

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.658 of 1994

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Against the judgment and order dated 26th Day of July, 1994 passed by Shri Awadh Kishore Singh, Chauhan, 5th Additional District Judge, Muzaffarpur in Probate Case No. 16/84.

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1. Dhirendra Thakur son of Late Mundrika Prasad Thakur, R/o village- Basua, P.S.- Aurai, District-Muzaffarpur
2. Smt. Prabha Devi W/o Radhey Shyam Singh D/o Late Mundrika Prasad Thakur, R/o village- Rain Shanker, P.S.- Runnisaidpur, District- Sitamarhi
3. Bharati Devi wife of Sant Kumar Singh, D/o Late Mundrika Prasad Thakur, R/o Tilak Tajpur Pota, P.S.- Runnisaidpur, District- Sitamarhi
4. Smt. Arati Devi wife of Mukesh Kumar Sahi, D/o Late Mundrika Prasad Thakur, R/o village- Bhalura, P.S.- aurai, District- Muzaffarpur

.... Appellants

Versus

Dharambir Sharma son of Shri Treveni Prasad Sharma, R/o village- Bsua, P.S.- Aurai, District- Muzaffarpur..... Respondent

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Appearance :

For the Appellant/s : Mr. V.R.P.Singh, Advocate
For the Respondent/s : Mr. Sidhendra Narayan Singh, Advocate
Mr. Ritesh Kr.Nr.Singh, Advocate
Mr. Ramakant Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

C.A.V. JUDGMENT

Date: 06-05-2015

The instant appeal has been filed by the caveators against the sole applicant in whose favour application for grant of Probate of the Will, dated 10.03.1989, executed by Most. Jai Rani Kuer @ Ram Jasi Kuer, has been allowed under judgment, dated 26th day of July, 1994, passed by the 5th Additional District Judge, Muzaffarpur in Probate Case No. 16 of 1989.

2. Briefly stated, the case of the applicant of Probate Case is that the husband of testatrix died in or about the year 1945 in state of separation from her two brothers. Sri Chandrika Prasad Thakur, the husband of the testatrix, had two younger brothers Mundrika Prasad Thakur and Triveni Prasad Sharma. Sri Chandrika Prasad Thakur died leaving behind his widow Jai Rani Kuer @ Ram Jasi Kuer and minor daughter Rampukari. Rampukari was married



at village Riga, District Sitamarhi but her husband died issueless only after two years of marriage, Rampukari also died. Thus, the testatrix became the sole heir. The testatrix was being looked after by the parent of the applicant. Jamabandi remained joint and the land of Jai Rani Kuer was recorded jointly in her name along with co-sharer Mundrika Prasad Thakur and Triveni Prasad Sharma. Jai Rani Kuer bestowed love affection to the applicant as her own son and had expressed her desire that she would bequeath her properties to the applicant. Most. Jai Rani Kuer @ Ram Jasi Kuer was suffering from leprosy which had caused thumb and other fingers of her both hands damaged and in that condition she insisted to execute the Will in respect of her properties in favour of the applicant. She called her full brother Ram Narayan Thakur, nephew Badri Narayan Thakur and her Samdhi Ram Kedar Sharma (father-in-law of deceased daughter). She also called the Scribe Ram Karan Sharma and some agnates of her late husband namely, Ramhit Thakur and Ram Kalewar Thakur and in their presence she asked the Scribe to prepare the Will and accordingly, on 10.03.1989, as per desire of the testatrix, the Will was executed and after knowing the contents of the Will she put pen mark on each and every page of the Will by holding the pen in her right hand palm. As per instruction of Jai Rani Kuer @ Ram Jasi Kuer, her nephew Badri Narayan Sharma wrote the execution portion and signed the Will on her behalf. The Will was attested by the aforesaid persons present there and the Scribe also certified the execution of the Will and thereafter, the Will was handed over to the applicant with her blessings on 10.03.1989. Jai Rani Kuer @ Ram Jasi Kuer thereafter, died on 16.07.1989 at about 8:30 am at her residence at village Basuwa, P.S.- Aurahi, District- Muzaffarpur where she was residing and which was her fixed place of abode.



3. The applicant filed the Probate Case which was numbered as Probate Case No. 16 of 1989 and thereafter, the father of the appellants filed a caveat, objecting the grant of Probate in favour of Dharmbir Sharma the applicant. As per the case of caveator, the Will in question is not a genuine one and has been created by committing forgery and fabrication, the thumb and other fingers of both the hands of Jai Rani Kuer were intact and in working condition and, as such, giving pen mark is a rank forgery, it is not possible that a person who has lost thumb and fingers will be able to hold a pen by palm and will put pen mark. The applicant was on duty at Katihar on 10.03.1989 and, as such, as claimed that on 10.03.1989, the testatrix had made over the Will to the applicant is totally false and imaginary. Neither any description of the properties of Jai Rani Kuer is appended with the Will nor there is any explanation for not appending the same. The testatrix died much after the alleged deed of Will and as such its non-registration also creates the circumstance that the same was not executed by Jai Rani Kuer. Bholu Thakur the brother of Badri Narayan Thakur was negotiating for the marriage of his daughter with sons of applicant's father and the father of the applicant had agreed that there will be no demand of dowry if Badri Narayan Thakur will assist him in getting the Will prepared with regard to properties of Jai Rani Kuer.

4. Learned court below on the basis of aforesaid pleadings of the parties framed the following issues:

- (1) Is the case, as framed, maintainable ?
- (2) Is the Will genuine, valid and legally enforceable ?
- (3) Whether Most. Jai Rani Kuer was possessed of sound health and mind and story of being affected with leprosy and her fingers had melted away correct ?
- (4) Whether the last rites and shradhh of Most. Jai Rani

Kuer were performed by the applicant or by the objector ?

(5) Whether the applicant is entitled to grant of Probate with Will annexed thereto ?

(6) To what other relief or reliefs, is the applicant entitled.

5. First of all issue no. 2 was taken for consideration and it was decided in favour of the applicant. Similarly, other issues were also decided in favour of the applicant and accordingly, the Probate Application was allowed, on contest without costs, with a direction to grant probate in favour of the applicant on furnishing security bond of Rs. 40,000/-.

6. During the pendency of the Probate Case, the caveator Mundrika Thakur died and thereafter in his place the appellants were substituted as his legal heirs.

7. On behalf of appellants it has been submitted that the applicant has failed to prove the execution of Will as per the provisions of Section 63 (c) of Indian Succession Act. It has come during evidence that testatrix was literate but in spite of that she has not signed the Will, regarding disease of leprosy also the evidence adduced on behalf of applicant is full of contradiction. There is no medical certificate that she was suffering from leprosy. When on behalf of appellants it was stated that on 10.03.1989, the applicant was on duty at Katihar, then amendment petition was filed stating that Will was handed over to him on 14.07.1989 and not on 10.03.1989 but that amendment petition was not allowed and, as such, the case of the applicant remained that the Will was handed over to him on 10.03.1989 itself. During evidence the applicant has tried to introduce that the Will was handed over to him on 14.07.1989 and, as such, this discrepancy also creates doubt over the genuineness of the Will in question. The Will was not registered, two witnesses, namely, Ramhit Thakur and Ram Kalewar Thakur have also not been examined and description of properties have



not been mentioned and, as such, the applicant failed to prove that the Will was executed by the testatrix out of her own sweet will in her sound condition of health and mind. Learned Additional District Judge has given perverse finding with respect to issues nos. 1, 2, 3, 4 and 5. There is no finding as to whether the last rites and Shradh of Most. Jai Rani Kuer was performed by the applicant or by the objector. It was the case of the caveator that Most. Jai Rani Kuer died in state of jointness and her last rites and Shradh were performed by objector. The Scribe is related to the applicant and the Will was prepared after committing forgery. The learned court below has not appreciated the evidence available on the record properly and, as such, the impugned judgment is fit to be set aside. Reliance has been placed upon the decision of this Court reported in **2013 (4) PLJR 703** in the case of **Mahadev Rai & Ors. Vs. Bhagwan Rai & Ors.**

8. On the other hand, on behalf of respondent-applicant it has been argued that the applicant has succeeded in proving that the Will was executed by Most. Jai Rani Kuer out of her own sweet will and desire and she has instructed her brother, nephew, Samdhi and Scribe to get the Will prepared bequeathing her properties to the applicant. The Will was executed as per requirements of Section 68 of the Evidence Act and Section 63 of the Indian Succession Act. On behalf of caveator only one witness, who is caveator himself, has been examined whereas on behalf of applicant 4 witnesses including the applicant have been examined and they all are competent. The case of caveator that the brother of Badri Narayan Thakur was negotiating for marriage of his daughter with son of Triveni Prasad Sharma and in turn, Triveni Prasad Sharma advised Badri Narayan Thakur to assist him in getting the Will prepared with regard to properties of Jai Rani Kuer appears not convincing as the Will was executed only in favour of one of the sons of Triveni Prasad



Sharma not in favour of Triveni Prasad Sharma. Learned court below has rightly considered the evidence available on the record and came to the conclusion that the Will executed by Jai Rani Kuer @ Ram Jasi Kuer in favour of Dharmbir Sharma is genuine, valid and legally enforceable. There is no suspicious circumstance available in the present case. No evidence has been adduced on behalf of the caveator, whereas the applicant has adduced evidence and has filed prescription of doctor also dated 07.04.1988 vide Ext. 5.

9. Learned counsel for the appellants on the other hand placed reliance upon the judgment reported in **2002(3) PLJR SC Page 103** in the case of **Madhukar D. Shende vs. Tarabai Aba Shedage** paragraphs 8 and 9, (AIR) **2005 Supreme Court 233** paragraphs 9, 10 and 13 in the case of **Daulat Ram & Ors. Vs. Sodha & Ors.**, (2003) **8 Supreme Court Cases 537** paragraph 9 in the case of **Ramabai Padmakar Patil vs. Rukminibai Vishnu Vekhande & Ors.**, **2002 (2) PLJR 41** paragraph 2 and 3 in the case of **Ajay Kumar & Anr. vs. Smt. Godawari Devi**, (2007) **1 SCC 546** paragraph 28, 77 and 79 in the case of **Gurdev Kaur & Ors. Vs. Kaki & Ors.**

10. In view of the above contentions of the parties, the main point arises for consideration in this appeal is as to whether the applicant has been able to prove the genuineness of the Will and due execution of it by Most. Jai Rani Kuer @ Ram Jasi Kuer and whether there are any suspicious circumstances which the propounder is legally bound to explain to the conscience of the Court.

11. The parties have produced their respective evidence oral as well as documentary in support of their respective cases.

12. On behalf of applicant AW 1 is Badri Narayan Sharma. He is the own nephew of Most. Jai Rani Kuer @ Ram Jasi Kuer. He has fully



supported the case of the applicant and has stated that Most. Jai Rani Kuer called him, his uncle Ram Narayan Thakur and Samdhi Pandit Ram Kedar Sharma and in their presence she told the Scribe to execute the Will in favour of Dharmbir Sharma and accordingly, as per instruction of Jai Rani Kuer, contents of the Will were scribed and after scribing the Will the Scribe read over and explained to Jai Rani Kuer and Jai Rani Kuer after understanding the contents, executed the Will by putting pen mark, as her fingers and thumb were damaged due to leprosy. On the instruction of Jai Rani Kuer, this witness executed the Will and has proved his signature as Ext. 1. This witness has executed and signed on behalf of Jai Rani Kuer. He has stated that Jai Rani Kuer used to love Dharmbir Sharma as her own son and Dharmbir Sharma also used to take care of her as like his mother. Jai Rani Kuer being pleased with the services executed the Will in favour of Dharmbir Sharma. This witness has further stated that the mental condition of Jai Rani Kuer was well at the time of execution of the deed of Will and her last rites and Shradh were performed by Dharmbir Sharma. He has further stated that Jai Rani Kuer after understanding everything has executed the Will out of her own free will and consent and no fraud was committed. This witness has been cross-examined at length but nothing has come to disbelieve his testimony rather he has become more competent. In paragraph 106, of his evidence, he has stated that deed of Will was not given to Dharmbir rather it was kept by Most. Jai Rani Kuer herself. He has denied that the Will is forged and fabricated and was brought into existence after the death of Jai Rani Kuer.

13. AW 2 is Ram Narayan Thakur. He is the own brother of Most. Jai Rani Kuer. He has fully supported the case of the applicant and due execution of the Will executed by Jai Rani Kuer in favour of Dharmbir Sharma.



He has stated that Jai Rani Kuer being pleased with the services of Dharmbir Sharma gave all her properties to Dharmbir Sharma after executing the Will. He has stated that the Scribe scribed the deed of Will at the instruction of Most. Jai Rani Kuer in his presence and the contents of the Will were read over and explained to Jai Rani Kuer and then she put pen mark on the deed of Will and thereafter, AW 1 executed and signed the Will on her behalf. He has proved his signature on the deed of Will. He has further stated that on the deed of Will Ram Kedar Sharma, Ramhit Thakur and one another person of village Basuwa have also signed as witnesses. He has stated that Jai Rani Kuer was suffering from leprosy and on her call he has gone to village Basuwa. This witness further states that last rites and Shradh of Jai Rani Kuer were performed by Dharmbir Sharma and at the time of execution of the Will the mental condition of Jai Rani Kuer was well. He has denied the case of caveator by stating that no fraud was committed in executing the deed of Will and Bhola Thakur never contacted to marry his daughter with the sons of Triveni Prasad Sharma. During cross-examination he has become more competent and nothing has come by which his testimony can be shaken rather in paragraph 37, of his evidence, he has stated that at the instruction of Jai Rani Kuer the deed writer scribed the deed. This witness has further been cross-examined on commission due to his health problem and during cross-examination on commission also nothing has come to disbelieve his testimony.

14. AW 2A is Ram Kedar Sharma. He has also been examined on commission. He is Samadhi of Most. Jai Rani Kuer. He has stated that the daughter of Jai Rani Kuer was married with his son Binay Kumar Sharma but Binay Kumar Sharma died just after two years of marriage issueless and thereafter, the daughter of Jai Rani Kuer also died. He has fully supported the



case of the applicant and due execution of the Will. He states that the Deed writer prepared the Will at the instruction of Jai Rani Kuer and the contents were read over to her and then she after understanding the contents executed the Will by putting her pen mark and on her behalf, on her instruction, AW 1 made endorsement and signed on the deed of Will. He has stated that Jai Rani Kuer was suffering from leprosy and her fingers were damaged. She put her pen mark with the help of her palm. He has stated that at the time of execution of the Will Ram Narayan Thakur, Badri Narayan Thakur, Ramhit Thakur and Ram Kalewar Thakur were present and at the instruction of Jai Rani Kuer all have signed the deed of Will as witnesses. He has proved his signature on the deed of Will as Ext. 2/4. He has stated that Jai Rani Kuer used to love Dharmbir Sharma as her son and Dharmbir Sharma used to take care of Jai Rani Kuer as his mother. Her last rites and Shradh were performed by Dharmbir Sharma. At the time of execution of the deed of Will, the mental condition of Most. Jai Rani Kuer was well. No fraud has been committed in execution of the deed of Will. He has been cross-examined at length but nothing has come to disbelieve his testimony rather he has become more competent. He has denied the case of the caveator.

15. AW 3 is Ram Karan Sharma, deed writer. He has stated that on 10.03.1989, Jai Rani Kuer executed the Will in favour of Dharmbir Sharma and he has scribed the Will at the instruction of Most. Jai Rani Kuer and at that time her mental condition and capacity of understanding were well. He has read over the contents of the Will to her and after understanding the contents of the Will she executed the deed of Will by putting pen mark with the help of her palm as her fingers were damaged due to leprosy. She told Badri Narayan Thakur to execute the deed of Will on her behalf and to sign over the same and accordingly, Badri Narayan Thakur made endorsement and signed over the deed



of Will at the instruction of Jai Rani Kuer, all other four persons have also signed as witness and he also signed as a deed writer. He has proved his signature and endorsement as Ext. 3. He has denied regarding the fraud committed at the time of execution of the Will. He has been cross-examined at length but nothing has come to disbelieve his testimony. He has denied the case of caveator during cross-examination.

16. AW 4 is the applicant himself. He has fully supported his case. In paragraph 15 of his evidence, he has stated that Jai Rani Kuer used to love him as her son and he also used to give respect as his mother. She has expressed her willingness to give all her properties to him in presence of villagers. She has called her brother, nephew and her Samadhi to remain present at the time of execution of the Will. The deed writer was also called by her and two witnesses Ram Kalewar Thakur and Ramhit Thakur of village Basuwa were also called by her. In the deed of Will, she declared him as executor and gave right to take probate. He has proved the signature of Ramhit Thakur as Ext. 2/5 and the signature of Ram Kalewar Thakur as Ext. 2/6. In paragraph 14 he has stated that deed of Will was handed over to him on 14.07.1989 by Most. Jai Rani Kuer. He has stated that Rs. 10,000/- was spent in the Shradh of Most. Jai Rani Kuer. He has denied the case of caveator. He has been cross-examined at length but nothing has come to disbelieve his testimony. In paragraph 123 of his evidence, he admits that due to mistake in paragraph 6 of his application it was written that the deed of Will was handed over to him on 10.03.1989. As a matter of fact, he has stated that on 14.07.1989 deed of Will was handed over to him. Besides this discrepancy there is nothing in his cross-examination. He has stated that Ram Jasi Kuer was treated by Dr. Biswanath Singh and he has proved the prescription as Ext. 5. Urine examination was also done and that was marked



'X' for identification. The report of skin test has been marked as Ext. 6. He has proved the Choukidari receipt as Ext. 7 and leave sanctioned to him as Ext. 8. He has been cross-examined at length but he has not been shaken. Ext. 1 is the endorsement and signature of Badri Narayan Thakur on the deed of Will Ext. 2 is the signature of Badri Narayan Thakur on behalf of Jai Rani Kuer @ Ram Jasi Kuer Ext. 2/1, and 2/2 are also the signature of Badri Narayan Thakur on behalf of Jai Rani Kuer @ Ram Jasi Kuer. Ext. 2/3 is the signature of witness Ram Narayan Thakur on the deed of Will. Ext. 2/4 is the signature of witness Ram Kedar Sharma on the deed of Will. Ext. 2/5 is the signature of witness Ramhit Thakur and Ext. 2/6 is the signature of Ram Kalewar Thakur on the deed of Will. Ext. 3 is the certificate and signature of deed writer and Ext. 4 is the deed of Will. Ext. 5 is the prescription of Dr. Biswanath Singh, Skin and Leprosy Specialist by which it reveals that Jai Rani Kuer was being treated by him. Ext. 6 is the skin test report of Ram Jasi Kuer, Ext. 7 is the choukidari receipt in the name of Triveni Thakur. Ext. 8 is the leave sanction report of Dharmbir by which it reveals that Dharmbir came after taking leave of 3 days on 13.07.1989 to his house but due to death of his aunt and to perform last rites he again got extended the leave and he joined duty on 01.08.1989 and his leave from 13.07.1989 to 30.07.1989 was sanctioned. Report of urine examination of Jai Rani Kuer has been marked 'X' for identification and voter list of the year 1988 has been marked as Ext. 9 by which it reveals that Ram Jasi Kuer was living with the applicant in house no. 251 whereas the caveator was living in another house bearing no. 261.

17. On behalf of caveator only one witness has been examined who is Dharendra Thakur himself. He has stated that at the time of death of Jai Rani Kuer she was joint with his father and with the father of the applicant and



her last rites was performed jointly. His father has performed the last rites. He has denied regarding execution of deed of Will. He has also stated that Jai Rani Kuer was not suffering from leprosy and she was never treated at Darbhanga and all the documents relating to her treatment which have been filed are forged and fabricated. He has stated that after the death of Jai Rani Kuer the deed of Will was prepared. Before her death she was suffering from illness for last six months and one week ago, she got attack of paralysis. He has also stated that Jai Rani Kuer died on 16.07.1989 at 11:00 am and not at 8:30 am. He has stated that Jai Rani Kuer never loved the applicant as her son and the applicant also never took her care as he remained out of village always. In Paragraph 33 of his evidence, this witness has admitted that Triveni Sharma used to get treated Jai Rani Kuer and in paragraph 34 he states that he has got no prescription regarding the treatment of Jai Rani Kuer. Suggestion has been given to him that till the death of Jai Rani Kuer her mental condition was well to which he denied. He has admitted in paragraph 45 that Ram Narayan Thakur is the brother of Jai Rani Kuer and Badri Narayan Tahkur is his nephew. In paragraph 47 this witness has stated that Dharmbir Sharma, Bagis and Bal Krishan Sharma are three brothers. In paragraph 48 and 49 he does not know about the daughter of Bhola Thakur. In paragraph 52 he has admitted that Ram Kedar Sharma is the father-in-law of the daughter of Ram Jasi Kuer. In paragraph 54 he states that the house of Triveni Sharma and his house is in one courtyard. Suggestion has been given in paragraph 55 that the house of both are separate. In paragraph 66 he states that Jai Rani Kuer has got 1/3rd share and in paragraph 67 he states that Jai Rani Kuer has executed the deed of Will for 1/3rd share but later on he states that the Will is forged. In paragraph 90 he states that he never got treated Jai Rani Kuer anywhere and in paragraph 91 he states that there is no proof

regarding Shradh of Jai Rani Kuer being performed jointly. In paragraph 96 he states that there is no proof that Jai Rani Kuer was literate. No other witness nor any document has been produced on behalf of the caveator to show any suspicious circumstances in execution of the Will.

18. The rulings relied upon by the learned counsel for the appellants reported in **2013 (4) PLJR 703** in the case of **Mahadeo Rai & Ors. Vs. Bhagwan Roy & Ors.** is not applicable in the present case. In the case of **Mahadev Rai** (Supra) the fact is on different footing. In that case no adequate provision was made for the widow whereas in the present case Most. Jai Rani Kuer @ Ram Jasi Kuer has got no other dependent on her and her pen marks appears not doubtful. In the present case the own nephew, brother and Samadhi of Ram Jasi Kuer besides others who are near relatives of Ram Jasi Kuer have been called and in their presence, at the instruction of Ram Jasi Kuer, will was executed. In the present case the propounder has not taken any part in the execution of the Will. Here, the attesting witnesses are not the relatives of the propounder rather they are the relatives of Ram Jasi Kuer.

19. In the case of **Madhukar D. Shende** (Supra) it has been held by the Apex Court in paragraph 9 which are as follows:

“It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing *prima facie* evidence proving the competence of the testator and execution of the will in the manner contemplated by law. The contestant opposing the Will may bring material on record meeting such *prima facie* case in which event the onus would shift back on the propounder to satisfy the court affirmatively that the testator did know well the contents of the will and in sound disposing



capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the court would not return a finding of 'not proved' merely on account of certain assumed suspicion or supposition. Who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

20. In the present case also the applicant has been able to establish the competence of testatrix to make the Will at the time when it was executed. Here, the applicant has discharged his onus by adducing evidence of AW 1, AW 2, AW 2A, AW 3 and AW 4. The caveator opposing the Will has not brought anything on the record. The Hon'ble Apex Court, in the case of **Daulat Ram & Ors.** (Supra), held that burden to prove that Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on person who alleges it to be so. Here in the present case, the caveator has not been able to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud. In the present case, besides AW 1, AW 2, AW 2A and AW 3 have been examined as attesting witnesses. In the present case also the applicant has been able to show that the Will executed by testatrix and that she had put her pen mark out of her own free will and at that time she was in sound disposition state of mind and understood the nature and effect of the dispositions and the testatrix had put the pen mark in the presence of those witnesses, who attested it. The Hon'ble Apex Court, in paragraph 10, has been pleased to hold that once these elements are established, onus rests on



the propounder to remove the suspicion by leading the appropriate evidence. The burden to prove that the Will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleged it be so. In the present case only discrepancy is that in the application in paragraph 6 it is alleged that the Will was handed over to the applicant on 10.03.1989 itself but during evidence the applicant has stated that the Will was handed over to him on 14.07.1989 and this suspicion has well been removed by leading the aforesaid evidence. The Hon'ble Apex Court, in the case of **Rambani Padmakar Patil** (supra), has been pleased to hold that if one of the attesting witness is examined and no infirmity found in his testimony, non-examination of the person who had typed the Will or the Advocate who was present at the time of preparation or registration of the Will cannot be a ground to discard the Will. Thus, argument of learned counsel for the appellants that two attesting witnesses have not been examined cannot be a ground to discard the Will. In the present case as has already been discussed above, more than one attesting witness has been examined and no infirmity has been found in their testimony and, as such, non-examination of two attesting witnesses who are of village Basuwa cannot be a ground to discard the Will.

21. It has also been argued on behalf of the appellants that AW 1, AW 2 and AW 2A are of other village and that two villagers, who are the attesting witnesses have not been examined and, as such, this creates suspicion and that suspicion has not been removed by the propounder. In the case of **Ajay Kumar Singh** (supra), this Court held, in paragraph 2, that simply because the attesting witness and Scribe belong to a different village it will not render the deed of Will invalid or forged. In the present case the propounder has been able to prove by evidence on record that the Will dated 10.03.1989 was free from all

doubts and suspicion whereas the appellants had failed to prove by evidence that the Will in question was tainted with fraud and undue influence.

22. In **Gurdev Kaur** (supra), the Apex Court, in paragraph 28, has held that the court's role is limited to examine whether the instrument propounded is the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. In paragraph 71 further it has been reiterated that that court's role is limited to examining whether the instrument propounded is the last Will of the deceased is or is not that by the testator and whether it is the product of the free and sound disposing mind. It is only for the purpose of examining the authenticity or otherwise of the instrument propounded as the last Will that the Court looks into the nature of bequest. In the present case, the propounder has been able to prove that the Will propounded is the last Will of the Testatrix and it is the product of the free sound disposing mind.

23. The applicant has got two more brothers also but the Will has been executed in favour of only the applicant and the two brothers are not objecting the Will and this circumstance also goes to lead an inference that the Will was executed by Jai Rani Juer @ Ram Jasi Kuer out of her own free will and consent.

24. The learned court below, in spite of filing objections by the caveator, did not get the probate case converted into title suit and this is mere an irregularity. In this appeal also, on behalf of appellants, no objection has been raised in this regard. In my considered opinion, only on this mere irregularity, the findings arrived at by the learned court below cannot be interfered with by this Court.

25. In view of the above discussions and in the facts and



circumstances, I find that the propounder respondent has succeeded to remove the suspicious circumstances to the satisfaction of the Court, non-examination of two attesting witnesses is not fatal. In the present case the Will has been proved to be validly executed by Most. Jai Rani Kuer @ Ram Jasi Kuer in favour of Dharmbir Sharma and the respondent has succeeded in proving its due execution.

26. I, therefore, do not find any reason to interfere with the findings recorded by the trial court. Accordingly, the findings of the trial court are here by affirmed. In the result, this first appeal is hereby dismissed. There shall be no order as to costs.

(Jitendra Mohan Sharma, J)

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