

HIGH COURT OF CHHATTISGARH, BILASPUR**MA No. 794 of 2004**

Narmada Prasad, S/o Late Shri Sunderlal Bajpai, aged about 45 years,
Occupation Advocate, R/o Village Dabhra, Post and Tahsil Dabhra,
District Janjgir Champa, Chhattisgarh

---- Appellant

Versus

1. Murarilal, S/o Late Shri Shiv Shankar Prasad, Aged about 54 years, R/o Village Tendu Mudi, Post Sukhapali, Tahsil Dabhra, District Janjgir Champa, Chhattisgarh.....(Applicant)
2. Kishorilal (dead).....(Non-applicant No.1)
Through LR's-
2(A). Smt. Prabha Bajpai (deleted)
2 (B). Smt. Sandhya Chaturvedi, W/o Shri Rajendra Chaturvedi, aged about 30 years, D/o. Kishorilal, R/o. Raigarh, Mohalla Baikunthpur, Near Shri Jaganath Mandir, Raigarh, District Raigarh, Chhattisgarh.....(LR's of non-Applicant No.1)
3. Rameshwar Prasad, S/o Late Shri Shivshankar Bajpai, aged about 66 years, Retired Assistant District School Inspector, R/o. Village Dabhra, Behind Government Hospital, Tahsil Dabhra, District Janjgir Champa, Chhattisgarh.....(Non-Applicant No.3)
4. State of Chhattisgarh, Through the Collector, District Janjgir Champa, C.G.....(non-Applicant No.4)
5. Deepak Kumar, S/o. Shri Murarilal Bajpai, aged about Years, R/o Tendu Mudi, Post and Tahsil Dabhra, District Janjgir Champa, Chhattisgarh(Non-Applicant No.5)

For appellant- Shri Prafull N. Bharat, Advocate.

For respondent No.2(B)-Shri H.S. Patel, Advocate.

For respondents No.1, 3 & 5-Shri A.D. Shrivastava, Advocate.

For State- Shri Dilman Rati Minj, Dy.G.A.

Hon'ble Shri Justice Goutam Bhaduri

C A V Judgment

(Reserved on 29.08.2018)

(Delivered on 11.10.2018)

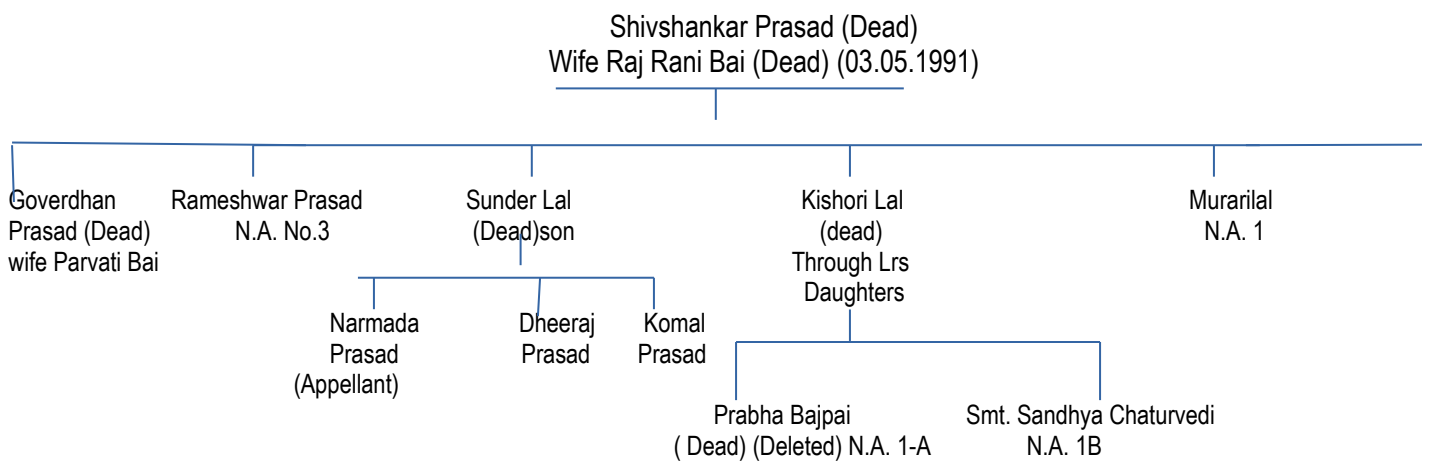
Heard.

1. Instant appeal is against the order dated 2/07/2004 passed in Misc.

Civil Case No.16/99 by the Additional District Judge, Sakti under Section 299

of Indian Succession Act. Appeal is filed by Narmada Prasad who was respondent No.2 in a proceeding under section 276 of the Indian Succession Act. By the impugned order learned court of Additional District Judge has granted probate to a WILL executed by one Rajrani Bai for the WILL dated 15/04/1991.

2. Admitted facts in this case are that Rajrani Bai had five sons namely Goverdhan, Rameshwar, Sunderlal, Kishorilal and Murarilal. Present appellant Narmada Prasad is son of Sunderlal @ Annu i.e. the grand son of testator Raj Rani Bai. The particulars are shown hereunder.



3. Rajrani Bai deceased had land bearing khasra No.65/1A, 65/2 and 345/3 admeasuring 4.60 acres at village Tendumudi Patwari Circle No.-8. An application for succession under section 276 of the Indian Succession Act, 1925 on the basis of the WILL was filed by Murarilal one of the son of Raj Rani Bai. It was pleaded by Murarilal that Smt. Rajrani Bai had bequeathed her entire property in favour of Murarilal. It was further stated that a civil suit was filed by Murarilal before Civil Judge, Class-II Sakti which was bearing Civil Suit No.131-A/1992. In that civil suit during trial different WILL were produced by the litigating parties, therefore, in order to adjudicate the devolution of property on the basis of the WILL orders were passed to obtain the letter of probate from the competent court. Consequently, proceeding was instituted under section 276 of the Succession Act by one son Murarilal for

grant of probate of a WILL dated 15.04.1991, whereby the property alleged to have been bequeathed solely in his favour. Kishorilal one of the brother was initially arrayed as respondent No.1, Narmada Prasad the present appellant in the appeal was arrayed as respondent No.2, Rameshwar Prasad another brother was arrayed as respondent No.3 and son of Murarilal namely Deepak was arrayed as respondent No.5. Goverdhan Prasad one other brother was not made a party as he was not alive on the date of application. During the course of proceeding under section 276 Kishorilal also died and his legal heir namely two daughters namely Prabha Bajpai and Sandhya Chaturvedi were arrayed as respondent No.1A and 1B. During the course of trial Prabha Bajpai also died as such her name was deleted.

4. In the proceedings under Section 276 of the Indian Succession Act grant of probate was claimed for in respect of the will dated 15.04.1991. It was pleaded by the applicant Murarilal, one of the son of testator that the property in question devolved on Raj Rani Bai pursuant to the order dated 03.07.1984 in civil suit No.18-A/1981 and the property was an absolute property of Raj Rani Bai. In the said application it was further pleaded that Rameshwar Prasad one of the brother, who was non-applicant No.3 initially got a WILL executed in his favour on 27.01.1986. It was stated that thereafter, canceling the said WILL another WILL by fraud was executed on 09.12.1989. which was completely fabricated and forged. It was alleged that Narmada Prasad (the present appellant), who was non-applicant No.2 along with Rameshwar Prasad got the said WILL executed in suppression of earlier WILL on 15.04.1991 and alleged that it was the last WILL of Raj Rani Bai for which the probate was claimed.

5. The learned court below conducted the enquiry in respect of WILL dated 15.04.1991 and examined the witnesses. The applicant of petition

under Section 276 of Indian Succession Act was namely Murarilal and was examined as AW-1. Apart from Basant Kumar Shukla who was said to be scribe of the WILL dated 15/04/91 was examined as PW-2. The attesting witness Ganga Sharan Shukla was examined as PW-3. As against this respondent/appellant to support the earlier registered WILL dated 09.12.1989 had examined clerk of office of Registry namely S.K. Anand as NAW-1, attesting witness Chunnulal Shukla as NAW-2, Narmada Prasad Bajpai one of the beneficiary of the WILL as NAW-3. After evaluating all the evidence the probate court granted the letter of probate in favour of applicant therein namely Murarilal which is subject of appeal before this court.

6. Learned counsel for the appellant would submit that the order under challenge cannot be sustained for the reason it failed to follow statutory requirement for proof of the WILL under Section 63 of the Indian Succession Act, 1925 and section 68 of the Indian Evidence Act. It is stated that the WILL dated 9/12/1989 which is Ex.D-2 was registered one wherein property were given to two beneficiaries i.e. one is Kishorilal and another is Narmada Prasad. He referred to sale deed Ex.D-1A and would submit that on 11/08/2000 Murarilal had purchased two lands from Kishorilal bearing khasra No.65/1A and 65/2 which were bequeathed by said WILL in favour of Kishorilal. It was stated that so called last WILL dated 15/04/1991 purports to bequeath entire property to Murarilal. It is stated that if the property had devolved on Murarilal there was no reason to purchase the said property again after death of Rajrani Bai by Murari Lal from Kishorilal. He submits that reading of the statement of PW-2 who scribed the alleged WILL, the presence and appearance and statements as compared to with attesting witness are contradictory. Counsel further referred to the statement of PW-3 Ganga Sharan the attesting witness and would submit that attesting witness did not

sign the WILL after the testator has signed the WILL and contended that he simply put his signature without signature being there that of the testator, therefore it was a non-compliance of Section 63 of the Indian Succession Act.

7. Likewise learned counsel Shri H.S. Patel appearing for respondent No.2(B) would submit that as many as four WILL came to fore and that four WILL were purported to have executed by Rajrani Bai. First WILL was executed in favour of Murarilal on 7/01/1980. Subsequent WILL was executed on 27/01/1986 in favour of Rameshwar, third WILL was registered WILL was executed on 9/12/1989 in favour of Kishorilal and Narmada Prasad and last for which the probate has been given is dated 15/04/91. It is stated that dispute is in respect of the last WILL for which probate has been given. He adopts the argument of appellant and would submit that probate issued in favour of Murarilal cannot be sustained.

8. Per contra, Shri A.D. Shrivastava, learned counsel appearing on behalf of respondents No.1, 3 and 5 would submit that initially a civil suit was filed on the basis of WILL dated 15/04/1991 in the year 1992, therefore it would show that the beneficiary under the WILL had not concealed anything and had come out of the existence of the WILL in the year 1992. It is contended that after going through the statement of attesting witness PW-3 that once the requirement of section 63 of the Succession Act and Section 68 of the Evidence Act is discharged by the beneficiary or person claiming under the WILL entire burden shifts to the person who challenges such WILL. It is further submitted that there is inconsistency in the written statement and the evidence which has come before the court as in written statement it was alleged that signed document were used whereas in the statement entire signature is denied on the basis of fraud. Consequently, the stand on the fraud cannot be shifted. He further went through the statement of PW-2 scribe

and PW-3 attesting witness and would submit that the presence of the witnesses on the scene when deed was executed no suspicion has been projected by the appellant, therefore no presumption can be drawn that the WILL was under the suspicious circumstances. He placed his reliance in the case of ***Daulat Ram and others Vs. Sodha and others {AIR 2005 SC 233}*** and submit that once the suspicion of a WILL is removed by propounder then the burden is on the person who alleges it to be of fraud or undue influence. Under the circumstances order of the court below is well merited which do not call for any interference. Reliance was also placed in the case of ***Bijendra Nath Shrivastava (Dead) through LRs V. Mayank Shrivastava and others {AIR 1994 SC 2562}*** and contended that charge of fraud must be substantially has to be proved and one type of fraud cannot be substituted by another fraud. Lastly reliance was placed in the case of ***Madhukar D. Shende Vs. Tarabai Aba Shedage (AIR 2002 SC 637)*** and stated when finding is recorded that WILL herein of 15.04.1991 is not suspicious, challenged to WILL only on the basis of conjecture or suspicion have no place.

9. Heard learned counsel for the parties at length and perused the record.

10. The records shows that a proceeding under Section 276 of the Indian Succession Act was filed by Murarilal, the propounder of WILL dated 15.04.1991 against Kishori Lal, Narmada Prasad and Rameshwar Prasad. Kishori Lal died during the pendency of the proceedings as such his legal heirs namely Prabha Bajpai and Sandhya Chaturvedi were arrayed as respondents. Deepak Kumar S/o Murarilal Bajpai was subsequently added as respondent No.5. Murarilal Bajpai, the applicant before the trial Court was examined as witness No.1 P-1. This fact is not in dispute between the parties

that Raj Rani Bai owned a property bearing Khasra No.65/1 (k), admeasuring 1.36 acres and 65/2, admeasuring 1.26 acres at village Deh and Khasra No.345/3, admeasuring 1.96 acres total 4.60 acres at village Deh. One order passed in civil Suit No.131-A/1992 (Ex P-2) dated 04.05.1999 by the Civil Judge Class-II, Sakti on record is perused. In the said civil suit, one WILL was produced dated 07.01.1980, which records that Raj Rani Bai has executed a WILL in favour of Murarilal Bajpai. Subsequently on 16.05.1986 another agreement Ex. P-5 was executed which purports a consent by testator showing Raj Rani had consented to the fact that the lands which belonged to her may be mutated in Revenue records in favour of Muarilal. The applicant alleged that on 09.12.1989 the other brothers took Raj Rani Bai to Bilaspur and another registered WILL was executed in their favour and beneficiaries were Kishori Lal and Narmada Prasad. The said WILL is marked as Ex. D2-C. It is stated by applicant Murarilal that last WILL was executed by Raj Rani on 15.04.1991 whereby entire property was given to Murarilal. The applicant Murarilal prayed that since three WILLs have come to fore, therefore, the last WILL dated 15.04.1991 required to be probated.

11. The records show that Ex. P-1 is WILL dated 07.01.1980 a registered WILL, whereby Raj Rani Bai has bequeathed her property to Murarilal Bajpai. The last WILL dated 15.04.1991 is marked as Ex P-3, whereby Raj Rani Bai executed a WILL in favour of Murarilal Bajpai, which is a unregistered WILL. Another WILL Ex. D-2 (c) is dated 09.12.1989, a registered WILL is also on record. So during the proceedings under Section 276 of Indian Succession Act, three WILLs were on record. The documents which are placed was one WILL dated Ex. P-1 purported to be executed by Raj Rani Bai in favour of Murarilal Bajpai on 07.01.1980. Ex. P-1 has not been proved according to Section 63 of the Indian Succession Act and Section 68 of Indian Evidence

Act, therefore, that is not the part of consideration except evaluating the surrounding circumstances. The WILL for which the probate was sought for is dated 15.04.1991 which is marked as Ex. P-3. The another WILL which is marked as Ex. D-2 (c) a registered WILL is dated 09.12.1989 but no adjudication is made of that by the trial Court and no prayer was made to grant probate of the same. Neither the issues were framed nor adjudication of authenticity of WILL dated 09.12.1989 was decided despite the attesting witnesses were examined. The respondent in proceeding under Section 276 of the Indian Succession Act were also dormant. So it being not under any issue, no finding is given by this Court in respect of WILL dated 09.12.1989 while adjudicating the first appeal.

12. In the proceedings before the Court below both the applicants and the non-applicants claimed WILL in their favour separately. The Court under the circumstances has to resort to the arm chair theory to consider the facts and evidence to rationally harmonized the same to construe the WILL. To consider the WILL under these circumstances this Court has to resort to the arm chair of the testator to evaluate the authenticity of WILL placed for consideration. The Supreme Court in the case of **Lakshmana Nadar and others Vs. B. Ramier {AIR 1953 SC 304}** further followed by **Navneet Lal alias Rangi Vs. Gokul and others {AIR 1976 SC 794}** has laid down the ratio that the arm chair theory can always be adopted to know the intentions of the testator in view of the surrounding circumstances. In given facts of this case it would be necessary to remove the suspicion and find out whether the WILL dated 15.04.1991 alleged to be executed by the testator is beyond suspicion by evaluating the surroundings and the evidence before the Court.

13. In the instant case, one fact is placed in a competitive domain to challenge the WILL i.e. the sale deed dated 11.08.2000. The deed is marked

as Ex. D-1 (A). It is in respect of sale of land bearing Khasra No.65/1(K) and 65/2 of village Tendumudi, whereby Kishori Lal Bajpai had executed a sale in favour of Murarilal Bajpai for a consideration of Rs.1,48,000/-. It is the same property which was bequeathed by Raj Rani in favour of Murarilal by virtue of WILL dated 15.04.1991, for which probate was sought for. As compared to it the document Ex. D- 2 (c) is a WILL dated 09.12.1989 whereby the same property was bequeathed in favour of Kishorilal to substantiate the source of devolution.

14. The witness DW-3 Narmada Prasad Bajpai contended that in the year 1989 Raj Rani Bai, the testator, who was his grandmother executed a WILL and property of 4.60 acres, comprised of three lands i.e. Khasra No.65/1, 62/2 and 2.64 acres was given to Kishori Lal Bajpai, one son, whereas the Khasra No.345, admeasuring 1.96 acres was given to Narmada Prasad, son of Sundar Lal, the grand son. Out of the said property one which devolved on Kishorilal, the other brother Murarilal purchased the same. The attesting witness of the said WILL dated 09.12.1989 namely Chunnu Lal Shukla was examined as DW-2 and another witness S.K. Anant was examined as DW-1, a person from the Sub-Registrar Office. No probate has been claimed for the said WILL dated 09.12.1989. The only adjudication is required as to the authenticity of the WILL dated 15.04.1991 (EX-P-3), for which probate was claimed.

15. If the series of the facts are considered, one serious infirmity as to the conduct of the propounder Murarilal Bajpai remains unexplained as to why he made a purchase of two lands for consideration of Rs.1,48,000/- from Kishori Lal Bajpai, which was claimed to be given by Raj Rani Bai to Kishori Lal and another one Narmada Prasad by the WILL dated 09.12.1989 the document Ex. D-2 (C). The subsequent WILL dated 15.04.1991 (Ex. P-3) purports that

the entire property of Raj Rani Bai including the property, the subject of sale was given to Murarilal Bajpai. The sale deed by which Murarilal Bajpai purchased two lands from Kishori Lal Bajapi is of 11th of August, 2000. So if Murarilal Bajpai was having all the lands in his favour by virtue of WILL dated 15.04.1991, what was the occasion for him to purchase the same land subsequently in the year 2000 cannot be equated to gentle art of forgetting.

16. Murarilal Bajpai, who was examined as PW-1, in his statement he has deposed that Kishori Lal Bajpai, the seller and the other brother, had kidney problem, as such in order to treat himself he had to visit Raipur for a many times, therefore, he wanted to help, as such he helped Kishori Lal and Kishori Lal, "therefore", had transferred his land in his name. The said statement of Murarilal Bajpai leads to show that he was in know of the fact that the land which was purchased by him belongs to Kishori Lal, which was given to Kishori Lal by Raj Rani Bai by the WILL dated 09.12.1989. These facts raises a doubt when a brother helps another brother for his treatment why he will get the sale deed executed in his favour and incur additions expenses by payment of sale consideration and stamp duty. The situation remained unexplained that if the lands were already held by virtue of devolution of title by WILL dated 15.04.1991 in favour of Murarilal what was the occasion for the sale deed. The applicant decisively broke with his own agenda to raise doubt over the last WILL dated 15.04.1991.

17. The Supreme Court in the case of ***Kalyan Singh Versus Smt. Chhoti and others {AIR 1990 SC 396}*** has observed that a WILL is one of the most solemn documents known to law. The executant of the WILL cannot be called to deny the execution or to explain the circumstances in which it was executed. It is therefore, essential that trustworthy and unimpeachable evidence should be produced before the Court to establish genuineness and

authenticity of the WILL. It must be stated that the factum of execution and validity of the WILL cannot be determined merely by considering the evidence produced by the propounder. In order to judge the credibility of witnesses and disengage the truth from falsehood the Court is not confined only to their testimony and demeanour. It would be open to the court to consider circumstances brought out in the evidence or which appear from the nature and contents of the documents itself. It would be also open to the Court to look into surrounding circumstances as well as inherent improbabilities of the case of reach a proper conclusion on the nature of the evidence adduced by the party. As has been stated in this case that the propounder himself has purchased the part of the property which he claims to have been given to him by WILL dated 15.04.1991, therefore, this question remains unanswered as to why he purchased the same property in the year 2000 for consideration though he claims to be the exclusive owner of the property by virtue of the WILL dated 15.04.1991, which was probated.

18. Further the Supreme Court in the case of **H. Venkatachala Iyengar v. B.N. Thimmajamma (AIR 1959 SC 443)** has observed that although the mode of proving a will did not ordinarily differ from that of proving any other document, nonetheless it requires an element of solemnity in the decision on the question as to whether the document propounded is proved as the last will and testament of departed testator. Where there are suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the court before the will could be accepted as genuine. Where there are suspicious circumstances, the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last will of the testator. These principles have been reiterated in the subsequent decisions of this Court in *Rani Purnima Devi. V. Kumar*

Khagendra Narayan Dev {(1962) 3 SCR 195} and Smt. Indu Bala Bose V. Manindra Chandra Bose {(1982) 1 SCC 20}.

19. To prove the WILL dated 15.04.1991 Murarilal Bajpai, was examined as PW-1. The scribed Basant Kumar Shukla was examined as PW-2 and attesting witness Ganga Sharan Shukla was examined as PW-3. Admittedly, the testator Raj Rani Bai died on 04.05.1991 i.e. 18 days after the WILL dated 15.04.1991 was executed. Murarilal Bajpai (PW-1) has deposed that he was looking after the cases on behalf of his mother at Sakti court and on 04.05.1991 when she died, she was aged about 85 – 90 years and she died at village Tendumudi. According to him she was serious and was ailing before the death and in the state of coma when she was brought to village Tendumudi from Raigarh where she died. It is also stated that before 1 & ½ to 2 months before the death she was staying in the house of Kishori Lal Bajpai at Raigarh. So these situations also raise a doubt as the death of testator occurred 18 days after the WILL was executed and state of health of testator appears to be not good.

20. Basant Kumar Shukla (PW-2), who scribed the WILL has admitted that Murarilal, the propounder is co-brother and further stated that he had went to the house of Ganga Sharan Shukla, wherein the alleged WILL was said to be executed. Further Murarilal Bajpai (PW-1) has stated that the testator was staying at Kamran Baikuthpur, Raigarh, which was at a distance. The scribe further stated that at 8.30 to 9 am he met the propounder Murarilal at a place known as Subhash Chowk at Raigarh and he was asked to come to the house of Ganga Sharan Shukla. Thereafter, after 15 – 20 minutes he reached to the house of Ganga Sharan Shukla and when he again went at that time testator along with the other persons were present there and the WILL was written according to the dictation of the testator.

21. The attesting witness Ganga Sharan Shukla (PW-3) has stated that he went to his office and came back at 11 o'clock to his house at that time the testator, Raj Rani, the witness Basant Shukla, Murari Bajpai were sitting in their house and some writing was going on. He was asked to stay for two minutes thereafter he signed the WILL Ex. P-3. A close scrutiny of statement shows contradiction with regard to the time of execution. These surrounding circumstances if are considered along with the factum of the sale deed, it appears that it does not satisfy the judicial conscious of the Court that the WILL was above the doubt.

22. The Supreme Court in the case of **S.R. Srinivasa and others Versus S. Padmavathamma {(2010) 5 SCC 274}** has held that when the execution of the WILL is surrounded by suspicious circumstances, it was necessary for the propounder to answer the same to remove the doubt.

23. The submission of the respondents in this appeal that the civil suit was filed in the year 1992 as per Ex. P-2 and the existence of the WILL was opened in the year 1992 do not answer the circumstances as to why thereafter also Murarilal purchased the land from Kishori Lal. Further the reliance placed by the respondents in the matter of **Daulat Ram and others Vs. Sodha and others {AIR 2005 SC 233}** will not come to the help of the respondents as the ratio of law laid down that if the suspicious circumstances exist, the onus is on the propounder to remove the suspicion by leading appropriate evidence still exists in facts of the case. With respect to the purchase of the land only the evidence is of Murarilal is on record with an explanation that in order to help his brother, the sale deed was executed. It was the propounder to remove such doubt which the propounder Murarilal failed to discharge.

24. The propositions laid down in the case of **Madhukar D. Shende Vs.**

Tarabai Aba Shedage (AIR 2002 SC 637) would be of no help to the respondent Murarilal Bajpai as the unnatural transaction of purchase of the land though the property was claimed to be bequeathed by way of WILL has not been explained. The assumed suspicion or supposition has to satisfy the conscious of the Court which Murarilal failed to discharge.

25. In a result, after close scrutiny of evidence, I am of the opinion that the order of the Court below dated 02.07.2004 cannot be sustained. Accordingly, the order dated 02.07.2004 is set aside. The appeal is allowed. No order as to costs.

Sd/-

(Goutam Bhaduri)

JUDGE