

## IN THE HIGH COURT OF JUDICATURE AT PATNA

### Miscellaneous Appeal No.449 of 2012

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1. Smt. Shri Devi W/O Mukendra Kumar Resident Of Village Mirganj, Police Station Shakurabad, District Jehanabad, At Present Mandavi, Jehanabad, Mohalla Pachmahalla, Police Station Jehanabad, District Jehanabad.

.... .... Appellant/s

Versus

1. Smt. Dewanti Devi W/O Deo Nandan Mistri Resident Of Mohalla Utta Makhdumpur, Purbi Gali, Police Station Jehanabad, District Jehanabad.

.... .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. Sanjeev Ranjan-Advocate

For the Respondent/s : Mr. Jitendra Kishore Verma-Advocate

Mr. Anjani Kumar-Advocate

Mr. Abisekh Anand-Advocate

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**CAV JUDGMENT**

**Date: 26-07-2016**

Appellant/ legatee filed instant appeal under Section 299 of the Indian Succession Act against the judgment dated 01.06.2012 and decree dated 07.06.2012 passed by the Additional District Judge-II, Jehanabad in Probate Case No.01 of 2006 leading to Title Suit No.02 of 2008 whereby and whereunder dismissed the petition.

2. Appellant/ legatee Smt. Shri Devi filed Probate Case No.01 of 2006 relating to registered Will dated 23.03.2004 allegedly executed by Mosmat Jeera Devi relating to Schedule-1<sup>st</sup> Property in her favour. Pappu Kumar has been identifier, Shyam Narayan Prasad and Vijay Shankar Prasad have been shown to be the witnesses. To substantiate the same, it has been pleaded that Mosmat Jeera Devi,



wife of Late Dilkeshwar Mistri held and possessed the property detailed under Schedule-1 of the petition. It has further been pleaded that aforesaid Mosmat Jeera Devi being pleased with the services rendered by the applicant, who was her tenant, executed a registered deed of Will dated 23.03.2004 with respect to the properties detailed under Schedule-1 of the plaint in favour of applicant including other properties though not detailed. It has further been ascribed that Mosmat Jeera Devi died on 02.05.2005 at Mohalla-Ramdhanpur Narhar Kothi, Gaya. It has further been pleaded that aforesaid Will happens to be the last Will of deceased Mosmat Jeera Devi. It has also been pleaded that Mosmat Jeera Devi had her fixed place of abode at Mohalla Mandvi, Panchmahal, P.S. and District-Jehanabad and in likewise manner, the properties detailed under Schedule-1 of the petition also lie within the original jurisdiction of the Court. It has also been pleaded that there happens to be no impediment in granting probate. The aforesaid petition was verified by one of the witnesses of the Will namely Shyam Narayan Prasad, apart from applicant herself.

3. Respondent, Dhanwanti Devi though not a party at an initial stage appeared on her own and filed objection wherein apart from raising ornamental objections, it has been pleaded that aforesaid Mosmat Jeera Devi was murdered by the husband of the applicant and for that, a criminal case was registered and the F.I.R., post mortem



have been made Annexure. It has further been pleaded that as the dead body was not identified at an initial stage of investigation, therefore, photo was kept preserved, which was identified by one Jhallu Mistri of village Amarpura. The husband of applicant was facing trial on account of submission of chargesheet against him.

4. It has also been pleaded that applicant has got no connection with Jeera Devi. Her husband was tenant of Jeera Devi and in the aforesaid background after committing murder of Jeera Devi, he created forged and fabricated document as a Will. It has further been pleaded that Jeera Devi never executed Will in favour of applicant nor she ever appeared before the Registrar for acceptance. It has also been submitted that anyhow, the husband of applicant succeeded in getting the photograph of Jeera Devi which he managed to affix over the document taking the lower cadre employee of the Registry Office in his collusion.

5. It has also been pleaded that neither scribe nor the so alleged witnesses were ever known to Jeera Devi and the aforesaid event happens to be out and out under criminal conspiracy in order to grab the property.

6. Furthermore, it has been submitted that Jeera Devi never possessed all the properties which have been detailed under Schedule-1 of the plaint. In likewise manner, it has also been



submitted that deceased Mosmat Jeera Devi was murdered prior to 30.04.2014 at the hands of husband of applicant and on account thereof, her death certificate showing the date of death as 02.05.2005, happens to be out and out a forged, fabricated document. Furthermore, it has also been submitted that filing of probate petition was not at all maintainable in the background of the fact that applicant does not happen to be the executor of the Will.

7. Then, it has specifically been pleaded that objector happens to be the relative of Jeera Devi. Jeera Devi executed the deed of gift on 27.12.1990 in favour of objector wherein she had admitted the inter se relationship as well as service being rendered by the objector. It has also been pleaded that the properties which ever been gifted to the objector by the aforesaid Jeera Devi happens to be under her peaceful possession and for that reason, the genuineness of the so alleged Will has been in question.

8. As the petition has been contested on account thereof, the proceeding transformed as a Title Suit and renumbered as Title Suit No.02 of 2008.

9. While proceeding with the trial, the learned lower Court had framed following issues:-

I) Is the application for the grant of probate maintainable?

II) Has the applicant got cause of action to file the probate case?

III) Has the registered Will dated 23.03.2004 purported to be executed by testatrix Jeera Devi in favour of applicant in her sound state of mind?

IV) Is the registered deed dated 23.03.2004 genuine, valid and free from suspicion?

V) Is the applicant entitled for grant of probate in her favour?

After detailed discussion, the learned lower Court dismissed the suit, hence this appeal.

10. The learned counsel for the appellant has submitted that the finding recorded by the learned lower Court happens to be bad, illegal as well as contrary to the mandate of law. That being so, is fit to be set aside.

11. To substantiate such plea, first of all status of respondent/ objector has been challenged. It has been submitted that deceased was carpenter while the objector happens to be Black Smith. That means to say, both two are of two different caste and so, objector could not be identified as a person having interest in the property of Late Jeera Devi and so, was not a necessary party in terms of Section 283(1)(C) of the Indian Succession Act. Therefore, the learned lower



Court should not have entertained her status and in likewise manner, would not have allowed the objector to contest the case. Even accepting for a moment that a deed of gift was executed by executant Mosmat Jeera Devi in her favour was not going to change her status. Therefore, allowing respondent/ objector to contest the suit happens to be against the spirit of law and further, considering her plea while deciding Issue Nos.3 and 4 appears to be illegal approach of the learned lower Court.

12. As testatrix Mosmat Jeera Devi died issueless having no kith and kin, therefore, none was impleaded nor details thereof, as required was furnished. In likewise manner, erasing presence of respondent/ objector in the facts and circumstances of the case as stated above, would not suggest any kind of impediment in granting probate. In its continuity, it has also been submitted that as respondent/ objector had not examined herself, therefore, her pleading is found out of consideration and in likewise manner, her status happens to be. Therefore, presence of the respondent/ objector should not be acknowledged and in the aforesaid situation, the instant appeal is fit to be allowed.

13. It has also been submitted that whenever Will is brought up for its proper adjudication in order to grant of letter of administration or probate, title, possession goes out of consideration.



The only consideration is with regard to genuineness of the Will. That means to say, testator was in fit mental condition to execute Will and during course thereof, the presence of witnesses should be in terms of Section 63(C) of the Indian Succession Act. Apart from this, having the witnesses duly substantiating the genuineness of the Will executed by testatrix Mosmat Jeera Devi, the document being registered one gives an additional support whereupon, its genuineness would not have been doubted.

14. It has further been submitted that presence of appellant at the place of testatrix Mosmat Jeera Devi was very much probable in the background of the fact that she was tenant and, as testatrix Jeera Devi was a widow without having near and dear, therefore, the appellant provided all sorts of service to Mosmat Jeera Devi and being pleased with the service rendered by the appellant, she executed a Will, which was a normal phenomenon and the same should not have been doubted and seen with suspicious eye by the learned lower Court.

15. It has further been submitted that the learned lower Court gave undue advantage over non-mentioning of testatrix being in fit mental condition at the time of execution as the same is not at all warranted as per requirement as categorized under the Indian Succession Act. Therefore, the learned lower Court should not have

much stressed over aforesaid deficiency.

16. In its continuity, learned counsel for the appellant also submitted that the witnesses have been examined, who substantiated their status not only to the extent of being witnesses of the Will rather they have also deposed as well as affirmed the fact that testatrix Jeera Devi had executed the Will in her sound mental condition and the document was scribed as per her dictation and further, the document was presented by herself before the Registrar for registration where she accepted the execution. Apart from this, it has also been stated by them that she was snapped and her photograph stood affixed over the document. That being so, as has been submitted, the appellant succeeded in substantiating the plea that testatrix Jeera Devi had executed registered deed of Will dated 23.03.2004 under her sound mental condition out of free volition.

17. It has further been stated that much hue and cry has been raised on behalf of respondent/ objector that husband of applicant happens to be murderer of testator Jeera Devi which, after conclusion of the trial, has been disbelieved and ultimately acquitted. The dead body, as claimed to be that of testator Jeera Devi, was a farce as, during course of trial, the same was not at all properly identified to be. So, submitted that the plea of respondent/ objector on this score is found completely smashed. Thus, by way of concluding

submission, it has been submitted that disowning status of respondent/ objector, the proceeding would not have been allowed to convert as Title Suit and further, as no hurdle was found in between, should have been allowed by way of granting probate.

18. The learned counsel for the appellant also relied upon 2008(4) SCC 300, 2008(10) SCC 489, A.I.R. 1977 (SC) 63, A.I.R. 1987 Kerala 193, A.I.R. 1941 Patna 475, A.I.R. 2009 SC 1670, A.I.R. 1955 SC 363, A.I.R. 1969 SC 1147, A.I.R. 1977 SC 63, A.I.R. 2006 SC 786, (2012)4 SCC 387, A.I.R. 1996 SC 1724, (2003)8 SCC 537, (2005)8 SCC 67, (2005)1 SCC 40, 280, (2002)2 SCC 85, (2008)7 SCC 216, (1995)4 SCC 459, A.I.R. 1985 SC 500, (2013)7 SCC 490, (2015)1 SCC 235.

19. Learned counsel for the respondent/ objector while refuting the submission made on behalf of appellant/ legatee submitted that the learned lower Court had rightly dismissed the petition and on account thereof, did not attract interference. It has also been submitted that being sister of alleged testatrix Mosmat Jeera Devi, who was issueless, the respondent/ objector got an interest in the property belonging to Mosmat Jeera Devi, more particularly in the background of deed of gift having in her favour wherein she had accepted the relationship. Apart from this, inclusion of the properties which stood gifted to the respondent/ objector under Schedule-I of the



petition gave a valid, legal cause to object, and as such, rightly been allowed to object, which malafidely been wrapped and concealed by the appellant/ applicant. Therefore, the petition happens to be non-maintainable in the eye of law. Furthermore, though much emphasis has been drawn up on the ground that Mosmat Jeera Devi was a carpenter (Badhai) while the husband of respondent/ objector happens to be Black Smith, but nowhere, while the husband of the respondent/ objector was being cross-examined, suggested that respondent/ objector happens to be of different caste. Because of the fact that respondent/ objector happens to be married in different caste on account thereof, inter se relationship would not be allowed to vanish.

20. It has further been submitted that instant petition happens to be non-maintainable as appellant/ applicant had prayed for grant of probate and not letter of administration. To substantiate such plea, it has been submitted that appellant/ applicant has not been appointed as an executor in the alleged Will and on account thereof, petition for probate would not lie.

21. Furthermore, it has been submitted that there happens to be sufficient material to suggest that the document in question happens to be forged and fabricated. To substantiate the same, it has been submitted that though the alleged Will happens to be a registered one, but there happens to be no endorsement by the Registrar over



acceptance of execution as well as registration at the end of testatrix. Also submitted that in light of specific plea that alleged testatrix Mosmat Jeera Devi was impersonated and further, admitted document the deed of gift, which was available on the record since before as well as being an Exhibit-D, the appellant/ applicant should have taken recourse of getting the L.T.I. of both two documents duly compared by an expert. Had there been such exercise, then in that event, the matter would have been exposed whether thumb Impression having over both two documents happens to be that of same lady or two different lady.

22. It has also been submitted that Dharmendra Kumar, alleged scribe has not been examined. Two witnesses, PW-1 as well as PW-2, claimed to be identified as well as witness over alleged Will are in consistent on each and every aspect and further, they have not deposed in order to substantiate the requirement of Section 63(C) of the Indian Succession Act. Whereupon, not only their evidences are fit to be disbelieved rather their status as an identifier as well as witness over alleged Will executed by Most. Jeera Devi also became doubtful. In its continuity, it has also been submitted that evidence of PW-3 is also not found synergetic to her plea as she herself, during course of her deposition failed to extricate the deficiency persisting on the record. The remaining witnesses are of no consequence because of

the fact that they have got no presence over the alleged Will dated 23.03.2004.

23. It has also been submitted that instant petition should not have been entertained by the learned lower Court as, though it has been incorporated that permanent place of abode of testatrix Mosmat Jeera Devi happened to be at Mohalla-Panchmahal, Jehanabad within the original jurisdiction of the Court, but the same is found controverted with the death certificate having been filed on behalf of appellant/ applicant showing the place of death within the town of Gaya and further, evidence of PW-3 the appellant/ applicant herself along with her husband found suffering from vagueness whether the testatrix was residing within the precinct of Gaya town before execution of the alleged Will or after the execution of the Will.

24. It has also been submitted that mandate of law for recognition of valid Will has not been fulfilled. The petition is lacking with regard to presence of the kith and kin left by testatrix Mosmat Jeera Devi rather the petition is completely silent on that very score and in likewise manner, lacking the details of the properties lying at the native place of Mosmat Jeera Devi. Had there been proper exercise as well as compliance at the end of appellant/ applicant in furnishing full details, then in that event, the matter would have been quite otherwise and so, withholding those information makes the

petition non-maintainable. In likewise manner, as the appellant/ applicant claimed to be personal acquisition of Mosmat Jeera Devi, then in that event, the persons having interest after the death of Jeera Devi should have been detailed in order to effectuate proper citation.

25. In order to substantiate such plea, the learned counsel for the respondent/ objector had relied upon A.I.R. 1995 Patna 122, A.I.R. 1996 SC 861, A.I.R. 1966 Patna 410, A.I.R. 1965 SC 1812, A.I.R. 2003 SC 4351, A.I.R. 1974 SC 971, A.I.R. 1949 Bombay 266, A.I.R. 2003 SC 761, 2015 (8) SCC 615, 2016(2) P.L.J.R. 26, 2012(2) P.L.J.R. 856, A.I.R. 1977 SC 1712, A.I.R. 1956 Patna 53, A.I.R. 1999 SC 2203, 2007(2) P.L.J.R. 594, 2001 (7) SCC 503, A.I.R. 1977 SC 73, A.I.R. 2007 SC 1975.

26. Two eventualities, are found permissible with regard to a Will. The first one having been permitted regarding grant of probate and the second one letter of administration. Section 218 speaks regarding grant of letter of administration followed by Section 220 whereunder effect of letter of administration has been perceived and in likewise manner, Section 222 permitting the scope of probate and Section 227, effect of probate. As per Section 222, probate is to be granted only to an executor appointed by the Will. Such appointment may be expressed or by necessary implication.

27. Letter of administration is to be sought for by way of



filing of a petition in accordance with Section 278 of the Indian Succession Act while the petition for probate is to be carried out in accordance with Section 276 of the Indian Succession Act. After going through both the relevant sections, it is evident that both has got independent requirements and the same is to be fulfilled at the end of the appellant/ applicant while filing the same under respective heading. There happens to be no provision under Indian Succession Act whereunder transposition of petition is permitted. However, the District Judge or the delegate, identified to the competent authority to grant letter of administration as well as probate. Be that as it may, considering that nomenclature of petition has wrongly been chosen and in likewise manner, incorporation of wrong Sections as Section 272 read with Section 276 of Indian Succession Act in the petition and further, in the facts and circumstances of the case, that means to say, considering the recital of the Will wherein the status of the appellant/ applicant does not happen to be that of executor (Exhibit-2), even by way of implication, then in that event, certainly the appellant/ legatee would not have filed petition for probate rather the petition would have been for letter of administration. Even in case, instant petition is treated to be a petition for grant of probate, then in that event, the petition would not be maintainable for want of appellant/ legatee being executor though incorporated under Para-4(e)



of the petition. Mere disclosure is not enough one, rather, is to be found duly recognized under the Will. Then in that event, it could be considered to be a petition for grant of letter of administration and for that, the following requirements were to be furnished.

- A) The time and place of deceased's death.
- B) A family and other relative of the deceased and their respective residences.
- C) The right in which the petitioner's claim.
- D) The amount of assets which are likely to come to the petitioner's hand.
- E) When the application to the District Judge that the deceased at the time of his death had affixed place of aboard or had some pro situation within the jurisdiction of the Judge.
- F) The District Delegate that the deceased at the time of his death had affixed place of aboard within the jurisdiction of delegate.

From the petition, it is evident that the persons whose interest having with the property of testatrix have not been disclosed and that happens to be vital one in terms Section 283 of the Indian Succession Act whereunder apart from others, citation is to be effected to all persons, who have got interest in the estate of deceased/ testator and on

account thereof, the instant petition happens to be defective one. When the evidence of PW-3, the appellant has been gone through, it is evident that neither she had gone to the house of testatrix, nor is known to her kith and kin.

28. Dealing with the issue through different angle, from the main petition as is evident, appellant/ applicant in terms of Para-4(e) had claimed to be an executor under the Will dated 23.03.2004 which, after going through the Will in question (Exhibit-2) in consonance with Section 222 of the Indian Succession Act, more particularly, scrutinized on the basis of the illustration given there under has been found contrary to the recital of the Will and on account thereof, status of the appellant/applicant would not be that of executor as claimed under Para-4(e) of the main petition. That has purposely been enumerated in the background deficiency having at the part of the appellant/ applicant in tracing out the other legal heirs having interest in the property belonging to testatrix Most. Jeera Devi and on account thereof, had there been it a petition for grant of letter of administration, it would not have sailed in the background of prohibition enumerated under Section 235 of the Indian Succession Act which read as follows:-

*“235. Citation before grant of administration to legatee other than universal or residuary.— Letters of administration with the Will annexed*

*shall not be granted to any legatee other than a 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.”*

29. And in the aforesaid background, there happens to be legal requirement for citation in terms of Section 283(1)(c ) of the Indian Succession Act. For better appreciation, same is quoted below:-

**“283. Powers of District Judge.-(1)** *In all cases the District Judge or District Delegate may, if he thinks proper,-*

*(a).....*

*(b).....*

*(c) issue citations calling upon all persons claiming to have any interest in the estate of the deceased to come and see the proceedings before the grant of probate or letters of administration.*

*.....*

*(2) The citation shall be fixed up in some conspicuous part of the court-house, and also the office of the Collector of the district and otherwise published or made known in such manner as the Judge or District Delegate issuing the same may direct.*

*.....*

*(3) Where any portion of the assets has been stated by the petitioner to be situate within the jurisdiction of a District Judge in another State, the District Judge issuing the same shall cause a*

*copy of the citation to be sent to such other District Judge, who shall publish the same in the same manner as if it were a citation issued by himself, and shall certify such publication to the District Judge who issued the citation.”*

30. From conjoint reading of both two Sections as detailed herein above, it is apparent that without citation encapsulating kith and kin, the letter of administration would not be granted.

31. In ***Crystal Developers v. Asha Lata Ghosh (Smt) (Dead) through LRS. and others with Archit Vanijya & Viniyog (P) Ltd. and others v. Asha Lata Ghosh (Smt) (Dead) through LRS. and others with Archit Vanijya & Viniyog (P) Ltd. and others v. Arindam Ghosh and others reported in (2005)9 SCC 375***, the relevant provision and its repercussion has thoroughly been discussed. For better appreciation the same is quoted below:-

*“28. Section 211 falls in Part VIII which deals with representative title to the property of the deceased on succession. Section 211(1) declares that the executor or the administrator, as the case may be, of a deceased person is his legal representative for all purposes and that all the property of the deceased vests in him, as such. Under section 212, it is inter alia provided that no right to any property of a person who has died*



*intestate can be established in any Court, unless letters of administration are granted by a probate Court. Under section 213, no right as an executor or a legatee can be established in any Court, unless probate of the will is granted, by the Probate Court, under which the right is claimed. Similarly, no right as executor or legatee can be established in any Court unless the competent Court grants letters of administration with the will annexed thereto. Sections 211, 212 and 213 brings out a dichotomy between an executor and an administrator. They indicate that the property shall vest in the executor by virtue of the will whereas the property will vest in the administrator by virtue of the grant of the letters of administration by the Court. These sections indicate that an executor is the creature of the will whereas an administrator derives all his rights from the grant of letters of administration by the Court. Section 214 states inter alia that no debt owing to a deceased testator can be recovered through the Court except by the holder of probate or letters of administration or succession certificate. Section 216 inter alia lays*



down that after any grant of probate or letters of administration, no person other than such grantee shall have power to sue or otherwise act as a representative of the deceased, until such probate or letters of administration is recalled or revoked. Part IX of the Act deals with probate, letters of administration and administration of assets of deceased. Under section 218(1), if the deceased is a Hindu, having died intestate, administration of his estate may be granted to any person who, according to the rules for the distribution of the estate applicable to such deceased, would be entitled to. Under section 218(2), when several such persons apply for letters of administration, it shall be in the discretion of the Court to grant letters of administration to any one or more of such persons. Section 220 refers to effect of letters of administration. It inter alia states that letters of administration entitles the administrator to all rights belonging to the intestate. Section 221 inter alia states that letters of administration shall not render valid any intermediate acts of the administrator which acts diminish or damage the estate of the intestate. Sections 218, 219, 220



*and 221 are relevant in the present case as they indicate that nothing prevented the intestate heirs of Balai Chand to apply for letters of administration, particularly when they alleged that Balai Chand died without making a will. Moreover, section 221 indicates that intermediate acts of the administrator which damage or diminish the estate are not validated. This section brings out the difference between letters of administration and probate. Section 221 expressly states that certain intermediate acts of the administrator are not protected as the authority of the administrator flows from the grant by the competent court unlike vesting of the property in the executor under the will (see: section 211). Section 222 states that probate shall be granted only to an executor appointed by the will. Section 227 deals with effect of probate. It lays down that probate of a will when granted establishes the will from the date of the death of the testator and renders valid all intermediate acts of the executor. Section 227 is, therefore, different from section 221. As stated above, in the case of letters of administration, intermediate acts of the grantee are not protected whereas in*



*the case of probate, all such acts are treated as valid. Further, section 227 states that a probate proves the will right from the date of the death of the testator and consequently all intermediate acts are rendered valid. It indicates that probate operates prospectively. It protects all intermediate acts of the executor as long as they are compatible with the administration of the estate. Therefore, section 221 read with section 227 brings out the distinction between the executor and holder of letters of administration; that the executor is a creature of the will; that he derives his authority from the will whereas the administrator derives his authority only from the date of the grant in his favour by the Court. Section 235 inter alia states that letters of administration with the will annexed shall not be granted to any legatee, other than universal or residuary legatee, until a citation has been issued and published calling on the next-of-kin to accept or refuse letters of administration. Such provision is not there in respect of grant of probate. In the circumstances, the judgment in the case of Debendra Nath Dutt & another v. Administrator-General of Bengal reported in*

*[ILR (1906) 33 Calcutta 713] will not apply to the present case."*

32. Now, coming to the evidence having been adduced on behalf of appellant/ applicant, it is evident that altogether six witnesses have been examined on her behalf out of whom, PW-4 is Niraj Kumar Sinha, who came to depose over death of Jeera Devi on 02.05.2005 at Narhar Kothi lying at Mohalla Ramdhan, Gaya and all the ceremonies were conducted by Mukendra Kumar, husband of appellant, PW-5 had exhibited a document dated 13.05.1984 exhibited by Ram Jiwan Paswan in favour of Smt. Jeera Devi. PW-6 is Akhilesh Kumar, who had exhibited original sale deed dated 30.06.1980 executed by Sarju Prasad in favour of Smt. Jeera Devi as well as sale deed dated 02.07.1982 executed by Baiju Paswan in favour of Jeera Devi. Therefore, these PWs are not at all relevant on the point of consideration over genuineness of the Will. PW-1, Pappu Kumar has claimed himself to be one of the tenants of Jeera Devi and further, identified Smt. Shri Devi (appellant/ applicant) to be another tenant of Jeera Devi. She rendered service to Jeera Devi. He had further deposed that Jeera Devi disclosed that she is going to execute Will relating to her building in favour of Shri Devi about five years ago and further, she had also requested to become witness thereupon. He had further stated that as per instruction, he along with Jeera Devi,



Shyam Narayan Prasad and Vijay Shankar came at Jehanabad Registry Office where, at the direction of Jeera Devi, Dharmendra Kumar got typed the document by Sanjay Kumar, Typist in presence of Jeera Devi along with them. Jeera Devi, Shyam Narayan Prasad, Vijay Shankar Prasad and he himself heard the recital. Again, he said that Dharmendra Kumar read the recital before Jeera Devi and Jeera Devi put mark of all the five fingers over Will in his presence and further, on her direction, he had identified the same. Shyam Narayan Prasad and Vijay Shankar Prasad witnessed over the document as directed by Jeera Devi. In Para-9, he had stated that Jeera Devi had herself produced Will before Registrar, accepted execution and he had identified Jeera Devi before Registrar. In Para-10, he had exhibited the document. During cross-examination, it is evident that no cross-examination has been made over his presence as an identifier over the alleged Will as well as signature having been done by other witnesses. However, cross-examination has been made to test his status with regard to acquaintance as well as possibility of him being an identifier as is evident from Paras-15, 16 and 18 of the cross-examination. So, from his evidence, it is evident that he happens to be mere identifier.

33. Witness No.2 is Shyam Narayan Prasad, he had stated that about five years ago, wife of Dilkeswar Mistri had called him and said that she is going to execute Will in favour of Smt. Shri



Devi. So, he should become a witness thereupon. He had further stated that accordingly, he came Jehanabad Registry Office where scribe Dharmendra Kumar got the document typed by a Typist as directed by Jeera Devi. The contents of the document was read over by the scribe to Jeera Devi and finding it correct, Jeera Devi put mark of all her fingers over the document. As directed by Jeera Devi, her tenant Pappu identified. He had further stated that Jeera Devi put her thumb impression in her presence and accepted recital thereof. During cross-examination, like PW-1, he has not been cross-examined on material facts.

34. Witness No.3 is appellant/ applicant herself. She had stated that Jeera Devi had executed Will in her favour on account of service having been rendered at her end while she was tenant of Late Jeera Devi. The recital of the document was typed by the scribe Dharmendra Kumar from a Typist. Pappu Kumar read the recital of the document to Jeera Devi. After preparation of the Will, the same was handed over to her by Jeera Devi. She had further stated that as per direction of Dharmendra Kumar, Pappu Kumar had signed over the document on behalf of Jeera Devi. Shyam Narayan Prasad and Vijay Shankar Prasad signed over Will as a Witness as per direction of the Jeera Devi. Jeera Devi herself produced the document before Sub-registrar. In Para-17, she had stated that Jeera Devi had got the

relevant recital in the Will that being pleased with the service rendered by Smt. Shri Devi, she is executing the Will. Property will be in my possession till my life time and after my death, it will go to Smt. Shri Devi.

35. From parallel scrutiny of the evidences of aforesaid three witnesses, who happens to be material one, it is evident that although PW-1 had stated that document was prepared at the wish and desire of Mosmat Jeera Devi, the same was read over to the Mosmat Jeera Devi, she put her fingerprint of all the five fingers in their presence and he identified the same. In same stroke, Shyam Narayan Prasad and Vijay Shankar Prasad put their signature as a witness as per direction of the Mosmat Jeera Devi, which is found completely smashed by the evidence of PW-2, who had simply stated that fingerprint of all the five fingers were put by Mosmat Jeera Devi and as per direction, Pappu Kumar (PW-1) had put his signature. Furthermore, he had stated that in his presence, Jeera Devi put thumb impression over the document. Although, he had identified his signature, but he had not stated that in presence of two witnesses that means to say, PW-2 as well as Vijay Shankar Prasad, Jeera Devi had put her thumb impression. In likewise manner, he had not stated that in presence of Jeera Devi, he had put his signature. He had not stated with regard to signature of another witness, how it was procured.

Therefore, casting doubt over his status being a bonafide witness over the Will in question, he had also doubted evidence of PW-1, because of the fact that he had not stated that the recital of the Will was read over to Jeera Devi in his presence as well as in presence of Pappu Kumar as well as Vijay Shankar Prasad. In likewise manner, PW-3, the appellant-applicant herself had invented a new story whereunder she had deposed that recital of the document was read over by Pappu Kumar which, neither PW-1 nor PW-2 had stated. Furthermore, she had stated that as per direction of Dharmendra Kumar, Pappu Kumar signed on behalf of Jeera Devi. She had not stated that Pappu Kumar had identified Jeera Devi as per wish and desire of Jeera Devi though with regard to remaining witnesses, Shyam Narayan Prasad and Vijay Shankar Prasad, she had stated like so.

**36.** Section 63 of the Indian Evidence Act laid down a criteria for valid Will. For better appreciation, the same is quoted below:-

***“63 Execution of unprivileged Wills. —Every testator, not being a soldier employed in an expedition or engaged in actual warfare, <sup>12</sup> [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.”*

37. When the evidences of the all the three PWs are taken together as well as after parallel scrutiny there of the requirement of law as envisaged under Section 63 (c) of the Indian Succession Act, is found completely lacking.

38. From perusal of the L.C. Record, as discussed in foregoing paragraphs, status of respondent/ objector is found not above the board with regard to her legal status in order to put objection, but the aforesaid deficiency will not automatically give an additional support to the appellant when, on her own, she failed to fulfil the legal requirement for admitting the document to be a valid one. Registration of a document being a Will would not spare the legatee from an obligation whereunder the genuineness of the

execution of the Will is to be proved. For better appreciation Section 68 of the Evidence Act is quoted below:-

**“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: 1[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. “

39. In ***Jagdish Chand Sharma v. Narain Singh Saini (Dead) through Legal Representatives and others reported in (2015) 8 SCC 615***, it has been held:-

**“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.*

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**44.** *The evidence of AW 1, AW 3 and AW 5, analysed collectively or in isolation, does not evince animo attestandi, an essential imperative of valid attestation of a Will. As Section 71 of the Act, 1872 by no means can be conceived of to be a diluent of the rigour of Section 63 of the Act, the testimony of these witnesses fall short of the probative content to construe Ex. A-1 to be a validly executed and attested Will as envisaged in law.*

**45.** *In Girija Datt Singh (AIR 1955 SC 346), the testimony of the two attesting witnesses was found wanting in credibility for which the propounder did fall back on the admission of the testator about the execution of the Will involved at the time of registration in presence of two persons Mr. Mahadeo Prasad and Mr. Nageshur, who also had appended their signatures at the foot of the endorsement of the*



*Sub Registrar. These signatures were contended to be enough to prove due attestation of the Will. It was held that mere signatures of these two persons appearing at the foot of the endorsement of registration could not be presumed to have been made as attesting witnesses or in the capacity of attesting witnesses and absence of animo attestandi was underlined.*

*46. This Court in H. Venkatachala Iyengar (AIR 1959 SC 443) while dilating on the statutory requisites of valid execution of a Will, observed that unlike other documents this testamentary instrument speaks from the death of the testator and by the time when it is produced before a Court, the testator had departed from his temporal state and is not available to own or disown the same. It was thus emphasised that this does introduce an element of solemnity in the decision on the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. In this context, it was emphasised that the propounder would be required to prove by satisfactory evidence that (i) the Will was signed by the testator, (ii) he at the relevant time was in a sound and disposing state of mind, (iii) he understood the nature and effect of the dispositions, and that (iv) he put his signature to the document of his own free will. It was observed that 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, the court would be justified in making a finding in favour of the propounder signifying that he/she had been able to discharge his/her onus to prove the essential*

*facts. The necessity of removal of the suspicious circumstances attendant on the execution of the Will, however, was underlined as well. That no hard and fast or inflexible rule can be laid down for the appreciation of the evidence to this effect was acknowledged.*

*47. That a propounder has to demonstrate that the Will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in presence of two witnesses who had attested it in presence and in the presence of each other, in order to discharge his onus to prove due execution of the said document was reiterated by this Court amongst others in Surendra Pal and Ors. (supra) It was held as well that though on the proof of the above facts, the onus of the propounder gets discharged, there could be situations where the execution of a Will may be shrouded by suspicious circumstances such as doubtful signature, feeble mind of the testator, overawed state induced by powerful and interested quarters, prominent role of the propounder, unnatural, improbable and unfair bequests indicative of lack of testator's free will and mind etc. In all such eventualities, the conscience of the Court has to be satisfied and thus the nature and quality of proof must be commensurate to such essentiality so much so to remove any suspicion which may be entertained by any reasonable and prudent man in the prevailing circumstances. It was propounded further that where the caveator alleges undue influence, fraud and coercion, the onus, however, would be on him to prove the*

*same, and on his failure, probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind.*

*48. In Jaswant Kaur [(1977)1 SCC 369] this Court held that suspicion generated by the distrustful circumstances 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 when the Will was made or that those like the wife and children of the testator, who would normally receive their due share in the estate, were disinherited because the testator might have had seen reasons for excluding them. It was underscored that it was obligatory for the propounder to remove all legitimate suspicions before the document could be accepted as the last Will of the testator.*

*49. In Ravindra Nath Mukherjee [(1995) 4 SCC 459] and Another (supra) this Court entertained the view that the, witnesses to the Will, if interested for the propounder is perceived to be a suspicious circumstance, the same would lose significance if the document is registered and the Sub Registrar does certify that the same had been read over to the executor who on doing so admits the contents.*

*50. In Pentakota Satyanarayan and Others [(2005) 8 SCC 67] the testator P. Mr. Ram Murthi had admitted the execution of the Will involved. He, however, expired while the suit was pending. The Will was registered and the signature of the testator was identified by two*



witnesses whereupon the Sub Registrar had signed the document. In this textual premise, it was held that the signatures of the registering officer and of the identifying witnesses affixed to the registration endorsement did amount to sufficient attestation within the meaning of the Act. It was held as well that the endorsement of the Sub Registrar that the executant had acknowledged before him the execution, did also amount to attestation. The facts revealed that the Will was executed before the Sub Registrar on which the signature of the testator as well as signature and the thumb impression of the identifying witnesses were taken by the said authority, whereafter the latter signed the deed. In general terms, it was observed that registration of the Will per se did not dispense with the need of proving its execution and the attestation in the manner as provided in Section 68 of the 1872 Act. It was enunciated as well that execution consisted of signing a document, reading it over and understanding and completion of all formalities necessary for the validity of the act involved. The facts as obtained in this decision are distinguishable from those in hand and are incomparable on many counts. No analogy can be drawn from this case to conclude that the testimony of AW 3 even if read with that of AW 1 and AW 5 can sum up to prove valid execution and attestation of the Will as stipulated by Section 63 (c) of the Act.

**51.** *Janki Narayan Bhoir [(2003)2 SCC 91* witnessed a fact situation where one of the attesting witnesses of the Will, though both were alive at the relevant time, was produced to prove the execution thereof. The scribe of the document was also examined. The attesting witness deposed that he had not seen the other witness present at the time of execution of the



*Will and further he did not remember as to whether he along with the latter were present either when the testator had put his signature on the Will or that he had identified the person who had put the thumb impression on the document. The issue raised before this Court was that the evidence of the said attesting witness had failed to establish the attestation of the Will by the other attesting witness who though available had not been examined and thus the Will was not proved. The contrary plea was that though Section 63 of the Act required attestation of a Will by at least two witnesses, it could be proved by examining one attesting witness as per Section 68 of the 1872 Act and by furnishing other evidence as per the Section 71 thereof.*

*52. While dwelling on the respective prescripts of Section 63 of the Act and Sections 68 and 71 of Act 1872 vis-à-vis a document required by law to be compulsorily attested, it was held in Janki Narayan Bhoir case that if an attesting witness is alive and is capable of giving evidence and is subject to the process of the Court, he/she has to be necessarily examined before such document can be used in evidence. It was expounded that on a combined reading of Section 63 of the Act and Section 68 of the 1872 Act, it was apparent that mere proof of signature of the testator on the Will was not sufficient and that attestation thereof was also to be proved as required by Section 63 (c) of the Act. It was, however, emphasised that though Section 68 of the 1872 Act permits proof of a document compulsorily required to be attested by one attesting witness, he/she should be in a position to prove the execution thereof and if it is a Will, in terms of Section 63 (c) of the Act, viz, attestation by two attesting witnesses in the*



*manner as contemplated therein. It was exposed that if the attesting witness examined besides his attestation does not prove the requirement of the attestation of the Will by the other witness, his testimony would fall short of attestation of the Will by at least two witnesses for the simple reason that the execution of the Will does not merely mean signing of it by the testator but connotes fulfilling the proof of all formalities required under Section 63 of the Act. It was held that where the attesting witness examined to prove the Will under Section 68 of 1872 Act fails to prove the due execution of the Will, then the other available attesting witness has to be called to supplement his evidence to make it complete in all respects.”*

40. After analyzing and scrutinizing the evidence as well as the deficiency persisting on the record, did not warrant interference in the judgment and decree impugned. Consequent thereupon, instant appeal is found meritless and is accordingly, dismissed. However, in the facts and circumstances of the case, parties will bear their own costs.

**(Aditya Kumar Trivedi, J)**

Vikash/-

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