

THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.393 of 2010

Rajani Kumar Verma S/o Bhattu Mahto, R/o vill.-Nanand, PS-Silao, Distt. Nalanda.
.... Appellant/s

Versus

1. Estate of Bhattu Mahto S/o late Rohan Singh, R/o Vill.- Nanand, PS-Silao, Distt.-Nalanda through Smt. Chandrakala Sinha, W/o Anjani Kr. Verma.
2. Smt. Chandrakala Sinha, W/o Anjani Kr. Verma, R/o village-Nanand, PS-Silao, District-Nalanda.

.... Respondent/s

Appearance :

For the Appellant/s : Mr. Mr. B.N.P. Singh

: Mr. B.P. Singh

For the Respondent/s : Mr. T.N. Maitin, Sr. Adv.

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

CAV JUDGMENT

Date: 05-04-2016

Heard counsel for the petitioner and the respondents.

The appellant in the present appeal is challenging the judgment and order dated 24th April 2010 passed by 1st Additional District Judge, Nalanda at Bihar Sharif in Title Suit No. 1 of 2009 (Probate Case No. 6 of 2006), whereby and whereunder the court below has granted probate in favour of the applicant now the respondent of the present appeal.

The short facts of this case is that Bhattu Mahto who is Testator of the Will, has two sons, namely, Anjani Kumar Verma @ Anjani and Rajani Kumar Verma (present appellant) and two daughters, namely, Keshari Devi and Saroj Devi. Chandrakala Devi wife of Anjani Kumar Verma is a



legatee of the Will. The fact is emerging that Bhattu Mahto had landed property about 20 acres at Shikarpur as well as Nanand. At Shikarpur, Bhattu Mahto inherited the property from his Nanihal whereas in Nanand he had inherited the property from the ancestral as well as purchased, thereby acquired the land. At Shikarpur what he had inherited the property from his Nanihal, out of which certain portion of land he had disposed of and at last he had 2.09 Acre of land and rest land, out of 20 acres, are situated at Nanand.

As per the claim of the respondent, Anjani Kumar Verma and his wife always looked after and rendered service to Bhattu Mahto who was pleased with her service, had shown his interest to donate some land to his eldest daughter-in-law, Chandrakala Devi, so that she may not face trouble in future. Bhattu Mahto had disclosed this fact before his well-wishers, who had advised him to execute the Will in place of gift so that during his life time, he will remain in possession of the property and after his death, Chandrakala Devi will be the owner of the property which was appreciated by Bhattu Mahto.

Considering the attending facts and circumstances, out of the free will, in full mental and good



physical condition, without any coercion or undue influence, he instructed the Scribe to prepare the Will. On his instruction, one Chandra Shekhar Prasad of village Barhari prepared the Will on 27th July 2005, after understanding the contents to be true, he put his thumb impression on the deed of Will and got attested of his two known persons, namely, Shashi Bhushan Prasad and Kailash Prasad of village Nanand. By execution of the Will, he had transferred 2 acres 58 decimals of land. Out of the aforesaid land, 2.09 acre of land was of Shikarpur and 49 decimals of land is of Nanand. The said Will was registered on 30th July 2005 and claimed that till his life time, Bhattu Mahto would remain in possession of the land and he died suddenly on 10th October 2005 at village Nanand.

It has been claimed that the Will dated 27th July 2005 is the last Will of Bhattu Mahto which was duly executed after understanding the contents made in the Will. It has been claimed by the plaintiff-respondent, he had incurred the expenses of Rs. 1,25,000/-(one lakh twenty five thousand) in the shradh of Bhattu Mahto and he estimated that by Will, he will acquire the property of Rs. 1,00,000/- (one lakh). In the probate case, Rajani Kumar Verma was made a party.

The Court below had issued the special citation to



the near relative and also issued the general citation in the newspaper in terms of Indian Succession Act. On appearance, objection was filed by the objector-appellant that the legatee-respondent has not impleaded Keshari Devi and Saroj Devi as party to the probate proceeding, who are daughters of Bhattu Mahto, as having not made them as party suffers from defect of party. It has further been said that not only the aforesaid fact, the applicant has also not impleaded the sons of Rajani Kumar Verma (present appellant) and in such view of the matter, the probate suit was required to be rejected outrightly. Further the claim has been made that Chandrakala Sinha, the applicant had ever rendered any service to Bhattu Mahto.

The defendant-appellant also challenged the Will of Bhattu Mahto about his intention to execute the Will on account of rendering service to him. This desire was never expressed to any of his relative or well-wishers, nor any person advised him to execute the Will in place of gift.

It has specifically been stated that Bhattu Mahto was not a man of sound mind, was not at all pleased with Chandrakala Sinha (present respondent). The claim of his desire and decision to execute the testament the Will in favour of respondent is a mischievous stand taken by the appellant. In



fact, the stand has been taken that the Will in question was never executed by Bhattu Mahto and the same is forged and fabricated which had been created under the conspiracy with her husband, namely, Anjani Kumar Verma and his associates, namely, Chandrashekhar Prasad, Shashi Bhushan Prasad and Kailash Prasad with the sole intention to grab the very valuable property of defendant-appellant. Plea has been taken that Bhattu Mahto was too old to move out. He was not a man of sound mind. He suffered from several ailments; he lost his sense and mental balance as he was bed ridden.

Everything was kept in dark and secret, stealthily the document in question was created. The so called attesting witnesses of the Will, are the supporters of Anjani Kumar Verma as Bhattu Mahto never intended to propound the deed of Will. He could not consult with son-in-law, this defendant and his daughter. It has further been averred that he died just after two months of execution of the Will. He never instructed any scribe to create the Will. At the relevant time, the defendant-appellant was Assistant in District Education Office, Bihar Sharif and he used to attend his duty from his native village and regularly served his father Bhattu Mahato. Sometimes, in absence of defendant his elder brother Anjani



Kumar Verma got Bhattu Mahato treated by the Doctor at Bihar Sharif. He has further averred that Anjani Kumar Verma in the pretext of treatment of Bhattu Mahato brought him at Bihar Sharif and managed to bring him at Rajgir, obtained L.T.I of Bhattu Mahato on the alleged Will taking undue advantage of his unsound mind and physical incapability, Bhattu Mahato got the thumb impression. It has been said that Bhattu Mahato was a literate person and he could not have put his thumb impression out of free will rather has been obtained over the Will, creates a serious doubt in view of fact that the person who used to put his signature, would never put his thumb impression on any document. Bhattu Mahato had never appeared before the Registrar nor he had accepted the execution. As Anjani Kumar Verma was the Karta of the family, after the death of Bhattu Mahato, Sharadh was done from the joint family property at native place.

In support of the case, applicant has examined A.W.1 Chandrakala Sinha, A.W.2 Kailash Prasad (attesting witness), A.W.3 Jitan Mahato, A.W.4 Ram Chandra Prasad, A.W.5 is Sahdeo Prasad. In the Will, two persons have been shown as attesting witnesses, one is Kailash Prasad (A.W.2) and Shashi Bhushan Prasad, who has not been examined.

Chandra Shekhar Prasad has been shown to be scribe, has not been examined in the suit.

In support of the case, the defendant-appellant has examined altogether four witnesses, namely, O.P.W. 1 Sudhir Kumar, O.P.W.2 Suresh Prasad, O.P.W.3 Rajani Kumar Verma (appellant), O.P.W.4 Raghunandan Prasad. The original copy of the Will has been marked as Exhibit-1. Exhibit-2 is the sale deed executed by Jago Devi in favour of Bhattu Mahato. Exhibit -3 is the original Khata of Bhattu Mahato. Exhibit-4 is the death certificate of Bhattu Mahato. Exhibit-5 is the original sale deed executed by Ram Krishna Mahato in favour of Bhattu Mahato. Exhibit-6 is the original sale deed executed by Jamuna Mahato in favour of Bhattu Mahato. Exhibit-7 is the original sale deed executed in favour of Bhattu Mahato. Exhibit-8 is the agreement between Megha Mahato and Bhattu Mahato. Exhibit-9 is the original deed of gift executed in favour of Megha Mahato, father-in-law of Bhattu Mahato.

From the side of the opposite party, Exhibit-A has been brought as prescription of Doctor dated 21.7.2005. It has been brought to notice of this Court that in the plaint of this Succession suit, Chandrakala Sinha has not mentioned

about the two daughters of Bhattu Mahto. In the present case, admittedly, name of two daughters of Bhattu Mahto have not been made as party.

The counsel for the appellant has submitted that the order of the court below suffers from illegality on the ground that Bhattu Mahto was not of sound mind which pre-requisite provided under Section 59 and 63 of the Succession Act as on the date of the alleged execution of the Will, Bhattu Mahto was quite old and on account of his long illness, he was incapable to understand his profit and loss. He has further submitted that the prescription of Doctor which appears from Ext.-A where the Doctor has categorically mentioned that Bhattu Mahato was behaving abnormally, requires treatment at Kanke, Ranchi. He further submits that the property at Shikarpur is very valuable property, with a purpose to usurp valuable property this document has been created with a sole intention to deprive the present appellant. He further submits that if a person is not a sound state of mind and he does not understand the consequences of his action, in such situation, the purported execution of Will would not create any semblance of any right as the requirement of law is that the person who is executing the Will, must be of a sound state of



mind, so much so that Bhattu Mahato is a literate person, but he put his thumb impression itself shows the suspicious circumstances. Further, it has been said that even registration of the Will does not give immunity to challenge the Will itself. The contention is that for a proper execution of Will, it must satisfy conditions laid down in Section 63 of the Succession Act and 68 of the Evidence Act. He further submits that as daughters of Bhattu Mahto have not been impleaded as party, as well as no recital with respect to them has been made, in their absence, it cannot be said that it was a valid proceeding as it suffers from none implement of necessary party, in their absence the will would be probated and the court below has fallen in error in granting probate in the present case, placed reliance on Sections 59, 63, 235 of the Succession Act and Section 68 of the Evidence Act. Also placed reliance on the judgment reported in AIR 1990 SC 1742 (Ram Piari v. Bhagwant and others), this case deals with, mere registration does not create immunity to challenge the factum of the Will. **(1992) 2 SCC 507** (Guro v. Atma Singh, this case has held, it is duty of propounder to prove execution in terms of the Evidence Act and it is foremost duty of propounder, he must dispel the all suspicious circumstances surrounded the Will

and distinguished the judgment. 2010 (1) BBCJ 291 (Harkesh Thakur-Vs- Smt. Lalita Devi and Anr.).

The counsel for the respondent submits that in terms of Section 276 of the Succession Act, the application was filed before the court below. The present appellant was impleaded as party. He fully participated in the proceeding. The cause for the execution of the Will is that Chandrakala Sinha has three daughters and dependent on the earning from the agricultural whereas the appellant is Government servant, sufficient means of livelihood of appellant, was the basic reason for execution of the Will in her favour. There is no material to show that Bhattu Mahto was not of sound mind. The prescription of Doctor (Ext.A) which is brought by the defendant-appellant is of no value when the Doctor was not examined and so much so that the document is a registered one, which was placed before the Registrar and after proper verification, the Will was registered itself dispels all suspicious circumstances surrounding the Will, so much so that witnesses who were examined by him, itself explained that Bhattu Mahato had good physical health and was keeping a sound state of mind executed the Will without any pressure and undue influence, he had executed the Will for the reasons

as aforesaid. He has further submitted that admittedly, Bhattu Mahato had 21 acres of land, out of the same, only small portion of the land had been executed in her favour and other properties are subject to the partition in terms of the Hindu Succession Act.

In reply, counsel for the appellant has submitted that he has examined the witnesses, who are neighbours of Bhattu Mahato who have categorically stated that Bhattu Mahato at the relevant time was not sound state of mind and he had never shown his desire to execute the Will in favour of either party whereas the witnesses have been examined by the plaintiff-respondent, are not the neighbours, which has no evidentiary value in view of the nearness of the witnesses who would be able to give proper description of actual state of affair.

The counsel for the respondent has also submitted that merely because the daughters have not been brought on record, does not mean that the Will was not probated correctly as in terms of Section 263, which requires just cause meaning thereby not only impleadment of near relative, but remains more than that. He has further submitted that merely because a person who is old, does not mean that



his mind was not properly working and he has not of a sound mind. If a person has reached to old age, generally he would prefer to put his thumb impression instead of putting his signature. Placed reliance on the judgments reported in AIR 2005 SC 780, para-15 (Sridevi and others v. Jayaraja Shetty and others), 2010 (1) BBJC 291 (Harkesh Thakur vs. Smt. Lalita Devi), AIR 1931 Calcutta 497 (Sadafal Kanu v. Sodari Hajam), AIR 1933 Bombay 370 (George Anthony v. Millicent Spencer) and also relied upon the judgment reported in AIR 1995 SC 346 (Girja Datt v. Gangotri Datt) where the Court has dealt with in what manner, the attestation of the Will is to be done, even if the testator put his signature or put marks in place of signature itself sufficient for the execution of the Will. The attestation has to be proved by one of the attesting witness. He further submits that in the present case out of two attesting witnesses, one attesting witness has been examined itself satisfies the requirement of Sections 63 and 68 of the Evidence Act.

In Girja Datt v. Gangotri Datt (supra) the question has been dealt with, with regard to in what circumstances, the Will will be revoked and the Court has said merely the near relative has not been made a party can not be

only ground for revocation of the Will. If the fact shows otherwise even though relative was not a party, the Will cannot be revoked.

For proper adjudication of this case it is relevant to examine the effect of Sections 59, 63, 68, 235, 276 and 278 of the Indian Succession Act including Section 68 of the Evidence Act.

Section 59 of the Indian Succession Act provides that every person of sound mind not being a minor may dispose of his property by Will so it is a pre-requisite that a person, who has testamentary property, must be major and was sound state of mind. The conditions are laid down for execution of valid Will, has been mentioned in Section 63 where it provides that every testator not being a soldier shall execute his Will according to the following rules. It provides that 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. Second condition is that 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 and third condition is that the Will must 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 there is no particular form of attestation shall be necessary.

Section 235 of the Succession Act is more important for the purpose of this case which provides, letters of administration with the Will annexed shall not be granted to any legatee other than the universal or a residuary legatee, until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

Section 276 provides essential elements will be comprised in the Probate application where it has been provided it must contain following the time of the testator's death should be there. The application should be annexed with the copy of the Will and testament. The same may be executed. In the application amount of assets must be



disclosed. Section 278 deals with the letters of administration which provides the application should contain time and place of deceased's death, the family or other relatives of the deceased and their respective residences have to be disclosed, the right in which the petitioner claims. Section 263 of the Succession Act provides revocation or annulment for just cause. The just cause has been mentioned in the explanation of section, where the proceedings to obtain the grant were defective in substance or the grant was obtained fraudulently by making a false suggestion or by concealing from the Court something material to the case or the grant was obtained by means of an untrue allegation of fact essential in point of law to testify grant though such allegation was made in ignorance or inadvertently and two other grounds not very much relevant for the purpose of disposal of this case. Section 68 of the Evidence Act deals with the manner of proving the execution of the Will which provides 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 the execution of the Will, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.



Before entering into the merit discussion, the general principle of granting probate has been adumbrated by the Hon'ble Supreme Court as well as by this Court in following manner, if the party propounding a Will or otherwise makes a claim under the Will is, no doubt, seeking to prove a document and in deciding how is to be proved, inevitably, it would be refusal to the statutory provisions which governs the proof of document. Sections 67 and 68 of the Evidence Act are relevant for this purpose. As per Section 67, if the document is alleged to be signed by any person, the signature of the said person must be proved to be in his hand writing and proving such hand writing, as per Sections 45 and 47 of the Evidence Act, opinion of Expert and or person acquainted with the hand writing of testamenter must be proved to be his handwriting and proving his handwriting the opinion of expert and of persons acquainted with the hand writing of the person concerned are relevant. Section 68 deals with the proof of execution of the document required by law to be attested which provides that the document must be attested by two attesting witnesses and the same cannot be used for evidence, until one attesting witness at least be called for proving the execution and the nature of proof must be satisfied

by the party who relies on the documents in a court of law.

Now, the question would be, as to whether, the will set up by the propounder has been proved to be last will of testator has to be looked into, further to be examined, has the testator signed the will ?, whether the document is last will of testator, did he understand the nature and effect of disposition in the Will, did he put his signature knowing contents of the Will. The answers of aforesaid questions would decide solemnity and genuinity of document, claiming to be will.

It is true that the Will has to be proved like any other document, except as to special requirements of attestation mentioned in Section 63 of the Succession Act. The test to be applied would be the usual test of satisfaction of a prudent mind in such matter.

There is one distinguishing feature for the proof of Will than the other documents, as the Will unlike other documents speaks from graveyard of the testator and when the same is propounded or produced before the court the testator who has already departed the world cannot say whether it is his Will or not. This aspect naturally introduces element of solemnity in the decision for the question as to whether the document propounded is proved to be the last Will and the



testament of the departed testator. It is sine qua non for the propounder of the Will to show by satisfactory evidence the Will was signed by the testator and at that time he was in as sound and disposing state of mind that he understood the nature and effect of disposition and put his signature to the document of his own free will. If the Will is surrounded by suspicious circumstances as the alleged signature on the Will by the testator may be, shaky and doubtful indicating the testator mind may appear to be very feeble and deteriorated, in that circumstance, the propounder will be called upon to dispel all the suspicious circumstances and at initial stage onus upon the testator very heavy and unless it is satisfactorily discharged the court will be reluctant to accept the document as the last Will of the testator. But in a case where caveat is filed alleging undue exercise of undue influence, fraud or coercion in execution of the Will propounded such plea may however be proved by the caveator but even without such plea circumstances may arise a doubt as to whether the testator was acting on his own free will in executing the Will and in such circumstances, it will be part of initial onus to remove such legitimate doubt in the matter. Apart from other suspicious circumstances, if the propounders themselves have taken

prominent part in execution of the Will which conferred on them substantial benefit it would be treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove such suspicion by clear and satisfactory evidence.

It is also the settled principle of law that the registration of the document provides credentiality in the execution of the same but merely because it is registered will not remain immune from the challenge about the genuineness of the Will. It will be relevant to place reliance upon the judgments reported in AIR 1959 SC 443 H. Venkatachala Iyengar v. B.N. Thimmajamma and others (Para-18 to 22) of the judgment as follows :

“Para-18. What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a will or otherwise making a claim under a will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68, Evidence Act are relevant for this purpose. Under S. 67, if a document is alleged to be signed by any person, the signature of the said person must be



proved to be in his handwriting, and for proving such a handwriting under Ss. 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, Ss. 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a will. This section also requires that the will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the will set up by the propounder is proved to be the last will of the testator has to be decided in the light of these provisions. Has the testator signed the will ? Did he understand the nature and effect of the



dispositions in the will ? Did he put his signature to the will knowing what it contained ? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of wills. It would prima facie be true to say that the will has to be proved like any other document except as to the special requirements of attestation prescribe by S. 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes wills from other documents. Unlike other documents the will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last will and testament of the departed testator. Even so, in dealing with the proof of wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions



and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus



very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred in some cases the wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by



ecclesiastical Courts in England when they exercised jurisdiction with reference to wills; but any objection to the use of the word 'conscience' in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

*22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the will has to prove the due and valid execution of the will and that if there are any suspicious circumstances surrounding the execution of the will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Parcq in *Harmes v. Hinkson*, 50 Cal W N 895 : (A I R 1946 P C 156) "where a will is charged with suspicion, the rules enjoin a reasonable scepticism,*



not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth," It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect."

In AIR 1962 SC 567 Rani Purnima Debi v. Khagendra Narayan the Hon'ble Supreme Court in Para-23 has dealt with the issue of registered Will and has stated that if the Will has been registered that is a circumstance which may having regard to the circumstances prove its genuineness of will. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding the Will where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration Will dispel the doubt as to the genuineness of the will. But, when it is shown that it was done in perfunctory

manner, the registration of Will would not be of much value.

“Para-23: There is no doubt that if a will has been registered, that is a circumstance which may, having regard to the circumstances, prove its genuineness. But the mere fact that a will is registered will not by itself be sufficient to dispel all suspicion regarding it where suspicion exists, without submitting the evidence of registration to a close examination. If the evidence as to registration on a close examination reveals that the registration was made in such a manner that it was brought home to the testator that the document of which he was admitting execution was a Will disposing of his property and thereafter he admitted its execution and signed it in token thereof, the registration Will dispel the doubt as to the genuineness of the will. But if the evidence as to registration shows that it was done in a perfunctory manner, that the officer registering the will did not read it over to the testator or did not bring home to him that he was admitting the execution of a will or did not satisfy himself in some other way (as, for example, by seeing the testator reading the Will) that the testator knew that it was a Will the execution of which he was admitting, the fact that the Will was registered would not be of much value. It is not unknown that registration may take place without the executant really knowing what he was registering. Law reports are full of cases in which registered Wills have not been acted upon : (see, for example, Vellaswamy Servai v. Sivaraman Servai, ILR 8 Rang



179: (AIR 1930 PC 24), Surendra Nath v. Jnanendra Nath, AIR 1932 Cal 574 and Girja Datt Singh v. Gangotri Datt Singh, (S) AIR 1955 SC 346. Therefore, the mere fact of registration may not by itself be enough to dispel all suspicion that may attach to the execution and attestation of a Will; though the fact that there has been registration would be an important circumstance in favour of the will being genuine if the evidence as to registration establishes that the testator admitted the execution of the will after knowing that it was a Will the execution of which he was admitting.”

The same principle has been reiterated in *Sridevi v. Jayaraja Shethi* reported in AIR 2005 SC 780. In the present case, first it has to be decided whether Bhattu Mahto at the time of execution of will was in a sound disposing state of mind, in view of the fact that the appellant has taken a plea that preceding one year of the death of Bhattu Mahto dated 10th October 2005 he was not in sound state of mind on account of his mental imbalance due to advance age whereas respondent has refuted the claim that Bhattu Mahto was not in sound state of mind having understood the contents had executed the Will and also appeared before the Registrar, there the Will was registered.

For deciding this issue it has to be understood



that Bhattu Mahto at the time of death was aged in between 90 (is mentioned in the recital of Will) and admittedly he was under treatment of doctor, as is apparently clear, first from the written statement raised by the appellant as has been stated in Para-11(b) that Bhattu Mahto had completely lost his sense, he was bed-ridden, he was not possessing sound state of mind and health. Chandra Kala Sinha (A.W.1) in his deposition at Para-20 has stated that the husband of Chandrakala Sinha used to take Bhattu Mahto to the doctor for treatment but did not produce any material to show that she or her husband used to take her father-in-law to the doctor for treatment. In Para-21 of his deposition she has denied that her father-in-law was not of sound mind.

Kailash Prasad, the attesting witness of the same village was examined as A.W.2. He has only stated about the execution of the Will, stated that Bhattu Mahto after going through the Will and after proper understanding put his signature and both the attesting witnesses had put their signature in his presence but he has not said a word about the mental condition and illness of Bhattu Mahto. Jitan Mahto resident of Shikarpur was examined as P.W.3, has not said about the mental condition of Bhattu Mahto and he is of

another village, only stated about Bhattu Mahto had acquired the land of Shikarpur and the cultivation was being conducted of Shikarpur independently and separately. Ram Chandra Prasad, P.W.4 of same village has not stated about mental condition of Bhattu Mahto. Sahdeo Prasad, P.W.5 of the same village has said about acquiring land by Bhattu Mahto

From the side of appellant, Sudhir Kumar of same village claiming to be close agnate and a neighbour has been examined as D.W.1, has stated that Bhattu Mahto had died at the age of 90 years, he was suffering from illness, was weak and one year before death, he lost mental balance. In the cross-examination, he has stated that he had attended the doctor in connection with treatment of Bhattu Mahto but there is no cross-examination about the mental condition of Bhattu Mahto. Suresh Prasad, D.W.2 is also a neighbor as well as agnate and stated that he used to visit the house of Bhattu Mahto, has stated that he died at the age of 90 years, was ill for 7 – 8 years and lost his mental balance one year prior to his death. The appellant who has examined himself as D.W.3 has stated that Bhattu Mahto had left behind two sons and two daughters, the Will is a manipulated document, Bhattu Mahto had never shown his desire to any person with regard to



execution of Will in favour of any person. He has stated that in connection with treatment, he used to carry his father on many occasions. He was treated by Dr. Nandlal Choudhary and he has issued the prescription dated 21st July 2005. The doctor has identified abnormal behavior and referred him to Neuro Physician cum Psychiatric Department, Kanke Mental Hospital, Ranchi (Jharkhand) and that prescription has been marked as Ext-A. In the examination in-chief, he has stated that his elder brother Anjani Kumar Verma who was looking after the affairs of the house, on account of advance age and suffering from illness, but there is no cross-examination with regard to mental position of father of appellant, namely, Bhattu Mahto. Raghunandan Prasad has been examined as D.W-4 resident of the same village, claiming to be a neighbour and having good interaction with the family members has stated that one year before his death, Bhattu Mahto lost his mental balance and confined to his bed for three months before death. In his cross-examination, he has stated that he used to visit Bhattu Mahto and whenever he paid respect by folded hands, he used to give reply.

In the present case, one thing is also important that the propounder of the Will has kept silence with regard to



two daughters nor any special citation has been issued to them. The issuance of special citation will be dealt with later on but if they would have been called as witnesses, or notice would have been issued, daughters would have been the best witnesses to say about the mental condition of their father but in absence of their evidence, it has to be assessed about the mental condition of Bhattu Mahto at the time of execution of the Will. Admittedly Bhattu Mahto was a man of advance age. Every person may not lose the mental balance but specifically while filing the written statement, specific plea has been taken by the appellant of Bhattu Mahto being ill and in the evidence he has stated that his father had lost mental balance, was not understanding anything, so much so that he had produced the doctor's prescription and proved that the doctor had opinioned about the mental condition of Bhattu Mahto being of abnormal behavior, suggested for treatment at Kanke Mental Hospital, Ranchi.

There is no cross-examination or suggestion that Bhattu Mahto was not shown to that doctor or the certificate produced by the appellant is concocted, manipulated document. The Court below has refused to take into consideration this on account of the fact that the doctor was



not examined will not be proper consideration to discard the prescription of the doctor whereas the appellant has stated that he had taken his father for treatment before the doctor who had examined and recorded the abnormal behavior and suggested for treatment at Kanke Mental Hospital, Ranchi. The said witness has stated about the mental condition of Bhattu Mahto and said that he lost mental balance one year prior to his death and Bhattu Mahto had died in a close proximity with the execution of the Will.

Learned Counsel for the respondent submitted that appellant or any witnesses has nowhere stated that what action committed by Bhattu Mahto was treated to be abnormal, has not been stated by the appellant or any of supporting witness, mere bald claim is not sufficient. Mere because the appellant or any witness have not stated that what action Bhattu Mahto constitutes abnormal behaviour, will not sufficient to hold that appellant failed to prove the mental condition of Bhattu Mahto, especially in view of the fact that respondent has not cross-examined the appellant and his supporting witnesses on mental condition of Bhattu Mahto. So this Court is of the view that Bhattu Mahto at the time of execution of the Will was not of sound mind, lost his capacity

of understanding of the fact and in such view of the matter about the mental condition this matter goes in favour of the appellant.

Another point has been raised by the appellant that Bhattu Mahto was a literate person, in stead of putting his signature, he has put his thumb impression in the alleged Will it self shows suspicious circumstances in execution of the Will whereas counsel for the respondent has submitted that merely because a person has put his thumb impression does not create ipso facto suspicious circumstances that too, to a person who has attained advance age generally a person of advance age in stead of putting signature uses to put thumb impression and placed reliance on two judgments i.e.

AIR1997 SC 3819 (Misri Lal v. Daulati Devi)

AIR 2005 SC 780 (Sridevi v. Jayaraja Sheth)

Learned counsel for the respondent has further submitted that there is no material to show that Bhattu Mahto was educated person and used to put his signature A.W.1 Chandrika Sinha has stated in Par-21 that Bhattu Mahto was not a literate person, where she has stated that it is not correct that Bhattu Mahto was a literate person. But in the written statement, in Para-16 the appellant has stated that Bhattu



Mahto was a literate person and D.W.3 Rajni Kumar Verma, appellant in Para-7 has stated that Bhattu Mahto was a literate person and the statement made in the written statement has not been disputed by the appellant anywhere. The presumption is that if a fact has not been denied, will be essential factor to show that Bhattu Mahto was a literate person and he used to put his signature. To counter this fact, strong reliance on judgment has been placed on Misri Lal v. Daulati Devi (supra) where the court in Para-10 has said that it is not unnatural for the old person to prefer thumb impression by way of marks, instead of signature. But in that case the Hon'ble Supreme Court has noticed that the testatrix while executing the deed with respect to other property had affixed her thumb impression. So in that circumstance, suspicious circumstance was removed. It will be relevant to quote Para-10 of the judgment:

“Para-10: After going through the judgments of the Trial Court and the Appellate Court as well as the oral and documentary evidence placed before us, we are of the view that the High Court has not exceeded its appellate jurisdiction in re-appreciating the oral evidence to upset the findings of the Trial Court. The learned Judge while dealing with the objection regarding the thumb impression has stated that it is not unnatural for an old person to prefer to put thumb mark instead of signature. In addition to that

as we noticed earlier, the testatrix herself in executing the waqf deed in respect of other property has conveyed the title by affixing her thumb impression only. Therefore, the doubt regarding execution of the Will on the basis of thumb impression has been rightly overruled by the High Court.”

Reliance has also been placed on a judgment reported in AIR 2005 SC 780 (supra) where the Hon'ble Supreme Court has said that the fact that the person who has executed the Will was of 80 years and died in 15 days interval where the Court has said that nothing was brought to show that the testator was not of good health and physically and mentally condition. From the cross-examination of the scribe and the two attesting witnesses, the objector had failed to bring out anything to doubt the physical or mental capacity of the testator of the Will.

In the present case as this Court has already held hereinabove that the testator was a person of weak mind or not understanding anything, in such a situation it has to be examined where the literacy or putting thumb impression has any nexus or not. Generally, a person who is putting his signature will not put his or her thumb impression on any

deed but when a person suffering from mental illness it will be easy to take thumb impression as he will not be able to put his signature in a proper manner.

In the present case, Bhattu Mahto was of advance age suffering from different types of ailment, doctor's certificate shows abnormal behavior, in such a situation, the plea that it is not abnormal for an old person to put his signature is rejected in the facts of the present case, as in AIR 1997 SC 3819 (Supra) there the Hon'ble Court has found that on earlier occasion, the testatrix had put her thumb impression while executing some other deeds but in the present case no such document has been produced by the propounder to show that Bhattu Mahto was in the habit to put his thumb impression in stead of signature.

One strong suspicion is created with regard to the fact that why Bhattu Mahto will execute the Will in favour of only one daughter in-law. Explanation has been offered that she used to serve her father in-law being pleased with the services rendered by her he executed the Will in her favour. The younger son was a government servant, including his wife was a teacher having sufficient earning on that account Bhattu Mahto had executed the Will. Apart from this explanation,



strong suspicious circumstance is created, the daughters are heirs of the same degree, why they have not been given property through the Will, when major portion of the property in the Will was inherited by Bhattu Mahto from his *Nanihal* and apart from that, if Bhattu Mahto was of the view that the property was to be given to his daughter in-law, then he could have asked his daughter or daughter in-law or close relative being attesting witness or identifier of the execution of the Will but even apart, Bhattu Mahto has daughters and daughters in-law but they are neither attesting witnesses nor any close relative has been made any attesting witness.

It is also a startling fact that appellant was neither made party nor special citation was issued to the present appellant. The present appellant filed an application under Order-1 Rule 10(2) C.P.C. on 1.8.2007 for being added as a party to the proceeding, the respondent filed Rejoinder on 5.9.2007, whereby seriously contested by the propounder. The Court below after hearing the parties vide order dated 11th December 2007, the present appellant was made a party to the proceeding. It itself shows that in a very clandestine manner, the respondent wanted the Will to be probated. Propounder of will neither impleaded the present appellant as party, who is

one of the son of testator, nor daughters were made party, itself creates suspicious circumstance against the propounder of will.

It has to be examined that effect of non-service of special citation to the two daughters admittedly no such averment is made in the application for probate, though Chandrika Sinha, propounder of the Will has stated about having two daughters of Bhattu Mahto. Admittedly in terms of Section 235 of the Succession Act it provides that the letter of administration with the Will annexed shall not be granted to any legatee other than an universal or a residuary legatee until a citation has been issued and published in the manner hereinafter mentioned, calling on the next-of-kin to accept or refuse letters of administration.

Presently two daughters are next to the kin they have not been mentioned in the entire application nor the court has issued any special citation to them. Whet her that will be a sufficient cause for refusing to grant probate to the legatee or not. To counter this submission, counsel for the respondent submits that merely because special citation or notice was not given next-to-kin will not ipso facto be just cause to revoke the probate but something more is required apart from mere non-



service of citation. In support of his contention, reliance has been placed on AIR 1931 Cal. 497 (Sadfal Kanu v. Sodari Hajam) the issue was also of non-service of special citation had come for consideration where it has been stated that if a person is entitled to special citation and such citation has not been served on him, absence of such special citation would not be itself sufficient to disentitle him to be probated when it has been proved in solemn affirmation. That was a case for revocation of the Will on the ground of non-service of citation. In the said case the Court has said that it is obligatory upon the Court when it is brought to its notice that there is a person entitled to special citation to be issued, it is the bounden duty of a propounder to have special citation served on a person who under the law, is entitled thereto. At the same time, however, even in the case of revocation of a probate the Court has certain amount of discretion.

But in that case, the Court refused to revoke the Will on the premise that the Will will not be revoked, if the party had knowledge about the proceeding. And could not show anything apart from non-citation without further any material being shown which would make the Court to hold that the proceedings were defective in substance or it resulted in

any prejudice to anybody.

In the present case, daughters are heirs of the same degree, they have been deprived of the property, as no provision has been made in the Will. It will be relevant to quote relevant paragraph of the judgment passed in sadfal Kanu case (supra):-

“It has been contended that a ground which would be sufficient for revocation of a probate would ordinarily be sufficient to invalidate a grant and that inasmuch as if Khublal Mistri had come forward and alleged that he being a person who would be the heir to the testator in the event of intestacy, was entitled to special citation and had not been so cited, the Court would have been justified in revoking the grant and ordering the proceedings to be taken in his presence therefore upon the circumstances to which reference has already been made, the proper course for this Court to adopt would be to set aside the decision of the learned District Judge and to direct that the proceedings be reopened and then gone on with upon notice being served upon Khublal. Now it need not be disputed for the purpose of the present appeal that if it is established in any particular case that the proceedings which resulted in the grant have been defective in substance, the grant may be set aside and the case reopened and reheard. It may also be concealed that it is obligatory upon the Court when it is brought to its notice that there is a person

entitled to special citation to issue such citation and further that it is the bounden duty of a propounder to have special citation served on a person who under the law, is entitled thereto. At the same time, however, even in the case of revocation of a probate the Court has certain amount of discretion. . .”

Either to act or not to act under the powers which the law confers on it to revoke a grant. If a person is entitled to special citation and such citation has not been served on him, the absence of such special citation would not of itself be sufficient to entitle him to require a will to be proved in his presence after it has once been proved in solemn form, if he was aware of the proceedings: Nistarini Debya v. Brazhmomoyi Debya (1). Of course, if Khublal Mistry applies in the present case for revocation of the probate on the ground of non-citation, it would be for the respondent in order to resist the application for revocation to show that notwithstanding such non-citation Khublal Mistry was aware of the proceedings. In the present case however, when the appellant himself had contested the proceedings he must show that if Khublal Mistry had been cited he would have contested the grant and would have done something which he himself has not been able to do. The discretion which a Court has in this respect cannot be exercised in appellant's favour unless he shows something more than mere citation of Khublal Mistry. In our opinion the appellant has not made out any such case as



would entitle this Court on appeal to set aside the decision of the Court below passed especially because Khublal himself will always have his remedy, namely, that if he was not aware of the proceedings and has been prejudiced by reasons of the proceedings having been held in his absence, he would be able to come forward and apply for revocation of the probate.

We are of opinion that all that the appellant has shown is that there has been no citation on Khublal and without anything further being shown which would entitle the Court to hold that the proceedings were defective in substance or have resulted in any prejudice to anybody it is not possible, nor would it be right, for us to interfere with the decision of the Court below.

The result is that, in our opinion, the order appealed from is correct and that the appeal should therefore, be dismissed. There has been no appearance on behalf of the respondent and there will be no order as to costs.”

Another judgment is AIR 1933 Bombay 379 (George Anthony v. Millicent Spencer) where also similar type of issue had come for consideration. There the Court said that grant of probate shall also be revoked if the proceedings before the Probate Court are defective. However, it is duty of the Court to issue citation to all the persons claiming to have

interest in the estate. The Court can revoke the grant where parties who ought to have been cited have not been cited but absence of citation has been made discretionary exercise of power to invalidate the grant. It will be relevant to quote the relevant portion as follows:

“...The grant may also be revoked if proceedings in the High Court are defective, under Section 263(a). Sexton 283(1)(c) however makes it discretionary for the Court to issue citations on all persons claiming to have an interest in the estate of the deceased, however slight the interest may be, and though Illus. (2) says that the grant may be revoked, where parties who ought to have been cited have not been cited it has been held by our appeal Court in Digambar v. Narayan (2), dealing with the corresponding sections of the old Probate and Administration Act of 1881 that absence of citations which are discretionary does not in itself invalidate the grant.”

In my opinion, therefore, under Section 263(c) there is just cause for a revocation of the grant of letters of administration. Ordinarily, revocation would follow, and under Section 296 of the Act the defendant would have to deliver up the letters of administration to this Court.”

Reliance has also been placed on AIR 1940 Cal 296 (Dinbandhu Roy v. Sarala Sundari) where identical

question was raised. T here the Court has said that if the person is required to be given notice was deprived of the special citation can be a good ground for revocation but the Court may refuse the same if it is found that the non-cited party had knowledge of the probate proceeding. It will be relevant to quote the relevant portion as follows:

“In my judgment there is no difference in principle between a special and a general citation issued under Section 283 (1), cl. (c). The object of both is to give notice to persons interested in the estate of the deceased of the proceedings for grant As a testamentary grant works in rem, it is of the utmost importance to give a wide publication to the proceedings. When the discretion is exercised and a general citation is issued, it is necessary that it should be published as required by sub. ss. 2 and 3 of Section 283. As I understand the decisions, a special citation issued in the court’s discretion under Section 283 must be served. If it is not served on the party the proceedings are defective and the grant must be revoked at his instance. Absence or non-service of special citation on a person who ought to be cited is itself a good ground for revocation at his instance in the absence of other circumstances on which the Court may refuse revocation on account of the discretion vested in it by Section 263. It would be a defect, but the defect would not be of substance, if the



non-cited part had knowledge of the probate proceeding s. If those special circumstances do not exist the grant must be revoked. It is not possible or desirable to enumerate exhaustively what those special circumstances may be. Delay in applying for revocation, which amounts to waiver or acquiescence, would be one. In the cases where such special circumstances exist, and specially if the will has been proved in solemn form before, revocation would not be made. 35 C W N 58, C W N 568, 21 CLJ 555 I think that Courtney Terrell C.J. has laid down the law correctly in AIR 1929 Pat. 385, when he said that Section 50 Probate and Administration Act (S.263, Succession Act) does not mean that the Court is entitled in its discretion to refuse revocation even when “just cause” is established. His statement regarded generally is what the Legislature means but that statement requires only the qualification which I have noted above.”

In AIR 1990 SC 1742 the Hon’ble Supreme Court has held that disinheritance among the heirs of equal degree no reason has been given for exclusion of daughter by testator, father, creates a strong suspicious circumstances and the propounder is remained dispell all the suspicious circumstances for getting grant probated.

It will be relevant to quote Para-4 of the judgment

as follows:

“Para-4. Ratio in Malkani v. Jamadar, AIR 1987 SC 767 was relied on to dissuade this Court from interfering, both, because the finding that Will was genuine, was a finding of fact and omission to mention reason for disinheriting the daughter or taking prominent part by beneficiary by itself was not sufficient to create any doubt about the testamentary capacity was because of misunderstanding of the correct import of the decision and the circumstances in which it was rendered. Property in Malkani's case was land. Beneficiary was nephew as against married daughter. Anxiety in village to protect landed property or agricultural holdings from going out of family is well-known. Even though it cannot be said to be hard and fast rule yet when disinheritance is amongst heirs of equal degree and no reason for exclusion is disclosed, then the standard of scrutiny is not the same and if the Courts below failed to be alive to it as is clear from their orders then their orders cannot be said to be beyond review. Although this Court does not normally interfere with findings of fact recorded by Courts below, but if the finding is recorded by erroneous application of principle of law, and is apt to result in miscarriage of justice then this Court will be justified in interfering under Article 136.”

In the present case on reading of the Will, no where it has been dealt with why testator has executed the Will in favour of only one daughter in-law leaving aside other daughter in-laws as well as the daughters when daughters are already there as the father always feels close to the daughter. No such averment has been made in the Will itself, save and except, mere statement has been made about execution of the Will in favour of Chandrika Sinha. The situation is made more complex and creates suspicious circumstances by keeping silence about appellant and two daughters.

On conspectus of facts and the attending circumstances, this Court is of the view that the court below has wrongly granted probate in favour of respondent as the respondent has failed to remove all the suspicious circumstances surrounding the Will. In such view of the matter, the impugned order of the trial court is set aside and the application filed by the respondent for grant of probate is dismissed.

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(Shivaji Pandey, J)