

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.238 of 2012

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1. RAM NANDAN SINGH S/O LATE NAGESHWAR SINGH @ NAGO SINGH
 2. ARBIND SINGH S/O RAM NANDAN SINGH
 3. RAMPATI DEVI W/O RAM NANDAN SINGH
 4. BABLOO KUMAR
 5. REKHA KUMARI
 6. SONI KUMARI

SL. NO.4 IS MINOR SON OF ARBIND SINGH AND SL.NO.5&6 ARE MINOR DAUGHTERS OF ASRBIND KUMAR UNDER THE GUARDIANSHIP OF HIS FATHER

ALL RESIDENT OF VILLAGE - MAUR, P.O. MAUR, POLICE STATION - BARBIGHA, DISTRICT - SHEIKHPURA (MUNGYR)

.... CAVEATOR/APPELLANT/S

VERSUS

1. RAM KISHORE SINGH @ GOPAL SINGH S/O RAM NANDAN SINGH R/O VILLAGE + P.O. MAUR, POLICE TATION - BARBIGHA, DISTRICT - SHEIKHPURA (MONGHYR).
2. MEERA DEVI D/O RAM NANDAN SINGH R/O VILLAGE + P.O.- MAUR, POLICE STATION - BARBIGHA, DISTRICT - SHEIKHPURA (MONGHYR).

.... APPELLANTS/RESPONDENT/S

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Appearance:

For the Appellant/s : Mr. Srinandan Prasad Singh, Adv.
Manish Kumar, Adv.
For the Respondent/s : Mr. Bipin Kumar, Adv.
Mr. Arun Kumar, Adv.

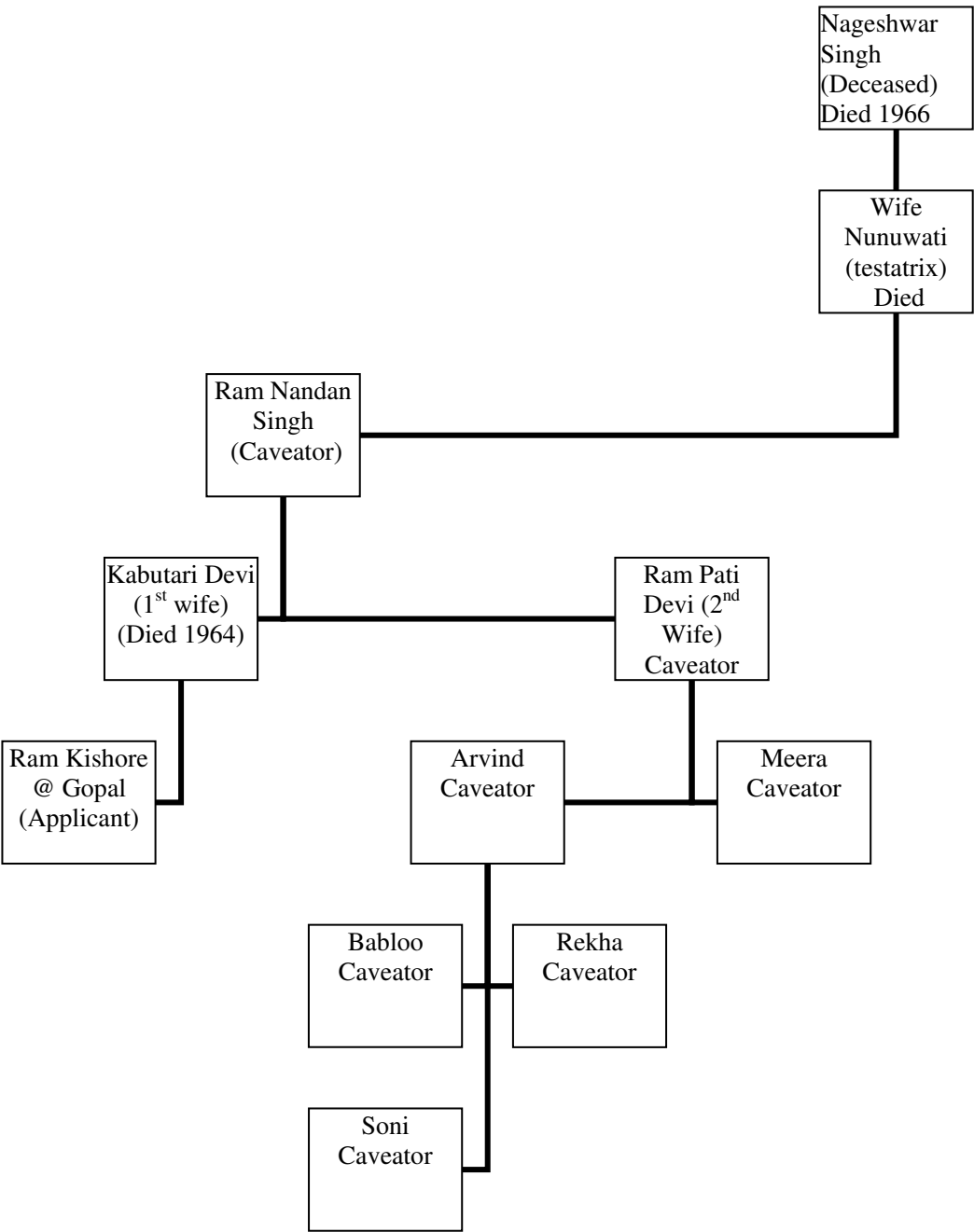
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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 30-10-2015

Caveator /appellant filed instant appeal in accordance with Section 299 of the Indian Succession Act against an order passed by Additional District Judge, FTC-I, Sheikhpura in Probate Case no.10 of 2002 whereby and whereunder probate has been granted relating to unregistered will dated 19.05.1979 executed by Most. Nunuwati Devi in favour of Ram Kishore Singh @ Gopal Singh, respondent/propounder. Before coming to detail the pleadings of the respective parties, admitted genealogical table is

taken note of in order to better appreciation of facts as well as legal aspect, as argued on behalf of respective parties.



2. Asking for grant of probate/letter of administration with regard to a will dated 19.05.1979 executed by Most. Nunuwati Devi relating to properties detailed under Schedule-I of the plaint, it has been submitted that Nunuwati, testatrix happens to be grandmother of applicant, Ram Kishore Singh @ Gopal Singh. It has also been pleaded that Schedule-I property



happens to be the exclusive property possessed by Nageshwar Singh and Nunuwati Devi, which was allotted to them in pursuance of Title (Partition Suit No.42 of 1966) brought up by the father of applicant as well as sole son of Nageshwar Singh, namely, Ram Nandan Singh and was accordingly managed by them independently. Nageshwar Singh died in the year 1966 leaving behind his wife Nunuwati Devi and on account thereof, Nunuwati Devi succeeded and continued with the aforesaid status till her death on 31.03.1983.

3. It has further been pleaded that Ram Nandan Singh was married with Kabutari Devi. Kabutari Devi died in the year 1964 leaving behind sole son Ram Kishore Singh @ Gopal Singh (applicant) who was aged about five years at that very time. Later on, Ram Nandan Singh remarried with Rampati Devi and from said wedlock Arbind, Meera were begotten. Arbind had one son Babloo and two daughters Rekha and Soni, all minors.

4. It has further been averred that Rampati Devi happens to be callous towards Ram Kishore Singh @ Gopal Singh (applicant) whereunder she began to torture him and on account thereof, his maternal uncle (Mama) took him away to his place where he continued for a quite long time.

5. It has also been narrated that behaviour of Rampati Devi towards Nunuwati Devi was also ruthless as well as Nunuwati Devi was ill-treated at her end and further, taking part at the side of his second wife, Ram Nandan Singh also treated Nunuwati Devi with cruelty whereupon Nunuwati Devi was

disassociated with Ram Nandan Singh his second wife and siblings.

6. In the background of ungraced family atmosphere as well as considering the service rendered by the applicant whenever he used to visit at his house from Mamhar, Nunuwati Devi became affectionate towards him as a result of which executed deed of will on 19.05.1979 with regard to the properties having allotted in pursuance of title (Partition Suit No.42 of 1966) on her own free will after communicating her intention. In order to have documentation, scribe was called upon who was one Awadh Kishore @ Baban Singh who wrote down the will as per instruction and direction of Nunuwati Devi in presence of witnesses, namely, Rajendra Singh, Chando Singh, Sheodani Singh, Uma Singh as well as also put her thumb impression over the will in their presence and handed it over to the applicant. It has also been asserted that after death of Nunuwati Devi, the Schedule-I property came in peaceful possession of applicant / legatee and is continuing with the same. It has further been averred that when he contacted the local bank to borrow loan to purchase tractor for agriculture work, the bank officials directed to have the will probated for its legal recognition otherwise loan will not be sanctioned and on account thereof, completing other paraphernalia as well as disclosing the fact that the present will happens to be the only one/last will of the testatrix, petition has been filed with the prayer as stated above.

7. Caveator/Appellants who are father step mother,



step brother, sister and son's daughter of step brother of legatee appeared and filed objection whereunder they have had objected over source by stating that no share was allotted to them under Title (Partition Suit) No.42 of 1966. Then had denied the assertion of the applicant that he was nourished by his maternal uncle as well as grandmother (testatrix) rather he was looked after properly by his father and step mother. It has also been disclosed that there was no discord amongst family members rather congenial, harmonious, pleasant atmosphere was prevailing in the family.

8. It has further been pleaded that applicant got married while staying at his Mamhar, came and then began to live separately. Only to defeat interest of the objector created false and forged document by way of instant will relating to Schedule-I properly. It has further been submitted that Nunuwati Devi never expressed her desire to execute will in favour of applicant nor had executed the will in question out of free will. Her thumb impression has been taken over the alleged deed of will under shrewd criminal design as well as conspiracy. That happens to be reason behind that applicant could not get possession over single inch of the land detailed under Schedule-I of the plaint.

9. It has also been submitted that after death of Nageshwar Singh, father Nunuwati Devi was taken cared of by her son Ram Nandan Singh (one of the objector), she resided with Ram Nandan Singh till her last days. After her death, all the rituals were performed by the Ram Nandan Singh. Therefore,

there was no question for executing the deed in question in favour of applicant and accordingly controverted the pleadings advanced by the applicant/respondent.

10. On the pleadings of the respective parties, the learned lower court framed following issues:-

- i. Whether deed of will dated 19.05.1989 alleged to be executed by Late Nunuwati Devi in favour of applicant Ram Kishore Singh @ Gopal Singh with respect to suit land, is a forged, fabricated or genuinely executed?
- ii. Whether petitioner is entitled for grant of letter of administration or for grant of probate of will dated 19.05.1989?

and decided both these issues in favour of applicant/respondent, granted probate holding the will dated 19.05.1979 to be legal, genuine. Hence, this appeal.

11. While challenging the judgment impugned, the learned counsel representing the appellant submitted that the judgment impugned suffers from inherent lacuna and on account thereof, would not survive.

12. To support such plea, it has been submitted that the alleged will happens to be dated 19.05.1979 while petition or probate had been filed in the year 2002. It has further been pleaded that although, at an earlier occasion the view that no limitation is applicable for praying for the grant of probate/letter



of administration against the will but subsequently the Hon'ble Apex Court in ***Kunvarjeet Singh Khandpur v. Kirandeep Kaur*** reported in **(2008) 8 SCC 463** as well as in ***Krishna Kumar Sharma v. Rajesh Kumar Sharma*** reported in **2009(3) PLJR 80 (SC)** has observed that Section 137 of the Limitation Act will apply and on account thereof, petition has to be filed within three years. However, relaxation has been given in case the delay is properly explained. So far present petition is concerned, it is apparent that delay has, not been properly explained and on account thereof, instant petition is found completely eclipsed by law of limitation.

13. It has further been submitted that there happens to be inherent defect persisting on the record which, the learned lower court, completely ignored. To buttress such plea, it has been submitted on behalf of appellant that in accordance with Section 281 of the Succession Act, the petition has to be verified by one of the attesting witness which has not been complied with. That means to say there happens to be utter violation of mandate of Section 281 of the Succession Act and on account thereof, instant petition should not have been admitted as well as proceeded with.

14. It has also been submitted that two attesting witnesses Uma Singh and Rajendra Singh have been examined as PW.2 as well as PW.6 respectively. From their deposition, it is apparent that neither they could be able to prove the document in terms of Section 68 of the Evidence Act nor have had satisfied

the genuineness of the will more particularly over its script as well as thumb impression having at the end of Nunuwati in their presence.

15. It has also been submitted that from the evidence of the witnesses, it is evident that will in question happens to be shrouded by suspicious circumstance and on account thereof, it was obligatory on the part of the propounder / applicant to have properly explained. They have failed on that very score, makes the document suspicious one whereupon, the learned lower court would not have granted probate. Hence, prayed for setting aside the order impugned.

16. At the other end, the learned counsel for the respondent submitted that on account of presence of step mother of respondent and further, falling under trap of step mother encrust the peaceful, congenial, harmonious atmosphere of the family since before execution of the will in question. To support the same, it has been submitted that father of applicant/respondent, namely, Ram Nandan Singh objector / applicant was the person who had filed Title (Partition Suit No.42 of 1966) wherein share was carved out followed with independent possession. Had there been falsity in the assertion of the applicant-respondent, then in that event, the objector /appellant would have filed judgment and decree of the aforesaid partition suit. Non filing of the same by the objector/appellant would led an adverse inference against him in the background of the fact that at the time of alleged litigation applicant /objector

was minor. Apart from this, it has also been submitted that whenever partition is sought for at the end of son, mother is entitled for a unit.

17. It has also been submitted that admittedly, in the year 1979 when the will in question was executed by the Nunuwati Devi applicant/respondent was minor and accordingly, the assertion raised on behalf of his father has got no substance. In the aforesaid background, referred contents of will wherefrom it is apparent that complete picturisation of continuing family atmosphere has been depicted therein. It has also been submitted that happens to be reason behind that objector/appellant had not controverted the contents of the will. It has also been submitted that the judgment so referred by the learned counsel for the objector/appellant did not satisfy that on that very score the probate proceeding should be thrown away outrightly rather explanation, if any, being offered is to be considered accordingly. From the application as well as from the evidence of witness Sadhu Sharan Singh, PW.4 who happens to be maternal uncle, the delay has properly been explained. It has further been submitted that two attesting witnesses Uma Singh and Rajendra Singh have categorically supported the execution of the will by the Nunuwati Devi in her free conscious state of the mind as well as they also endorsed their individual status over the document including others and on account thereof, the learned lower court has rightly granted probate.

18. After hearing rival submissions as well as going

through the respective pleadings the following points have been perceived to be just and legal for proper adjudication.

a) Whether the judgment impugned suffers from illegality?

19. Before coming to the points as formulated above it looks apparent to take stock of the lower court record.

20. At a glance of lower court record, it is evident that altogether seven witness have been examined on behalf of applicant-respondent out of PW.1 is Vijay Kumar, PW.2 is Uma Singh, PW.3 is Kanchan Kumar, PW.4 is Sadhu Sharan Singh, PW.5 is Ram Kishore Singh @ Gopal Singh, PW.6 is Rajendra Singh, PW.7 is Gopal Sharan Singh while at the other end two witnesses have been examined on behalf of objector/appellant out of whom OPW No.1 is Arvind Singh, OPW No.2 is Rampati Devi. The applicant-respondent had exhibited Ext.1-Signature of learned counsel over Vakalatnama, Ext.2-Signature of attesting witnesses Uma Singh over will dated 19.05.1979, Ext.3-Death certificate of Nunuwati Devi, Ext.4 Series-Signature of other witnesses over will dated 19.05.1979, Ext.5-Signature of scribe, Ext.5/1-Writing of scribe of will dated 19.05.1979. In likewise manner objector/appellant had exhibited Ext.A-Judgment dated 08.08.1994 passed in Title Suit No.2 of 1992, Ext.B-Certified copy of decree of Title Suit No.2 of 1992.

21. There happens to be procedure prescribed for filing of petition for probate wherein Section 280 attracts verification of the petition by the applicant as well as his pleader while Section

281 deals with verification of petition by one witness of the will and for that specific proforma has been prescribed. For better appreciation, Section 281 of the Indian Succession Act, 1925 is incorporated below:-

“281. Verification of petition for probate, by one witness to Will.—Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely:—

“I (C.D.), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence).”

22. After perusal of the lower court record, it is evident that no such verification at the end of one of the attesting witness of the alleged will over petition for probate has been made. From the judgment impugned, it is apparent that learned lower court had not taken into consideration the aforesaid deficiency as well as its repercussion while adjudicating upon the matter.

23. Apart from this, when the petition has been gone through, it is apparent from para-7 last line that will was handed over to the applicant by the testatrix. For better appreciation the same is quoted below:-

“.....
and after final preparation and execution of said Deed of Will, the testator Late Nunoowati Devi had handed over the original Deed of Will to the Lagatee namely Ram Kishore Singh @ Gopal Singh who is petitioner”

With regard to delay in filing petition, the same has been

explained under para-13 of the petition whereunder, it has been disclosed that delay was not intentional rather due to absence of knowledge of law and act as well as having assertion that no limitation in filing of probate case or grant of letter of administration is prescribed. Objector/appellant had taken the aforesaid ground of delay in filing petition for grant of probate.

24. The applicant/respondent had examined his maternal uncle, namely, Sadhu Sharan Singh, PW.4 who under para-5 had stated that on account of minority of Gopal Singh (petitioner), Nunuwati Devi had handed over the document to him to be kept under safe custody. He took the document to his house and then kept it along with other documents and forget it. Petitioner /objector Ram Kishore Singh @ Gopal Singh has been examined as PW.7 and in para-8 he had stated that he came to know about the will in the month of November, 2001 when it was handed over by his maternal uncle. During cross-examination at para-13, he had stated that his grand mother had not handed over the will to him rather she had handed over the same to his maternal uncle and at that very time he had aged about 10-11 years.

25. From the judgment impugned, it is evident that learned lower court had not discussed the aforesaid event.

26. True it is that the earlier judicial pronouncement favoured contention raised on behalf of applicant/respondent however, in due course of time the aforesaid pronouncement has been modified and recently in **Krishna Kumar Sharma v.**

Rajesh Kumar Sharma reported in **2009(3) PLJR 80 (SC)**, it has been held that article 137 of the Limitation Act does apply and for better appreciation the same is quoted below:-

“8. Though the nature of the petition has been rightly described by the High Court, it was not correct in observing that the application for grant of probate or letters of Administration is not covered by Article 137 of the Limitation Act. Same is not correct in view of what has been stated in **The Kerala state Electricity Board’s case** (supra). 9. Similarly, reference was made to a decision of the Bombay High Court’s case in **Vasudev Daulatram Sadarangani vs. Sajni Prem Lalwani** (AIR 1983 Bom. 268).”

Para 16 reads as follows:-

“16. Rejecting Mr. Dalapatrai’s contention, I summarise my conclusions thus:-

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of death of the deceased, is unwarranted;

(c) such an application is for the Court’s permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within three years from the date of the deceased’s death.

(e) delay beyond 3 years after the deceased’s death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and

attestation are proved, suspicion of delay no longer operates.”

10. These aspects were highlighted in ***Kunvarjeet Singh Khandpur vs. Kirandeep Kaur & Ors.*** [(2008) 8 SCC 473].

27. Furthermore, in terms of Section 63(c) of the Indian Succession Act, 1925, the will has to be attested by the attesting witnesses in whose presence the testator would have to affix his signature/LTI. During course of continuing over proceeding for grant of probate, it is evident that those signatures have to be brought up on record in terms of Section 68 of the Evidence Act and in case presence of witness is not procured, the same has to be proved in accordance with Section 71 of the Evidence Act. From perusal of the judgment of the learned lower court, it is evident that learned lower court had not commented while appreciating the evidence of the witnesses whether Will in question coupled with signature as well as LTI of Nunuwati Devi have been legally brought up on record in terms of Section 68 of the Evidence Act.

28. In ***M.B. Ramesh (D) By LRs. V. K.M. veeraje Urs (D) by LRs. & Ors.*** reported in ***AIR 2013 SC 2088***, it has been held:-

“16. That takes us to the crucial issue involved in the present case viz. with respect to the validity and proving of the will concerned. A will has to be executed in the manner required by Section 63 of the Succession Act. Section 68 of the Evidence Act requires the will to be proved by examining at least one attesting witness. Section 71 of the Evidence Act is another connected section “which is permissive and an enabling section permitting a party to

lead other evidence in certain circumstances", as observed by this Court in para 11 of *Janki Narayan Bhoir v. Narayan Namdeo Kadam* reported in AIR 2003 SC 761 and in a way reduces the rigour of the mandatory provision of Section 68. As held in that judgment Section 71 is meant to lend assistance and come to the rescue of a party who had done his best, but would otherwise be let down if other means of proving due execution by other evidence are not permitted. At the same time, as held in that very judgment the section cannot be read to absolve a party of his obligation under Section 68 of the Evidence Act read with Section 63 of the Succession Act to present in evidence a witness, though alive and available. The relevant provisions of these three sections read as follows:

"Section 63 of the Succession Act

"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)

(b)

(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 acknowledgment of his signature or mark, or of 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."

Section 68 of the Evidence Act

"68. Proof of execution of document required by law to be attested.— If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for

the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence:"

Section 71 of the Evidence Act

"71. Proof when attesting witness denies the execution.—If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence."

17. In the present matter, there is no dispute that the requirement of Section 68 of the Evidence Act is satisfied, since one attesting witness i.e. PW 2 was called for the purpose of proving the execution of the will, and he has deposed to that effect. The question, however, arises as to whether the will itself could be said to have been executed in the manner required by law, namely, as per Section 63(c) of the Succession Act. PW 2 has stated that he has signed the will in the presence of Smt Nagammanni, and she has also signed the will in his presence. It is however contended that his evidence is silent on the issue as to whether Smt Nagammanni executed the will in the presence of M. Mallaraje Urs, and whether M. Mallaraje Urs also signed as attesting witness in the presence of Smt Nagammanni. Section 63(c) of the Succession Act very much lays down the requirement of a valid and enforceable will that it shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will, and each of the witnesses has signed the will in the presence of the testator. As held by a Bench of three Judges of this Court (per Gajendragadkar, J., as he then was) way back in *H. Venkatachala Iyengar v. B.N. Thimmajamma* AIR 1959 SC 443, that a will has to be proved like any other document except that evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Succession Act, apart from the one under Section 68 of the Evidence Act.

18. The propositions laid down in *Venkatachala Iyengar (supra)* have been followed and explained in another judgment of a Bench of three Judges in *Jaswant Kaur v. Amrit Kaur*, reported in AIR 1977 SC 74, wherein the law has been crystallised by Y.V. Chandrachud,

J. (as he then was), into the following propositions:

"10. There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *H. Venkatachala Iyengar v. B.N. Thimmajamma and Ors.* [1959] Su. 1 S.C.R. 426 (AIR 1959 SC 443). The Court, speaking through Gajendragadkar, J., laid down in that case the following propositions:-

(1) Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.

(2) Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by Section 68 of the Evidence Act, one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence.

(3) Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.

(4) Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading



part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

(5) It is in connection with wills, the execution of which is surrounded by suspicious circumstances that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

(6) If a caveator alleges fraud, undue influence, coercion, etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."

19. In *Janki Narayan Bhoir* (AIR 2003 SC 761) (*supra*), this Court has explained the inter-relation between Section 63(c) of the

Succession Act, 1925 and Sections 68 and 71 of the Evidence Act, 1872. In that matter only one attesting witness to the will was examined to prove the will, but he had not stated in his deposition that the other attesting witness had attested the will in his presence. The other attesting witness, though alive and available, was not examined. The Court noted the relevant facts in para 5 of the judgment as follows:-

"Prabhakar Sinkar, the attesting witness, in his deposition stated that he did not know whether the other attesting witness Ramkrishna Wagle was present in the house of the respondent at the time of execution of the will. He also stated that he did not remember as to whether himself and Raikar were present when he put his signature. He did not see the witness Wagle at that time; he did not identify the person who had put the thumb impression on the will. The scribe Raikar in his evidence stated that he wrote the will and he also stated that he signed on the will deed as a scribe. He further stated that the attesting witnesses, namely, Wagle and Prabhakar Sinkar are alive."

On this background, the Court held at the end of para 6 of the judgment that "it is true that although a will is required to be attested by two witnesses it could be proved by examining one of the attesting witnesses as per Section 68 of the Evidence Act., but it also noted in paragraph 9 that "that one of the requirements of due execution of a will is its attestation by two or more witnesses, which is mandatory." In paragraphs 11 and 12 of the judgment, the Court noted the relevance of Section 71 of the Evidence Act by stating that "aid of Section 71 can be taken only when the attesting witnesses, who have been called, deny or fail to recollect the execution of the document to prove it by other evidence." "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." In the facts of the case, therefore, the Court held that the attestation of the will as required by Section 63 of the Succession Act was not established which

was equally necessary.”

29. Thus, considering the deficiency as indicated above it looks improper to accede with the finding recorded by the learned lower court. On account thereof, the judgment impugned is set aside. Appeal is allowed. However, the matter is remitted back to the learned lower court for fresh adjudication in terms of finding as recorded above. In the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J.)

Patna High Court
Dated 30th day of Oct., 2015
Prakash Narayan

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