

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.172 of 2012

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1. **Most Kewala Devi**, wife of Late Raj Mangal Chaudhary.
 2. **Ram Naresh Chaudhary**, son of late Raj Mangal Chaudhary, both resident of village-Bairaha Tola, Panchgahhia, Police Station and Anchal-Bathnaha, P.O.-Bhutahi, District-Sitamarhi.....Opposite Parties.... Appellant/s

Versus

1. **Sri Krishna Devi**, wife of Sri Raj Karan Chaudhary, resident of village-Bairaha tola, Panchgachhia, P. S. and Anchal-Bathnaha, Sub Registry Office-Bhutahi, Pargana-Nijamuddin, District-Sitamarhi.....Appellant.....Respondent 1st Party
2. **Raj Karan Chaudhary**, son of late Jagdeo Chaudhary, resident of village-Bairaha tola, Panchgachhia, P. S. and Anchal-Bathnaha, P.O.Bhutahi, District-Sitamarhi

Opposite Party Respondent/s IIND Party.

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Appearance :

For the Appellant/s : Mr. T. N. Maitin- Sr. Advocate
 Mr. Rajeev Kumar Sinha-Advocate
 For the Respondent/s : Mr. Abinash Kumar-Advocate
 Mr. Shankar Kumar-Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 15-12-2015

Opposite Parties/ Appellants filed instant appeal under Section 299 of the Indian Succession Act against the judgment dated 12.01.2010 passed by the Additional Sessions Judge, Fast Track Court-VII, Sitamarhi in Probate Case No.14 of 2002/ 01 of 2007 whereby and whereunder the learned lower Court allowed the petition by way of granting probate with regard to a will dated 02.11.1999 executed by late Jagdeo Chaudhary in favour of respondent 1st party/ applicant.

2. For the sake of convenience, the parties herein after are referred to in accordance with their original status before the learned

lower Court.

3. Applicant filed a petition in terms of Section 276 of the Succession Act (for Brevity Act) asking for grant of probate relating to a will executed by late Jagdeo Chaudhary in her favour, dated 02.11.1999 which happens to be the first and last will of aforesaid testator in accordance with Section 289 of the Act. It has further been disclosed that aforesaid testator Jagdeo Chaudhary, son of late Ram Khelawan Chaudhary died on 18.02.2002 at his native place at village-Bairaha, Panchgahhia, P. S. and Anchal-Bathnaha, District-Sitamarhi within original jurisdiction of Court. Furthermore, it has also been disclosed that aforesaid will happens to be registered one and was executed by the executant Jagdeo Chaudhary in sound state of physical as well as mental condition without any coercion, duress, allurement, out of love and affection as well as hospitality rendered by the applicant who is none else, own daughter-in-law. It has also been disclosed that deceased/ executant Jagdeo Chaudhary died leaving behind his pre-deceased son Raj Mangal Chaudhary's wife Most. Kewala Devi as well as his son Ram Naresh Chaudhary, another son Raj Karan Chaudhary, husband of applicant. Furthermore, completing the other formalities as well as detailing the properties covered under will under Schedule-A of the plaint, filed instant petition.

4. Opposite parties, who are wife and son of predeceased



son of late Jagdeo Chaudhary put their appearance and filed objection in a form of caveat wherein apart from others, had challenged the each and every aspect including the status of the alleged will. It has been submitted that family happens to be joint and on account thereof, late Jagdeo Chaudhary was not legally competent enough to execute will with regard to the joint family properties without having proper consent of other co-sharer.

5. It has also been pleaded that as late Jagdeo Chaudhary was not competent enough to execute the will relating to joint family properties, in likewise manner, applicant was not competent enough to ask for probate relating to the same on account of persisting infirmities. Furthermore, it has also been submitted that apart from ancestral property, the family also made acquisition wherein there happens to be contribution by all the coparceners. On account of some sort of dispute having visualized in the family ultimately let institution of Partition Suit No.11 of 2000 for peaceful, smooth way of partition of the family property. In the aforesaid background, the story of partition so propounded by the executant as is evident from the recital of the documents, has also been challenged.

6. With regard to genuineness of the document in question, it has specifically been pleaded that the same happens to be forged, fabricated, collusive document. To substantiate the same, it



has been submitted that alleged executant Jagdeo Chaudhary was more than 90 years of age at the time of alleged execution and was virtually crippled having loss of sound mental as well as physical condition and was unable to understand. Having such pitiable physical as well as mental condition, he was very much prone to influence.

7. To support the aforesaid theme, it has further been submitted that alleged executant Jagdeo Chaudhary was a literate person and having so, it was expected at his end, in case the alleged will dated 02.11.1999 happens to be genuine one, so claimed by the applicant, then in that event, it should have bore the signature of the executant deceased Jagdeo Chaudhary, contrary to it, it contains the L.T.I. and that supports a lot including a opportunity of being impersonated. So submitted that petition filed on behalf of applicant with regard to grant of probate in connection with will dated 02.11.1999 is not at all maintainable.

8. While the proceeding was sailing, one Raj Kishore Chaudhary nephew of executants late Jagdeo Chaudhary jumped into fray which was negativated by the learned lower Court against which a Civil Revision No.1640 of 2004 was filed and the same was allowed vide order dated 08.12.2004 whereupon another set of objection came up at his side.

9. It has been pleaded therein that though parties are



separate in mess and business and the lands have been partitioned for the sake of convenience, but partition in its real sense by metes and bounds has not been effected and so, the deceased Jagdeo Chaudhary was not in a position to execute will as aforesaid with regard to the properties so detailed therein, as the same happens to be joint properties of objector as well as deceased and his siblings.

10. It has also been submitted that in case the aforesaid mode of partition is accepted for a moment, then in that event, survey plot no.1706, 1714, 1715 have wrongly been incorporated in the will which found duly allotted under the share of the objector as well as having under peaceful possession apart from putting objection over other plots regarding which it has been stated that location has purposely been shifted contrary to physical possession of the respective parties. Furthermore, an ornamental objection has also been raised with regard to validity of the will in question.

11. On the basis of the pleadings of the respective parties, the learned lower Court, as is evident from Para-12 of the judgment, had formulated the single point for determination “whether the will is genuine and the same has properly been executed by Jagdeo Chaudhary in favour of Smt. Krishna Devi in accordance with law” and dealt with the same, finally concluding the same to be genuine and further, giving some sort of access to the parties concerned

relating to their plea keeping the door open for further litigation, allowed the petition whereby granted probate relating to the will dated 02.11.1999 executed by late Jagdeo Chaudhary in favour of applicant Smt. Krishna Devi, hence this appeal.

12. The learned counsel for the appellant/ opposite party while challenging the judgment impugned, raised several points, the first and foremost happens to be regarding propriety of the judgment impugned in the background of burden to be discharged by the respective parties. On this score, it has been submitted that suspicious circumstance is to be perceived by the Court as well as propounder of the will and obligation on the part of the propounder to remove the suspicious circumstance to the best of his ability up to such extent that one should find the aforesaid suspicious circumstance duly explained, but the learned lower Court shifted the burden on appellants, contrary to law. To support the same, the learned counsel for the appellants relied upon in 1959 Supplementary (1) SCR 426 as well as 1964 (6) SCR 814.

13. So far suspicious circumstance is concerned, it is itself apparent from face of the record. The husband of opposite party no.1, elder son of deceased Jagdeo Chaudhary, executant, pre-deceased him and on account thereof, in normal circumstance, deceased would have taken proper care, pity over opposite party no.1



as well as opposite party no.2, who at that very moment was minor and should have taken all sorts of precaution for their safeguard of interest as well as relating to future of opposite party no.2 in the background of the fact that deceased Jagdeo Chaudhary was not a vagabond as well as was Karta of the Joint Hindu Family. He had sufficient landed property under his control and instead thereof, completely ignoring their presence had brought such kind of document, which, in the facts and circumstances of the case became doubtful and for that should have properly been explained. From the record, it is evident that neither in the petition nor during course of evidence, the applicant explained the same. Therefore, the suspicious circumstance is not at all found properly explained.

14. It has further been submitted that during course of evidence of Smt. Krishna Devi, the applicant as PW-12, it is apparent that deceased Jagdeo Chaudhary was crippled at the time of execution of will. He had blurred eye sight, body was quivering, then in that event, having his L.T.I. over the document that too out of free-will again became doubtful, more particularly, when the same is taken together with the evidence of PW-2 Gorakh Baitha, an attesting witness. Therefore, after having conjoint reading of evidence of PW-12 along with PW-2 coupled with the evidence of PWs-3 and 4 scribe the dubious conduct of the applicant is found very much exposed and



that being so, again the learned lower Court should not have washed away the important, vital and poignant point by way of shifting the burden upon the appellant that as he pleaded the fraud, therefore, he was under obligation to prove the same which was a secondary issue as Appellants/ Respondent carried the burden to remove suspicious circumstance, first and having failed on that very score, granted probate.

15. It has further been submitted that when from the recital of the document, the alleged will dated 02.11.1999, it is apparent that both the brothers that means to say, executants Jagdeo Chaudhary as well as Jagat Lal Chaudhary, father of another objector were separate by metes and bounds and further, there also happens to be disclosure with regard to separation in the family of executant Jagdeo Chaudhary, then in that event, incorporating the lands having in share of objector Raj Kishore Chaudhary, son of Jagat Lal Chaudhary speaks a lot with regard to intention of the party as well as nature of the document having created at the end of the applicant. At this occasion, the learned counsel for the appellant drew attention towards Para-50 of PW-12 wherein she had narrated that the will contains the description of the land having been allotted to the deceased Jagdeo Chaudhary on partition only. In case, there happens to be some other land, that will not belong to her nor she will claim



the same. Then in that event, grant of probate relating to Schedule-A property as incorporated under plaint, out of which some of plot numbers happens to be the land belonged to the objector was not at all legally maintainable and in likewise manner, it has also been submitted that conclusion arrived at by the learned lower Court under Paras-37, 38 and 39 of the judgment was not at all recognizable in the eye of law. So, submitted that the judgment impugned suffers from illegality as well as arbitrariness and on account thereof, is fit to be set aside.

16. Per contra, it has been submitted on behalf of Respondent/ applicant that learned lower Court had passed the judgment after taking into account each and every legal as well as factual point and on account thereof, is fit to be confirmed. To support the same, it has been submitted that learned lower Court had adopted the basic principle of law whereunder the genuineness of will is to be adjudicated upon without going into controversy of the properties relating to which the will has been executed. Because of the fact that both has to be dealt with under two different spheres commanded by two different principles of law. The grant of probate of a will has nothing to do with the nature of the properties. The Court acting under Section 273 of the Indian Succession Act is to adjudicate whether the will in question was executed by the executants in pursuance of

mandate of law so identified under Section 63 of the Indian Succession Act and further, whether any sort of suspicious circumstance prevails and if so, whether that has properly been explained.

17. From perusal of the judgment impugned as argued, it is apparent that learned lower Court had taken into consideration the suspicious circumstance as pleaded on behalf of appellant by way of referring a decision reported in A. I. R. 2009 SC 1766 under Para-40 of the judgment and same has properly been dealt with. Therefore, the suspicious circumstance is found very much explained. In the aforesaid background, as submitted there happens to be no impediment apparent in considering as well as acknowledging the will dated 02.11.1999 to be a valid, genuine will executed by late Jagdeo Chaudhary in favour of applicant. So, it has rightly been simulated by way of granting probate.

18. It has also been pleaded that there happens to be no suspicious circumstances, as the deceased executant, been gratifyingly out of service rendered by the applicant inclined to bequeath the property to the applicant, which he done, while having sound mental & physical condition. Furthermore, on account of registration of document, is an additional circumstance to gravitate the status of executant having possessing sound mental as well as physical

condition. Not only this, evidence and finding of Finger Print Expert affirms towards its genuineness.

19. Furthermore, it has been submitted that Partition Suit No.11 of 2000 filed by the objector stood dismissed. Their grievances have already been disaccorded upto this Court, mainly on the ground that previous partition is found duly substantiated.

20. Then, coming to the plea of objector, it has been submitted that learned lower Court had taken into account the principle laid down by the High Court itself as reported in 2001 (2) P.L.J.R. 184 whereunder the option has been left upon for the objector to proceed afresh for declaration inspite of having the will probated. Therefore, the judgment impugned is legal, just and proper and is based upon proper appreciation of factual as well as legal aspect, hence, is fit to be confirmed.

21. After appreciating the rival argument, the sole point rests for adjudication “whether the Will in question is a valid Will?

22. Before coming to the main issue on a cursory glimpse of lower Court’s record, it is manifest that on behalf of applicants as many as eighteen (18) witnesses have been examined viz. AW-1 Bhabhichhan Singh, AW-2 Gorakh Baitha, AW-3 Ram Shringar Singh, AW-4 Ram Ashish Mahto, AW-5 Radheshyam Chaudhary, AW-6 Basudev Rai, AW-7 Gangadhar Jha, AW-8 Bhuta



Mahto, AW-9 Chhedi Mahto, AW-10 Mauje Thakur, AW-11 Shambhu Prasad, AW-12 Krishna Devi (applicant), AW-13 Raghunath Kumar, AW-14 Satya Narain Singh, AW-15 Nagendra Singh, AW-16 Nageshwar Rai, AW-17 Tapan Vishwas and AW-18 Shivendra Nath Mishra. On behalf of applicants some documents have also been proved which are exhibited as Exhibit-1 Original Will dated 02.11.99 executed by Jagdeo Chaudhary in favour of Smt. Krishna Devi, Exhibit-2 Signature of witness Bhagwan Jha over original Will dated 02.11.1999, Exhibit-3 and 3/1 are rent receipts, Exhibit-4 Sale deed dated 07.07.44 executed by Maharani Kuer, Exhibit-4/1 Sale deed dated 27.04.92 executed by Jagdeo Chaudhary, Exhibit-5, 5/1, 5/2 and 5/3 are photographs of admitted and disputed finger prints, Exhibit-6 is the report of Shivendra Nath Mishra, Finger Print Expert, Exhibit-7, 7/1, 7/2 and 7/3 are the negatives of Exhibit-5 series. Side by side, on behalf of Opposite Party as many as twelve (12) witnesses have been examined viz. O.P. No.-1 Raj Karan Chaudhary, O.P. No.-2 Upendra Kumar, O.P. No.-3 Krishna Chandra Prasad, O.P. No.-4 Birendra Ram, O.P. No.-5 Chunni Ram, O.P. No.-6 Siyaram Singh, O.P. No.-7 Lal Babu Das, O.P. No.-8 Shatrughna Rai, O.P. No.-9 Sukeshwar Das, O.P. No.-10 Mahendra Ram, O.P. No.11 Kebla Devi and O.P. No.12 Ram Naresh Chaudhary. Some documents have also been filed which are exhibited as Exhibit-A



rejoinder petition dated 15.05.2003 against the injunction petition filed by O. Ps. no. 2 and 3 in the Court in this case, Exhibit-B is the signature of Jagdeo Chaudhary on the receipt of Gram Panchayat dated 05.11.1987, Exhibit-C certified copy of judgment dt. 09.01.2007 of P. S. No.11/2000 passed by Sub Judge-IV, Sitamarhi. On behalf of Intervenor as many as seven witnesses have been examined viz. I.W.-1 Chulhai Mandal, I.W.-2 Jitan Mandal, I.W.-3 Marhen Ram, I.W.-4 Raj Kishore Chaudhary, I.W.-5, Shyam Sundar Yadav, I.W.-6 Bhikhari Jha and I.W.-7 Fulan Jha. Some documents have also been filed on behalf of intervenor which are exhibited as Exhibit-A/1-written statement on behalf of defendant 1st party Raj Karan Chaudhary and others in P.S. No.11/2000, Exhibit-B/1 Anchal C.O. Bathanaha letter no.2110 dated 12.08.2006, Exhibit-C/1 certified copy of application given by Jagdeo Chaudhary to C.O., Bathnaha, Exhibit-C/1-1 Partition order by C.O. Bathanaha in Mutation Case no.203/74-75, Exhibit-D/1 certified copy of Khatiyani, Exhibit-E/1 certified copy of C.O. Order dated 31.01.1975.

23. From perusal of Para-40 of the judgment impugned, it is evident that learned lower Court had taken into account the suspicious circumstance as identified by the Hon'ble Apex Court reported in A.I.R. 2009 SC 1766, I do nothing better than quote the same:-

“ Suspicious circumstances like the following may be found to be

surrounded in the execution of the will:

(i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.

(ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.

(iii) The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.

(iv) The dispositions may not appear to be the result of the testator's free will and mind.

(v) The propounder takes a prominent part in the execution of the Will.

(vi) The testator used to sign blank papers.

(vii) The Will did not see the light of the day for long.

(viii) Incorrect recitals of essential facts”.

24. In Sridevi and Ors.....Appellants vs. Jayaraja Shetty and Ors....Respondents reported in 2005(2) PLJR 154 (SC), it has been held:-

“11. *It is well settled proposition of law that mode of proving the Will does not differ from that of proving any other document except as to the special requirement of attestation prescribed in*



the case of a Will by Section 63 of the Indian Succession Act, 1925. The onus to prove the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and proof of the signature of the testator, as required by law, need be sufficient to discharge the onus. Where there are suspicious circumstances, the onus would again be on the propounder to explain them to the satisfaction of the court before the Will can be accepted as genuine. Proof in either case cannot be mathematically precise and certain and should be one of satisfaction of a prudent mind in such matters. 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. (For this see H. Venkatachala Iyengar v. B.N. Thimmajamma & Ors. [(1959) Supp. 1 SCR 426] and the subsequent judgments Ramchandra Rambux v. Champabai & Ors. [(1964) 6 SCR 814]; Surendra Pal & Ors. v. Dr. (Mrs.) Saraswati Arora & Anr. [(1974) 2 SCC 600]; Smt. Jaswant Kaur vs. Smt. Amrit Kaur & Ors.

[(1977)1 SCC 369]; and Meenakshiammal (Dead) thr. L.Rs. & Ors. v. Chandrasekaran & Anr. [(2005) 1 SCC 280].

25. So, after having proper appreciation of the principle laid down by the Hon'ble Apex Court, it is apparent that suspicious circumstances have to be identified, and the applicant is under obligation to explain. Therefore, it has to be seen whether the burden having over applicant, is to be found duly discharged?

26. Before coming over main point, it looks pertinent to have critical analysis of "Will". Will is a phenomenon whereunder executor is at liberty to settle his desire, intention relating to property possessed by him. Will in terms of Indian Succession Act, happens to be of a typical nature in the back ground of possessing some sort of peculiar character. The first one, like other documents to be registered in case consideration exceeds more than Rs.100, it has got no such obligation. The other one with regard to creation of a Will, the executant has got his option opened till his death by way of revocation which other kinds of document did not permit, the next one, the other kind of documents became operative during the life time of executant while Will is always operative after death of executant. Therefore, its recognition always happens to be posthumous.

27. Now, coming to the other score, Indian Succession Act deals with the definition of will, requirement of will and further,



having its acknowledgement in the eye of law by way of granting probate as well as letter of administration, according to desire of the executant, identifying the proper forum to entertain such prayer along with procedural law providing other kind of legal amenities. Section 2(h) of the Indian Succession Act defines 'Will' as:- Will means the legal declaration of the intention of the testator with respect to his property which he desires to be carried into effect after his death".

28. From plain reading of definition, it is apparent that a document to be considered as Will must fulfil the ingredients (I) Legal declaration at the testator's intention (II) That declaration must be with respect to his property (III) The desire of testator which should be effectuated after his death. That means to say, the legal declaration should be relating to the property belonging to testator, which happens to be volatile till it is finally settled. At the present moment, Section 59 of the Indian Succession Act has also to be taken into consideration which lays down:-

59. Person capable of making Wills.—Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 1.—A married woman may dispose by Will of any property which she could alienate by her own act during her life.

Explanation 2.—Persons who are deaf or

dumb or blind are not thereby incapacitated for making a Will if they are able to know what they do by it.

Explanation 3.—A person who is ordinarily insane may make a Will during interval in which he is of sound mind.

Explanation 4.—No person can make a Will while he, is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

29. Having minute observation of Section 59 of the Act, as referred above, it is apparent that it not only permit execution of will by the executant regarding his property, rather it also prescribe qualification thereto.

30. From category no.4, it is evident that the person having his incapability to perceive what he is going to do on account of intoxication or from illness or from any other cause, is further found complimented with illustration no.III and being so, evidence on that score must be brought up on record.

31. Not only the Indian Succession Act abandoned to define property, it also failed to incorporate whether the definition of property having in different text be taken into account while dealing with the subject. As per dictionary meaning, property means, as the



right and interest which a man has in lands and chattels to the exclusion of others. The term 'property' is a generic term of extensive application, and while strictly speaking, it means only the right which a person has in relation to something, or that dominion or indefinite right of user and dispossession which one may lawfully exercise over particular things or object, it is frequently used to denote the subject of the property, or thing itself which is owned or in relation to which the right of property exists. In the further sense, it extends to every species of valuable right and interest, in either real or personal property, or in easements, franchises and in corporal hereditaments, and in the latter to everything which is the subject of ownership in which the right of property may legally attach, or in other words every class of acquisitions which a man can own enhance an interest in.

32. From the judgment impugned, it is evident that learned lower court has relied upon *Vikas Singh & others vs. Devesh Pratap Singh* reported in 2001(2) P.L.J.R. Page-184 on this score, but on minute observation, it is evident that the principle so decided therein has not been properly considered during course of consideration of the controversy relating to adjudication over nature of property. Though the aforesaid judgment while dealing with the issue has not taken into account the definition incorporated under Section 2(h), on the contrary dealt with the issue in terms of Section

59, however, laid down in following way under Para-6:-

“6. As regards the use of the words "his property", it is clear and, if I may say so, implicit that a person can execute a Will like any transfer-deed, only with respect to his own property and not someone else's property and, therefore, nothing much turns on use of those words in [Section 59](#) as to confer jurisdiction on the probate Court to decide any dispute relating to title, ownership, etc. of the testator/testatrix in the property which is the subject-matter of the Will. It is settled legal position that it is not the duty of the probate Court to consider any issue as to title of the testator to the property with which the Will propounded purports to deal or to the disposing power the testator may have possessed over such property or as to the validity of the bequeaths made. See, for example, the case of Kashi Nath v. Dulhin AIR 1941 Patna 475. Proceedings for grant of Probate or Letters of Administration is not suit in the real sense, it only takes the "form" of a regular suit according to the provisions of the Code of Civil Procedure, "as early as may be" vide [Section 295](#) of the Act. Reference may be



made to a Division Bench decision of this Court in [Sidhnath Bharti v. Jai Narayan Bharti](#) 1994 (1) PLJR 644, a Full Bench decision of the Allahabad High Court in [Panzy Ferondes v. M.F. Queoros](#), AIR 1963 Allahabad 153, and a Division Bench decision of the Calcutta High Court in [Batai Lall Banerjee v. Debaki Kumar Ganguly](#), AIR 1984 Calcutta 16. The grant of Probate or Letters of Administration is decisive only of the Will propounded and not of the title, etc. of the testator to the property. As the issues relating to title, ownership etc. are not to be gone into in such proceedings, it follows that even a favourable decision in favour of the petitioner/plaintiff granting Probate or Letters of Administration in his favour does not operate as res judicata in any future suit which the Objector is at liberty to bring seeking declaration of his right, title, interest, etc. in the property. In the above premises the objection of the objector as to disposing capacity, i.e., ownership of the testatrix is rejected”.

33. After careful scrutiny of the aforesaid finding, it is crystal clear that will is to be executed with regard to the property which the testator possesses, and the dispute, if any, relating to the

same is not to be scuttle down under proceeding brought under probate. However, different kind of picturization has to be perceived whereunder admittedly the property not belonging to testator have been bought up under deed of will. Then, is it found out of domain of probate proceeding, and if the principle so laid down, as referred above, is appreciated in its true spirit wherein, execution of Will relating to own property of testatrix is to be effected. Then certainly, it will come within the purview, as with regard to these properties neither probate nor letter of administration could be granted, otherwise it will allow multiplicity of the proceeding, which does not happens to be intention of legislature. Aforesaid view is found supported with **Smt. Radhika Devi vs. Ajay Kumar Sharma reported in 2011(1) P.L.J.R. 845.**

34. Now, reverting back to main issue, first of all, one has to take notice of Section 61 of the Act which lays down:-

“61. Will obtained by fraud, coercion or importunity. —A Will or any part of a Will, the making of which has been caused by fraud or coercion, or by such importunity as takes away the free agency of the testator, is void.

Illustrations

(i) A, falsely and knowingly, represents to the testator, that the testator's only child is dead, or that he has done some undutiful act and thereby induces the testator to make a will in his, A's favour; such Will has been obtained by fraud, and is invalid.

(ii) A, by fraud and deception, prevails upon the testator to bequeath a legacy to him. The

bequest is void.

(iii) A, being a prisoner by lawful authority, makes his Will. The Will is not invalid by reason of the imprisonment.

(iv) A, threatens to shoot B, or to burn his house or to cause him to be arrested on a criminal charge, unless he makes a bequest in favour of C. B, in consequence, makes a bequest in favour of C. The bequest is void, the making of it having been caused by coercion.

(v) A, being of sufficient intellect, if undisturbed by the influence of others, to make a Will yet being so much under the control of B that he is not a free agent, makes a Will dictated by B. It appears that he would not have executed the Will but for fear of B. The Will is invalid.

(vi) A, being in, so feeble a state of health as to be unable to resist importunity, is pressed by B to make a Will of a certain purport and does so merely to purchase peace and in submission to B. The Will is invalid.

(vii) A, being in such a state of health as to be capable of exercising his own judgment and volition, B uses urgent intercession and persuasion with him to induce him to make a Will of a certain purport. A, in consequence of the intercession and persuasion, but in the free exercise of his judgment and volition makes his Will in the manner recommended by B. The Will is not rendered invalid by the intercession and persuasion of B.

(viii) A, with a view to obtaining a legacy from B, pays him attention and flatters him and thereby produces in him a capricious partiality to A. B, in consequence of such attention and flattery makes his Will, by which he leaves a legacy to A. The bequest is not rendered invalid by the attention and flattery of A.”

35. In the aforesaid background, when the pleadings of



respective parties coupled with evidence on their score have been gone through, it is evident that partition amongst the co-sharers duly surfaced. Furthermore, the intervener had elaborately dealt with status of land under Paras-8, 9 of his pleading which is supported under Para-50 of the deposition of PW-12, the applicant herself. Objector Raj Kishore Chaudhary, who examined himself as O.P.W. No.4 had detailed the same and objected probate of Will on that score, as is evident from Para-4, 5 of his examination in-chief, whereupon he has been cross-examined under Paras-2, 3, 4. The most relevant material at this juncture happens to be absence of denial at the end of applicant.

36. Furthermore, from the petition as well as from the deposition of other witnesses so examined on behalf of applicant, nothing is coming out on this score, save and except, at the time of execution of will, deceased-testator was aged about 100 (hundred) years of age, however, was possessing sound mental condition. The learned lower Court identified suspicious circumstances as laid down by the Hon'ble Apex Court as reported in A.I.R. 2009 SC 1766 under Para-40 of the judgment but did not care to deal with the same, more particularly in the background of evidence deposed by applicant, who had examined herself as PW-12 under Para-27, 28, 32, 35 of her cross-examination, which should have been properly cared with in consonance with the evidence of other witnesses, while dealing with

the same.

37. One more question arose, which could play an important role while adjudicating upon authenticity of the Will in question. It is needless to say that will is registered one. Furthermore, on account of examination of Finger Print Expert, L.T.I. of executant is found over will, though he was literate, and his signature has been found over other documents, so exhibited. Furthermore, there happens to be disclosure at the end of propounder herself that deceased testator was aged about 100 years at the time of execution of will and on account of old age, deceased hands were shivering. Though, the witnesses had deposed that deed in question was scribed at his dictate, though with some variance PW-2, Para-2 (Attesting witness), PW-12, Para-1, as she had not claimed that executant had put his L.T.I. in presence of PW-2, as well as Bhagwan Jha, another witness, who has not been examined though his non-examination been explained by PW-7, however, from the evidence of PW-12, Para-28, it is evident that due to old age, eye and hands of executant was not functioning. None of the PWs, more particularly, PW-2, PW-3, PW-4 have deposed on that score. At the other hand, from evidence of PW-4, Para-10, it is evident that executant was aged about 50-60 years. This part further been concealed by O.P.W.-1 (husband of propounder), who in his Para-7, had stated that his father (executant) was suffering

from cough and cold. He did not controvert disclosure of PW-12, Para-28. Not only this, from perusal of evidence of PW-2 as well as PW-12, coupled with recital of will, it is evident that Registrar had not explained the nature of document and obtained consent at the end of executant, which in the background of evidence of PW-12, Para-28, will play prominent role and on account thereof, it is manifest that suspicious circumstances have not properly been explained. From perusal of judgment impugned, it is apparent that learned lower Court had not appreciated the same, nor dealt with.

38. In Ratindra Nath Mukherjee vs. Panchanan Banerjee reported in (1995)4 SCC 459, it has been held that “the witnesses to the will, if interested for the propounder is perceived to be a suspicious circumstance, the same would lose significance if the document is registered and the Sub-registrar does certify that the same had read over to the executor who on doing so admits the contents”. Deficiency on this score by the applicant is found recessive one.

39. That being so, the judgment impugned is set aside. Appeal is allowed. In the facts and circumstances, the parties will bear their own cost.

(Aditya Kumar Trivedi, J)

Patna High Court,
Dated- 15.12.2015
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