

objection and accordingly, above stated Probate case was converted into title suit.

3. The case of the plaintiff is that one Baijnath Jha executed registered Will dated 06.04.1987 in his favour in respect of his property as described in Schedule I of the application filed under section 276 of the Indian Succession Act. The testator, namely, Baijnath Jha used to reside at village Mor and died on 03.12.1990 leaving behind defendants, who happen to be his daughters. The plaintiff is nephew of the testator Late Baijnath Jha and he used to look after the testator and being pleased with the services rendered by the plaintiff, testator executed the above stated registered Will dated 06.04.1987 in favour of the plaintiff by his own sweet will without any undue influence or coercion. The testator, having understood and having full knowledge of the contents of the Will, signed the said Will in presence of witnesses Ram Awatar Jha, Ram Bilash Singh, Chamari Mahto and Binda Devi. The witnesses also signed the Will deed. The aforesaid Will was the last Will of testator Baijnath Jha and accordingly, the plaintiff prayed for probate of registered Will dated 06.04.1987.



4. Defendants filed separate written statement.

Defendant no.1, namely, Sushila Devi filed her written statement on 24.07.1998 whereas defendant no.2, namely, Nirmala Devi filed her written statement on 08.02.2001. Defendants denied execution of the Will and its genuiness. Defendants, specifically, pleaded that the property given in so-called Will was an ancestral property of Late Baijnath Jha who got the aforesaid property in partition. The said Late Baijnath Jha got mutated his name on the basis of partition and after mutation, he had been paying rent to the State of Bihar. Late Baijnath Jha was **Karta** and manager of the joint family consisting of his wife and defendants who are his daughters. Some of the property had been acquired by Late Baijnath Jha out of income from the property which was allotted to him in the partition of their ancestral property. Defendants further pleaded in written statement that Late Baijnath Jha had not executed Will on 06.04.1987 in respect of the property mentioned in Schedule I of the application filed under section 276 of the Indian Succession Act and, as a matter of fact, plaintiff got prepared forged and fabricated Will without knowledge of Late Baijnath Jha. They,



further, averred that so-called Will had been prepared fraudulently in collusion with Ram Awatar Jha, Chamari Mahto and Ram Bilash Singh and so-called Will dated 06.04.1987 is not a genuine Will. They, further, averred that signatures of Late Baijnath Jha and his wife Binda Devi were taken on Will dated 06.04.1987 by playing fraud upon them. They, further, averred that the contents of alleged Will dated 06.04.1987 were never read over to Late Baijnath Jha and Late Baijnath Jha had never put his signature on the aforesaid alleged Will dated 06.04.1987. They, further, averred that Late Baijnath Jha along with his wife Binda Devi had gone to registry office, Sheikhpura on 06.04.1987 for execution of a gift in favour of the plaintiff and the paper of gift was prepared by scribe Ram Bilash Singh but by playing fraud the plaintiff in collusion with the aforesaid Ram Bilash Singh and witnesses got prepared a deed of Will without knowledge and without consent of Late Baijnath Jha and, as a matter of fact, scribe did not read over the recital of the Will deed to Late Baijnath Jha and his wife Binda Devi and in good faith, Late Baijnath Jha and his wife signed the document knowing that Late Baijnath Jha was



going to execute gift deed and at the same time, the aforesaid person got signatures of Late Baijnath Jha and his wife on several stamp papers with this understanding that the aforesaid stamp papers were essential for execution of gift deed and, as a matter of fact, Late Baijnath Jha had not executed any Will in favour of the plaintiff. They, further, averred in the written statement that subsequently, when Late Baijnath Jha came to know about execution of forged Will, he immediately filed application for withdrawal of the said Will. They, further, averred that Late Baijnath Jha died on 03.12.1990 and till his death he was in possession of the property given in the so-called Will and after his death defendants came in possession of the aforesaid property. They, further, averred that they used to reside with their father at village Mor and the plaintiff never used to look after Late Baijnath Jha, though the plaintiff is nephew of Late Baijnath Jha. They, further, averred that the plaintiff with an object to harass defendants executed forged sale deeds on 19.12.1990 with respect to property in question in favour of Brajesh Jha, Brijraj Jha, Brijnandan Jha and Brijchandra Jha who are own brothers of the plaintiff and



accordingly, defendants prayed for dismissal of the aforesaid probate case.

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

i) Is the suit as framed maintainable?

ii) Is the registered deed Will dated 06.04.1987 genuinely executed by Late Baijnath Jha as his last Will or the same is forged and fabricated piece of document?

6. In support of his case, the plaintiff got examined, altogether, four witnesses and also got exhibited some documents. The defendants got examined themselves as defendant witness no.1 and defendant witness no.2 and apart from this certified copy of order sheet dated 07.02.1997 was got exhibited as exhibit A.

7. The learned court below, having heard the parties, passed the impugned judgment holding that deed of gift (it appears in place of 'Will' it has wrongly been mentioned as 'gift deed') executed on 06.04.1987 in favour of the plaintiff was genuine and was created without any fraud and the court below, further, held that he had no reason to disbelieve the evidences adduced on behalf of the plaintiff whereas evidences adduced on



behalf of the defendants were not acceptable.

8. Learned counsel appearing for the appellants assailed the impugned judgment arguing that defendants are the daughters of Late Baijnath Jha and the aforesaid fact is not in dispute. She, further, submitted that the plaintiff is nephew of Late Baijnath Jha and this fact is also not in dispute. Furthermore, on 06.04.1987 Late Baijnath Jha along with his wife Binda Devi had gone to execute gift deed in favour of the plaintiff and the aforesaid fact is also not in dispute. Learned counsel for the appellants, further, submitted that the plaintiff was present at the time of execution and registration of the so-called Will deed and admittedly, no provision in respect of wife of testator had been made in the alleged Will, especially, in the circumstances, when at the time of execution and registration of the so-called Will deed, wife of testator was alive and, therefore, the aforesaid circumstance creates doubt about genuineness of the alleged Will and it was incumbent duty of the plaintiff to clarify the aforesaid doubt but the learned court below wrongly shifted the burden of proof upon the defendants. In support of the above stated contentions, learned counsel



for the defendants relied upon decision of **Mahadeo Rai and others vs. Bhagwan Roy and another reported in 2013 (4) PLJR paged 703** in which a coordinate bench of this court having relied upon the decision of the Hon'ble Apex Court rendered in the case of **Bharpur Singh vs. Shamsheer reported in AIR 2009 SC 1766** held that where there are suspicious circumstances onus is on the propounder to explain them to the satisfaction of the court before the Will could be accepted as genuine. She, further, submitted that in the present case, plaintiff failed to clarify the suspicious circumstances which arose in respect of execution of the Will deed but even then the learned court below granted probate in favour of the plaintiff which is not in accordance with law. She, further, submitted that it is admitted case of the parties that that testator Baijnath Jha along with his wife Binda Devi had gone to execute gift deed in favour of the plaintiff for certain piece of land and the aforesaid gift deed was executed and registered on 06.04.1987 i.e. on the same day when the alleged Will is said to have been executed and, therefore, aforesaid circumstance clearly goes to show that the testator wanted only to execute gift



deed in favour of the plaintiff and taking advantage of the aforesaid situation, plaintiff fraudulently got executed alleged Will and when the aforesaid fact came to notice of testator, he, himself, destroyed the alleged Will. She, further, submitted that the learned court below did not frame proper issues and, as a matter of fact, over-looked the evidences available on record while deciding the dispute.

9. On the other hand, learned counsel appearing for the plaintiff supported the impugned judgment and decree arguing that admittedly, on 06.04.1987, testator Baijnath Jha along with his wife Binda Devi had gone to execute gift deed in favour of the plaintiff and executed gift deed for certain piece of land in favour of the plaintiff. Furthermore, execution of Will deed is also not in dispute and the defendants have only challenged the genuineness of the aforesaid Will deed and, therefore, the learned court below rightly held that burden of proof was upon the defendants. He, further, submitted that the plaintiff had to prove only this fact that Will deed had been executed in accordance with law by the testator by his own sweet will and if Will deed is challenged by the



defendants on the ground of fraud, then it is duty of the defendants to prove the aforesaid fact. He, further, submitted that admittedly, testator had never challenged execution of the Will in his life, though according to the defendants' case, he had learnt about execution of the Will in his life time. He, further, submitted that the defendants admitted in their evidence that last ritual of the testator as well as his wife was performed by the plaintiff and, therefore, all the aforesaid circumstances go to prove that Will in question had been executed by the testator by his own sweet will and there was no suspicious circumstances to cloud the Will in question.

10. Having heard the contentions of both parties, I went through the record along with lower court record.

11. The question arises for determination as to whether the testator had executed the registered Will dated 06.04.1987 by his own volition as his last Will and upon whom the burden lies to prove the aforesaid fact. I find that certain facts are admitted. It is admitted position that defendants are daughters of the testator Late Baijnath Jha. It is also admitted position that at the time of execution of Will in question, testator wife, namely,



Binda Devi was alive and according to the plaintiff's case, she had also participated in execution of the Will but admittedly, no provision for the testator's wife namely, Binda Devi had been made in the Will in question. Furthermore, it is admitted position that on 06.04.1987 testator had executed registered gift deed in favour of the plaintiff, who happens to be nephew of the testator. Furthermore, it is admitted position that Will in question was executed on 06.04.1987 on which date gift deed had been executed and both the aforesaid deeds were witnessed by the same persons. It is also not in dispute that the plaintiff was also present at the time of execution of both the aforesaid deeds.

12. In Bharpur Singh case (Supra), the Apex Court has given some example about suspicious circumstances which may be found to be surrounded in the execution of the Will which run as follows:-

i) The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.

ii) The condition of the testator's mind may be very feeble and debilitated at the relevant time.

iii) The disposition may be unnatural, improbable or unfair in the light of relevant



circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.

iv) The dispositions may not appear to be the result of the testator's free will and mind.

v) The propounder takes a prominent part in the execution of the Will.

vi) The testator used to sign blank papers.

vii) The Will did not see the light of the day for long.

viii) Incorrect recitals of essential facts.

13. In the present case, admittedly, propounder had taken a prominent part in the execution of the Will and no adequate provision for the natural heirs was made in the Will in question. Furthermore, testator along with his wife Binda Devi had gone to execute gift deed in favour of the plaintiff but on the same day, not only gift deed but Will in question was also executed in favour of the plaintiff and both deeds were witnessed by the same witnesses.

14. Therefore, it is obvious that the aforesaid suspicious circumstances create doubt about genuineness of the Will in question and it was incumbent duty of the plaintiff to clarify the aforesaid doubt but the plaintiff failed to clarify the aforesaid doubt and the learned court



below wrongly shifted the burden upon the defendants to prove that fraud had been played upon the testator at the time of execution of Will dated 06.04.1987. It is admitted position that the plaintiff is nephew of the testator Late Baijnath Jha and Late Baijnath Jha wanted to gift some land to the plaintiff and for that purpose, he along with his wife had gone to execute gift deed in favour of the plaintiff but it is not clear what prompted the testator Late Baijnath Jha to execute Will in favour of the plaintiff without making any adequate provision for his wife and daughters who were alive at the time of execution and registration of the Will. It is admitted position that wife of the testator died in the year 1989 and both the aforesaid deeds were executed in the year 1987 and, therefore, aforesaid circumstance creates serious suspicious about genuiness of Will in question. Moreover, active participation of the plaintiff in execution of both deeds also creates doubt regarding genuiness of the Will in question.

15. No doubt section 111 of the Evidence Act is generally not applicable in respect of execution of the Will as the aforesaid section is applicable in a transaction



which takes place between the parties but in the present case, circumstances are quite different because, admittedly, on same day, two deeds i.e. gift deed and Will deed were executed and the plaintiff was in a position of active confidence being nephew of the testator and, therefore, in my view, the spirit of section 111 of the Evidence Act is applicable in the present case and in view of section 111 of the Evidence Act, burden of proof was upon the plaintiff to prove this fact that the Will deed was executed by testator by his own volition.

16. It has been argued that the testator had not challenged the genuineness of the Will in his life time but it has come in evidence that when the testator came to know about fraudulent execution of the Will deed, he destroyed the original Will deed and, therefore, the aforesaid circumstance suggests that the testator had never executed the Will of his property in favour of the plaintiff. It is settled principle of law that the Will can be revoked by execution of another Will and the above stated fact goes to show that by destroying original Will deed the testator expressed his intention of revocation of the Will in question. Therefore, only on the aforesaid



ground the case of the defendants can not be rejected.

17. On the basis of the aforesaid discussions, I find that the learned court below has committed error in granting probate in favour of the plaintiff, especially, in the circumstances, when the plaintiff failed to explain the above stated suspicious circumstances and, therefore, I am of the view that the impugned judgment and decree can not sustain in the eye of law.

18. Accordingly, this appeal is allowed and the judgment and decree dated 18.06.2007 passed by the Additional District Judge (Fast Track Court) V, Sheikhpura in Probate case no. 08/1991 is, hereby, set aside as a result whereof probate case stands dismissed.

Shahid

(Hemant Kumar Srivastava, J)

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