

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.346 of 1991

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Srimati Indira Devi, Wife of Arjun Sharma, Resident of village- Shankarpur,
P.S.- Muffasil, District - Munger.

... .. Appellant

Versus

1. Ramji Sharma, son of Sitaram Sharma, deceased.
2. Lalu Sharma, son of Sitaram Sharma, deceased.
3. Sunita Devi,
4. Anita Devi @ ManMan Devi,
5. Kiran Devi,
6. Lali Kumari, All daughters of Late Sitaram Sharma, Residents of village – Daulatpur, P.S. Jamalpur, District-Munger (legal heirs of deceased defendant No.1 Sudha Devi).
7. Tanki Devi, wife of Kant Lal Sharma, resident of Mohalla Mangal Bazar, P.S. Kotwali, District- Munger.
8. Bhago Devi, daughter of Late Rit Lal Mistri, resident of village – Shankarpur Nawada, P.S. Muffasil, District – Munger.

... .. Respondents

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Appearance :

For the Appellant	:	Mr. Sharda Nand Mishra, Advocate Mr. Dhananjay Kumar Gupta, Advocate Mr. Deepak Kumar, Advocate
For the Respondents	:	Mr. Ganpati Trivedi, Sr. Advocate

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CORAM: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

CAV JUDGMENT

Date : 26-09-2018

This is the plaintiff's appeal against the Judgment and decree dated 05.02.1991 passed in Title Suit No. 27 of 1986, whereunder the Additional District Judge- 12th , Munger, dismissed the plaintiff's suit for probate of the Will deed dated 05.11.1984 said to have been executed by deceased Ritlal Mistry.

2. The plaintiff/appellant Indra Devi filed an application under Section 276 of the Indian Succession Act for



probate of Will said to have been executed by her father Ritlal Mistry on 05.11.1984 with contention that her father Ritlal Mistry, son of Karu Mistry, resident of village- Shankarpur, P.S. Muffasil, District – Munger died on 15.11.1984 at his residence. Before death, Ritlal Mistry executed Will on 05.11.1984 in respect to his property, as detailed in Schedule-I of the application. At the time of execution of Will on 05.11.1984, her father Ritlal Mistry was of sound mind and he had executed the said Will voluntarily without any coercion in her favour at his residence. The Will deed was scribed by Sakhichandar Mandal at the instruction of her father Ritlal Mistry and he put his thumb impression in presence of the attesting witnesses, namely, Dipnaraian Sharma and Thakur Yadav, who also put their signatures as attesting witnesses on the instruction of her father on the Will deed. The further case of the plaintiff is that Ritlal Mistry died leaving behind him, his three other daughters, namely, Bhago Devi, wife of Late Sheet Narayan Mistry, Resident of village – Shankarpur Nawada, P.S. Muffasil, District – Munger, Tanki Devi, wife of Kant Lal Sharma, resident of Mohalla Mangal Bazar, P.S. Kotwali, District- Munger and Smt. Sudha Devi, wife of Sitaram Sharma, Resident of village – Daulatpur, P.S. Jamalpur, District-Munger. The plaintiff being



the youngest daughter of Ritlal Mistry used to look after him, as such, due to love and affection, he executed Will on 05.11.1984 in her favour.

3. On notice, Most. Bhago Devi, Tanki Devi and Sudha Devi appeared and filed their joint contesting written statement with contention that deceased Ritlal Mistry died on 05.11.1984 not on 15.11.1984, as alleged in the petition, and he never executed the alleged Will deed nor the same is his last Will. The alleged Will dated 05.11.1984 is forged, fabricated, fraudulent, invalid and void *ab initio*. The execution of will deed and it's due attestation are denied. The deceased Ritlal Mistry was old, illiterate, blind and deaf man and he was also a man of weak understanding, suffering from various diseases. At the time of death Ritlal Mistry was aged about 90 years and he was not in a position to understand about wrong and right. All the four daughters of deceased Ritlal Mistry are in common enjoyment of the estate of the deceased after his death. Most. Bhago Devi, who is elder daughter of deceased Ritlal Mistry, became widow in her young age in the year 1951 and she used to live with her father for providing all services to him. Since, Most. Bhago Devi became widow in her young age and was issue-less, due to that reason, she was kept by deceased Ritlal



Mistry with him as he had got some landed property. The plaintiff Smt. Indra Devi used to reside at her Sasural in village-Rishipaharpur, P.S. Surajgarha, District -Munger and she used to visit with her husband at her Mayaka casually. The plaintiff Smt. Indira Devi and her husband Arjun Sharma are shrewd and they by bringing to Dipnarain Sharma, Sakhichandra Mandal and Thakur Yadav in their collusion brought into existence the forged Will in question, which cannot be operated. Deceased Ritlal Mistry, besides the property detailed in Schedule-I of the application, possessed other property also which has not been included in the Schedule-I of the application. The alleged Will has not come from proper custody rather the same has been brought by the plaintiff, who claims to be sole beneficiary. The plaintiff has not made parties to the answering defendants purposely in the application filed under Section 276 of the Indian Succession Act and she has given her name in the eastern boundary of property, as detailed in item No.2 of Schedule-I of the petition. The plaintiff is not entitled for any relief and also not entitled for grant of probate, as such, her petition for granting of probate is liable to be rejected.

4. On the basis of the pleadings of the parties, the trial Court framed following issues:-



- (1) Is the suit as framed maintainable?
- (2) Has the Plaintiff got the cause of action and right to sue?
- (3) Is the suit bad for defect of the parties?
- (4) Whether the will in question has been executed by the deceased Ritlal Mistry on 05.11.1984?
- (5) Whether the will was dully attested?
- (6) Whether the testator had the testamentary capacity?
- (7) Whether the will in question does not bear the thumb impression of the deceased Ritlal Mistry?
- (8) Whether the plaintiff is entitled to the relief as claimed?

5. In support of her case, during the hearing, the plaintiff examined, altogether, 9 witnesses including herself as P.W.2 and also got exhibited the Will deed dated 05.11.1984 said to have been executed by Ritlal Mistry as Ext.2 and several other documents. On the other hand defendants examined, altogether, 10 witnesses in support of their case.

6. On perusal of the evidence available on the record, the learned Addl. District Judge- 12th , Munger decided all the issues against the plaintiff and in favour of defendants except Issue No. 3 and, accordingly, dismissed the suit of the



plaintiff/appellant for grant of probate in respect to Will deed dated 05.11.1984 alleged to have been executed by deceased Ritlal Mistry.

7. Learned counsel appearing on behalf of plaintiff/appellant made submission that the learned trial Court has not appreciated the evidence available on the record in right prospective and illegally decided the main issues i.e. Issue Nos. 4, 5, 6 and 7 against the plaintiff/appellant and illegally dismissed the plaintiff's suit for probate of Will executed by deceased Ritlal Mistry regarding his property in favour of plaintiff/appellant. He further made submission that Sakhichandar Mandal (A.W.2), who is scribe of the Will deed, has deposed in his evidence that he scribed the Will deed on the instruction of Ritlal Mistry and he put his signature as a witness and in his presence, Dip Narain Sharma (A.W.3) and Thakur Prasad Yadav (D.W.8) also put their signature as attesting witnesses, but in spite of that the learned Addl. Sessions Judge, Munger disbelieved the due execution of Will deed only by denying the attestation by Dip Narain Sharma (A.W.3) and Thakur Prasad Yadav (D.W.8).

8. In view of the submissions of the learned counsel for the parties, the following point arises for consideration in



this First Appeal:

(I) Is the alleged Will deed dated 05.11.1984 executed by
Ritlal Mistry genuine and valid?

9. Admittedly, the deceased Ritlal Mistry died leaving behind him four daughters, namely, Most. Bhago Devi, Tanki Devi, Sudha Devi and Indra Devi (plaintiff/appellant). According to plaintiff/appellant Indra Devi, her father Ritlal Mistry was of sound mind and he executed the Will on 05.11.1984 in her favour due to services rendered by her and, thereafter, he died on 15.11.1984.

On the other hand, the case of the defendants/respondents is that Ritlal Mistry died on 05.11.1984 not on 15.11.1984 and he was aged about 90 years at the time of death. He was blind, deaf and he was not of good health and memory and unable to understand about right and wrong. In fact, the plaintiff/appellant and her husband are shrewed and they got managed to prepare the alleged Will deed in connivance with deed writer and attesting witnesses.

10. A.W.1 Smt. Indra Devi, who is plaintiff, has stated in her evidence that Ritlal Mistry was her father, he died on 15.11.1984 in village Shankarpur. Her father died leaving behind him his three daughters. She was youngest daughter of



her father Ritlal Mistry and due to services rendered by her, her father executed the Will on 05.11.1984 regarding his whole property. At the time of execution of Will by her father, she was with him. She used to look after her father after her marriage residing at her Myaka, while her other three sisters used to reside at their respective Sasural village. She has further stated that it is not true that her father Ritlal Mistry died on 05.11.1984 as stated by defendants. She has further stated in her cross-examination that her father was illiterate and was unable to put his signature due to that reason he put his thumb impression on Will deed and at that time her husband Arjun Sharma (A.W.5) was present there. The Will deed was drafted by her counsel Sakhichandar Mandal (A.W.2), who was doing the work of Advocate's clerk at that time. He was known to her since before 24 years, because he was her classmate. She had called Sakhichandra Mandal (A.W.2) on the instruction of her father to draft the Will. After execution of the Will by her father, the Will was in her possession, which is produced by her in the Court. She has further stated that eldest daughter of her father Ritlal Mistry is Most. Bhago Devi and she became widow soon after her marriage and she used to reside at her Myaka.

From the evidence of this witness, it is apparent



that while she has stated in her examination-in-chief that she used to reside at her Myaka to look after her father Late Ritlal Mistry after her marriage and her three sisters used to reside at their Sasural village, but she admitted in her cross-examination that her eldest sister Most. Bhago Devi, after the marriage became widow and she used to reside at her Myaka. She further admitted in her cross-examination that the alleged Will deed dated 05.11.1984 was drafted by her classmate Sakhichandar Mandal (A.W.2), who is also counsel in the present case.

11. A.W.2 Sakhichandar Mandal has stated in his evidence that he knew to Ritlal Mistry, who died in his village Shankarpur. Ritlal Mistry had executed the Will in favour of his youngest daughter Indra Devi. He drafted the Will on which Ritlal Mistry put his thumb impression in presence of attesting witnesses Dip Narain Sharma (A.W.3), who put his signature on Will deed as attesting witness on the instruction of Ritlal Mistry and Thakur Prasad Yadav (D.W.8) also put his signature as a witness. He also put his signature as scribe and also as a witness on the Will deed. He further stated in his cross-examination that it is not true that Ritlal Mistry died on 05.11.1984. He further stated in his cross-examination that at the time of drafting the Will deed, he was Advocate's clerk and he was attached with Sri



Gopal Prasad Sinha, Advocate. He has also stated in his cross-examination that at the time of drafting the Will deed, he had not advised to Ritlal Mistry to call his relative, Sarpanch and Mukhiya, because there was no need of relative and other persons. He also stated in his cross-examination that husband of Indra Devi is known to him since twenty years, as he used to reside in his village. He also denied the suggestion of defence, in cross-examination, that it is not true that alleged Will deed is forged and fabricated and the same was prepared in collusion with Indra Devi.

12. A.W.3 Dip Narain Sharma, who is said to be attesting witness of the Will, has stated in his evidence that he knows to Ritlal Mistry, who died at his house situated in village Shankarpur. The plaintiff Indra Devi is the youngest daughter of Ritlal Mistry and Ritlal Mistry had not executed any Will, in his presence, nor he had put signature on the Will executed by Ritlal Mistry in favour of Indra Devi. He further deposed in his evidence that husband of Indra Devi had came with blank papers at his house and obtained his signature on the pretext that both wanted to take loan from the bank. This witness only proved his signature and endorsement on the Will deed as Ext.1 and also proved his signature on all pages of the Will deed as



Ext.1/1 to 1/7. He has further stated on Court's question that when he put his signature on the blank papers, Ritlal Mistry had died.

From the evidence of this witness, it is apparent that he denied to put his signature as an attesting witness, on the Will said to have been executed by Ritlal Mistry with contention that his signatures were obtained on a blank papers by Indra Devi and her husband on the pretext of taking loan from the Bank after death of Ritlal Mistry.

13. D.W.8 Thakur Prasad Yadav, who is said to be one of the witness of Will deed dated 05.11.1984 alleged to have been executed by Ritlal Mistry in favour of the plaintiff Indra Devi, has stated in his evidence that he knows both parties and he had gone to the village of Ritlal Mistry, who died before 5 to 6 years. Ritlal Mistry was blind, deaf and of weak memory at the time of death and his age was about 100 years. Ritlal Mistry had only four daughters and he was being looked after by her daughter Bhago Devi as Bhago Devi used to reside with him in village Shankarpur. After seeing the signature on the Will deed, he stated that he cannot read and write and denied his signature on the Will deed as witness.

From the evidence of this witness, it is apparent



that this witness has denied his signature alleged to be put on the Will deed as witness.

14. From the evidences of the aforesaid witnesses, it is apparent that Dip Narain Sharma (A.W.3), who is said to be attesting witness of the Will alleged to have been executed by Ritlal Mistry denied about the execution of the Will by Ritlal Mistry with statement that his signature was obtained by plaintiff Indra Devi and her husband on blank papers on the pretext for taking loan from the Bank. Thakur Prasad Yadav (D.W.8) also denied his signature on the alleged Will deed stating that he does not know to read and write and he used to put his thumb impression.

15. Section 63(c) of the Indian Succession Act, 1925 mandates that *“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 been some other person sign the Will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the Will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be*



necessary.”

According to Section 68 of the Evidence Act “*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”.*

16. In the present case, the Will deed dated 05.11.1984 said to have been executed by Ritlal Mistry in favour of plaintiff Indra Devi cannot be taken into evidence as attesting witnesses Dip Narain Sharma (A.W.3) and Thakur Prasad Yadav (D.W.8) have denied about its execution by Ritlal Mistry in their presence.

17. From the aforesaid discussions, it is clear that the plaintiff has failed to prove the execution of the Will said to have been executed by her father Ritlal Mistry on 05.11.1984 in her favour. The learned Addl. District Judge has discussed the evidence available on the record in detail in deciding the issue Nos. 4, 5, 6 and 7 and has rightly arrived at the conclusion that proponent has failed to prove that the Will was duly attested and testator had testamentary capacity to execute the Will in question and dismissed the plaintiff's suit for probate of Will said to have been executed by Ritlal Mistry in favour of the plaintiff. Accordingly, Point No.1 is decided against the



plaintiff/appellant and in favour of defendant/respondents.

18. In the result this First Appeal is dismissed but there shall be no order as to cost.

(Rajendra Kumar Mishra, J)

Manish/-

AFR/NAFR	N.A.F.R.
CAV DATE	05.09.2018.
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