaintiff and against the defendants.

25. Further the findings with regard to execution of the Will in question being purely on a question of fact cannot be interfered with by this Court in the limited scope of Section 100 of CPC as has been held by Hon'ble Apex Court in the case of ***Shyamlal @ Kuldip Vs. Sanjeev Kumar and others*** reported in ***(2009) 12 SCC 454.*** Even otherwise, this Court has perused the evidence of defendants' witnesses, which shows that there are major contradictions in the testimony of the defendants and the attesting witnesses including scribe, regarding place and time of execution of the Will.

26. As both the Courts have recorded concurrent finding with regard to execution of Will against the defendants 3–5, therefore, such findings are not liable to be interfered with. Further in presence of prior execution of Agreement of Gift (Ex.D-1), the Will becomes a suspicious document and such suspicion has not been removed by the defendants 3-5. On the contrary, Ram Kishore Shukla (DW-2) has clearly deposed that after execution of agreement/gift deed (Ex.D-1) Vindheshwari Prasad had lost his right in the property. Hence, the proposed additional substantial questions of law also do not arise in this second appeal.

27. In view of the aforesaid, the second appeal deserves to be and is hereby dismissed. However, no order as to costs.

(DWARKA DHISH BANSAL)
JUDGE

PB