

IN THE HIGH COURT OF JUDICATURE AT PATNA
Letters Patent Appeal No.1124 of 2015
In

Test Suit No.02 of 1999

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1. Sri Indra Kumar
 2. Sri Amar Yadav
 3. Sri Tapan Rai All sons of Sri Gyanendra Prasad Yadav @ Shashi Baboo, All resident of Mohalla- Thakurbari Road, P.O. & Police Station- Kadamkuan, District- Patna- 800 003

... .. Appellant/s

Versus

1. Saloni Kumari Daughter of Uday Prakash (Traceless Since 1984) and grand daughter of late Rampyari Devi and late Surendra Yadav Resident of Mohalla- Thakurbari Road, P.S.- Kadamkuan, District- Patna.
2. Smt. Anju Devi, Wife of Uday Prakash Yadav (Tracelless, son of Late Surendra Yadav @ Surendra Nath Yadav)
3. Raj Shekhar @ Buntty
4. Ritesh Shekhar @ Babua Lal Both sons of Late Surendra Yadav @ Surendra Nath Yadav
5. Smt. Neelam Devi, Wife of Alok Chandra Pd., Daughter of Late Surendra Yadav @ Surendra Nath Yadav
6. Smt. Parinita Devi, Wife of Mithilesh Kr. Singh, Daughter of Late Surendra Yadav @ Surendra Nath Yadav
7. Vaibhav Vikas, Son of Uday Prakash Yadav. All are residents of Mohalla- Thakurbari Road, P.S.- Kadamkuan, District- Patna

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Yogendra Mishra Mr. Bhanu Pratap Singh
For the Respondent/s	:	Mr. L.N.Das Mr. Umesh Prasad

CORAM: HONOURABLE MR. JUSTICE JYOTI SARAN
and
HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN
SINGH)

Date : 26-07-2018

The judgment and order 19.02.2015, passed in Test
Suit No. 02 of 1999 arising out of Testamentary Case No. 02 of



1993 by a learned Single Judge of this Court, whereby the suit seeking issuance of letter of administration in respect of a *Will* has been dismissed, is under challenge in the present appeal under Clause X of the Letters Patent of the High Court of Judicature at Patna.

2. This appeal was admitted by an order dated 09.08.2017, and accordingly, it has been heard for final adjudication.

3. We have heard Mr. Yogendra Mishra assisted by Mr. Bhanu Pratap Singh, learned Advocates for the appellants and Mr. L.N.Das assisted by Mr. Umesh Prasad, learned Advocates for the respondents.

4. The plaintiffs case in brief, is that one Ram Chandra Lal Yadav died leaving behind his widow Amrit Devi, and two sons, namely, (i) Sri Surendra Yadav and (ii) Sri Gyanendra Prasad Yadav @ Shashi Baboo and three daughters, namely, (i) Smt. Savitri Devi, (ii) Smt. Sharda Devi and (iii) Smt. Purnima Devi. Sons of Gyanendra Prasad Yadav, namely, Indra Kumar, Amar Yadav and Tapan Rai are the plaintiffs/appellants herein. Surendra Yadav had three sons, namely, (i) Uday Prakash, (ii) Raj Shekhar @ Bunty and (iii) Ritesh Shekhar @ Baua Lal. Whereabouts of Uday Prakash is



not known for the last 15-16 years. Surendra Yadav had two daughters also, namely, Neelam Devi and Parmita Devi. Anju Devi and Biabhav Vikash are the wife and the son respectively of the aforesaid Uday Prakash Yadav, who is traceless. Amrit Devi, the grandmother of the plaintiffs/appellants had acquired some land and constructed a building thereon and remained in exclusive possession thereof. She executed a *Will* on 24/25.8.1992 in favour of the plaintiffs in respect of the said land and the building, held and possessed by her as *stridhan*, as mentioned in the *Will*. She died on 23.09.1992.

5. After her death, the plaintiffs filed Testamentary Case No. 02 of 1993 before this Court for probate of the *Will*. Surendra Yadav, on service of summons appeared and filed Caveat and objection against probate of the *Will* leading to conversion of the said Testamentary Case No.02 of 1993 into a suit which came to be registered as Test Suit No. 02 of 1999.

Defendant's/Appellant's case.

6. The case of the defendant as pleaded in his Caveat and the affidavit filed under Rule 18 of Chapter XI of Part II of the Patna High Court Rules has been that the *Will* is not genuine, rather, forged and fabricated. The Testatrix had left behind her two sons and three daughters with whom she was



equally affectionate. She was equally affectionate to all her grandchildren also and, therefore, it was improbable and false that she would leave behind the will bequeathing the premises only to the applicants. Late Amrit Devi, the Testatrix was a literate lady and had signed over a number of documents in her life time whereas the alleged *Will* does not bear her signature, which signifies that it was not executed by her. The left thumb impression bearing on the *Will* was also not genuine, rather, it was forged. The *Will* is ante dated and had been concocted and brought into existence by the father of the applicants, namely, Gyanendra Pd. Yadav who is a litigious person. The *Will* was never drawn at the instance of said Testatrix nor it was read over to her nor did she execute it, after understanding the contents of the alleged *Will*. The premises in question was in fact acquired by the father of the objector, namely, late Ram Chandra Lal Yadav in the name of his wife and the building over the land was constructed by his father with his own resources in which the entire family lives.

7. The Testatrix had become very old and was about 90 years as on the date of the death. She had lost her power of understanding for nearly six months prior to her death and was, therefore, completely depending on others. She was being



looked after and served by her elder son Surendra Nath Yadav and his family members. Father of the applicants and the applicants were not in good terms with testatrix for about a year before a death. The *Will* is, therefore, suspicious and improbable. Had she executed the *Will* in her senses she would not have excluded her other grand children or her daughters and their children. Recitals in the *Will* are false and concocted. The alleged attestation of the *Will* having been done by the strangers to the family made the said *Will* further suspicious since at the time of the alleged execution of the *Will* the objector, his sister and son-in-law of the testatrix were also present in the building who could have attested it. The *Will* which was purportedly ascribed on 14.08.1992 was allegedly executed on 25.08.1992 without any visible justification thus, rendering the *Will* further suspicious. There are various improbabilities and cuttings in the *Will*, some of them are in writing of Gyanendra Pd. Yadav, without initials, which goes to show that the *Will* is a fabricated document.

Issues Framed.

8. Based on rival pleadings of the parties, following two issues were framed in the suit:-

(1) Whether Mosst. Amrit Devi executed the *Will*



voluntarily and in sound state of mind?

(2) Whether Mosst. Amrit Devi was entitled in law to execute the *Will* with regard to the property covered by the *Will*?

Findings of Learned Single Judge.

9. In support of their rival pleadings, the plaintiffs and objector-defendant adduced their evidence, both oral and documentary. The plaintiffs examined 8 witnesses and adduced 12 exhibits. The Objector-defendant also examined 3 witnesses and exhibited the documents marked as Exhibit A, Exhibit B, Exhibit C to Exhibit C/7. There is a finding recorded by the learned Single Judge, noticing certain errors in the pleadings of both sides that date when the *Will* was ascribed was on 24th August, 1992 and not on 14th August, 1992. There is, however, no dispute about the preparation of the *Will* on 24th August, 1992.

10. For the present adjudication, accordingly, we have proceeded with the said date i.e. 24th August, 1992 as the date when the said document was ascribed.

11. Learned Single Judge, dealing with issue no. 1, after having dealt with the evidence of witnesses at length, has



decided the said issue against the plaintiffs. Issue no. 2, was not pressed by either side and accordingly, the same accordingly stood disposed of as not pressed.

12. This is to be noted that the *Will* was proved as Exhibit-3 by the plaintiffs, which contained 8 pages, each page of which contained one thumb impression with the endorsement “*Anguthey ka nisan hamare mauzodgi mai manmokir se lee gayi*” (‘Thumb impression was marked in my presence’). The execution of *Will* was claimed to have been made in the presence of following witnesses; (1) Md. Mahmood Alam, (2) Kumar Shailendra Singh, (3) Gopal Chandra Chaudhary, (4) Yogendra Prasad Singh and (5) Chandrashekhar Kumar Verma, who had also put his signature. Out of the aforesaid five witnesses Md. Mahmood Alam and Gopal Chandra Chaudhary had died. Chandrashekhar Kumar Verma had filed affidavit of his statement-in-chief. Kumar Shailendra Singh and Chandrashekhar Kumar Verma were not examined. According to the appellants, the said two witnesses namely, Kumar Shailendra Singh and Chandrashekhar Kumar Verma were gained over. The other witnesses Yogendra Prasad Singh, deposed as PW-8, who proved the execution, attestation and signature of the witnesses. The learned Single Judge noticing



non-examination of the attesting witnesses, who were alive and other circumstances has recorded his opinion in paragraph 13 as followed:-

“.....Such detail gives an impression that somehow or the other the document was prepared on 24th August, 1992 but subsequent acts could be done only on the following day.”

13. Dealing with endorsement made by Md. Mahmood Alam, an attesting witness (not examined since dead), learned Single Judge has held that though such endorsement gives an impression that document was read-over to the testatrix, who only after understanding the contents made therein put her impression but there was nothing in his endorsement as to who read it over. In the background of the challenge to the genuineness of the thumb impression, an expert's opinion had been directed for comparing the said thumb impression of the testatrix with admitted thumb impression who found that out of nine impressions on Exhibit-3, three appeared similar to the admitted impression and six were not fit for comparison and, therefore, no definite opinion could be given in respect of said six impressions. The finger print expert was examined as PW-1. Learned Single Judge has observed in the



impugned judgment (paragraph-16) that if thumb impressions are taken on different sheets, a few may appear blurred but if majority of them are such, the same would need stricter scrutiny since it smelt foul. Since the finger print expert did not comment on the signature of the testatrix over a document appearing admitted thumb impression, learned Single Judge has held that said PW-1 avoided any comment. Learned Single Judge put the *Will* in suspicious category on noticing the documents containing signature of the testatrix on the admitted documents executed earlier and upheld the objection put forward by the Objector that there was no explanation as to how and under what circumstances, the testatrix who was capable of putting her signature was unable to do so and put her only thumb impression instead. The plaintiffs were examined as P.Ws-2, 3 & 4. PW-5, brother of the attesting witness, Md. Mahmood Alam, was also examined to prove that Md. Mahmood was dead. One Kumar Vinay Bhushan was examined as PW-7, who claimed to be present at the relevant point of time along with others and that the witnesses had put their signatures at the instance of testatrix in her presence. He, however, remained silent about the fact as to whether testatrix was present there or not and as to whether she had put her LTI in their



presence or not. One of the attesting witnesses i.e. PW-8, Yogendra Prasad Singh, who deposed in his examination-in-chief, on affidavit that at the instance of testatrix the scribe, Parmanand Prasad Singh, has prepared the document and only because Md. Mahmood Alam, could not arrive, the will could not be executed, and accordingly, on the following day i.e. 25th August, 1992, in the presence of the witnesses and identifier, the contents was read-over to the testatrix and thereafter the testatrix had put her LTI followed by the signatures of the witnesses thereon.

14. Learned Single Judge has, however, doubted his evidence since he had remained silent on the point as to whether everything had happened in the presence of the testatrix and also since he had named scribe as the person reading over the contents to the testatrix, contrary to the endorsement in the will. His evidence that the testatrix carried perfectly good health on the day of the execution and denial that she was bedridden on the said date has also been considered by learned Single Judge, with doubt and suspicion. A plea was taken on behalf of the plaintiffs, that the testatrix had bad feelings against the Objector-defendant who had been ill treating her and in support thereof station diary entry of Kadam Kuan Police Station on



03.03.1994, was proved as Exhibit-5. To support this plea, the Officer-In-Charge of the Police Station, was examined as PW-6, who deposed that he was able to say as to whether the inquiry was made with respect to the contents of the said station diary entry. One of the daughters of the testatrix, Poonam Kumari, was attesting witness to Sanha leading to station diary entry, however, was not examined. Learned Single Judge has observed that she was also withheld without any reasons. Dealing with the stand of the plaintiffs, that there was no evidence on record to show that the testatrix was not carrying sound mental health, learned Single Judge has held in paragraph 33 of the judgment under appeal, that the “plaintiffs by their own misconduct concealment of relevant facts and circumstances as indicated above, as well, by not coming with clean hands, have made it irrelevant”. With such reasoning, learned Single Judge has dismissed the suit.

Submissions on behalf of the Appellants.

15. Assailing the impugned judgment of the learned Single Judge, Mr. Yogendra Mishra, learned counsel for the appellants has submitted that Section 3 of the Transfer of Property Act, 1882 (hereinafter referred to as ‘the T.P. Act’) read with Section 69 of the Indian Evidence Act, 1872 (hereinafter



referred to as ‘the Evidence Act’) does not contemplate any particular form for attestation. In support of his plea he has relied on a Division Bench decision of this Court in case of ***Dulhin Ful Kueri and another vs. Moti Jharo Kuer*** reported in ***1972 PLJR 358***. On the question of valid proof of *Will*, he has submitted that Section 63 of the Indian Succession Act, 1925 (hereinafter referred to as ‘the Succession Act’) read with Section 69 of the Evidence Act lays down the procedure for proof of the *Will* and with reference to the evidence adduced on behalf of the plaintiffs, he has submitted that the propounder of the *Will* had successfully proved the validity of the *Will*. He contends that there existed valid reasons for the Testatrix to execute the *Will* in favour of the plaintiffs because of stiff relationship between the testatrix and the Caveator which is evident from Ext.5, the Sanha lodged by the testatrix alleging assault on her by sons and daughters of the caveator. The said sanha proved tense relationship between the testatrix with the objectors sons and daughters. On the genuineness of the *Will*, he has submitted that the LTI appearing on the *Will* and other admitted LTI on different documents were sent to the Central Finger Print Expert under the order of this Court. Three LTIs appearing in the will were found to be that of testatrix with



comparison to the admitted documents. In respect of six other LTIs, the expert could not form a definite opinion because it was found that sufficient points were not available for comparison with the corresponding points of the admitted signatures as the said points were not clear. He submits that the report of the finger print expert in respect of the said six aforesaid LTIs does not suggest that the LTIs were not identical. He has next submitted that one of the daughters of the Testatrix Sabita Devi had been examined in a partition suit registered as T (P) No. 302 of 1995, which goes to show that the property in question was self acquired property of the Testatrix who had built a house over the same out of her own resources. He contends that this aspect has been completely overlooked by the learned single Judge. In support of his submission, he has relied on following decisions also:-

***(1) (2009) 4 SCC 790(Yamnam
OngbiTampha Ibema Devi
Vs.Yumnum Joykumar Singh)***

***(2) (2007) 7 SCC 91 (Adivekkka and
others Vs. Hanamavva Kom
Venkatesh (Dead) By LRS. And
another)***



(3) AIR 1962 Patna 481 (Ram Nath Vs. Ram Nagina)

(4) AIR 2013 Kolkatta 39 (In Re: Bibhabati Chattopadhyay) and

(5) AIR 1956 Patna 377 (Nand Kumar Vs. Chander Kishore).

16. With reference to the aforesaid decisions, he has argued that the plaintiffs did discharge their onus in proving the execution, attestation, genuineness and non-existence of any suspicious circumstance, in respect of the *Will* in question.

Submissions on behalf of the Respondents.

17. Mr. L.N. Das with Mr. Umesh Prasad, learned counsel appearing on behalf of the respondents, on the other hand, has argued that the very fact that the Testatrix died on 23.09.1992, i.e, only within 40 days of the alleged preparation of the will on 14.08.1992 makes the circumstance in which the *Will* was executed, suspicious. He has reiterated that the Testatrix having equal affection for her all sons and daughters and her grand children also, there was no reason for her to execute the will in favour of the appellants only. Referring to the will he has contended that it is evident from Ext.3 that it was



neither read over nor there is any indication to show that she had understood the contents of the will. He has next submitted that since the Testatrix was a literate lady who had been signing documents regularly there was no reason for her to put her thumb impression in place of signature in the will. He has also argued that the Testatrix died at the age of 90 years and on the date of execution she had lost her power of understanding nearly six months from before. Delay of 11 days in execution of the will after it was ascribed on 14.08.1992 also creates suspicious circumstance. The handwriting expert could not record his definite conclusion about her thumb impression in the will which strengthens the element of suspicion. Non-examination of scribe is another suspicious circumstance why learned single Judge rightly refused to grant letters of administration. Two named attesting witnesses, though alive, have been withheld, who did not come forward to prove the attestation of the will. Even the identifier of the thumb impression Kumar Shailendra Singh has not been examined. Thus, the mandatory requirement of Section 63 of the Indian Succession Act could not be fulfilled. Ext-b, a Vakalatnama which was executed by the testatrix within one year of her death establishes that the testatrix was able to put her signature.



18. The plaintiffs have tried to conceal both the facts that the testatrix was ill and confined to her bed and was though capable of putting her signature, the plaintiffs never explained under what circumstance, she had put her LTI and, therefore, finding recorded by the learned single Judge does not suffer from any infirmity. Relying on Supreme Court's decision in case of ***Yumnam OngbiTampha Ibema Devi Vs. Yumnum Joykumar Singh*** (supra), it has been argued that the plaintiffs failed to prove that signatures of the attesting witnesses were made in presence of the Testatrix at her command or she had put her LTIs in their presence. In the absence of such proof, will cannot be held to be valid which has been rightly opined by the learned single Judge. Referring to Supreme Court's decision in case of ***Adivekka and others Vs. Hanamavva Kom Venkatesh (Dead) By LRS. And another (supra)***, he has submitted that the learned Single Judge has rightly considered the circumstances of death of the Testatrix within a month from the date of execution of the will to be a suspicious circumstance for the purpose of grant of letters of administration. Reliance has also been placed on Supreme Court's decision in case of ***Bhagwan Kaur Vs. Kartar Kaur*** reported in ***(1994) 5 SCC 135***. According to him, in the background of the apparent contradictions and suspicious



circumstance, the learned single Judge rightly dismissed the suit. Reliance has also been placed on a decision of this Court in case of ***Kashibi and another Vs. Parwatibi and others*** reported in ***1996 (1) BLJ 507***.

19. In reply to the submissions advanced on behalf of the defendants-respondents, Mr. Yogendra Mishra, learned counsel has relied on Supreme Court's decision in case of ***M.B, Ramesh Vs. K.M. Veeraje and Others*** (AIR 2013 SC 2088) to submit that P.W.8 fully proved all ingredients of Section 3 of the Succession Act read with Section 69 of the Evidence Act. He has also submitted that evidence of P.Ws. 5 and 7 corroborate the evidence of P.W.8, which is also relevant in view of Section 71 of the Evidence Act. He has argued that the plea of the defendants that the LTIs of the Testatrix was obtained after her death cannot be even considered in the absence of any pleading by the Caveator. This question was not even referred to the handwriting expert nor the Caveator/objector examined any handwriting expert to contradict the evidence of the P.W.1, the handwriting expert, who had answered the questions referred to him in terms of Section 73 of the Evidence Act and the opinion has, therefore, to be accepted as correct in terms of Section 45 of the Evidence Act. Reiterating what has been



argued by him already which has been taken note of earlier, he has submitted referring to evidence of P.Ws 2 to 4 that the Testatrix was not a literate lady, rather she was able, anyhow, to write her name which also she had stopped from long before the date of the execution. He has submitted that minor cuttings in the will, which do not touch the contents of the will cannot make the will suspicious. Countering the submissions of the respondents, accordingly, he has submitted that the decision of the learned single Judge deserves interference.

Discussions

20. Before we enter into the discussions on rival submissions made on behalf of the parties, we need to take note of relevant statutory provisions first, which have been referred to and need to be explained for the present adjudication.

21. Section 63 of the Indian Succession Act deals with execution of unprivileged wills which reads thus:-

“63. Execution of unprivileged Wills- Every testator, not being a soldier employed in an expedition or engaged in actual warfare (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 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.”

22. Section 3 of the Transfer of Property Act, 1882

defines the expression “attested” as follows:-

“Section 3-----*** *****

“attested”, in relation to an instrument, means and shall be deemed always to have meant attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has seen some



other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment or executant, or has received from the executant a person acknowledgment or his signature or mark, or of the signature of such person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary”

23. Sections 68 and 69 of the Evidence Act deal with proof of execution of document required by law to be attested and proof where no attesting witness found. Sections 68 and Section 69 read thus:-

“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”

69. Proof where no attesting witness found- If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his



handwriting, and that the signature of the person executing the document is in the handwriting of that person.”

24. Section 63 (c) of the Act, if read with Section 3 of the T.P. Act suggests no particular form of attestation. Mr. Mishra is correct in his submission in this regard while placing reliance on Division Bench decision of this Court in case of ***Dulhin Ful Kueri and another vs. Moti Jharo Kuer***(supra). The requirement of Section 63(c) is that the will must be attested by two or more witnesses, each of whom has ‘seen the testator sign or affix his mark to the will’ or has been some other person sign the Will, in the presence and by the direction of the testator. The language of Section 63(c) is unambiguous and states that each of the witnesses should 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. The Section also makes clear that no particular form of attestation shall be necessary.

25. Let’s now examine Section 68 of the Evidence Act which lays down the procedure as to how the document required by law to be attested can be proved. It flows from Section 68 of the Evidence Act that an attesting witness who is alive and capable of giving evidence has to be essentially



examined before the document required by law to be attested can be used in an evidence. Whereas the term “attested” which has been defined under Section 3 of the T.P. Act in relation to an instrument envisages attestation by two or more witnesses, ‘each of whom has seen the executant sign or affix his mark to the instrument’, Section 68 of the Evidence Act stipulates that if a document is required by law to be attested, there should be at least one attesting witness to be called for the purpose of proving its execution, if there be an attesting witness alive. It is not the mandate of law under Section 68 of the Evidence Act that all the attesting witnesses are to be essentially called for proving the execution of a document required by law to be attested.

26. What is easily culled out upon conjoint reading of Section 68 of the Evidence Act and Section 63 of the Succession Act is, that for a Will to be valid it should be attested by two or more witnesses in the manner provided under Section 63 of the Succession Act and the propounder thereof should examine at least one attesting witness to prove the Will. The attesting witness should speak not only about the testator’s signature or affixing his mark to the will but also that each of the witnesses had signed the will in presece of the testator



(Yumnam OngbiTampha Ibema Devi Vs. Yumnum Joykumar Singh) (supra). In case of *Daulat Ram v sodha* reported in *(2005) 1 SCC 40*, the Supreme Court has held that once the elements of due attestation of the Wills are established and it is shown by the propounder that the Testator was at the relevant point of time in a sound disposing state of mind and understood the nature of effect of dispositions, the onus which rests on the propounder is discharged and the burden to prove that the will was forged or that it was obtained under undue influence or coercion or by playing a fraud is on the person who alleges it to be so. Similar view has been taken in case of *Pentakota Satyanarayana Vs.Pentakota Seetharatnam* reported in *(2005) 8 SCC 67* (paragraph 24).

27. There should not be iota of doubt about the proposition of law that the Court granting letters of administration has to satisfy itself, not only about the genuineness of the Will but also satisfy itself that it was not fraught with suspicious circumstance. To prove the validity of a Will executed by the Testator, attestation by the witnesses as contemplated under Section 63 of the Succession Act and Section 68 of the Evidence Act read with Section 3 of the T. P. Act need to be proved first by the propounder of the Will. In



addition to bringing the execution and attestation of will he has to show that the Testator was in a sound disposing state of mind capable of understanding that the nature of effect of dispositions. Only thereafter the onus would shift to the objector to prove that the Will was forged and that it was obtained under undue influence, coercion or by fraud. The propounder is also required to remove element of suspicion, by leading appropriate evidence.

Points For determination.

28. In the background of the discussions above, the points for determination which arise in the present appeal are as under:-

- (i) Whether the propounder of the will was able to discharge his onus to prove execution and attestation of the Will as contemplated under Section 63 of the Succession Act read with Section 68 of the Evidence Act and Section 3 of the T.P. Act?
- (ii) Whether the objectors were able to make out a case that the Will was free from suspicion in view of the suspicious circumstances



existing, based on evidence on record?

29. Before we proceed to consider the points of determination as noted above, we at the very outset decline to entertain the submission on behalf of the respondents-Objectors that the date when the Will was scribed is 14.08.1992, in view of clear finding recorded by the learned Single Judge that it was scribed on 24.08.1992; in the absence of any challenge to the said finding. We will proceed accordingly, in the present judgment taking 24.08.1992 as the date when the will was prepared.

Point for determination No.(I)

30. As we have already noticed, there are 5 persons who have been shown in the Will (Ext.3) as the attesting witnesses, out of whom 2 had died. Two other persons, namely, Kumar Shailendra Singh and Chandrasekhar Kumar Verma could not be examined as witnesses. The attesting witness Yogendra Pd. Singh was examined as P.W.8, who, according to the appellants proved the execution and attestation of the *Will*. He in his examination-in-chief on affidavit said that on 24.08.1992, at the instance of Testatrix, the scribe, Permanand Singh had prepared the document and because the attesting witnesses Md. Mahmood could not arrive on 24.08.1992, the



Will could not be executed on that date. On the following date, i.e. 25.08.1992 in the presence of the witnesses and identifier, the contents of the Will were read over to the Testatrix by the scribe and thereafter the Testatrix put her LTI followed by the signature and witnesses thereon. In the cross examination, he deposed that the Testatrix was perfectly in good health on the date of execution and denied that she was bed ridden on the said date. He also deposed that entire writing on the Will, all the contents thereon and signatures of all the person and also thumb impression of Amrit Devi in the Will were executed in her presence. Amriti Devi had put her LTI, he deposed and denied the suggestions that the testatrix was not in a position to put her thumb impression on the Will.

31. In order to determine Point No.(I) as noted above, we need close scrutiny of Section 63 of the Succession Act to find out whether the propounder could prove essential mandatory requirements incorporated in Clause (c) thereof. We find no ambiguity in the language used in Clause (c) of Section 63 which, has two essential ingredients:- (i) the Will shall be attested by two or more witnesses and (ii) each of whom has seen the testator sign and affix his mark to the Will. The aforesaid rule of execution of Will and attestation stipulated



under Section 63 of the Succession Act are mandatory in nature and in the absence of strict compliance of the said requirement, the Will cannot be said to be duly executed and if all the requirements stipulated therein are not proved in evidence, the Will cannot be said to be proved.

32. As noticed, in compliance of Clause (c) of Section 63 of the Succession Act, the minimum number of two attesting witnesses should be such that each of whom has seen the testator sign or affix his mark to the Will. The question is whether P.W.8, who was the only attesting witness examined by the plaintiffs to prove the Will, in his evidence, could prove that at least two attesting witnesses, including P.W.8, had seen the testatrix affix her mark to the Will, in order to satisfy the requirements of Clause (c) of Section 63 of the Succession Act? Since the evidence of P.W.8 is crucial for answering the point for determination no.1, we consider it apt to quote verbatim his evidence, which reads thus:-

Paragraph '5' of
Examination in-chief on affidavit.

“5- यह कि दिनांक 25.8.1992 को सभी गवाहों एवं पहचानकर्ता के उपस्थिति में कातिब ने वसीका के मजमून को पढ़कर समझा दिया और उनके सुनने समझने के पश्चात उन्होंने अपने बाये अंगुठे का निशान बनाई



तथा अन्य गवाहान भी अपना-अपना गवाही बनाए।"

“Examination-in-Chief

I had occasion to know Amrit Devi. She was cousin mother-in-law of my elder brother Shivrindan Singh.

The land of Amrit Devi was purchased from the sale proceeds for her ornaments which she had received at the time of her marriage.

Amrit Devi used to reside with Indra Kumar, Amar Yadav and Tapan Rai.

There were five witnesses to the aforesaid Will of Amrit Devi, namely, myself, Mahmood Alam, Gopal Chandra Choudhary, Chandra Shekhar Kumar Verma and Kumar Shailendra Singh. I can identify my signature on the Will (marked as Ext. 6 series).

The shradh ceremony of Amrit Devi was performed by Gyandendra Prasad Yadav.

Cross examination:

I had seen the Will for the last time on 25.8.1992, the day on which I had put my signature over the Will. Amrit Devi had put her thumb impression on the Will. I don not know whether Amrit Devi was a literate woman, capable of putting her signature or wholly illiterate, capable of



only putting her thumb impression. It is not a fact that Amrit Devi was a literate woman and used to do all her transactions in writing.

The Will was prepared on 24.8.1992 but as Mohammad Mahmood did not turn up for putting his signature over the Will as a witness, the signatures of the witnesses were obtained only on 25.8.1992. The Will was written by one Parmanand, a deed writer.

The day i.e. 25.8.1992 on which the Will was executed by Amrit Devi, she was perfectly in a good health.

There is no date below my signature on any of the dates of the Will.

Amrit Devi had died within a month of execution of the Will on 25.8.1992. Age of Amrit Devi at the time of execution of the Will was about 90 years.

The entire writing on the Will, all the contents thereof and the signature of all the persons as also thumb impression of Amrit Devi on the Will were executed in my presence. In cannot say who was the person who had encircled the thumb impression of Amrit Devi on each of the page of the Will with red ink and had made an endorsement that the thumb



impression was given in his presence.

This is not a fact that the said Will was not executed in my presence.

Amrit Devi had two sons, namely, Gyanendra Prasad Yadav and Surendra Yadav. All the three beneficiaries to the Will are the sons of Gyanendra Prasad Yadav.

The other son Surendra Yadav and his family members do not live in the house in which Amrit Devi was residing.

There were in all seven persons including myself at the time of execution of the Will by Amrit Devi. Apart from the five witnesses on the Will and Amrit Devi, the seventh person was my brother-in-law, namely, Binay Bhushan alias Rambabu. It is not correct to say that Gyanendra Prasad Yadav was also present at the time of execution of the Will. It is not a fact that the endorsement made by encircling the thumb impression on all the pages of the Will was made by Gyanendra Prasad Yadav.

Amrit Devi had sent one Gopal Chandra Choudhary to summon me for being a witness on the Will. It was some time in the evening that I was called. Amrit Devi had put her thumb impression without any help or support by any one. It



is not correct to say that on 25.8.1992 Amrit Devi was bed ridden and not in a position to put her thumb impression on the Will. The deed writer was the person who had read over and explained the contents of the Will to Amrit Devi. I do not remember who was the first person, who had put his signature on the Will after putting of the thumb impression on the Will by Amrit Devi. I do not remember the seriatim in which the witness had put their signature on the Will.

I do not know that a partition suit is being contested between Surendra Yadav and Gyanendra Prasad Yadav. I also do not know that my brother had deposed as a witness in the partition suit. It is not correct to say the Will was manufactured and was not prepared in the manner explained by me.

Parmanand, the deed writer and two other witnesses apart from me of the Will are still alive. Mahmood Alam and Gopal Chandra are no more alive and have already died.”

33. We have highlighted the relevant portion of the deposition of P.W.8 on which heavy reliance has been placed by Mr. Yogendra Mishra, learned counsel for the appellants, to



buttress his contention that all the requirements of valid execution and attestation of Will prescribed under the Succession Act, were duly proved at the trial.

34. On a deeper scrutiny of the evidence of P.W.8, we notice that what he proved on the point of the attestation was that the thumb impression of the testatrix was given in his presence. He thereafter deposed that there were seven persons including him at the time of execution of Will. He, however, did not prove that other witnesses present there had 'seen' the testator affixing her thumb impression to the Will.

35. Mr. Yogendra Mishra, learned counsel for the appellants has attempted to convince this Court by placing reliance on Supreme Court's decision in case of *Shymal Ghose Vs. State of Bengal (AIR 2012 SC 3539)* with reference to paragraph 34 thereof to contend that the Court should examine the statement of witnesses in its entirety, in order to arrive at a rational conclusion. He has argued that no statement of witnesses can be read in part and/or in isolation. The said legal proposition is unexceptionable. However, in the present case, P.W.8 is only attesting witness who came forward to prove the Will. Proof of attestation of the Will is mandatory for grant of letters of administration. It



is mandatorily required under Section 63(c) of the Succession Act that at least two attesting witnesses must have seen the testator/testatrix putting her/his signature or affixing his/her mark over the Will. We find that there is absolutely no evidence on record to prove that two attesting witnesses had 'seen the testatrix putting her thumb impression'.

36. In that background, we are of the view that the requirement of due attestation of Will could not be proved by the plaintiff-appellants at the trial and the finding of the learned Single Judge in this regard suffers from no infirmity. The point of determination no.1 is accordingly decided against the appellants.

37. Since the question of determination of point No. (II) would have arisen had the point of determination No. (I) been decided in affirmative in favour of the appellants. Since the decision on point for determination is against the appellants inasmuch as the appellants failed to prove the mandatory compliance of Clause (c) of Section 63 of the Succession Act, point of determination No. (II) need not be answered.

38. Resultantly, this appeal fails and is dismissed



being devoid of merit.

39. There shall be no order as to costs.

(Jyoti Saran, J)

(Chakradhari Sharan Singh, J)

arun/-

AFR/NAFR	AFR
CAV DATE	N/A
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