

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.838 of 1980

(Against the judgment and order dated 21.08.1980 passed by 2nd Additional District Judge, Arrah in Probate Case No.36 of 1969/Title Suit No.12 of 1969).

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Arvind Kumar Pandey & Ors.

.... Defendants-Appellants

Versus

Krishna Ballav Tiwary & Ors.

.... Plaintiffs-Respondents

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Appearance :

For the Appellant/s : Mr. Anil Kumar Jha, Sr. Advocate

Mr. Harendra Kumar Tiwary, Advocate

For the Respondent/s : Mr. Radha Mohan Pandey, Advocate

Mr. Chandra Shekhar Verma, Advocate

Mr. Vibhuti Ranjan, Advocate

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date: 15-12-2015

1. The defendants have filed this First Appeal against the judgment and order dated 21.08.1980 passed by the learned 2nd Additional District Judge, Arrah in Probate Case No.36 of 1969/Title Suit No.12 of 1969 whereby the court below allowed the probate case and granted letters of administration.

2. The original respondent, Banshidhar Tiwary filed the aforesaid probate case for the grant of letters of administration with the Will executed by Most. Bhagjogana Kuer in favour of him on 15.06.1966. According to the plaintiff (since deceased), Bhagjogana Kuer died on 9th February, 1968. She had executed the Will, as such, the plaintiff is the legatee.



3. After notice, the original appellant appeared and filed caveat and contested the matter. Thereafter, the probate case was converted to title suit. According to the objectors-caveators, the property for which the probate case has been filed was not in possession of Bhagjogana Kuer when she executed the Will. The Will is not true and genuine document rather it is fabricated document. Bhagjogana Kuer had no intention to execute the Will in favour of the plaintiff. The Will in question is neither executed duly and attested validly. On 15.06.1966, Bhagjogana Kuer had gone to Jagdishpur, Sub-Registrar office in order to register a sale deed in favour of one Kalaktar Ahir for selling her land of village Lahthan. The petitioner, Banshidhar accompanied her and then he along with Kalaktar Ahir, Kedarnath, Sheokant Lal, Parmeshwar Lal conspired together and got a deed of Will executed by Most. Bhagjogana Kuer by practicing fraud upon her. Sometime before the execution of the Will Bhagjogana Kuer was ill and as such, she was very weak both physically and mentally. She executed the Will when she was not of sound mind and she was not knowing that in fact, she was executing a Will.

4. The further case of the objector is that Bhagjogana Kuer executed a gift on 26.01.1968 in favour of Sri Ram Pandey with respect to 2.85 ½ acres out of properties mentioned in the probate



case. After execution of gift, she was to register the same but Sri Ram Pandey fell seriously ill, therefore, the gift deed could not be registered. When the petitioner (plaintiff) came to know about the execution of gift deed by Bhagjogana Kuer, the plaintiff kidnapped Bhagjogana Kuer and killed her at village Jigna by administering poison to her. She was hale and hearty at the time of execution of gift deed. After alleged Will, said Bhagjogana Kuer has executed the gift deed in favour of Sri Ram Pandey. The Will automatically stand revoked with respect to 2 acre 85 ½ decimals.

5. On the aforesaid pleadings of the parties, the learned court below framed the following issues:

- I. Whether the Will in question is true and genuine?
- II. Whether the Will in question was executed by Most. Bhagjogana Kuer in sound and disposing state of mind?
- III. Whether the applicant is entitled to if so, in respect of which of the suit properties?

6. Thereafter, the court below by the impugned judgment and order allowed the probate case recording a finding that objectors failed to prove that any fraud was played on her and further, found that the Will is valid and genuinely executed by Bhagjogana Kuer.

7. The learned senior counsel, Mr. Anil Kumar Jha for the appellants submitted that the learned court below has not



properly appreciated the evidences and wrongly held that the Will in question is valid and genuine document. According to the learned counsel, the plaintiffs examined only one attesting witness to prove the due execution of the Will by Bhagjogana Kuer whereas according to law, two attesting witnesses are required to be examined. The attesting witness who has been examined has in his evidence clearly stated that she has identified Bhagjogana Kuer before the Registrar, therefore, the witness who identified Bhagjogana Kuer cannot be termed as an attesting witness to the Will. In such circumstances, it can safely be said that none of the attesting witnesses have been examined by the plaintiffs-respondents in the court below but the learned court below without considering these materials wrongly held that the Will in question is valid and genuine. In support of his contention, the learned counsel relied upon various decisions to the effect that the identifying witness cannot be the attesting witness.

8. The learned senior counsel, Mr. Jha further submitted that in the Will, there is no description of the property but in the probate application, the petitioner/plaintiff has given the details of the property. The gift deed which was executed by Bhagjogana Kuer on 26.01.1968 was registered on 13.02.1974, therefore, with respect to the property covered by the gift, the Will stands revoked but the court below wrongly held that the Will is a genuine Will executed



by Bhagjogana Kuer. The learned counsel further submitted that there are many suspicious circumstances and the plaintiffs-respondents failed to explain the suspicious circumstances but the court below did not consider this aspect of the matter. The learned counsel further submitted that at the time of execution of so called Will, the original plaintiff was present there which again is one of the suspicious circumstances on the ground of which the Will can be said to be influenced by the plaintiff and as such, the plaintiff is not entitled to the grant of letters of administration. In support of his contention, the learned counsel relied upon AIR 1959 Supreme Court 443. The learned senior counsel further submitted that the onus is on the propounder to prove satisfactorily that the Will is genuine Will duly executed by Bhagjogana Kuer in presence of the attesting witnesses. In the present case, since only one attesting witness has been examined who too has stated that he had identified Bhagjogana Kuer before the Sub Registrar, he cannot be termed as attesting witness. Therefore, the Will is not duly proved as provided by the Act under Section 68 of the Evidence Act and Section 63(c) of the Indian Succession Act. On these grounds, the learned senior counsel submitted that the impugned judgment and order be set aside and the probate application filed by the plaintiff-respondent be dismissed.

9. On the other hand, the learned counsel for the



respondents submitted that it is not the case of the defendants-appellants that the original plaintiff has taken any active role in execution of the Will. Mere presence at the time of either execution or registration will not raise any suspicion. According to the learned counsel, the appellants had no caveatable interest because he is not related in any way with Bhagjogana Kuer. He is claiming interest in the property on the basis of alleged gift deed which is said to have been executed by Bhagjogana Kuer on 26.01.1968 but it was never registered by Bhagjogana Kuer. The appellant himself presented the same before the Sub Registrar for registration in the year 1974. Therefore, the gift deed itself is not a valid document and on the basis of this gift deed, it cannot be said that the caveator-appellant has got any interest in the property. The learned counsel further submitted that the court below has rightly considered all the witnesses and also the circumstances and thereafter rightly granted the letters of administration. According to the learned counsel, one attesting witness has been examined as required by Section 68 of the Indian Evidence Act. This attesting witness also identified the executant, Bhagjogana Kuer before the Sub Registrar. Merely because he identified her before the Sub Registrar, it cannot be said that he is not an attesting witness. On these grounds, the learned counsel submitted that the First Appeal be dismissed.

10. In view of the above contentions of the parties, the point arises for consideration in this appeal is as to “whether the gift deed in question is genuine and validly executed by Bhagjogana Kuer in sound and disposing state of mind” and “whether the impugned judgment and order is sustainable in the eye of law?”

11. From the pleading, it appears that the specific case of the objector-appellant that Bhagjogana Kuer had gone to the office of Sub Registrar for executing a sale deed in favour of one Kalaktar Ahir on 15.06.1966. The plaintiff and Kalaktar Ahir with others conspired and played fraud on her and got the Will executed. So far commission of fraud is concerned, except this statement in the pleading nothing has been brought on record in support of the fact that any fraud was played on her. Although, it is the pleading of the objector that Bhagjogana Kuer executed the Will without knowing the contents thereof as she was not in sound mind and was not capable of understating the matter but expert was examined to compare the thumb impression of Bhagjogana Kuer on the Will and the admitted Rehan deed dated 03.06.1943(Ext. 6). Exhibit 4 series are the photographs and A.W.4 is the photographer. A.W.5 is the expert who opined that both the thumb impressions are of same person i.e. of Bhagjogana Kuer. He had compared the disputed thumb impression on the Will, Exhibit 1 with the admitted signature on Rehan deed,

Exhibit 6.

12. A.W.1 is Kalaktar Ahir himself in favour of whom on the same day, Bhagjogana Kuer has executed a registered sale deed. According to this witness, the Will was executed by Bhagjogana Kuer in presence of this witness. Parmeshwar Lal was the scribe of the Will. The contents of the Will was read over and explained to Bhagjogana Kuer by the scribe. This witness signed on the request of Bhagjogana Kuer on behalf of her. Bhagjogana Kuer has put her L.T.I. on the same. The attesting witnesses have also signed in presence of each other at the instance of Bhagjogana Kuer. His evidence is also that Bhagjogana Kuer was in sound disposing mind.

13. A.W.2 is the scribe of the Will. He has also fully supported the case about the fact that at the instance of Bhagjogana Kuer he scribed the Will and read over and explained it to Bhagjogana Kuer and after understanding, she put her L.T.I. A.W.3 also fully supported the fact of execution and attestation of the Will. This A.W.3 is the attesting witness. He has fully supported his case and proved the due execution of the Will according to the provision as contained in Section 68 of the Evidence Act and Section 63(c) of the Indian Succession Act. A.W.6 is the plaintiff himself. He has stated that the Will was not executed in his presence. From these evidences, now it becomes clear that the plaintiff has produced the evidences to show



that Bhagjogana Kuer had in fact, executed the Will and the Will was duly attested by the attesting witnesses. The Will was read over and explained to her and she after understanding the contents thereof put her L.T.I. The case of the objector-appellant is also that on the same day, she had gone to Sub Registrar office for the purpose of executing sale deed and she executed a sale deed and registered the same in favour of Kalaktar Ahir. Now, therefore, it cannot be said that for the purpose of executing and registering the sale deed, she was of sound mind but for executing the Will and registering the same she was not of sound mind. As stated above, although, the objector admitted that she executed the Will but she could not know the contents. The plaintiff has examined the witnesses to the satisfaction of the Court who all specifically stated that the contents of the Will were read over and explained to her by the scribe in presence of the witnesses and then she put her L.T.I. So far playing fraud is concerned, except the pleading nothing is there on record brought at by the objector.

14. Order VI Rule 4 C.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 aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading.” In the present case, except

the use of the word fraud, nothing has been brought on record by the objector.

15. The objectors-appellants have also examined witnesses in support of their case. O.W.9 who is one of the objectors has stated that the Will in question was obtained by practicing fraud on Most. Bhagjogana. The evidences of other witnesses are also on the same line.

16. The learned senior counsel, Mr. Anil Kumar Jha appearing for the appellants submitted that no citation was given by the plaintiff and the appellant suo motu appeared and filed caveat. In such circumstances, the court below should have rejected the probate application in view of provision as contained in Section 235 of Indian Succession Act. So far this submission is concerned, it may be mentioned here that it is not the case of the objector that Bhagjogana Kuer died leaving behind any near relation or agnate. According to the plaintiff, she died without leaving any near relation and, therefore, there was no question of giving any citation arises. Here, in the present case, the appellants are objecting the grant of letters of administration on the basis of the so called gift said to have been executed by Bhagjogana Kuer on 26.01.1968. It may be mentioned here that the defendant-objector's case is that on 15.06.1966, Bhagjogana Kuer was not in sound disposing mind and she was not

capable of understanding the affairs and was not knowing as to whether she executed sale deed or a Will but now with respect to the alleged gift deed, the objector's case is that she executed the gift.

17. The learned senior counsel submitted that the question of title cannot be decided in probate case. So far this submission is concerned, no doubt, it is settled principles of law that question of title cannot be decided in a proceeding under the Indian Succession Act but in the present case, the appellants are claiming caveatable interest on the basis of gift. The gift deed is said to have been executed on 26.01.1968, Exhibit E. This Exhibit E is the certified copy of the gift deed. The original was never produced by them. It may be mentioned here that according to the plaintiff, Bhagjogana Kuer has not executed the alleged deed of gift. Sri Ram Pandey has set up a fictitious lady and got a deed of gift executed in his favour. Now, therefore, original gift deed is not on record, therefore, the learned court below found that in absence of the original gift deed, the thumb impression cannot be compared. However, it is clear that the gift deed was never registered during the lifetime of Bhagjogana Kuer nor Bhagjogana Kuer presented the gift deed before the Sub Registrar for registering it. From perusal of the gift deed, it appears that the gift deed was produced by Sri Ram Pandey himself before the Sub Registrar for registration after the death of Bhagjogana



Kuer. The only reason assigned for not presenting the gift deed by Bhagjogana Kuer during her lifetime is that wife of Sri Ram Pandey was ill. So far this ground is concerned, it is not reliable as because of illness of wife of Sri Ram Pandey why Bhagjogana Kuer will not produce the gift deed before the Registrar for registering the same. This explanation cannot be accepted.

18. It further appears that the probate case was filed on 22.04.1969 and thereafter a case was registered by Sri Ram Pandey before the police alleging that the gift deed has been stolen away in the night of 12/13 December, 1969. Exhibit 4 is the letter dated 13.12.1969 written by Sri Ram Pandey to the officer-in-charge, Ramgarh police station. Exhibit B is the endorsement made thereon. Therefore, these documents came into existence after institution of the suit.

19. The defendants produced Exhibit C series, the rent receipts which are not relevant for deciding the genuineness of the Will in question. Likewise, the other documents Exhibit F series which are letters in postcard are also not relevant for deciding the genuineness of the Will. Prima facie, it appears that the gift deed in question on the basis of which the appellants are claiming title over 2 acres 85 ½ decimals has not been proved to have been executed and registered by Bhagjogana Kuer. It is settled principles of law that the

question of title or validity of gift deed cannot be decided in a proceeding for the grant of probate or letters of administration. Therefore, this question raised by the defendants-appellants may be raised before the appropriate forum but prima facie, in the present probate application, they have got no caveatable interest.

20. The learned senior counsel Mr. Jha relied upon the decision of Hon'ble Supreme Court **AIR 1959 Supreme Court 443 (H. Venkatachala Iyengar v. B.N. Thimmajamma and others)** and submitted that presence of the propounder is a suspicious circumstances and in the present case, the attesting witnesses and other witnesses examined by the propounder himself have stated that propounder i.e. plaintiff was present at the time of execution of the Will. So far this submission is concerned, it may be mentioned here that the Hon'ble Supreme Court in the said decision has held that if the propounder takes a prominent part in the execution of the Will which confers substantial benefit on him that itself is a suspicious circumstances attending the execution of the Will and in appreciating the evidence in such a case, the court should proceed with an open but nevertheless vigilant and cautious mind. In the present case at our hand, the propounder has clearly stated in his evidence that it was not executed in his presence. Moreover, there is nothing on record to show that the propounder took a prominent part in execution of the

Will. In my opinion, therefore, this decision is not applicable here.

21. The Hon'ble Supreme Court subsequently in **AIR 2005 Supreme Court 4362(Pentakota Satyanarayana and others v. Pentakota Seetharatnam and others)** has held that active participation and execution of Will by propounders/beneficiaries - that by itself is not sufficient to create any doubt either about testamentary capacity or genuineness of Will." In this decision it has further been held by Hon'ble Supreme Court that "signatures of the Registering Officer and of the identifying witnesses affixed to the registration endorsement were sufficient attestation within the meaning of the Act. The endorsement by the sub-registrar that the executant has acknowledged before him execution of deed also amount to attestation." In the present case also, the endorsement of registering officer is there. In addition to that, the propounder has also examined the scribe and one of the attesting witnesses.

22. The learned senior counsel, Mr. Jha relied upon a decision of this Court, AIR 2015 Patna 137 and submitted that A.W.3 has admitted that he identified Bhagjogana Kuer before registering officer, therefore, it cannot be said to be an attesting witness. In my opinion, the fact of the case relied upon is different than the present case. In **A.I.R. 2004 Supreme Court 436(Bhagat Ram and another v. Suresh and others)** and **A.I.R. 1969 Supreme Court 1147(M. L.**

Abdul Jabbar Sahib v. H. Venkata Sastri and Sons and others

etc.) referred to in the aforesaid decision clearly held that an attesting witness who identified the executant before the Registering Officer cannot be said to be attesting witness. In the present case, in fact, A.W.3 is attesting witness. Subsequently, he identified Bhagjogana Kuer before the Registering Officer. Now, therefore, it cannot be said that A.W.3 who is attesting witness will not become the attesting witness only because he has identified Bhagjogana Kuer. I, therefore, find that this decision is not helpful to the appellants.

23. In view of my above discussion, I find that the plaintiffs-respondents have been able to prove that the Will in question is genuine Will duly executed by Bhagjogana Kuer in favour of the original plaintiff and it was duly attested by the two attesting witnesses, as such, is genuine and valid Will. Prima facie, the objector-appellant failed to prove their caveatable interest in the present case. So far the gift deed is concerned, prima facie, it is found that it is not a valid document. However this finding is recorded for the purpose of finding the caveatable interest only. If the appellants will file any suit subsequently on the basis of this gift deed this finding will never operate as *res judicata*.

24. In view of the above facts, the finding of the court below is, therefore, hereby confirmed. I further find that the appellants

failed to prove any fraud played by the original plaintiff-respondent and also failed to prove that the executant, Bhagjogana Kuer was not in sound mind on the date of execution of the Will. The finding of the court below on this question is also hereby confirmed.

25. In the result, I find no merit in this First Appeal and accordingly, this First Appeal is dismissed. In the facts and circumstances of the case, no order as to costs.

(Mungeshwar Sahoo, J)

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