IN THE HIGH COURT OF MADHYA PRADESH AT JABALPUR

BEFORE

HON'BLE SHRI JUSTICE SANJAY DWIVEDI

ON THE 17th OF JUNE, 2025

FIRST APPEAL NO.468/2014

SWAMI DATT PYASI AND OTHERS

VS.

SMT.VIDYA BAI AND OTHERS

Appearance:

Shri Anuj Agrawal - Advocate and Ms. Ankita Singh Parihar - Advocate for the appellants.

Shri R.P. Khare - Advocate for respondent No.7.

None for respondent Nos. 1 to 6.

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Reserved on : 23.04.2025

Pronounced on : 17.06.2025

ORDER

On 08.02.2023, at the request of counsel for the parties, this case was listed for final hearing under the caption 'Top of the List' on 16.02.2023. On 16.02.2023, nobody appeared for the parties and, therefore, the case was adjourned for 22.02.2023 for final hearing. Again on 27.07.2023, the matter was taken up for hearing but it got adjourned on the request made by counsel for the appellant and thereafter the Court, considering the fact that the appeal is nine years old, adjourned the case with a direction that on the next date, it would be argued finally. On 17.08.2023, on behalf of the respondents, an

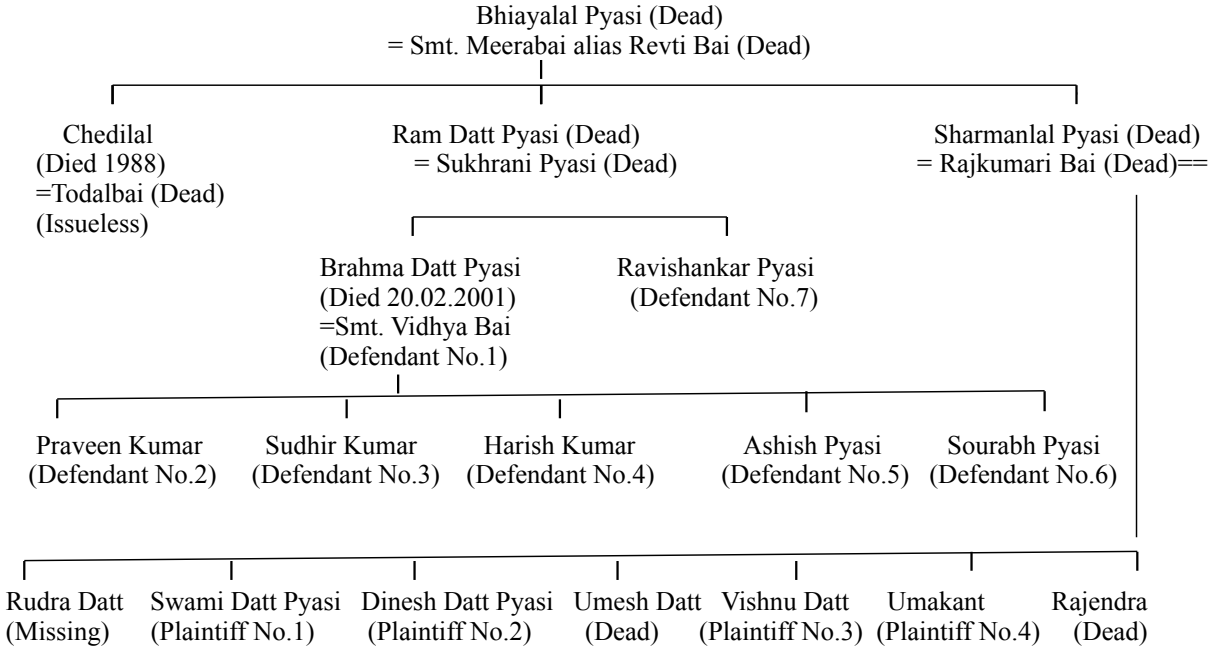
application was filed for change of counsel and Shri Shriniwas Tiwari appeared on behalf of the respondents as the changed counsel and the case was fixed for 20.12.2023. On 21.09.2024, an application for urgent hearing was considered and the Court was pleased to direct for listing the case in the following week. On 28.02.2025, at the request of counsel for the appellants, the case was directed to be listed for final hearing on 05.03.2025 under the caption 'Top of List' and finally on 23.04.2025, with the consent of counsel for the parties, the case was finally heard.

2. This first appeal under Section 96 of the Code of Civil Procedure has been filed by the plaintiffs/appellants challenging the impugned judgment and decree dated 17.04.2014 passed by the Third Additional District Judge, Jabalpur in Civil Suit No.84/09 (Swami Datt Pyasi and others Vs. Smt.Vidya Bai and others) whereby the trial Court had dismissed the suit.

3. As per facts of the case, the plaintiffs/appellants filed a suit for declaration of title on the basis of 'Will' dated 28.10.1987 (Exhibit P/1) and also seeking permanent injunction and removal of encroachment over the suit land. However, the plaintiffs had also sought a declaration that the settlement-deed dated 21.08.2007 was executed by Smt. Vidya Bai (defendant No.1) in favour of her son namely Praveen Pyasi in respect of land ad-measuring 800 sq. ft. and marked as 'A', 'B', 'C' and 'D' with red colour in the plaint map be declared as null and void. As per the plaintiffs, this land in fact belonged to Dinesh Datt Pyasi.

4. As per the averments made in the plaint, late Bhaiyalal Pyasi had three sons namely Chhedilal Pyasi, Ram Datt Pyasi and Sarmanlal Pyasi. Bhaiyalal and his wife Smt. Meera Bai @ Revti Bai died in the year 1962 and 1972 respectively. Upon their demise, an oral partition took place amongst their sons in the year 1980 and each son took

possession over their respective share. The genealogy of late Bhaiyalal Pyasi so as to make further facts convenient is as under:-



5. Chhedilal Pyasi, the eldest son of Bhaiyalal Pyasi married with Todal Bai in the year 1987 and both died issueless. During his lifetime Chhedilal Pyasi executed a Will on 28.10.1987 in favour of children of Sarmanlal Pyasi in presence of Shiv Kumar Choubey and Pramod Kumar Shukla who were the attesting witnesses of the Will dated 28.10.1987. Chhedilal died in the year 1988.

6. On 21.08.2007, Smt. Vidya Bai (defendant No.1) executed a settlement-deed in favour of her sons purporting to convey more property than she was entitled to under the partition. On the basis of the said partition and settlement-deed dated 21.08.2007, the defendants raised construction over the said land and, therefore, the plaintiffs filed the instant suit.

7. Defendant No.7 Ravi Shankar Pyasi and his legal heirs supported the claim of the plaintiffs and admitted their claim. Although, defendants No.1 to 6 who were the attesting witnesses filed their

written-statement denying the claim of the plaintiffs and also stated that no partition ever took place among Chhedilal Pyasi, Ram Datt Pyasi and Sarmanlal Pyasi. It was also denied that Ram Datt Pyasi separated himself with Chhedilal Pyasi and Sarmanlal Pyasi by taking 1/3rd share in the property. It was also denied that Chhedilal Pyasi ever resided with his brother Sarmanlal Pyasi but sons of Sarmanlal Pyasi tried to grab the property of Chhedilal Pyasi claiming themselves to be the adopted sons and also claimed that Chhedilal Pyasi was their guardian. It is also stated in the written-statement that sons of Sarmanlal Pyasi with their power forcibly possessed the property of Chhedilal Pyasi and also of the defendants. It is also stated that the plaintiffs have filed a suit with collusion of defendant No.7. The Will dated 28.10.2007 was never executed and it is a fabricated one.

8. The trial Court after considering the pleadings made by counsel for the parties framed as many as 12 issues but the basic issue which was framed by the trial Court i.e. issue No.3 is relating to execution of the Will dated 28.10.1987 on the basis of which plaintiffs claimed their title. The other issue is with regard to the fact whether any partition took place among Chhedilal Pyasi, Ram Datt Pyasi and Sarmanlal Pyasi.

9. I have perused the impugned judgment and also the record of the trial Court.

10. Although, the suit has been dismissed by the trial Court holding the issue No.3 in negative manner and observed that the Will dated 28.10.1987 was not executed and the plaintiffs have failed to prove the Will (Exhibit P/1) as per the requirement of Section 63 of the Indian Succession Act.

11. In my opinion, the remaining facts and issues are related to the Will and based upon the recital of the Will and if it is found that the Will

has been executed and validly proved by the plaintiffs, then remaining issues based upon the said fact can be decided accordingly. Thus, this Court is required to see as to whether the trial Court's finding with regard to issue No.3 and about validity of Will as also its execution, are proper or not.

12. The trial Court has dealt with the issue with regard to validity of the Will (issue no.3) in paragraph 16 onward. The trial Court in paragraph-17 of its judgment had considered the recital of the Will and also considered the statement of Swami Datt Pyasi (PW-1), who has stated that his father namely Chhedilal Pyasi, in his life time, has executed a Will dated 28.10.1987 (Exhibit P/1) before the witnesses namely Shiv Kumar Choubey and Pramod Kumar Shukla and after his death, the property of Chhedilal Pyasi came in favour of his nephew Rudra Datt, Swami Datt, Umesh, Dinesh, Vishnu, Umakant and Rajendra. In paragraph- 20, it has been further observed by the trial Court that the requirement of Section 63 of the Indian Succession Act, 1925 has to be seen and if it is fulfilled then only the document can be considered to be a Will. In paragraph-23 of the impugned judgment, it is observed by the trial Court that the Will is required to be proved by a person claiming right by virtue of the same and onus lies upon him to prove the same whereas in paragraph-24, the trial Court has discussed the statement of witnesses came in the witness box during the trial but in paragraph-27 finally it is observed that the procedure prescribed under Section 63 of the Indian Succession Act and its requirement for proving the Will have not been fulfilled and, therefore, it is observed by the trial Court that the plaintiffs by adducing evidence, failed to prove that any Will was executed by Chhedilal Pyasi on 28.10.1987.

13. Now, this Court is required to see whether on the basis of material available and evidence adduced by the parties, the finding given by the trial Court can be given a seal of approval or not.

14. On perusal of statement of Swami Datt Pyasi (PW-1), it is clear that he has stated everything in his statement and also about execution of Will by Chhedilal Pyasi**.** As per the genealogy of Bhaiyal Pyasi, Swami Datt Pyasi was the son of Sarmanlal Pyasi, who in turn was the brother of Chhedilal. Swami Datt Pyasi even in his cross-examination has identified the signature of his uncle Chhedilal Pyasi and Exhibit P/1 contained his signature and also produced other documents i.e Exhibit P/4, the joint account which was jointly in the name of Chhedilal Pyasi and Swami Datt Pyasi. Other documents i.e. Exhibit P/2 and P/3 are the revenue records in which Chhedilal Pyasi was shown to be a b*ali* of his own property as well as the property belonging to Sarmanlal Pyasi and as such, their stand was that Chhedilal Pyasi was the '*Karta*' of the property belonging to him and Sarmanlal Pyasi because after the death of Bhaiyalal Pyasi, Ram Datt Pyasi had taken his share and separated himself from Chhedilal Pyasi and Sarmanlal Pyasi. In the cross-examination, he has also identified the signatures of Shiv Kumar Choubey and Pramod Kumar Shukla who were the attesting witnesses of Exhibit P/1. He has also stated that one of the witnesses namely Shiv Kumar Choubey died 10 to 12 years back and the witness namely Pramod Kumar Shukla was alive but he lost his eye sight and he was consistent with regard to the statement made in examination-in-chief also in regard to the documents produced. From the cross-examination of PW-1, it is clear that there was no effective cross-examination with regard to the document (Exhibit P/1) the Will dated 28.10.1987.

15. I have also seen the cross-examination. Even no suggestion was made by counsel for the defendants that the Will dated 28.10.1987 (Exhibit P/1) is a fabricated document and it is also not suggested that the said document was never executed by Chhedilal.

16. Likewise, Shailesh Choubey (PW-2) the son of Shiv Kumar Choubey who was one of the witnesses of Exhibit P/1 got examined. In his affidavit filed under Order 8 rule 4 of CPC, he has very categorically stated that he could identify the signature of his father and after examining Exhibit P/1 when it was asked whether the signature of Shiv Kumar Choubey at page 3 of Exhibit P/1 from 'B to B' is the signature of his father then he approved that it was his father's signature. In the cross-examination, he has never suggested that he could not identify the signature of his father. It is also not suggested that Exhibit P/1 did not contain the signature of Shiv Kumar Choubey, the father of the witness. Thus, I am sure that there was no effective cross-examination on behalf of the defendants with regard to validity of Exhibit P/1.

17. Thereafter, Pramod Kumar Shukla has also given an affidavit under Order 18 Rule 16 of CPC in which he has stated that the Will dated 28.10.1987 was prepared before him and Chhedilal Pyasi signed the same in his presence. He was one of the witnesses of Exhibit P/1 and that Will was handed over to his nephew Rudra Datt Pyasi. It is also stated in the affidavit that at the time of execution of the Will, Chhedial Pyasi was physically and mentally sound. He has also stated that on 31.12.1991 the said Will got registered in the office of Sub-Registrar, Jabalpur after verifying his signature and also the signature of Shiv Kumar Choubey.

18. The defendants never asked for any cross-examination and as such, no cross-examination was done but in view of the provisions of

Order 18 Rule 6 of CPC, that statement can be considered. Looking to the statement of witnesses and as per the requirement of Section 63 of the Indian Succession Act, 1923, it is relevant to quote Section 63 which reads as under:-

> "**63. Execution of unprivileged Wills**.—
> Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 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.

In view of the aforesaid requirement, I am surprised as to why and how the trial Court had not considered Exhibit P/1 as a Will. The same has been signed by two witnesses. Shri Pramod Kumar Choubey was alive and in his affidavit under Order 18 Rule 16 of CPC, he has very categorically stated that Chhedilal Pyasi has signed the Will before him and also before Shiv Kumar Choubey and the said Will got registered in the office of Sub-Registrar, Jabalpur after verifying their signatures over the said document by the Registrar and, therefore, the observation made by the trial Court and the finding given thereof in respect of not signing

the document (Exhibit P/1), in my opinion, is illegal, contrary to law and not sustainable and as such deserves to be set aside.

19. The Supreme Court in case of **Muddasani Venkata Narsaiah (Dead) through legal representatives Vs. Muddasani Sarojana** reported in **2016(12) SCC 288** has considered the fact in respect of a registered document and observed as under:-

> "15. Moreover, there was no effective cross-examination made on the plaintiff's witnesses with respect to factum of execution of sale deed, PW 1 and PW 2 have not been cross-examined as to factum of execution of sale deed. The cross-examination is a matter of substance not of procedure one is required to put one's own version in cross-examination of opponent. The effect of non-cross-examination is that the statement of witness has not been disputed. The effect of not cross-examining the witnesses has been considered by this Court in Bhoju Mandal v. Debnath Bhagat [Bhoju Mandal v. Debnath Bhagat, AIR 1963 SC 1906]. This Court repelled a submission on the ground that the same was not put either to the witnesses or suggested before the courts below. Party is required to put his version to the witness. If no such questions are put the Court would presume that the witness account has been accepted as held in Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd. [Chuni Lal Dwarka Nath v. Hartford Fire Insurance Co. Ltd., 1957 SCC OnLine P&H 177 : AIR 1958 P&H 440]"

20. Further, in case of **Kuwarlal Amritlal Vs. Rekhlal Koduram and others** reported in **1949 SCC OnLine MP 35,** the Division Bench of Nagpur High Court has considered when execution of document was specifically denied in the written-statement, then, it was necessary in the case to call one of the attesting witnesses to prove the execution but in cross-examination if attestation is not specifically challenged then it would be presumed that the document has been proved. The observation made by the Division Bench in the said case reads as under:-

> "6. The execution of the document was specifically denied in the written statement, therefore it was necessary in this case to call one of the attesting witnesses to prove the execution. But that has been done. P.W. 1 is one of those witnesses. He has been called and he states that the document was attested by Suganmal and himself and that the

> mortgagor was present when they both attested the deed. It was argued that this is not sufficient to prove execution as required by S. 68 because when a witness is required to prove due execution he must set forth each of the details of attestation as required by Section 3 of the Transfer of Property Act. It is not enough to say that the document was attested and executed. With this we cannot agree.
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> 7. When attestation is not specifically challenged and when a witness is not cross-examined regarding the details of the attestation it is sufficient for him to say that it was attested by the other witness and himself. That is enough to prove the attestation. The law will then, assume that when the witness swears that it was attested the witness means by that 'attested according to the forms required by law.' If the other side wants to challenge that statement it is their duty, quite apart from raising it in the pleadings, to cross-examine the witness along those lines. As that was not done here the plaintiffs were entitled to assume that the mode of attestation was not being attacked and there, fore that it was enough for their witness merely formally to prove attestation. Sarkar in his Law of Evidence (Edn. 7, p. 651) quotes Brahmadat Tewari v. Chaudan Bibi, 20 C.W.N. 192 : (A.I.R. (3) 1916 Cal. 374) where it is said that when a will has been proved to have been duly executed in the presence of witnesses the presumption is that the requirements of the law of attestation were satisfied. Later he refers to a Privy Council ruling in Kundan Lal v. Mt. Musharrafi Begam, 63 I.A. 326 : (A.I.R. (23) 1936 P.C. 207) in support of the view that;
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> > "Where execution was admitted but it was never suggested at the trial Court that the attesting witnesses had not signed in the presence of the executant, such a contention cannot be reasonably raised before the appellate Court."
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> 8. Of course execution was not admitted in the written statement but it was proved and, as we have Slid, the fact of execution, meaning thereby the signing of the document by the mortgagor, has not been challenged before us. The only point argued is that it was not duly attested. In the circumstances set out above and on the evidence of P.W. 1, particularly as he says that the mortgagor was present when both he and the other attesting witness attested the deed, we agree with the lower Court and hold that the document was validly attested."

21. In view of the aforesaid enunciation of law, it is clear that the trial Court has given an erroneous finding in respect of execution of Will (Exhibit P/1) dated 28.10.1987 and the said finding is not only contrary to law but also perverse. Therefore, the said finding is set aside.

Accordingly, the other claim of the plaintiffs which is based upon the document (Exhibit P/1) are also sustained and as such, the suit deserves to be decreed accordingly. From the recital of Exhibit P/1, it is clear that Chhedilal Pyasi has clarified the-then status of the property and also clarified that the property after the death of his father Bhaiyalal Pyasi has been devolved in three brothers but Ram Datt Pyasi has taken his share and separated himself and, therefore, share of Chhedilal Pyasi and Sarmanlal Pyasi, who were residing together, after the death of issueless Chhedilal Pyasi, the Will executed by him in his lifetime shall be inherited by the son of Sarmanlal Pyasi in whose favour the Will was executed.

22. Resultantly, the appeal is **allowed**. The impugned judgment and decree passed by the trial Court is hereby set aside. The suit is decreed in *toto*. Let a decree be drawn accordingly.

(SANJAY DWIVEDI)
JUDGE

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