

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**First Appeal No.450 of 2001**

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Ram Ekbal Dubey @ Nathuni Dubey son of Praduman Dubey, R/o village-  
Chausa, P.S.-Buxar, District- Buxar..... Appellant

Versus

1 (i) Anusua Devi wife of Late Deo Kumar Dubey  
1(ii) Premshankar Dubey son of Late Deo Kumar Dubey  
1(iii) Jai Narain Dubey son of Late Deo Kumar Dubey  
1(iv) Satendra Kumar Dubey son of Late Deo Kumar Dubey  
1(v) Neelam Devi daughter of Late Deo Kumar Dubey  
2 (a) Most. Shushila Devi wife of Ram Ashray Kumar Dubey  
2 (b) Budhi Sagar Dubey son of Ram Ashray Kumar Dubey  
2 (c) Ghanshyam Dubey son of Ram Ashray Kumar Dubey  
all R/o village- Chausa, P.S.- Buxar, District- Buxar

..... Respondents

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**Appearance :**

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| For the Appellant   | : | Mr. K. N. Chaubey, Sr. Advocate<br>Mr. Ambuj Nayan Choubey, Advocate<br>Mr. Ashok Kumar Garg, Advocate<br>Mrs. Ritu Priyadarshni, Advocate<br>Mr. Yogendra Kumar Dwivedy, Advocate<br>Mr Dineshwar Pandey, Advocate |
| For the Respondents | : | Mr. Shrinandan Pd.Singh                                                                                                                                                                                             |

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**CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA**

**C.A.V. JUDGMENT**

**Date : 20-06-2018**

The instant appeal has been preferred against the judgment and order dated 05.09.2001 passed by Sri Arun Kumar Srivastava, the then 2<sup>nd</sup> Additional District Judge, Buxar in Title Suit No. 16 of 1992 whereby and whereunder the Probate Petition filed by the plaintiff was dismissed on contest but without cost. The plaintiff is the appellant whereas the defendants are the respondents.

2. The plaintiff/appellant filed an application in the court of Sub-Judge Ist, Buxar giving rise to Probate Case No. 23 of 1991 and on objection the same was converted as Title Suit No. 16



of 1992. The plaintiff has filed the aforesaid suit for obtaining probate regarding the registered deed of Will dated 09.12.1974 executed by the Testator Raghubansh Dubey regarding the estate of the deceased fully detailed in Schedule-A at the foot of the petition of Probate.

3. As per the case of the plaintiff, one Raghubansh Dubey @ Bachchan Dubey duly executed a Deed of Will on 09.12.1974 and Suraj Dubey and Srinath Sahay were the witnesses. The aforesaid Will was registered under the provision of Indian Registration Act. The Testator Raghubansh Dubey @ Bachchan Dubey died on 26.11.1989 at village Chausa and the Deed of registered Will is his last Will and the suit property described in schedule-A belongs to the Testator and also owned and possessed by the deceased at the time of his death which have come or likely to come in the hands of the plaintiff. The plaintiff is the executor of the said registered Will. The deceased Testator, at the time of his death, had permanent abode at village Chausa and the property in question is also at village Narbatpur, P.S.- Buxar within the jurisdiction of the Court. The plaintiff is the grandson of the deceased Testator and no such Probate Case was filed earlier either before this Court or any other Court.



4. The case of the defendants, as per the written statement, in short, is that the suit is not maintainable, the value of the suit property is more than Rs. 1,00,000/- and unless the court fee is not paid the suit cannot proceed. The plaintiff has not complied the provision of Section 278 of the Indian Succession Act and has not mentioned the names of the relations of the deceased and also did not mention the names of persons who are interested in the estate of the deceased. The plaintiff has suppressed the fact that the Testator Raghubansh Dubey executed a registered deed of gift in favour of the defendants on 30.05.1977 and the Will in question is not the last Will of the deceased. The aforesaid Will is not validly executed and attested and that was not executed after fully understanding the contents of the deed. The same has been obtained by fraud upon the deceased with the collusion of the witnesses and scribe. The deed of gift dated 30.05.1977 executed by Testator Raghubansh Dubey in favour of the defendants is a valid document and on that basis Mutation was also done and the defendants are in possession over the same. There was a dispute regarding suit property with one Babuli Ahir under Section 48 E of the B. T. Act regarding the suit property with the defendants and ultimately the defendants succeeded therein. Raghubansh Dubey also sold plot No. 495, 476 of village



Chausa and plot No. 996, 1004 of village Narbatpur and as such the plaintiff is not entitled to get any probate regarding the same.

5. On the basis of the pleadings of the parties the learned court below framed the following issues:

(I) Is the suit maintainable under law ?

(II) Is the suit properly valued ?

(III) Whether the Will in question is fraudulent, genuine and executed by the Testator by free Will and properly attested by the witnesses thereon ?

(IV) Whether the Will in question is a last will executed by the Testator ?

6. Learned Court below without deciding the issues involved came to the conclusion that at the time of the death of the Testator, the suit property was not owned and possessed by the deceased Testator and, as such, question of come or likely to come in the hands of the applicant/plaintiff does not arise at all as the property had already been gifted to the defendants and even an inch of the suit property for which the application of probate has been filed by the plaintiff has not been left by the Testator, then the question of granting probate does not arise at all and accordingly, dismissed the probate case.

7. The plaintiff/appellant being aggrieved and dissatisfied with the said judgment and order preferred this appeal challenging the legality, correctness and propriety of the same on the ground that the Testator after the execution of the deed of gift



in favour of the defendants executed a deed of cancellation and further filed Title Suit for declaring the deed of gift as illegal and void document and said Title Suit is still going on and, as such, on the basis of that deed of gift the probate case cannot be dismissed. The Senior Counsel arguing on behalf of appellant has submitted that the learned court below exceeded its jurisdiction in considering the title and possession of the parties. The probate jurisdiction is confined to the fact as to whether the Will was the last one and a genuine one or not. The reasons assigned by the learned court below are unsound, wrong and improper. It is an admitted fact that title suit filed by the Testator against the defendants is still pending and in that title suit the plaintiff has been impleaded as plaintiff after the death of Testator and such the judgment and order passed by the learned court below is not sustainable and is fit to be set aside.

8. On the other hand, learned counsel for the respondents/defendants has submitted that after the execution of the deed of gift in favor of the defendants, the defendants came in possession over the properties, their names have also been mutated, some lands have been acquired under the Land Acquisition Act and notices were issued to the defendants. The aforesaid deed of gift was acted upon and the defendants accepted



the compensation money under the Land Acquisition Act. The deed of Will was not dully executed and it is not proved in accordance with law and as such the learned court below has rightly dismissed the probate case and there is no need of any interference by this Court.

**9.** The only point for consideration in this appeal is as to whether the registered deed of Will dated 09.12.1974 was executed by Testator by free Will and was properly attested and whether the same is the last Will executed by the Testator.

**10.** The plaintiff has examined six witnesses in support of his case. P.W.-1 is Suraj Dubey one of the attesting witness of the registered deed of Will, P.W.-2 is Nathuni Shigh, P.W.- 3 is Ram Kripal Dubey, P.W.- 4 is Raghunath Singh, P.W.-5 Ram Ekbal Dubey the appellant and P.W.-6 Nagendra Narain Lal. Apart from oral evidence, the plaintiff has also filed registered deed of Will executed by the Testator Raghubansh Dubey in favour of Ram Ekbal Dubey which has been marked as Ext. 1, Ext. 2 is the certificate of S.D.O., Irrigation Department whereby compensation was granted to Raghubansh Dubey, Ext. 3 is original gift deed executed by Raghubansh Dubey in favour of Deo Kumar Dubey and Ramashray Dubey dated 30.5.1977 to show the custody of original deed of gift, Ext. 4 is order passed by District Judge,



Buxar in Miscellaneous Case No. 6 of 2000 by which the record of original Title Suit No. 76 of 1989 was ordered to be reconstructed. Exhibit-5 is the certified copy of plaint of Title Suit No. 76 of 1986 filed by Raghubansh Dubey. In this appeal the entire ordersheets of Miscellaneous Case No. 25 of 1991 / Title Suit No. 76 of 1989 has been marked as Ext. 6.

**11.** On the other hand, the defendants also adduced 5 witnesses in support of their case. DW-1 is Surj Nath Dubey, DW-2 is Bhola Singh, DW-3 is Sarangdhar Rai, DW-4 is Ramadhar Singh and DW-5 is Deo Kumar Dubey. Besides the oral evidence, the defendants also filed documentary evidences. Ext. A is notice in the name of caveator, Ext. B to B/2 are rent receipts in the name of Deo Kumar Dubey. Exhibit C, C/1 and C/2 are the order sheets of Bataidari Case No. 5 of 1997-98, Exhibit D is certificate of B.D.O. about genealogy, Ext. E is certified copy of death register of Municipality to show that Raghubansh Dubey died on 25.11.1989 at Varanasi, Ext. F is certified copy of deed of gift dated 30.5.1977 in favor of caveator.

**12.** The learned court below did not decide the issues framed in the suit and dismissed the suit after holding that at the time of the death of Testator, the Testator was not in possession over the properties in question. From plain reading of the



impugned judgment and order it reveals that the impugned judgment and order are unsatisfactory and the learned court below has dismissed the suit after exceeding the jurisdiction. The learned court below by virtue of being a court of limited jurisdiction had no right to decide the right, title and interest of the parties and on that ground alone the impugned judgment and order are fit to be set aside.

**13.** Now it is to be seen as to whether the Will in question is fraudulent or genuine and executed by the Testator by free Will and properly attested by the witnesses and whether the same is the last Will.

**14.** P.W. -1 Suraj Dubey is one of the attesting witness of the Will in question. He has stated that Raghubansh Dubey executed deed of Will in favour of Ram Ekbal Dubey. The Scribe read over the contents of the Will to him and then Raghubansh Dubey put his signature and he signed over the same as identifier as per the advice of Raghubansh Dubey. This witness has also stated that Raghubansh Dubey and Srinath Sahay both died. He has been cross-examined at length but nothing has come to disbelieve his testimony. On recall he has further been examined and he has proved the registered deed of Will as Ext. 1. During cross-examination he has stated that he has identified Raghubansh



Dueby before the Registrar also. PW 2 being Mukhiya of Gram Panchayat Chausa has come to say that Raghubansh Dubey was issuess and he was being served by Ram Ekbal Dubey and Babli. He has also been cross-examined but nothing has come to disbelieve his testimony. PW 3 has also stated that Raghubansh Dubey was issuess and he was being served by Ram Eekbal Dubey and Raghubansh Dubey executed a deed of Will on 09.12.1974 in favour of Ram Ekbal dubey and no fraud was committed. Raghubansh Dubey died on 26.11.1989 and he has participated in his Shradh. He has also been cross-examined at length but nothing has come to disbelieve his testimony. PW 4 had stated that the Will was executed in his presence by Raghubansh Dubey. No fraud was committed in executing the Deed of Will. He has also been cross-examined at length but nothing has come to disbelieve his testimony. PW 5 is the applicant/plaintiff himself. He has fully supported his case. He has also stated that original deed of gift remained in possession of Raghubansh Dubey and he handed over the same to him. Raghubansh Dubey executed the deed of cancellation for cancelling the deed of gift. The deed of cancellation has been marked 'X' for identification. During cross-examination he has become more competent and there is nothing in his cross-examination to discredit him. PW 6 has proved Ext. 2.



**15.** From the evidences, as discussed above, it is manifest that the plaintiff has succeeded in proving the execution and attestation of the registered deed of Will in question in terms of Section 63 of the Indian Succession Act 1925 and Section 68 of the Indian Evidence Act.

**16.** DW 1 has come to say that Raghubansh Dubey was being served by Deo Kumar Dubey and at the time of death he was at Varanasi. Deo Kumar Dubey performed Dhah Sanskar and Sharadh Karm of Raghubansh Dubey. During cross-examination, in paragraph 4, he cannot state the genealogical table of Deo Kumar Dubey and Raghubansh Dubey. He cannot state the khata number of the land of Raghubansh Dubey. He cannot say as to when he saw Raghubansh Dubey at Chausa. In paragraph 4 he has admitted that he used to sit with Deo Kumar Dubey. No reliance can be placed upon the testimony of said witness. DW 2 has also come to say that Raghubansh Dubey was being served by Deo Kumar Dubey and his rites was performed by Deo Kumar Dubey, Raghubansh Dubey died at Varanashi. During cross-examination, in paragraph 8, he has stated that he has not seen any paper which was executed in his presence. He cannot say the name of the doctor who has treated Raghubansh Dubey vide paragraph 9. He cannot say the time, date and month regarding going to Varanasi.



Thus, this witness is also not reliable. DW 3 has also come to say that Raghubansh Dubey was being served by Deo Kumar Dubey and he died at Varanasi where he had gone for treatment. Dhah Sanskar was performed by Deo Kumar Dubey. During cross-examination, in paragraph 3, he has stated that he cannot say the boundary of the house of Deo Kumar Dubey. In paragraph 4 he cannot say the boundary of the house of Raghubansh Dubey and Ram Ekbal Dubey. Suggestion has been given to him that he has falsely stated as he is the friend of Deo Kumar Dubey. From the evidence of this witness it does not transpire that the Will in question was executed after playing fraud. DW 4 has come to say that Raghubansh Dubey gifted all his movable and immovable properties in favour of Deo Kumar Dubey and Ram Ekbal dubey is not in possession over an inch of the properties. During cross-examination, in paragraph 3, he cannot say the plot, area and boundary of the land of Ram Ekbal Dubey and Deo Kumar Dubey. In paragraph 5 he has stated that he has not seen Raghubansh Dubey executing any paper. Thus, this witness is also not relied-worthy. DW 5 is defendant himself. He has come to support his case. In paragraph 9 he has stated that the Deed of Will, which Raghubansh Dubey has executed, is said to be wrong. In paragraph 17 he has come to say that Raghubansh Dubey has not filed Title



Suit No. 76 of 1989 in the Court of Munsif II. He cannot say as to whether that Title Suit is going on or not. In paragraph 22 he has stated that he has not seen the original deed of Will and he has not read over the contents of the same. Nothing has come in his evidence by which it can be said that the Deed of Will in question was executed after committing fraud. From Ext. A to Ext. F also does not transpire that any fraud was committed at the time of execution of deed of Will. Rent receipts and other documents are also not going to throw light that any fraud was committed at the time of execution of the deed of Will.

**17.** From the scrutiny of the evidences available on the record and after considering the pleadings of the parties, it is manifest that the plaintiff has succeeded in proving that the Will in question is genuine and was executed by the Testator by his free Will and the same was properly attested by the witnesses and it is also manifest that the Will in question is the last Will executed by the Testator. So far the deed of gift said to be executed in favour of the defendants is concerned, Title Suit No. 76 of 1989 is going on between the parties, as to whether the deed of gift, said to executed in favour of the defendants, is genuine or not and that question cannot be decided in this case. The finding of the learned court below is not sustainable and the same is accordingly, set aside.



Here, the Title and possession of the parties are not to be decided. In the result, it is held that the registered deed of Will dated 09.12.1974 was executed by Raghubansh Dubey @ Bachchan Dubey in presence of witnesses namely, Suraj Dubey and Srinath Sahay out of his own free will and the same was the last Will. Original deed of gift remained in custody of Raghubansh Dubey which he handed over to Ram Ekbal Dubey, the plaintiff, which has been filed in the court and marked as Ext. 3. Raghubansh Dubey filed Title Suit also bearing No. 76 of 1989 challenging the said deed of gift which is still pending. Thus, the impugned judgment and order dated 05.09.2001 passed in Title Suit No. 16 of 1992 are hereby set aside and the instant appeal stands allowed but under the circumstances without cost.

18. Let the Probate of the Will dated 09.12.1974 be granted in favour of the appellant with a copy of Will annexed thereof which shall have effect throughout the territory of India.

(Jitendra Mohan Sharma, J)

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