

HIGH COURT OF CHHATTISGARH, BILASPURF.A No.202 of 2006Reserved on 19.03.2021Pronounced on 31.03.2021

Shivnarayan Gupta, aged about 63 years, S/o Late Shri Manrakhan Lal Gupta,
R/o Aarang, Tah. Aarang, District Raipur (CG) ----- **Appellant**

Versus

1. Vyasnarayan Gupta, aged about 62 years, S/o Late Shri Manrakhan Lal Gupta,
2. Jainarayan Gupta, aged about 59 years, S/o Late Shri Manrakhan Lal Gupta
3. Kamalnarayan Gupta, aged about 57 years, S/o Late Shri Manrakhan Lal Gupta
4. Smt Anasuiya Bai, aged about 80 years, W/o Late Shri Manrakhan Lal Gupta (Deleted)

All are Residents of Aarang, Tah. Aarang, District Raipur (CG)

4A. Smt. Kusum Gupta, aged about 50 years, W/o Shri Rajendra Prasad Gupta,
R/o Juna Bilaspur, Krishna Ward, Bilaspur, Distt. Bilaspur (CG)

5. The State of Chhattisgarh through the District Collector, District Raipur (CG)

----- **Respondents**

For Appellant:	Shri Ravindra Sharma along with Shri Ashutosh Shukla, Advocates.
For Respondents No.1, 2 & 4A:	None, though served.
For Respondent No.3:	Shri Sumesh Bajaj, Advocate.
For the State/Respondent No.5:	Shri Udhaw Sharma, Government Advocate

Single Bench: Hon'ble Shri Sanjay S. Agrawal, J
C A V Judgment

1. Challenge to this Appeal preferred by the Plaintiff under Section 96 of the Code of Civil Procedure, 1908 (for short 'the Code of 1908') is the judgment and decree dated 31.08.2006 passed in Civil Suit No.44-A/2004 whereby the learned trial Court has dismissed his claim for partition and separate possession. The parties to this Appeal shall be referred hereinafter

as per their description before the court below.

2. The facts which are essential to be stated for adjudication of this Appeal are that a suit for partition and separate possession has been made by the Plaintiff Shivnarayan Gupta submitting *inter alia* that the properties described in Plaint Schedule – 'A' situated at village Aarang and Baihar of District Raipur and village Sarekel of District Mahasamund are the Joint Hindu Family properties and they were being managed by his father Manrakhan Lal Gupta. According to the Plaintiff, his father, in the year 1982-83, entrusted and recorded lands in the name of himself, his wife Anusuiya Bai, his sons and their wives and also gave houses to them for better management of the family and it was not intended to be a partition. In pursuance of the said family arrangement, the properties described in Plaint Schedule-'B' were recorded in revenue papers in father's name and upon his sad demise on 07.11.1999, the entire ancestral properties were devolved upon him and his legal heirs.

3. Further case of the Plaintiff is that his brother Kamalnarayan Gupta, Defendant No.3, with whom his father used to live, has created a forged and fabricated Will, said to have been executed by father in his favour on 24.12.1998 and succeeded thereafter to get the mutation order from Revenue Authorities and, thus, trying to set up his individual interest thereon. The Plaintiff has, therefore, been constrained to file the suit in the instant nature claiming 1/5th share over the properties described in Plaint Schedule-'A' and/or claiming alternatively 1/6th share over the Plaint Schedule – 'B' properties, which is recorded in the name of his father.

4. The aforesaid claim of the Plaintiff has been accepted by Defendants No.1 & 2 namely Vyasnarayan and Jainarayan, the Plaintiff's brothers, while his another brother Kamalnarayan (Defendant No.3) and mother Smt Anusuiya

Bai (Defendant No.4) have contested the claim by submitting *inter alia* that the properties in question as described in Plaint Schedule – 'A' have already been partitioned in the years 1978-79 during the lifetime of said Manrakhan Lal Gupta and Revenue papers were thereafter mutated in 1982-83, in which Plaint Schedule – 'B' properties came in the name of father Manrakhan Lal Gupta. It is contested further on the ground that the alleged deed of Will dated 24.12.1998 was duly executed by father Manarakhan Lal Gupta and based upon it, the Revenue papers were recorded in his (Kamalnarayan) name as per the order dated 31.10.2001 passed by the Tahsildar, Aarang.

5. Smt. Kusum Gupta (Defendant No.4A), who is the sister of the Plaintiff, contested the claim on the ground that the properties in question have already been partitioned during the lifetime of father and in pursuance thereof, the Revenue papers were also mutated in their names in 1982-83. According to her, the Plaintiff, while instituting the suit, has not disclosed the particulars of the house, i.e. House No.13/10, situated at Naramadapara, Station Road, Raipur owned by her father and pleaded further that being a daughter, she acquired equal interest of 1/6th share over the properties left by her father.

6. In support, the Plaintiff has examined himself and his aunt (*bua*) namely Smt. Kamli Bai, the attesting witness of the alleged Will, while Defendant No.3 Kamalnarayan has examined himself, mother Smt Anusuiya Bai and the attesting witness Kiran Saheb (brother of his wife) and the scribe (Shobharam) of the alleged Will.

7. After considering the evidence led by the parties, it has been held by the trial Court by placing its reliance upon the documentary evidence Ex.D-1 to Ex.D-9 that the ancestral properties owned by the parties described in Plaint Schedule – 'A' have been partitioned during the lifetime of father Manrakhan

Lal Gupta in 1978-79, in which, the properties described in Plaintiff Schedule – 'B' came in father's share and the Revenue papers were accordingly mutated in their individual names. It held further that although one of the attesting witnesses of the alleged Will, namely, Smt. Kamli Bai has not supported the execution of it, but upon considering the statement of the another attesting witness, namely, Kiran Saheb and its scribe, the due execution, attestation and validity of the alleged Will has been upheld. It observed further that the properties bearing Khasra Nos.1923/3, 2655 and 2655/3 and 2939/2 admeasuring respectively as 0.226 , 0.550, 0.311 and 0.069 hectares of land were not the part of the alleged Will, therefore, the legal heirs of father Manrakhan Lal Gupta would be entitled to 1/6th share each, over the same and since the house being House No. 13/10, situated at Naramadapara, Station Road, Raipur was not included in the suit properties, therefore, the claim as made by the Plaintiff seeking partial partition is, liable to be dismissed and, in view of that, dismissed the claim. This is the order, which has been questioned by way of this Appeal.

8. Shri Ravindra Sharma, learned Counsel appearing for the Appellant/Plaintiff submits that the finding of the trial Court upholding the factum of partition effected in 1978-79 and upholding further the execution of the alleged Will (Ex.P-28C), is apparently contrary to law. According to him, Manrakhan Lal Gupta, being the head of the family has made the alleged arrangement only for better management of the joint family properties without the intention of effecting partition. It is contended further while drawing attention to the statement of the attesting witness of the alleged Will namely Smt. Kamli Bai, (PW-2) that since the executor of the alleged Will has not signed the said document in her presence, therefore, it cannot be held that its

execution was duly proved in accordance with law by the propounder of the said Will, i.e., Defendant No.3-Kamalnarayan Gupta and has placed his reliance upon the decisions rendered in the matters of Janki Narayan Bhoir vs. Narayan Namdeo Kadam, M.B. Ramesh (dead) by Lrs. vs. K.M. Veeraje Urs (dead) by Lrs. and Others, Raj Kumari and Ors. vs. Surinder Pal Sharma and Ghanshyam & Ors vs. Deepak Kumar Patnayak & Orthers reported in (2003) 2 SCC 91, (2013) 7 SCC 490, (2020) 2 MPLJ 55 (SC) and **Second Appeal No.710/2003** decided by the co-ordinate Bench of this Court on **08.03.2019**, respectively.

9. Countering the aforesaid contention, Mr Sumesh Bajaj, learned Counsel appearing for Defendant No.3 submits that in view of the documentary evidence, like Ex.D-1 to Ex.D-9, it is evident that the partition of the ancestral properties have already been effected in 1978-79 itself and in pursuance thereof, the Revenue records were duly mutated in 1982-83. While inviting attention to the statement of the attesting witness Kiran Saheb (DW-3) and the scribe Shobharam (DW-4) of the alleged Will, it is contended further by him that the authenticity of the alleged Will has rightly been upheld by the trial Court. It is contended further that since the Plaintiff has questioned the authenticity of the alleged Will on the ground of fraud and undue influence, the burden to prove the same was, therefore, upon him and has placed his reliance upon the decision rendered by the Supreme Court in the matters of Ladli Parshad Jaiswal vs. The Karnal Distillery Co. Ltd. Karnal and others and Govindbhai Chhotabhai Patel and Ors. vs. Patel Ramanbhai Mathurbhai reported in **AIR 1963 SC 1279** and **AIR 2019 SC 4822**, respectively.

10. I have heard learned Counsel for the parties and perused the entire record carefully.

11. The questions which arise for determination in this Appeal are:-

“(i) Whether the ancestral properties described in Plaint Schedule 'A' were rightly held to be partitioned by the trial Court in the year 1978-79 ?”

“(ii) Whether due execution, alteration and validity of the Will deed dated 24.12.1998 (Ex.P-28C) executed by father Manrakhan Lal Gupta in favour of his son Kamalnarayan Gupta, has rightly been upheld by the trial Court ?”

“(iii) Whether the trial Court was justified in dismissing the Plaintiff's claim by holding that partial partition is not permissible under the law ?”

Determination of question No.(i) :-

12. Undisputedly, the suit properties described in Plaint Schedule – 'A' were the ancestral properties of the parties. According to the Plaintiff, the father Manrakhan Lal Gupta had made an arrangement in 1982 – 83 for the betterment of the said joint family property. It was, however, denied by Defendant No.3, mother Smt. Anusuiya Bai and sister Smt Kusum Gupta. According to them, the alleged suit properties have already been partitioned during the lifetime of Manrakhan Lal Gupta in 1978-79 and the Revenue records were mutated accordingly in the year 1982-83.

13. Exhibit D-1 is the application submitted jointly by the parties, including the Plaintiff Shivnarayan Gupta, before the Certifying Officer, Aarang. A bare perusal of the said application (Ex.D-1), submitted on 14.06.1982, would show that the partition has already been effected in 1978-79 during the lifetime of father and they are in possession since then, and therefore, they had prayed for recording of their names in the Revenue papers. It reveals further that the particulars of the alleged partition as effected in 1978-79 were also attached with the said application which were marked as Ex.D-2C to Ex.D-7C and Ex.D-9C and, similar is the fact visualized from the application Ex.D-8C submitted

jointly by the father and all his sons on 29.02.1982. That apart, the aunt (*bua*) of Plaintiff, namely, Smt. Kamli Bai (PW-2) has also admitted the alleged factum of partition in her evidence. In view of the specific admission of the parties, as reflected from those documentary evidence (Ex.D-1C to Ex.D-9C), it is evident that the alleged ancestral properties described in Plaintiff Scheduled 'A' were partitioned in 1978-79 and their names were accordingly recorded in 1982-83 in pursuance thereof and, the suit properties shown in Plaintiff Scheduled 'B' have fallen in share of father Manrakhan Lal Gupta. In view of the said background, I do not find any infirmity in the finding of the trial Court in this regard.

Determination of question No.(ii) :-

14. Now, in so far as the contention of Mr. Sharma that the alleged deed of Will (Ex.P-28C), purported to have been executed by father Manrakhan Lal Gupta in favour of his son Kamalnayan Gupta, was not duly executed, is also noted to be rejected for the reasons assigned hereinafter.

15. True it is, that one of its attesting witnesses, namely, Smt Kamli Bai (PW-2), who is the real sister of said Manrakhan Lal Gupta, has deposed that although her signature is there in the alleged Will in place of "D" to "D", but her brother Manrakhan Lal Gupta, the executor of it, has not signed in her presence and her signature on it has been obtained by said Kamalnayan Gupta. However, another attesting witness, namely, Kiran Saheb (DW-3), who is brother-in-law of said Kamal Narayan Gupta has deposed that he read over the alleged Will to said Manrakhan Lal Gupta and who in turn, upon accepting his signature made therein earlier in presence of the scribe at Mahasamund, has put his signatures again in two places of it and thereafter, he and said Kamli Bai have signed the same. His evidence could not be rebutted in cross

examination.

16. Shobharam Shriwas (DW-3) is the scribe of the alleged Will, who prepared the same at Mahasamund as per the instruction of the executor Manrakhan Lal Gupta. According to him, said Manrakhan Lal Gupta had come along with his son Kamalnarayan with a "*kacchha majboon*" (a kind of rough description) of a Will and he thereafter prepared the same as per his instruction, who put his signatures in each page of it. According to him, no witnesses were present at the time of execution of the Will, therefore, he suggested him to put his signature again in presence of the witnesses. It is stated further by him that after 2-3 days, he came along with the signature of witnesses on the alleged Will, where address of Kiran Saheb and the name of husband of another witness, namely, Smt Kamli Bai and her address was not there on the said document, therefore, he mentioned those particulars upon asking the same from him (Manrakhan Lal Gupta), who thereupon put his signature on the said relevant page. He deposed further that he (Manrakhan Lal Gupta) affixed his photograph in the Will in front of him when he came for the second time.

17. It is thus, evident from the aforesaid statements that although one of the attesting witnesses (Smt Kamli Bai) has not supported the execution of the alleged Will but a bare perusal of the statement of another attesting witness and the scribe of the alleged Will, it can safely be said that its execution was duly established by Defendant Kamalnarayan Gupta and in view of that, the reliance of Mr. Sharma as placed upon the decision in the matter of Janki Narayan Bhoir vs. Narayan Namdeo Kadam (*supra*) is rather supporting the version of the propounder of Will, namely Kamalnarayan Gupta. As in the said matter, one of the attesting witnesses was examined, but, he failed to prove

the due execution of the Will, said to have been executed by one Honaji Dama in favour of her cousin brother's son in accordance with the provision prescribed under clause (c) to Section 63 of the Indian Succession Act, 1925 and the other attesting witnesses, though alive, was not examined for its due execution. In view of that factual scenario, it was observed at paragraphs 10 and 12 as under:-

“10. Where one attesting witness examined to prove the will under Section 68 of the Evidence Act fails to prove the due execution of the will then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.”

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“12. Turning to the facts of the case on hand, it is evident that only one attesting witness Prabhakar Sinkar, examined in the case, did not prove the execution of the will inasmuch as he did not prove the attestation of the will by the other attesting witness Wagle who though available was not examined..... The evidence of Sinkar, the only attesting witness, does not satisfy the mandatory requirements of Section 68 of the Evidence Act. We are not in a position to accept the contention urged on behalf of the respondent that the evidence of other witnesses, namely, that of the respondent and the scribe could be considered under Section 71 of the Evidence Act. Section 71 has no application when the one attesting witness, who alone has been summoned, has failed to prove the execution of the will and the other attesting witness though available has not been examined..... This section has no application when one attesting witness has failed to prove the execution of the will and the other attesting witnesses were available who could prove the execution if they were called.”

18. It is thus, clear that if one of the attesting witnesses of the Will is

examined and fails to prove its due execution, then it could be proved by examining the other attesting witness of the Will. In the instant matter, as observed hereinabove, although one of the attesting witnesses of the Will (Ex.P-28c), namely Smt Kamli Bai (PW-2) has failed to prove its due execution in accordance with the provision prescribed under Section 63(c) of the Indian Succession Act, but it was, however, found to be duly established by its another attesting witness, namely, Kiran Saheb (DW-3) and the trial Court has, therefore, not committed any illegality in upholding its due execution and attestation.

19. In so far as the principles laid down by the co-ordinate Bench of this Court in the matter of Ghanshyam & Ors vs. Deepak Kumar Patnayak & Ors (supra) are concerned, the same are also held to be distinguishable from the facts involved in the present one. As in the said matter, one of the attesting witnesses, namely, Vijay Shankar of the Will was examined, but he failed to prove the due execution of it, while the other attesting witness namely Khemraj, though alive, was however not called for its due execution.

20. Mr. Sharma has placed his reliance further upon the decision rendered in the matter of Raj Kumari and Ors. vs. Surinder Pal Sharma (supra). However, the principles laid down therein are not applicable to the facts involved herein, as in the said matter, none of the attesting witnesses were called and, therefore, the execution of the Will cannot be said to be proved by taking recourse to the provision prescribed under Section 71 of the Succession Act. Further reliance of Mr. Sharma in the matter of M.B. Ramesh (dead) by Lrs. vs. K.M. Veeraje Urs (dead) by Lrs. and Others (supra) is also distinguishable from the facts involved in the present matter and would be of no use.

21. Besides, it is pertinently to be observed here that neither the execution of the alleged Will nor the signature of the testator on it has been denied by the Plaintiff. In fact, what was pleaded by him in this aspect is that since his father used to live with the said brother (Kamalnarayan), therefore, by taking undue advantage of it, he (Kamalnarayan) has prepared a forged and fabricated Will and this is the only plea which has been taken for its invalidation. However, in order to establish the fact that it was obtained by taking undue advantage or fraud, a specific plea in this regard was required to be taken as per the provision prescribed under Order 6 Rule 4 CPC. While interpreting the said provision, it was observed by the Supreme Court in the matter of *Ladli Parshad Jaiswal vs. The Karnal Distillery Co. Ltd. Karnal and others* (supra) at paragraph-20 as under:-

“20. Order 6 Rule 4 Civil P. C. provides that in all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms in the Appendix, particulars (with dates and items if necessary) shall be stated in the pleading. The reason of the rule is obvious. A plea that a transaction is vitiated because of undue influence of the other party thereto, gives notice merely that one or more of a variety of insidious forms of influence were brought to bear upon the party pleading undue influence, and by exercising such influence, an unfair advantage was obtained over him by the other. But the object of a pleading is to bring the parties to a trial by concentrating their attention on the matter in dispute, so as to narrow the controversy to precise issues, and to give notice to the parties of the nature of testimony required on either side in support of their respective cases. A vague or general plea can never serve this purpose; the party pleading must therefore be required to plead the precise nature of the influence exercised, the manner of use of the influence, and the unfair advantage obtained by the other. This rule has been evolved with a view to narrow the issue and protect the party charged with improper conduct

from being taken by surprise. A plea of undue influence must, to serve that dual purpose, be precise and all necessary particulars in support of the plea must be embodied in the pleading; if the particulars stated in the pleading are not sufficient and specific the Court should, before proceeding with the trial of the suit, insist upon the particulars, which give adequate notice to the other side of the case intended to be set up.”

22. In the light of the aforesaid principles laid down by the Supreme Court and in absence of the specific plea, it cannot be said that the alleged Will (Ex.P-28C) has been obtained by said Kamalnarayan Gupta from his father by playing fraud upon him as alleged by the Plaintiff. That apart, the burden to prove the same was upon the Plaintiff that by taking an undue advantage, he got it prepared as such. It was, however, neither stated as such by his said witness Smt Kamli Bai nor by him. Moreover, I do not find any cogent and reliable evidence led by him so as to hold that the alleged Will was a forged document or got it prepared by Defendant Kamalnarayan by taking any kind of undue advantage. At this juncture, the principles laid down in the matter of Sridevi and Others Vs. Jayaraja Shetty and Others reported in (2005) 2 SCC 784 are to be seen wherein, it has been observed by the Supreme Court at paragraph-11 as under:-

“11.....In case the person contesting the Will alleges undue influence, fraud or coercion, the onus will be on him to prove the same. As to what are suspicious circumstances has to be judged in the facts and circumstances of each particular case.
.....”

23. Yet, in the matter of Govindbhai Chhotabhai Patel an Ors. vs. Patel Ramanbhai Mathurbhai (supra), it has been held by the Supreme Court under such circumstances at paragraph-41 as under:-

“41. The facts of the present cases are akin to the facts which were before the Kerala High Court in Kannan Nambiar. The appellants have not denied the execution of the document but alleged forgery and fabrication. In the absence of any evidence of any forgery or fabrication and in the absence of specific denial of the execution of the gift deed in the manner held in Kannan Nambiar, the Donee was under no obligation to examine one of the attesting witnesses of the gift deed. As per evidence on record, the Donee was taking care of the Donor for many years. The appellants were residing in the United States but failed to take care of their parents. Therefore, the father of the appellants has executed gift deed in favour of a person who stood by him. We find that there is no error in the findings recorded by the High Court.”

24. In view of the foregoing discussions and in the light of the principles laid down by the Supreme Court, the due execution, attestation and validity of the Will, dated 24.12.1998 (Ex.P-28-C) cannot be held to be a forged or a fabricated one, as alleged by the Plaintiff nor could it be disowned from the stretch of any imagination and Dependant No.3 (Kamalnarayan Gupta) has thus, acquired his interest with regard to the properties mentioned therein, except the properties i.e. bearing Khasra Nos.1923/3, 2655 and 2655/3 and 2939/2 admeasuring respectively as 0.226, 0.550, 0.311 and 0.069 hectares of land, owned by father Manrakhan Lal Gupta as the same were not the part of it.

Determination of question No.(iii):-

25. Admittedly, a house bearing House No.13/10 situated at Narmada Para, Station Road, Raipur was found to be owned by father Manrakhan Lal Gupta, yet the same has not been included in the suit. In view of that, the trial Court has rightly arrived at a conclusion based upon the principles laid down in the matter of Janouti Bai vs. Rajo Bai reported in **1985 M.P.W.N 400**, that the

partial partition is not permissible and I do not find any infirmity in the same.

26. Consequently, the Appeal, being devoid of merit is hereby dismissed.

No order as to costs.

27. A Decree be drawn accordingly.

Sd/-
(Sanjay S. Agrawal)
Judge

Priya