

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.87 of 2012

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Gaurav Singh son of Shri Deo Sharan Singh resident of Akhlaapur PS & PO,
Bhabua, Distt-Kaimur.

.... Appellant/s

Versus

1. General Public
2. Most. Girija Kuar wrongly described as Wife of Late Vindhyavashni Singh,
resident of Village-Akhlaapur, PS & PO, Bhabua, Distt-Kaimur, presently
resident of village-Kudasan, PS, Bhabua, Distt- Kaimur Respondent/s
- =====

Appearance :

For the Appellant/s : Mr. R.S. Dvivedi, Sr. Advocate
Mr. Sangeeta Sharma, Advocate
Mr. Md. Waliur Rahman, Advocate
Mr. Shailendra Kumar Dvivedi, Advocate
Mr. Lakshman Lal Pandey, Advocate
Mr. Sandip Singh, Advocate
Mr. Ashok Kumar, Advocate
Mr. Ranjan Kumar Dubey, Advocate

For the Respondent/s : Mr. Rajesh Kumar, Advocate
Mr. Vinod Kumar Seth, Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 24-02-2016

The sole appellant/propounder has preferred instant appeal against judgment dated 11.05.2009 passed by Additional District and Sessions Judge-FTC Court No.IV, Kaimur, Bhabua in Probate Case No. 137 of 2007 whereby and whereunder the learned lower court dismissed the petition filed on his behalf for grant of probate.

2. Appellant/propounder had filed a petition purported to be under Section 276 of the Indian Succession Act (for brevity 'the Act') with regard to grant of probate of 'Will' dated 06.01.2003 executed by Vindhyavashni Singh in favour of appellant/applicant. Furthermore, it has been incorporated that the aforesaid Vindhyavashni Singh died on 12.01.2006 at his permanent place of abode at Village, Akhlaapur, PS-Bhabua, Distt-Kaimur. Furthermore,



‘Will’ in question happens to be the last ‘Will’ of the testator. It has also been averred that the ‘Will’ was duly executed by the testator, Vindhyavashni Singh in presence of witnesses, Nandu Singh, son of Surajbhan Singh of Village-Akhlaspur as well as Ramakant Pandey resident of Village, Ufrauliya who, as per instruction of testator put their signature respectively. It has also been asserted that at the time of death, the testator had fixed place of abode at Village, Akhlaspur within the original jurisdiction of the court and in likewise manner, the property so detailed under Schedule-A of the plaint also lie within the original jurisdiction of the court. It has also been asserted that deceased died leaving behind his son, Deosharan Singh and grandson, Shivsharan Singh, besides applicant. It has further been stated that the ‘Will’ was executed by the testator while possessing sound physical as well as mental condition. The testator was very much capable to execute the ‘Will’ in favour of applicant who happens to be his one of the grand sons.

3. Though, Girija Kuar was not at all cited, however, after her appearance, the learned lower court allowed her to be impleaded as objector vide order dated 19.04.20008 and on account thereof, certain new facts have been incorporated by way of amendment. It has been averred that Girija Kuar should not be allowed to be identified as an intervener/objector because of the fact that she does not happen to be widow of late Vindhyavashni Singh. The assertion of Girija Kuar that she happens to be the widow of late Vindhyavashni Singh and



further shown her permanent address as village, Kudasan is wrong. It has further been incorporated that Girija Kuar is the daughter of late Ramekbal Singh. It has further been incorporated that father of Mahipal Singh and Ramekbal Singh were known to grandfather of applicant. Girija Kuar, who was wife of somebody else, was deserted by her husband and was residing with her father on account of, dispute in the family whereunder Girija Kuar was harassed and ousted by the family members of her Sasural, therefore, at the request of Ramekbal Singh and father of Mahipal Singh, Vindhyavashni Singh accommodated her as maid-servant to look after the affairs of the house as well as property of Vindhyavashni Singh at Village, Kudasan in and near about 1976 and for that, she was paid cash as well as also given grains. It has also been asserted that the aforesaid feelings of Vindhyavashni Singh have been honoured even after his death. However, it has been specifically asserted that there happens to be no relationship in between Vindhyavashni Singh and Girija Kuar. It has further been asserted that when applicant requested Girija Kuar to vacate the house, so that others be employed to look after the affairs on account of her old age and was not found fit to be retained in the service of maid-servant, Mahipal Singh, a close associate of Girija Kuar hatched a conspiracy whereunder new story has been introduced that Girija Kuar was married with Vindhyavashni Singh and is his wife. It has also been asserted that Girija Kuar is neither the first wife nor legally wedded wife of Vindhyavashni Singh. The name of



grandmother of applicant (wife of Vindhyavashni Singh) is Girija Devi who was much older to present Girija, an imposter. It has also been asserted that neither applicant nor his father has been able to trace out the name of husband of Girija Kuar who had deserted her even after much query. It has further been averred that the deceased Vindhyavashni Singh had no sexual or marital relationship with Girija Kuar. It has also been averred that neither question of citation relating to her is warranted nor the same should be considered. It has further been stated that other documents have been created by the aforesaid Girija Kuar in order to grab the land of the applicant.

4. The aforesaid petition was verified by one of the attesting witnesses, Nandu Singh. Schedule-A of the petition, details of the properties.

5. After filing of the petition, it is evident that Girija Kuar appeared on her own and filed petition substantiating her plea to be impleaded as an objector which was allowed. She had asserted that she happens to be a legally wedded wife of Vindhyavashni Singh. She had further asserted that Deosharan Singh is her son and the applicant along with Shivsharan Singh are her grandsons. It has also been pleaded that after death of her husband, Vindhyavashni Singh, the so alleged 'Will' has been created at the instance of applicant on account of some sort of differences amongst them. Late Vindhyavashni Singh never executed 'Will' in favour of applicant nor did the alleged document have his signature. The applicant taking his henchman

created forged and fabricated documents just to wipe out her existence.

6. It has further been asserted that in due course of time, Vindhyavashni Singh kept another lady as his wife and unfortunately, her name was also Girija Kuar long after passing of Hindu Marriage Act and on account thereof, subsequent Girija Kuar had no legal right to be recognized as legally wedded wife of Vindhyavashni Singh. It has further been asserted that being legally wedded wife of Vindhyavashni Singh, she should inherit the property left by deceased, Vindhyavashni Singh. With a mala fide intention, just to digest her interest, the document in question has been collusively prepared by the applicant.

7. It has further been averred that on account of old age, the deceased Vindhyavashni Singh was not at all capable to understand logically nor he was physically fit, therefore, the disclosure made at the end of the applicant is found wrong, incorrect. Furthermore, it has been asserted that applicant had filed Title Suit No. 295/2007, on the other hand, Title Suit No. 261/2007 has been filed at her end for partition of the property. Therefore, submitted dismissal of petition. At the fag end of WS a genealogical table has been furnished.

8. The learned lower court has framed the following issues:-

1. Whether the 'Will' in question happens to be genuine one and was executed by the testator in sound mental, physical condition in presence of two witnesses?
2. What other relief or reliefs, applicant is found entitled

for?

and decided the issue against the appellant/propounder, consequent thereupon, dismissed the petition. Hence this appeal.

9. While assailing the judgment impugned, it has been submitted on behalf of appellant that the learned lower court though framed issue no.1 in correct manner but failed to decide the same in the same way and on account thereof, the finding so recorded by the learned lower court happens to be wrong, illegal, incorrect and contrary to the law. To substantiate such plea, it has been submitted that whenever a petition is filed for grant of probate with regard to ‘last will’ executed by a testator, two question play important role in order to properly adjudicate upon the issue. The first one, whether the ‘Will’ was executed under free mental condition and secondly, whether there happens to be proper compliance in accordance with Section 63 of the Act. Therefore, the learned lower court was expected to confine itself on those two ingredients which is found duly substantiated by having the document registered one containing photograph of the testator. That means to say, the document was executed, presented, accepted by the testator before the Registrar and having photo thereupon, is found additional evidence on the score of genuineness of the document. Therefore, presence of registered ‘Will’ has paved the way of presumption that the document has been properly executed by the testator and that being so, there was no scope for any kind of suspicion.



10. In likewise manner, it has also been submitted that the testator was to put his signature in presence of two witnesses either in one stroke of time or at different occasion in terms of Section 63(C) of the Act. So far present status is concerned, both the witnesses have stated that the deceased Vindhyavashni Singh had executed in their presence and as directed by late Vindhyavashni Singh, they had also put signatures in presence of late Vindhyavashni Singh. Therefore, the requirement in terms of Section 63(c) of the Act is found duly complied with.

11. The learned counsel for the appellant, in the aforesaid background, has submitted that when there happens to be examination of both the witnesses who have affirmed the action of deceased, Vindhyavashni Singh who executed document in their presence and in mark thereof, these witnesses also put their signatures, then in that event, there was no scope for doubt and contrary finding recorded by the learned lower court on that very score happens to be mere imaginative without factual as well as legal support.

12. Furthermore, it has also been submitted that in probate proceeding, the status of the party cannot be adjudicated upon. That means to say, the disputed status of Girija Kuar was not at all within the province of present litigation, and in likewise manner, the step taken by the learned lower court, impleading Girija Kuar as an objector happens to be out of ambit of law. Furthermore, it has been submitted that there happens to be an admission of objector regarding

presence of another lady namely, Girija during lifetime of testator Vindhyavashni Singh, on account thereof, unless and until the status of Girija, either objector or another lady is duly ascertained, objector/respondent should not have been allowed to be impleaded, as stranger to family, having no interest in the property could not be allowed to be impleaded as party. Hence, on this score also the learned lower court had committed inherent mistake.

13. It has further been submitted that being the theme of Girija Kuar, a controversial one, and further, having incompetency of the court to adjudicate upon the issue, on account thereof, instead of entertaining the petition filed on behalf of Girija Kuar should have directed to have proper adjudication of her claim as well as status. In likewise manner, the documents whatsoever been filed at her end also happens to be irrelevant and in likewise manner, have wrongly been appreciated by the learned lower court negativating the plea of the appellant. So submitted that the learned lower court has chosen the wrong path as well as misconstrued the settled principle of law.

14. Then it has been submitted that having exclusion of Girija Kuar in the aforesaid facts and circumstances of the case, neither there persists any kind of deficiency nor the petition could be found incompetent on account of absence of citation relating to Girija Kuar. So submitted that the finding recorded by the learned lower court is fit to be set aside.

15. Learned counsel for the appellant also referred to the

following cases i.e., AIR 2005 SC 233, AIR 1972 Pat 146, (2009) 3 SCC 687, AIR 1954 SC 280, AIR 1963 Pat 24, AIR 1972 Pat 214, AIR 1956 Pat 77, AIR 1995 SC 1852, AIR 1985 SC 529, AIR 1995 SC 1684, AIR 2005 SC 4362, AIR 2015 SC 107, 1994(1) PLJR 636.

16. On the other hand, supporting the finding recorded by the learned lower court, it has been submitted on behalf of respondents that creation of a 'Will' is a phenomenon by which testator intends to block the normal way of inheritance directing devolvement of inheritance according to wish and desire of the testator and to effectuate the same, the document is being scribed wherein an individual is identified to succeed him. Therefore, the law asks that the aforesaid document should be pious one which would have been executed by the testator under his free will without having any scope of coercion, allurement, threatening, influence in free sound mental condition side by side, it should be free from suspicious circumstances and that happens to be reason behind that by series of judicial pronouncements, the Hon'ble Apex Court have laid down specific criteria to be adopted during course of appreciation of the document as well as in likewise manner, an obligation has been laid over propounder to explain the suspicious circumstance, if any surviving failing which, even the document being registered one, would not be accepted as a document created on own volition of the testator.

17. With regard to the present controversy, it has been



submitted that status of the appellant though challenged is found admitted. The respondent is found staying in one of the houses and further, presence of respondent has been acknowledged by the appellant himself apart from having relevant documents filed on behalf of respondent in affirmation. Furthermore, it has also been admitted by the appellant that the last instalment of the loan amount borrowed by the deceased, Vindhyavashni Singh was paid by the respondent before drawing of instant Probate Case. Furthermore, it is also admitted that Title Suit No. 261/2007 with regard to partition of the property at the behest of respondent as well as Title Suit No. 295/2007 at the behest of appellant happens to be there amongst them. In the aforesaid background the controversy goes out of phonate hence, the appellant should have taken recourse of citation by having presence of respondent and having deficient on that very score, makes the petition non-maintainable in the eye of law.

18. Furthermore, it has also been submitted that the controversy with regard to Girija Kuar, Girija Devi, the respondent had already explained and in the aforesaid background, presence of respondents was very much there and so, would have been impleaded. After coming to know about the filing of the petition for grant of probate on the basis of alleged forged 'Will', the respondent appeared and then thereafter, the appellant by way of amendment has challenged the status of the respondent not being wife of Vindhyavashni Singh, on account thereof, unless and until the

appellant got the issue duly adjudicated upon by way of properly framed suit, would not be entitled to proceed with the instant proceeding because of the fact that citation has to be made relating to descendent having left by the deceased testator.

19. So, in a nut shell, it happens to be the submission of the respondent that on account of non citation, the proceeding happens to be bad, illegal as well as non entertainable.

20. It has further been submitted that any proceeding for grant of probate, the court is to adjudicate upon whether the 'Will' happens to be executed by a testator and further, it was executed while possessing sound and disposing state of mind in presence of two witnesses. From the evidence available on the record, it is apparent that the basis whereupon the 'Will' has been executed is found completely nullified as the document speaks that the executor was living with propounder who was giving service to the executor on account of which, the executor became very much pleased whereupon he shown his inclination to transfer the property possessed by him in favour of executant which he accepted and thereupon, 'Will' was scribed. Alleged 'Will' happens to be dated 06.01.2003. Appellant himself examined as PW-5 who had stated in para-7 of his cross-examination that he remained at Dehradun from 1989-1999. After leaving Dehradun, he happens to be at Banaras where he is doing LL.B Course. Parties are residents of Village-Akhlaspur, and on account thereof, really the appellant had any occasion to render

service, and if not, then the basic framework is found completely smashed.

21. The document is said to be registered one whereupon photo has been affixed but that photo neither bears the stamp of registry office nor the aforesaid photo is found attested by the Registrar. The photo is attested by the scribe and on account thereof, it could not be relied upon for the purpose that it was affixed over the document since before registration.

22. Furthermore, it has also been submitted that respondents have challenged the genuineness of signature of alleged testator, Vindhyavashni Singh and on account thereof, it was incumbent upon the appellant to have substantiated the same by cogent and reliable evidence. At the present moment, it has been submitted that during course of examination of AW-5, appellant, he had stated in his examination-in-chief at para-2 itself that Vindhyavashni Singh (his grandfather) had gifted 14 Acres of land to his brother, Shiv Sharan Singh and on account thereof, at least, should have placed the aforesaid document to substantiate that the signature having over the alleged 'Will' happens to be that of Vindhyavashni Singh. Furthermore, in para-4 of his examination-in-chief, he had further stated that his grandfather had executed power of attorney in his favour and the aforesaid power of attorney has not been brought up on the record in legal way apart from the fact that execution of power of attorney in favour of appellant makes the situation more

clumsy. Therefore, it has been submitted that the document in question is not a genuine document having been executed by Vindhyavashni Singh. Furthermore, it has also been submitted that so called witnesses, Nandu Singh AW-1 and Ramakant Singh Pandey, AW-2 are the worthless witnesses and their evidences are not going to substantiate the plea of the appellant. As such, the finding recorded by the learned lower court happens to be just, legal and proper.

23. In a probate proceeding, the only matter lies for consideration is whether the 'Will' executed by the testator happens to be the genuine document and whether the same has been executed under free will out of own volition under sound mental condition as well as happens to be free from suspicious circumstances. It is needless to say that by way of creating 'Will', the testator gave a pause to the normal rule of inheritance and that happens to be the reasons behind that certain obligations have been introduced in order to justify the same. Before that, the status of the objector is also to be seen in the background of the fact that in terms of Section 283(1) (C) of the Act, there is mandatory requirement for citation whereunder, the persons having interest in the estate of deceased are invited to have their presence, in case, so desired. That means to say, those persons having interest in the estate of deceased are only entitled to participate otherwise, would not.

24. As such, first of all, the status of respondent has to be looked into. Though the appellant had admitted presence of



objector/respondent at his place but, with an explanation that coming pity over her situation, Vindhyavashni Singh permitted her presence which she is allowed to continue even after death of Vindhyavashni Singh, did not inspire confidence, more particularly in the background of admission at the end of appellant that last instalment of loan amount borrowed by deceased, Vindhyavashni Singh was paid by her. Had she not been related with Vindhyavashni Singh, no payment would have been made by her. There happens to be some sort of confusion at the present moment when respondent as OW-2 declined to identify the photograph but that does not mean to decipher her presence when the father and son examined as AW-4 and AW-5 have categorically admitted something more than in normal circumstance, having control over the house and further maintaining her and for that explained that to honour the wish and desire of Vindhyavashni Singh, they are carrying on. Furthermore, it is evident that at an earlier occasion AW-4 had admitted Girija Kuar to be his mother which, subsequently on the petition filed by the AW-4 was cut down and in place thereof, Girija Devi was incorporated after a long interval which ought not have been made by the learned P.O. as the same happens to be against the law, as for that purpose, the memorandum was to be prepared that too, on the specified date itself. Therefore, presence of Girija Kuar for the present purpose is found duly acknowledged and is held so.

25. Then coming to next ladder, genuineness of 'Will' is to

be seen, and for that, as per Section 59 of the Act, every person of sound mind not being minor has been identified to be capable to dispose of his property by 'Will'. Furthermore, Section 63 laid down the procedure whereunder 'Will' is to be created. That means to say, wherever, a 'Will' is brought up before the Court, the Court has to see whether there happens to be proper compliance of Section 59 as well as 63 of the Act, and during course thereof, any sort of unexplained suspicious circumstance is found, will nullify the same.

26. Recently, in the case of *Jagdish Chand Sharma v. Narain Sing Saini* as reported in (2015) 8 SCC 615, after considering all the previous judicial pronouncements, it has been held under the following paragraphs which are as follows:-

19. The contentious pleadings and the assertions based thereon in the backdrop of the evidence as a whole have been duly analysed by us. The competing perspectives notwithstanding, the purport and play of Section 63 of the Act read with Sections 68 and 71 of Act 1872 as deciphered by various judicial enunciations would have a decisive bearing on the process of resolution of the irreconcilable issues that demand to be addressed. It would thus be apt, nay, imperative to refer to these legal provisions before embarking on the appreciation of the evidence to the extent indispensable.

20. Section 63 of the 1925 Act and Sections 68 and 71 of the 1872 Act, are thus extracted hereunder for ready reference.

20.1 Indian Succession Act, 1925

“63. Execution of unprivileged Wills.-

Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1[or an airman so employed or engaged,] or a mariner at sea, shall execute his Will according to the following rules:-

(a) The testator shall sign or shall affix his mark to the Will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a Will.

(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 acknowledgement of his signature or mark, or 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.

22.2 Indian Evidence Act, 1872

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;

Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.

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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.

21. As would be evident from the contents of Section 63 of the Act that to execute the Will as contemplated therein, the testator would have to sign or affix his mark to it or the same has to be signed by some other person in his presence and on his direction. Further the signature or mark of the testator or the signature of the person signing for him has to be so placed that it would appear that it was intended thereby to give effect to the writing as Will. The Section further mandates that the Will shall have to be attested by two or more witnesses each of whom has seen the testator sign or affix his mark to it or has seen some other persons sign it, in the presence and on the direction of the testator, or has received from the testator, personal acknowledgement of a signature or mark, or the signature of such other persons and that each of the witnesses has signed the

Will in the presence of the testator. It is, however, clarified that it would not be necessary that more than one witness be present at the same time and that no particular form of attestation would be necessary.

22. It cannot be gainsaid that the above legislatively prescribed essentials of a valid execution and attestation of a Will under the Act are mandatory in nature, so much so, that any failure or deficiency in adherence thereto would be at the pain of invalidation of such document/instrument of disposition of property.

22.1 In the evidentiary context Section 68 of the Act 1872 enjoins that if a document is required by law to be attested, it would not be used as evidence unless one attesting witness, at least, if alive, and is subject to the process of Court and capable of giving evidence proves its execution. The proviso attached to this Section relaxes this requirement in case of a document, not being a Will, but has been registered in accordance with the provisions of the Indian Registration Act 1908 unless its execution by the person by whom it purports to have been executed, is specifically denied.

22.2. These statutory provisions, thus, make it incumbent for a document required by law to be attested to have its execution proved by at least one of the attesting witnesses, if alive, and is subject to the process of Court conducting the proceedings involved and is capable of giving evidence. This rigour is, however, eased in case of a document



also required to be attested but not a Will, if the same has been registered in accordance with the provisions of the Indian Registration Act, 1908 unless the execution of this document by the person said to have executed it denies the same. In any view of the matter, however, the relaxation extended by the proviso is of no avail qua a Will. The proof of a Will to be admissible in evidence with probative potential, being a document required by law to be attested by two witnesses, would necessarily need proof of its execution through at least one of the attesting witnesses, if alive, and subject to the process of the Court concerned and is capable of giving evidence.

22.3 Section 71 provides, however, that if the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence. The interplay of the above statutory provisions and the underlying legislative objective would be of formidable relevance in evaluating the materials on record and recording the penultimate conclusions. With this backdrop, expedient it would be, to scrutinize the evidence adduced by the parties.

22.4 As hereinbefore mentioned, the appellant has endeavoured to prove the execution and attestation of the Will, Ex. A-1 through AW 1 Mr. G. C. Kumar and AW 5 Mr. Budh Ram. He has examined as well AW 3 Mr. A. K. Jain, Sub Registrar, New Delhi before whom the Will was registered on the very same day of its execution i.e., 22-10-1973.

27. Registrar has not been examined. On account thereof, certain ambiguity so persisting could not be properly explained. The first one, regarding presence of photograph since before presentation of document, and further, the executant was the same persons who admitted execution before him. Be that as it may, now the evidences adduces on behalf of appellant has to be seen.

28. AW-1, Nandu Singh had stated that scribe had written down the 'Will' at the direction of Vindhyavashni Singh. Thereafter, the scribe, Subhash Chandra read over the recital of the 'Will'. He himself also read and then thereafter in his presence, Vindhyavashni Singh had put his signature and executed the same. He also put his signature at the direction of Vindhyavashni Singh and in his (Vindhyavashni Singh) presence. He had further stated that document was produced by Vindhyavashni Singh before the Registrar. He had further stated that he had identified the signature of Vindhyavashni Singh and had exhibited the same as Ext-1. During cross-examination at para-7, he had stated that first of all, 'Will' was written in rough by Subhash Chandra and then it was prepared finally. He had not seen who had purchased the paper. He had further stated that the 'Will' happens to be in three pages. He had signed at one place only. He had further stated that after putting his signature, he along with Ramkant Pandey, Vindhyavashni Singh and Subhash Chandra had gone to the office of Registrar. He had further stated that he had not seen at how many places, Ramakant Pandey had put his signature. Vindhyavashni



Singh had put his signatures at two places while had put impression of his five fingers at five places. He also stated that first of all, Vindhyavashni Singh, then he himself and then Ramkant Pandey and lastly, Subhash Chandra had put respective signatures. He had further stated that he had put his signature and in likewise manner Ramakant Pandey and Vindhyavashni Singh also put their signatures. He had further stated that at the time of execution of 'Will' Vindhyavashni Singh was aged about 75-76 years.

29. From his evidence, it is apparent that he had not spoken with regard to mental condition of Vindhyavashni Singh. During examination-in-chief, he had not spoken with regard to putting signature by Ramakant though during cross-examination at para-7, as narrated above, he had stated like so but at how many places signatures were made, he again failed to disclose. That means to say, putting signature by Ramakant in his presence by his own evidence, has put suspicion and in likewise manner, whether Ramakant had signed in presence of Vindhyavashni Singh. The aforesaid event is to be seen cautiously because of the fact that all the persons were available at place of AW-3, the scribe and therefrom, the document was placed before the Sub-Registrar for registration after execution.

30. AW-2 is Ramakant Pandey. He had stated in his examination-in-chief that Vindhyavashni Singh had executed 'Will' in favour of his grandson, Gaurav Singh. The 'Will' was executed by Vindhyavashni Singh in his presence. Subhash Chandra prepared the

‘Will’ at the direction of Vindhyavashni Singh. Subhash Chandra read. Vindhyavashni Singh also read himself and then had executed it. As directed by Vindhyavashni Singh, he had put his signature as a witness which he had exhibited.

31. During cross-examination, he had admitted his status as a scribe and further, he had scribed so many documents at the instance of Vindhyavashni Singh. From para-5 of his cross-examination, it is apparent that he had stated that on the direction of Vindhyavashni Singh, he had put his signature. Signature of Vindhyavashni Singh, Nandu Singh and scribe were present since before his signature over the document. He had further stated that he had signed at the last. In para-6, he had stated that he met with Vindhyavashni Singh at Kachahri. In para-7, he had stated that after putting his signature, he became engaged in his own work.

Thus, apart from casting doubt over manner of preparation of ‘Will’, it is evident that he also contradicted evidence of AW-1 on the score of event whereunder witnesses have had put their signatures as well as subsequent event.

32. AW-3 is the scribe who had stated that at the direction of Vindhyavashni Singh, he had prepared the ‘Will’. Then thereafter, the ‘Will’ was read over. He himself read the ‘Will’ and then Vindhyavashni Singh executed the same. He had further stated that Vindhyavashni Singh had signed in his presence as well as in presence of Nandu Singh and Ramakant Pandey. He took finger-print



of all the five fingers. He had also attested the photograph and impression. He also took signature of Gaurav Singh as well as finger-print of all the five fingers of left hand of Gaurav Singh. During cross-examination at para-5, he had stated that he had written firstly over plain paper and then, it was read over to Vindhyavashni Singh and then, it was made fair. He had also signed over the document as scribe. First of all, Nandu Singh had signed. Five persons have signed in total over the document including he himself. He had further stated at para-7 that after writing 'Will', the same was handed over to Vindhyavashni Singh.

33. From conjoint reading of evidences of all the three relevant witnesses, as stated above, it is evident that there happens to be some sort of infirmity with regard to status of the witnesses because of the fact that AW-3, the scribe had not disclosed that AW-2, Ramakant Pandey had signed in his presence. Furthermore, it is evident that from the evidence of PW-3 he had not stated that he took signature of the witnesses at one page only. This witness had not spoken that he had produced the document before the Registrar for registration. This witness had not spoken with regard to mental condition of Vindhyavashni Singh. Although, he had spoken regarding the age of Vindhyavashni Singh to be 75 years at the time of his presence.

34. AW-2, as stated above, had not spoken during his examination-in-chief that AW-1 had signed in his presence though he



had deposed that document was read over to Vindhyavashni Singh in his presence as well as Vindhyavashni Singh also read over the document in his presence. Vindhyavashni Singh had signed in his presence and as per direction, he had signed. However, during cross-examination at para-5, he had stated that signatures of Vindhyavashni Singh, Nandu Singh and scribe were present since before his signature. In the aforesaid background, it is apparent that his presence at the relevant place has become doubtful, more particularly, when his evidence is taken together with that of AW-1 at para-3 wherein he had stated that Vindhyavashni Singh had produced the 'Will' before the Sub-Registrar. He had identified Vindhyavashni Singh in presence of sub-registrar while AW-2 at para-7 had said that after putting his signature as a witness, he had gone to do his own work.

35. Now coming to the document in question, the 'Will', it is apparent that it happens to be in three pages wherein the first page lacks presence of witnesses. The third page again lacks presence of witnesses and in the second page there is presence of AWs-1 and 2 and on account thereof, the genuineness of the 'Will' is found at stake.

36. In the case of *M.B. Ramesh v. K. M. Veeraje Urs* as reported in *AIR 2013 SC 2088*, the Hon'ble Supreme Court have held in the following way:-

16. That takes us to the crucial issue involved in the present case, viz. with respect to the validity and proving of the concerned will. A Will, has to be executed in the manner required by S 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 paragraph 11 of **Janki Narayan Bhoir Vs. Narayan Namdeo Kadam** reported in **2003 (2) SCC 91** 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 acknowledgement 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 it's 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 **R. Venkatachala Iyengar Vs. B N. Thimmajamma** reported in **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 **Smt. Jaswant Kaur Vs. Smt Amrit Kaur**, reported in **AIR 1977 SC 74**, wherein the law has been crystallized 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 R. Venkatachala lyengar v. B.N. Thirnmajamma and Ors. [1959] Su. 1 S.C.R. 426. 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 63 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 circumstance 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 Section 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 reported in SCC) 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 the 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 Indian 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 attestation of the will as required by Section 63 of the Succession Act was not established which was equally necessary.

23. The approach to be adopted in matters concerning wills has been elucidated in a decision on a first appeal by a Division Bench of Bombay High Court in **Vishnu Ramkrishana Vs. Nathu Vithal** reported in [AIR 1949 Bombay 266]. In that matter, the respondent Nathu was the beneficiary of the will. The appellant filed a suit claiming possession of the property which was bequeathed in favour of Nathu, by the testatrix Gangabai. The suit was defended on the basis of the will, and it came to be dismissed, as the will was held to be duly proved. In appeal it was submitted that the dismissal of the suit was erroneous, because the will was not proved to have been

executed in the manner in which it is required to be, under Section 63 of Indian Succession Act. The High Court was of the view that if at all there was any deficiency, it was because of not examining more than one witness, though it was not convinced that the testatrix Gangabai had not executed the will. The Court remanded the matter for additional evidence under its powers under Order 41 Rule 27 CPC. The observations of Chagla C.J., sitting in the Division Bench with Gajendragadkar J. (as he then was in Bombay High Court) in paragraph 15 of the judgment are relevant for our purpose:-

*“15..... We are dealing with the case of a will and we must approach the problem as a Court of Conscience. It is for us to be satisfied whether the document put forward is the last will and testament of Gangabai. **If we find that the wishes of the testatrix are likely to be defeated or thwarted merely by reason of want of some technicality, we as a Court of Conscience would not permit such a thing to happen.** We have not heard Mr. Dharap on the other point; but assuming that Gangabai had a sound and disposing mind and that she wanted to dispose of her property as she in fact has done, the mere fact that the propounders of the will were negligent – and grossly negligent in not complying with the requirements of S.63 and proving the will as they ought to have should not deter us from calling for the necessary evidence in order to satisfy ourselves whether the will was duly executed or not.....”*

(emphasis supplied)

24. As stated by this Court also in **R. Venkatachala Iyengar and Smt. Jaswant Kaur (both supra)**, while arriving at the finding as to whether the will was duly executed, the Court must satisfy its conscience having regard to the totality of circumstances. The Court's role in matters concerning the wills is limited to examining whether the instrument propounded as the last will of the deceased is or is not that by the testator, and whether it is the product of the free and sound disposing mind [as observed by this Court in paragraph 77 of **Gurdev Kaur Vs. Kaki** reported in **2006 (1) SCC 546**]. In the



present matter, there is no dispute about these factors. The issue raised in the present matter was with respect to the due execution of the will, and what we find is that the same was decided by the trial Court, as well as by the first appellate Court on the basis of an erroneous interpretation of the evidence on record regarding the circumstances attendant to the execution of the will. The property mentioned in the will is admittedly ancestral property of Smt. Nagammanni. She had to face a litigation, initiated by her husband, to retain her title and possession over this property. Besides, she could get the amounts for her maintenance from her husband only after a court battle, and thereafter also she had to enter into a correspondence with the appellant to get those amounts from time to time. The appellant is her stepson whereas the respondents are sons of her cousin. She would definitely desire that her ancestral property protected by her in a litigation with her husband does not go to a stepson, but would rather go to the relatives on her side. We cannot ignore this context while examining the validity of the will.

37. Apart from this, the other circumstances as visualizing from the conduct of the parties have also to be seen. Admittedly, propounder happens to be grand son of testator, Vindhyavashni Singh. Even in absence of 'Will', the property would have devolved upon the propounder being ancestral property, and on account thereof, what was necessity for executing 'Will'. In likewise manner, there also happens to be discloser at the end of propounder that the testator at an earlier occasion had executed gift of deed in favour of another brother of the propounder.

38. In its natural phenomenon, the aforesaid event was unwarranted. As the same surfaced, that appears to be unnatural and

therefore, whole event is to be seen with suspicious eye which is found unexplained as, no explanation has been offered at the end of propounder that necessitating execution of 'Will'.

39. In *Ramabai Padmakar Patil (dead) v. Rukminibai Vishnu Vekhande* as reported in (2003) 8 SCC 537, it has been held as under:-

“A Will is executed to alter the mode of succession and by the very nature of things it is bound to result in either reducing or depriving the share of a natural heir. If a person intends his property to pass to his natural heirs, there is no necessity at all of executing a Will. It is true that a propounder of the Will has to remove all suspicious circumstances. Suspicion means doubt, conjecture or mistrust. But the fact that natural heirs have either been excluded or a lesser share has been given to them, by itself without anything more, cannot be held to be a suspicious circumstance especially in a case where the bequest has been made in favour of an offspring. In *PPK Gopalan Nambiar v. PPK Balakrishnan Nambiar and others*, AIR 1995 SC 1852 it has been held that it is the duty of the propounder of the Will to remove all the suspected features, but there must be real, germane and valid suspicious features and not fantasy of the doubting mind. In this case, the fact that the whole estate was given to the son under the Will depriving two daughters was held to be not a suspicious circumstance and the finding to the contrary recorded by the District Court and the High Court was reversed. In *Pushpavati and others v. Chandraja Kadamba and others*, AIR 1972 SC 2492, it has been held that if the propounder succeeds in removing the suspicious

circumstance, the Court would have to give effect to the Will, even if the Will might be unnatural in the sense that it has cut off wholly or in part near relations. In Rabindra Nath Mukherjee and another v. Panchanan Banerjee (dead) by LRs. and others (1995) 4 SCC 459, it was observed that the circumstance of deprivation of natural heirs should not raise any suspicion because the whole idea behind execution of the Will is to interfere with the normal line of succession and so, natural heirs would be debarred in every case of Will. Of course, it may be that in some cases they are fully debarred and in some cases partly. The concurrent finding recorded by the District Court and the High Court for doubting the genuineness of the Will on the aforesaid ground was reversed.

40. Thus, after analyzing the evidence as discussed above, along with the principle laid down by the Hon’ble Apex Court as referred above, it is apparent that appellant could not succeed in removing the suspicious circumstance persisting over the alleged ‘Will’ dated 06.01.2003 and on account thereof, the instant appeal is found deficient one. Hence, the same is dismissed. However, in the facts and circumstances of the case, parties will bear their own costs.

Patna High Court
February 24th 2016
perwez/AFR

(Aditya Kumar Trivedi, J)

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