

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.163 of 2012

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Parasnath Giri son of Late Uttam Giri resident of village-Mangalpur, PS. Laukariya,
Distt-West Champaran, Bihar

.... Appellant/s

Versus

Durga Giri son of Singasan Giri resident of village-Shastrinagar, PS. Bagaha, Distt-
West Champaran, Bihar.

.... Respondent/s

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Appearance :

For the Appellant/s : MR. BAXI S.R.P. SINHA, SR. ADV.
MR. SURESH PRASAD SHARMA, ADV.

For the Respondent/s : MR.DRONACHARYA, ADV.
MR. VIJAY KUMAR SINHA, ADV.
MR. ARGHES KUMAR, ADV.

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 03-12-2015

Appellant/objector being aggrieved by and dissatisfied with the judgment dated 21.11.2011 passed by 2nd Additional District Judge, Bagaha, West Champaran in Probate Case No. 24/1995 whereby and whereunder held the Will dated 24.05.1995 executed by the deceased Chandra Giri genuine and in pursuance thereof, granted Letter of Administration in favour of applicant/respondent, Durga Giri for management of temple property, filed the instant petition.

2. Applicant/respondent filed a petition for grant of probate/letter of administration with respect to the properties so detailed on account of Will dated 24.05.1995 executed by late Chandra Giri son of Sheodhari Giri of village, Mangalpur, West

Champan in his favour after the death of aforesaid Chandra Giri on 24.08.1995, after completing the other legal obligations.

3. Appellant/objector appeared and filed WS wherein, apart from raising ornamental objection, had also challenged the status of the applicant who had been identified as shrewd litigant, dishonest, greedy and further, in order to grab the property belonging to the deity, maneuvered the whole event and as such, prayed for dismissal of the application. It has further been averred that deceased, Chandra Giri died in jointness with the objector. It has also been submitted that Ful Kuer, wife of Chandra Giri who had self acquisition had endowed 1 Bigha 10 Katthas and 5 Dhurs to Shankarji vide registered deed of endowment dated 22.05.1980. It has also been submitted that other properties have also been gifted to Shankarji. It has further been disclosed that the Ful Kuer herself as well as the heirs after her death have been picked up in order to maintain the temple as well as to provide Rajbhog, Samaiya, service to the deity, saint which will be provided from the usufruct which, after death of Ful Kuer was being performed by the Chandra Giri (deceased) and after his death, objector, as has been nominated by the mass in general identifying the Institution to be public in character, began to look after. After death of Chandra Giri, his *Shradha* was performed by the objector. Property as



well as temple is being looked after by the objector. Bataidari claim was advanced under Bataidari Case No. 96/1997 against objector at the instance of one Raghunath Yadav and the same was duly contested by him relating to the properties possessed by deity. Rent is being paid by him.

4. It has further been submitted that applicant happens to be a stranger who, after death of Chandra Giri, created a forged Will in question taking in collusion with his own men. The fact remains that Chandra Giri never shown inclination towards execution of a Will in favour of applicant nor ever disclosed his desire before anybody including the witnesses so named regarding execution of Will. Chandra Giri was a literate and therefore, it was expected that in case, the Will in question happens to be his last Will, then in that event, instead of LTI, signature of Chandra Giri would have been there. Absence of signature is indicative of the fact that a forged and fabricated document was prepared and in likewise manner, he was impersonated. It has further been disclosed that Chandra Giri was continuing with feeble physical, mental condition since before his death on account of his old age.

5. After considering the rival pleadings, the learned lower court framed following issues:-

I. Whether petition for Probate is maintainable?

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- II. Whether Will executed by Chandra Giri on 24.05.1995 is genuine and free from all doubts?
 - III. Whether Chandra Giri was entitled to execute will for the land in question in favour of petitioner Durga Giri?

6. After formulating the above issues the learned lower court decided the same in favour of applicant/respondent. Hence this appeal.

7. While assailing the judgment impugned, manifold arguments have been raised. The first and foremost argument happens to be relating to propriety of the judgment impugned in the background of the fact that applicant/respondent had prayed for grant of Probate while the learned lower court had granted Letter of Administration. During course thereof, the learned lower court failed to consider that when the property was already endowed in favour of Shankarji and Parvatiji, then in that event, the status of the temple would have been considered by the learned lower court whether it remained as private or public in nature. Had it there been a public in nature, then in that event, it has to be guided in terms of Bihar Religious Board Trust Act and in the aforesaid background the competency of Chandra Giri must have been duly identified in order to execute a Will.



8. In an alternative, even if considering that temple remained private, after gift being in favour of deity, the property in question would not have survived as a personal property on account thereof, Will was not at all permissible. In likewise manner, it has been submitted that by way of Will, Shebaitship would have been transferred and not the property. Therefore, unless and until, applicant/respondent would have been identified in the aforesaid status, under the garb of so alleged Will, he would not be held entitled or entrusted to manage the property in accordance with Will.

9. It has also been submitted that the condition imposed under endowment has got primacy because of the fact that wish and desire of donor has to be acknowledged and subsequent creation of Will, contrary to the spirit of endowment is bad, illegal and that being so, the status of the judgment impugned.

10. It has also been submitted that mere registration of a Will will not keep the document above board rather the same set of procedure so prescribed therefor has to be followed to ascertain genuineness, authenticity and validity whereunder the applicant/respondent failed. Therefore, in sum and substance, it has been pleaded that the document in question has not been validated in accordance with law. Furthermore, it has been submitted that

document in question suffers from suspicious circumstances whereunder it would not have been relied upon. As such, the judgment impugned is fit to be set aside.

11. Per contra, refuting the submission made on behalf of appellant/objector, it has been submitted on behalf applicant/respondent that learned lower court had taken into account the intention of the testator and that happens to be the reason behind that instead of granting Probate, Letter of Administration has been granted with some sort of rigour so that properties are kept immune from any sort of encroachment. It has also been submitted that there happens to be no hurdle in exercising such kind of power by the learned lower court because of the fact that Probate gives title as well as possession while Letter of Administration happens to be for preservation of the property. Admittedly, the properties belonged to deity and being *Sewait*, applicant/respondent has got bounded duty not only to perform the rituals relating to solemn existence of the deity but also to perform Rajbhog, Samaiya, celebrate the festivals as well as to serve Sadhu-Sant.

12. It has also been submitted that appellant/objector could not be able to place cogent and reliable evidence to discredit the document in question to be the last Will of Chandra Giri, on the other

hand, the learned lower court had elaborately dealt with the evidence adduced on behalf of respective parties and found the Will in question to be genuine one. As such, the order impugned does not attract any interference.

13. After hearing the parties as well as going through the record the following point is formulated.

(a) Whether the Will in question is properly acknowlegable in the eye of law?

14. Before dealing the aforesaid point, on a cursory perusal of the lower court record, it is evident that altogether five witnesses have been examined on behalf of applicant/respondent out of whom PW-1, Nohar Yadav, PW-2, Vira Rai, PW-3, Haliwant Pandey, PW-4, Durga Giri and PW-5, Uday Narayan Prasad.

15. On the other hand, Appellant/Objector had examined altogether eight DWs out of whom DW-1 is Rama Kant Giri, DW-2, Krishnadeo Giri, DW-3, Muni Thakur, DW-4, Abdul Aziz, DW-5, Deo Nath Sukul, DW-6, Mukhi Baitha, DW-7, Manoj Prasad and DW-8, Paras Nath Giri.

16. On behalf of applicant only one exhibit has been brought up on record which happens to be original registered will dated 24.05.1995 as Exhibit-1 while on behalf of objector Ext-A,



Panchnama, Ext-B, Receipt, Ext-C-1 to C-6, rent receipts, Ext-D, Registered partition, Ext-E, Deed of Wakfnama dated 22.05.80, Ext-E-1, Deed of Wakfnama dated 20.11.1992, Ext-F, Paper of Hoonda dated 12.05.94, Ext-F, Ext-G, Notice of Bataidari of Case No. 1/96, Ext-H, Certified copy of voter list of village Shashtrinagar, Ext-I, Death certificated of Chandra Giri, Ext-J, Misc.Certificate have been made.

17. “Will” has been defined under Section 2(h) of the Indian Succession Act which is as follows:-

“ ‘*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.”

18. From the plain reading of definition of the ‘will’, it is apparent that there should be three necessary ingredients to fulfil the criteria of ‘will’. (a) there must be a legal declaration of the testator’s intention, (b) that declaration must be with respect to his property and (c) the desire of the testator that the said declaration should be effected after his death.

19. In the case of ***Krishna Kumari Devi v. Rajendra Bahadur Sinha Deo*** reported in ***A.I.R 1929 Privi Council 122*** it has been held:-

“Their Lordships were not impressed by this contention any more than had been either of the Indian

Courts. It may, indeed, they think, be summarily disposed of by reference merely to the well known rule that the will of this testator without, as is agreed, any intimation there to be found of any contrary intention, must in relation to the property comprised in it be regarded as speaking from his death, and its validity with reference to the devise of any particular property thereby made must depend upon the testator's statutory or other lawful disposing power over that property at that time."

20. In *Ram Nath v. Ram Nagina* as reported in *AIR 1962 Pat 481(DB)*, the matter came up before the Bench with regard to consideration of a document purported to be a "will". Their Lordship have elaborately dealt with under para-7 which is as follows:-

7. Adverting to the main contention that the document in question was not strictly a Will, but an instrument purporting to appoint only a successor, it will be necessary to examine the contents of the Will. Its relevant portion is as under:

"Therefore, I, the executant, in a sound state of mind, in enjoyment of my proper senses, on fully understanding all the matters in good faith and for the benefit of the Kutias on taking advice from my well-wishers and legal advisers, independently, without pressure and coercion, without any inducement and persuasion on the part of others, execute this Will as per stipulations given below. So long as I, the executant, am



alive, I shall remain in possession and appropriation of all the articles and property and the Kutias as usual. After the death of me, the executant, Ram Nath Das, the disciple of me, the executant, will be the Mahanth of the aforesaid Kutias in my place. He will enter into possession of the entire property and assets of the Kutias in place of me, the executant. He will manage the affairs in the same manner as they are done during the time of me, the executant, and he will improve the property and the Kutias so that Puja Path, Rag Bhog of Shri Ramjee and all other gods, and the Sadhus and Mahatmas may continue nicely. Whatever rights I, the executant, have, will pass on to Ram Nath Das. He will get his name registered wherever necessary, in place of the name of me, the executant. I, the executant, appoint Ram Nath Das aforesaid as executor."

The language of the Will is quite explicit and unambiguous. The operative portion of the Will reproduced above manifestly shows that there is no disposition of the properties of the Math by this document. All that Mahanth Banwari Das purports to do by this document is to provide for his successor and thus he has laid down therein that after his death, Ram Nath Das, his disciple (the applicant), would be the Mahanth of the Kutias mentioned therein in his place. It is further evident, and it is not disputed by learned counsel for the appellant, that the properties of the Kutias are not dealt with by this document. There is no disposition of the

properties of the Math.

It is true that there is a direction that Ram Nath Das will enter into possession of the properties and the assets of the Kutias in his place and will manage the affairs in the same manner as were done in the lifetime of Mahanth Banwari Das. He has further laid down that whatever rights he had would pass on to Ram Nath Das. This is not, strictly speaking, a disposition of the properties. It is nothing but an adumbration of what would legally follow on the applicant's assuming the Mahanthship of the Kutias. As a Mahanth he will have to manage the properties, and for this he will have to obtain possession thereof. The direction about possession and management of the properties, therefore, is not a disposition, but a statement of the necessary consequence of his appointment as a Mahanth. It is plain, therefore, that there was no disposition of the properties of the Math, and what Mahanth Banwari Das purported to do by the execution of this document was to appoint his successor.

The important question, therefore, is whether a document, by which properties are not disposed of but only a successor to a certain office is appointed, can be regarded as a Will. There are two Bench decisions of the Calcutta High Court directly bearing upon this question. In *Chaitanya Gobinda v. Dayal Gobinda*, ILR 32 Cal 1082, their Lordships observed as follows:-

"The word 'will' has been defined in the Probate and



Administration Act. It 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'. Now, upon the statement of the declarant himself, the alleged testator in the document in question, it is not his property, but the property of the thakurs. But, however that may be, it is quite clear that all that he does or purports to do by the document in question is to appoint the petitioner as a shebait or manager for the purpose of carrying out the sheba, puja and other rites and ceremonies appertaining to the akhra, of which he was the head. There was no testamentary disposition of the properties belonging to the akhra, and indeed he could not make any such disposition. If it was simply an appointment of a manager made by the late Mohunt, it is obvious that there was no disposition of any property. We think that the Court below is right in the view that it has expressed, and that probate of a document like this cannot be applied for under the Probate and Administration Act."

This decision was followed in a later case in *Jagadindra v. Madhusudan*, 20 Cal LJ 307 : (AIR 1915 Cal 289). It has been laid down in this case that where a Mahanth by a document purported to appoint his successor on the gaddi, and to make over to him as Mahanth all the properties of the Asthal and the right of performing the Debsheba and did not purport to deal with any property of his own, the document was not a

Will and could not be admitted to probate.

There are two decisions of the Privy Council, which though not strictly in point, lend sufficient assistance in determining this question. In *Jagannath v. Kunja Behari*, AIR 1922 PC 162 (2), a Hindu executed an unregistered document calling it a Will in favour of his wife to the effect:

"I have consented to your adopting a son at your pleasure and conducting the management of the estate in the best manner." On an interpretation of this document, their Lordships have held that the document is not a Will, but only a power to adopt, and as such ought to have been registered under section 17 of the Indian Registration Act, 1877. Their Lordships observed that standing by itself the document is nothing more than a present authority to the wife to make an adoption, and there is nothing else of substance in the document. It failed as a Will because it did not deal with any property.

In the other case, namely, *Vijayaratnam v. Sudarsana Rao*, AIR 1925 PC 196, their Lordships of the Judicial Committee were considering a document which purported to be a disposition of the property of the executant and at the same time conferred a power of adoption on his widow. The executant was a minor, and, therefore, it was plain that the document which purported to be a Will could have no legal effect as such. The question arose whether the document could operate as an authority to adopt. Their Lordships held that a



document which purported to be a Will but was inoperative as such might nevertheless constitute a valid authority to adopt. This case is an authority for the proposition that where a document does not purport to be a disposition of property cannot operate as a Will. A similar view has been expressed in the cases of *Umacharan Bose v. Rakhal Das Ray*, AIR 1927 Cal 756 and *Puran Lalji v. Ras Behari Lal*, AIR 1922 All 285.

As against this, learned counsel for the appellant referred to the decisions in *Mancharam v. Pranshankar*, ILR 6 Bom 298, *Chandranath Chakrabarti v. Jadabendra Chakrabarti*, ILR 28 All 689, *Ram Charan Ramanuj Das v. Gobinda Ramanuj Das*, 56 Ind App 104 and *Ishwardeo Narain Singh v. Kamta Devi*, AIR 1954 SC 280. In none of these cases the question we are confronted with was pointedly raised and answered. Learned counsel laid great stress upon the observations of their Lordships of the Supreme Court in the case of *Ishwardeo Narain Singh*, AIR 1954 SC 280 referred to above that the Court of Probate is only concerned with the question as to whether the document put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind and that the question whether a particular bequest is good or bad is not within the purview of the Probate Court.

These observations do not support the proposition



of law enunciated by the learned counsel namely, that a document purporting to appoint a successor, though not purporting to dispose of a property, may constitute a Will. Where there is a Will on the face of the document, the Probate Court certainly will not proceed to consider whether or not the disposition of the property was good or bad. But the Probate Court cannot act like an automaton and grant probate in respect of any document whether the document constituted a Will or not. The primary duty of the Probate Court is to see first whether prima facie the document constituted a Will. "Will", as defined by section 2 (h) of the Indian Succession Act, 1925, means the legal declaration of the intention of a testator 'with respect to his property' which he desires to be carried into effect after his death. (Underlined (here in single quotation marks' -Ed) by me). "Codicil", as defined by section 2 (b), means an instrument made in relation to a Will, and explaining, altering or adding to its disposition and shall be deemed to form part of the Will. It is manifest, therefore, that unless a document satisfies this definition it cannot constitute a Will in the eye of law.

The condition which must be satisfied before a document can be called a Will is that there must be some disposition of property. The document must contain a declaration of the intention of the testator not with respect to anything, but with respect to his property. If there is a declaration of intention with respect to his



successor, it cannot constitute a Will, as defined by the Indian Succession Act. When, therefore, a document though called a Will, does not deal with any property, it will not be given effect to as a Will, although it may operate to effectuate any other purpose provided therein. In the instant case, the document did not contain any legal declaration of the intention of Mahanth Banwari Das with respect to any property, and there was no disposition of any of the assets of the deceased testator or the deities. Therefore, having regard to the authorities quoted above, and more particularly to the definition of the Will, it cannot constitute a Will, strictly speaking. The learned Additional District Judge, therefore, was right in his conclusion that the document was not a Will, and, therefore, it could not be admitted to probate. On this ground, his decision must be upheld.

21. Now coming to present context, first of all para-7 of the judgment impugned has to be seen whereunder there happens to be an admission on the part of applicant/Respondent that the properties whatsoever been incorporated under Will (Ext-1) had already been endowed by the deceased along with his wife to the Shankarjee, Parwatijee. To verify the truthfulness in the admission Ext-1 in consonance with Ext-E, E/1 have been gone through whereupon it is apparent that all the properties whatsoever been

brought up under Ext-1 was not at all the property belonging to deceased Chandra Giri and that being so, the major ingredient identified to constitute a 'Will' is found faulted with.

22. Though the learned lower court ignored such event, at one end, however, granted letter of administration instead of probate as prayed for but during appreciation of the finding recorded by the learned lower court that aspect has also to be borne in mind and appreciation of the relevant portion of Ext-1 has to be considered which purposely been left out by the learned lower court while reproducing the same under para-7 of the Judgment impugned.

“एराजी मजकुरे वाला ताहीतहयात मनमोकीर को कब्जा वो दखल मे रहेगा वाद वफात एराजी मजकुरे वाला साबीत बहादुर वसीयतदार मजकुर चेला दूर्गा गिरी काबिज दाखिल रहेगे। इसका लगान अदा करके रसीद बनाम खूद लिखा करेगे वो नाम अपना बिहार सरकार के वसीरीस्ते कार्यालय अंचल के मुन्दर्ज जमाबंदी करा लेगे।”

23. From the aforesaid part of recital of Ext-1, Will, it is apparent that Executant had claimed to be *Shebait* of deity in whose favour the endowment was already made as well as identified the legatee to be his *Chela* at the other hand posed himself like owner of the lands and in likewise manner, tried to vest right to the appellant/respondent/propounder. That being so, it has rightly been derecognized by the learned lower court while appreciating legality of

Ext-1, the Will .

24. Coming to another aspect whereunder, letter of administration has been granted by the learned lower court, it is apparent that the learned lower court failed to identify absence of intention of the testator along with the fact that from the recital of Ext-1, Will, it is apparent that *Shebaitship* has not been transferred. The aforesaid part is further found strengthened from the oral evidence of PW-5, the attesting witness who had not deposed that Late Chandra Giri had shown inclination to transfer *Shebaitship* and in like wise manner, the evidence of PW-4, applicant/respondent happens to be.

25. At the present juncture, it looks apt to refer '*Chaitanya Gobinda Pujari Adhicari, Petitioner, Appellant, v. Dayal Gobinda Adhicari, Objector, Respondent* reported in *1904-05 Calcutta Weekly notes, page 1021*, it has been held as follows:-

“ A Will as defined in the Hindu Wills Act and the Probate and Administration Act, means the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death. Probate as defined means the copy of a Will certified under the seal of a Court of competent jurisdiction with a grant of administration to the estate of the testator. The property to which the alleged Will relates was neither the property nor the estate of the alleged testator who was no more than a *Shebait* or manager of it. The alleged Will does not therefore come under the denomination of a Will and no probate of it can be granted. If the alleged testator *Dole Gobinda Adhikari* had power to nominate his successor in the



office of a *Shebait* it was a valid nomination or letter of appointment, but no Will in the legal sense of the term. In this view I am supported by the Privy Council ruling *Bhagaban Ramanuj Das v. Ram Praparna Ramanuj Das* (1). On page 857 of that volume, there is an observation of their Lordships of the Privy Council in that decision. The observation runs thus: 'The document is not a Will, it has no testamentary effect, it is simply a statement of Haigrib' (the testator who executed a Will similar to the Will propounded in the present case).

26. Now coming to factual aspect concerning mode of execution of will, it is apparent from the evidence of deposition of PW-4, Durga Giri (party himself) para-3 that deceased testator was only capable to sign on account of old age, his hands were shivering, hence put his L.T.I. He also deposed status of Udai Narain, PW-5 as witness, identifier while Hari Prasad witness has not been examined. PW-5 had claimed himself to be attesting witness. When his evidence has been gone through minutely, it is apparent that he had not deposed regarding physical condition of deceased testator nor he stated over cause, as a result of which L.T.I. was affixed over document by the testator, when testator was literate.

27. Furthermore, from the evidence of all the aforesaid witnesses, PW-4 and PW-5, it is manifest that they failed to depose on the score of mental condition of deceased testator, whether he was possessing sound mental condition and was capable to understand, at

least the event whereunder he (deceased) was going to execute Will. The aforesaid event became more suspicious on account of non-examination of scribe Madhurendra Prasad Verma as well as another witness Hari Prasad, son of Chandrika Prasad.

28. Admittedly, the document will (Ext-1) is registered document. But even then, its validity has to be proved like unregistered Will, in terms of Section 68 of the Evidence Act. After perusal of evidence of PW-4 as well as PW-5, it is crystal clear that he had not deposed to the context that the document was read over to the executant by the Registrar, which got nod at the end of executor and on account thereof, suspicious circumstance seems purging.

29. Considering the nature of Will to be registered one even then the obligation on the part of propounder is not found duly discharged in order to wipe out suspicious circumstance as has been held by the Apex Court in ***Rabindra Nath Mukherjee v. Panchanan Banerjee*** reported in ***(1995) 4 SCC 459***,

“That the witnesses to the will, if interested for the propounder is perceived to be a suspicious circumstances, the same would lose significance if the document is registered and the sub-registrar does certify that the same had been read over to the executor who on doing so admits the contents.”

30. To see, whether the Registrar had complied such mandate, Ext-1, Will has been gone through and surprisingly, no such endorsement at the end of Registrar is found thereupon.

31. Hence, after having minute observation of the evidence brought up by the propounder, it is evident that he utterly failed to explain suspicious circumstance persisting over alleged Will, and on account thereof, the judgment impugned is not at all found appreciable.

32. Having cumulative effect of aforesaid deficiency/decadent the finding recorded by the learned lower court did not find favour. Consequent thereupon, the same is set aside. Appeal is allowed. However, in the facts and circumstances of the case, parties will bear their own cost.

(Aditya Kumar Trivedi, J)

Patna High Court
December 3rd 2015
Perwez/AFR

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