

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.459 of 2011

1. Maimuna Khatoon(since deceased)
1(a)Shakeel Kajlewash(since deceased)
1(b) Sultana Jahan
1(c)Anjum Ara
1(d)Negar Jahan Ara
2.S. Shamim Ahmad.
3.S. Nasim Ahmad, All sons of Syed Wakil Ahmad, r/o Mohalla Yahiyapur,
P.S. Sheikhpura.

... Opposite Party ... Appellant/s

Versus

1.Basanti Devi wife of Late Sitam Ram Yadav.
2.Ramdeo Yadav.
3.Mohan Yadav.
4.Sohan Yadav, All sons of Late Sita Ram Yadav, r/o Yahiyapur, P.S.
sheikhpura, District sheikhpura.
5. Smt. Sunita Devi d/o Late Sita Ram Yadav, wife of Pappu Yadav, r/o Goma,
P.O. Shilao, P.S. Shilao, District Nalanda. Heirs and legal representatives of
deceased applicant, Sita Ram Yadav.
6. Sajid Ahmad.
7. Rashid Ahmad.
8.Tabassum Jahan Ara.
Respondent nos. 6 to 8 are r/o Yahiyapur, P.O. & P.S. Sheikhpura, District
Sheikhpura.
9.Naushaba Khatoon w/o Late shakeel Kajlewash.
10.Alquama(minor) s/o Late Shakeel Kajlewash under the guardianship of his
Mother and natural guardian Naushaba Khatoon r/o Yahiyapur, P.S.
Sheikhpura, District Sheikhpura.

... Respondent/s

Appearance :

For the Appellant/s : Mr.Saba Ashfaq, Adv
For the Respondent/s : Mr.Arun Kumar, Adv

CORAM: HONOURABLE MR. JUSTICE S. KUMAR
ORAL JUDGMENT

Date : 01-10-2019

Heard learned counsel for the parties.

2. This appeal has been filed under Section 299 of the
Indian Succession Act, 1925, for setting aside the judgment and
order dated 19.06.2010 passed in Probate Case No. 11 of 1989



passed by Additional District & Sessions Judge, FTC-II, Sheikhpura, granting Letter of Administration in favour of Sita Ram Yadav applicant/respondent.

3. Testator Syed Serajul Haque was son of late. Munshi Abdul Nahab Mokhtar r/o Mohalla Yahiyapur, Sheikhpura, who was practising as Mokhtar in Munger and Jamui and died on 05.10.1975 at 5:00 am in his house at his village, and before his death, he had executed a Will on 01.10.1975, which was attested by Md. Imam Ali, Dayanand Gupta, Sishu Prasad and Sadhu Saran. The Will was scribed by Kameshwar Nath-Deed Writer, Sheikhpura, which was drafted on the instruction of testator and same was read over to the testator by the deed writer in presence of witnesses who attested the Will by putting their signatures in presence of testator. The Will was registered in the house of testator on 02.10.1975 by Sub-Registrar, Sheikhpura, and at the time of registration testator was identified by Karu Sah before the Sub-registrar, Sheikhpura and testator admitted due execution of Will before the Sub-registrar, Sheikhpura.

4. Application was filed before the Court by the legatee of the Will Sita Ram Yadav in whose favour the Will was executed. It has been further stated in the application that the original Will was in custody of petitioner Sita Ram Yadav



however same was fraudulently taken away by Shameem Ahmad s/o late Wakil Ahmad as such certified copy of the Will was brought before the court. The entire property covered by Will was valued at Rs. 45,000/- and legatee is entitled to appropriate usufructuary in the ratio of 22 Sheers and 18 Sheers out of 1 Mann with respect to property as detailed in Schedule-1 of the Letter of Administration petition and out of sale proceeds of 22 Sheers first party would pay rent at first and remaining will be utilized by him for his personal needs and balance of 18 Sheers would be utilized for the charitable purpose as per terms spelt out in the Will. The properties in the Will are 1/3rd share of the entire estate left by the testator.

5. Application for grant of Probate and Letter of Administration was objected by the objectors Syed Akeel Ahmad, Syed Shamim Ahmad and Syed Naseem Ahmad and they filed their objection against the said petition of applicant. Objectors claim to be nephews of testator Syed Serajul Haque. In the entire objection they have stated that application for grant of Letter of Administration is not maintainable as the same has not been verified in the manner laid down under Section 281 of the Indian Succession Act. Attesting witness Dayanand Prasad Gupta has failed to prove the signature and due execution of



Will. Testator Syed Serajul Haque was never regular practitioner as Mokhtar either at Jamui or at Munger. The signature over the registered will is forged and same is not of Sirajul Haque. The Will has been registered by practicing fraud upon Registering Authority. It has been further stated by the Objectors that the testator Syed Serajul Haque was seriously ill and confined to bed and was unable to move, since, 15 days prior to his death and had lost his mental capacity and was not in a position to know the nature and consequences of his acts and did not execute the Will in conscious state of mind.

6. Will is surrounded by suspicious circumstances. The certified copy of Will does not come within the meaning and definition of Will as defined under Section 2(H) of the Indian Succession Act. The property covered by the said will is more than $\frac{3}{4}$ th of the entire property left behind by the testator, as such is illegal as the testator was not empowered to execute the Will with respect to more than $\frac{1}{3}$ rd of his property.

7. On rival contentions raised by parties, trial Court framed three issues for its consideration and determination:-

(i) whether the petitioner u/s 273 of the Indian Succession Act filed by the petitioner is maintainable?

(ii) whether the Will has been duly



executed by the testator late Syed Serajul Haque and it had also been duly attested by Md. Imam Ali, Daya Nand Gupta and other witnesses?

(iii) whether the testator executed the Will in his sound mind for disposing his properties?

8. The Probate Court is only concerned with the question as to whether the documents put forward as the last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind or any suspicious circumstances existed at the time of execution of Will. In *Savithri v. Karthyayani Amma*, since reported in (2007) 11 SCC 621 in para 17, the Apex Court has held as follows:-

“17. The legal requirements in terms of the said provisions are now well settled. A will like any other document is to be proved in terms of the provisions of the Succession Act and the Evidence Act. The onus of proving the will is on the propounder. The testamentary capacity of the testator must also be established. Execution of the will by the testator has to be proved. At least one attesting witness is required to be examined for the purpose of proving the execution of the will. It is required to be shown that the will has been signed by the testator with his free will and that at the relevant time he was in sound disposing state of mind and understood the nature and effect of the disposition. It is also required to be established that he has signed the will in the presence of two witnesses who attested his signature in his presence or in the presence of each other. Only when there exist suspicious circumstances, the onus would be on the propounder to explain them to the satisfaction of the



court before it can be accepted as genuine.”

9. Karu Sah has been examined as Applicant Witness No. 1, who in his examination-in-chief has stated that Serajul Haque (Mokhtar) in the year 1975 in the month of Aswin called him and he went to his residence and Mokhtar Sahab told that he has to write a Will. Apart from him Sadhu Saran, Dayanand Gupta and Syed Ali Imam were also present at the residence of Mokhtar Sahab. Munshi wrote Will on dictation of Mokhtar Sahab and after writing, he read over the contents of the Will and thereafter same was handed over to him. Mokhtar Sahab himself read the contents of the Will in their presence and put his signature on it in presence of others and asked them to put their signature as attesting witness then he and others in presence of Mokhtar Sahab put their signature on the Will. Next day also he was called by Mokhtar Sahab and when he went there others were also present who were called by Mokhtar Sahab. Registrar of Registration Office, Sheikhpura had also come there who was handed over the document and Registrar enquired from all persons present there and in presence of Registrar, Mokhtar Sahab put his signature and admitted the execution of Will and he had identified him before the Sub-registrar and other witnesses also put their signature in presence



of Sub-registrar. The Will was scribed in Urdu which was executed in favour of Sita Ram Yadav.

In his cross examination he stated that the age of testator at the time of execution of Will was 80-90 years and he was aged 32 years. His nephew was also present there. At the time of execution of Will Md. Serajul was mentally fit. Kameshwar Nath drafted the Will. He is a deed writer in Sheikhpura Registration Office which was written at the dictates of Serajul. Will was scribed in Urdu. Registrar came to residence on next day for which an application was filed before the Registrar. He died after three days of execution of Will. He was present at the time of registration also. He had identified Serajul at the time of registration. He had not read the Will but the same was read over by Serajul. Serajul last rites were organized by Sita Ram Yadav. Sita Ram Yadav was his bataidar. He denied that alongwith Kameshwar Nath and others he has fraudulently prepared the Will when Serajul was not mentally fit.

10. Applicant-Witness No. 2 is Kameshwar Nath who in his examination-in-chief has stated that he was the deed writer. The contents of the Will after being reduced in writing, was read over to him and explained and thereafter he himself



read it. The Will was drafted as per instruction of Serajul Haque. Serajul Sahab put his signature first and thereafter on his instruction others present there put their signature. Syed Ali Imam, Dayanand Prasad Gupta, Sishu Prasad, Sadhu Saran and Karu Sah were attesting witnesses of the Will. Serajul Sahab was in fit state of body and mind. Family of Sita Ram Yadav used to serve Serajul. He has not seen any muslim serving Serajul Haque. Serajul Haque had none in his family. This was the only document which was prepared by him.

In his cross-examination he has stated that the draft of Will was prepared first and same was read over to him and Serajul thereafter himself read the contents of the Will. He further stated that Sita Ram Yadav is his bataidar and 22 Sheers was in the share of Sita Ram Yadav and out of remaining 18 Sheer 9 Sheer was to be donated in Masjid and 9 Sheer to be distributed among the poor and needy. It was not registered on the same day. He has denied that Serajul was not in a fit state of mind and was bed ridden. 3-4 days after execution of Will he died.

11. Dayanand Gupta has been examined as Witness No. 3 on behalf of applicant who in his examination-in-chief has stated that Serajul had executed deed of Will in favour



of Sita Ram Yadav. Serajul was friend of his father and was on visiting terms. Syed Ali came to him and told that Serajul was calling him and he went there at 9 O' Clock. He saw Kameshwar Nath, (Wasika Nabis), Karu Sah and Sishu Prasad who were present there. Serajul asked the deed writer to read the contents of the Will upon which Kameshwar Nath read over the contents of the Will and thereafter Serajul took the Will in his hand and himself read it and said alright and put his signature on the Will and thereafter persons present there on the instruction of Serajul Sahab i.e. Karu Sah, Sishu Prasad, Sadhu Saran, Syed Md. Ali put their signatures as attesting witnesses and he signed the Will in presence of Serajul Sahab. When the Will was read over everyone heard it. He also heard it. All signatures were made on the Will in his presence. He was mentally fit and was fully conscious.

In his cross-examination he has stated that the Will was written on 01.10.1975. He was aged 34 years and Serajul age was 80-85 years. He is a stamp vendor for last 27 to 28 years. Registration of Will was done on commission. Deed was registered on 02.10.1975 at his residence and he died on 05.10.1975. Serajul had no relatives in village. He has denied that the Will was fraudulently prepared.



12. Mahesh Prasad Yadav has been examined as Witness No. 4 on behalf of applicant, who is a formal witness.

13. Sishu Prasad has been examined as Witness No. 5 on behalf of applicant who in his examination-in-chief has stated that Sita Ram Yadav is known to him as well as Serajul Haque was Mokhtar and was a respectable person of the locality and people used to call him Mokhtar Sahab. Mokhtar Sahab had called him at his residence on 01.10.1975 through Sadhu Saran and he went there and expressed his desire that he wants to write a Will. Apart from him (Munshijee) Kameshwar Nath, Karu Sah, Dayanand Gupta, Ali Imam, Sadhu Saran were present there and Mokhtar Sahab himself asked Kameshwar Nath (Munshijee) to draft the Will and on his instruction Will was drafted by Munshijee and on completion same was read over by Munshijee in presence of everyone and all present there heard the contents of the Will and thereafter the content was read by Mokhtar Sahab himself and everyone heard it and on being satisfied, he put his signature over it and thereafter all present there put their signature in presence of Mokhtar Sahab. He also put his signature in presence of other witnesses. Munshijee has also put his signature in presence of others and thereafter Mokhtar Sahab asked everyone to come next day also and when



all went to his residence, Registrar of Registration Office, Sheikhpura was present there and the Will was presented to him and Registrar read over the contents of Will and Mokhtar Sahab put his signature and accepted the execution of Will where all the five witnesses were present.

In his cross-examination he stated that in the year 1975, he was 35 years old and Mokhtar Sahab was 80 years of age. Mokhtar Sahab was well known to him. He has further stated that he reached the residence of Serajul Sahab at 9:00 am. Mokhtar Sahab was in good health and was able to walk within his residence. Munshijee drafted the Will on the instruction of Serajul Sahab. Sita Ram Yadav was also present there. Serajul Sahab died on 05.10.1975. On 02.10.1975 when he reached the house of Serajul Sahab at 12 O' Clock, he saw Registrar to be present there. In presence of Registrar he and other witnesses put their signatures. He has denied that at the time of execution of Will Serajul was not mentally or physically fit. He has denied that Will was fraudulently prepared.

14. Md. Sultan Ali Zaidi has been examined as Witness No. 6, who in his examination-in-chief has stated that as per terms and conditions of Will out of 40 Sheers Sita Ram Yadav was to have 22 Sheers and remaining 18 Sheers was of



Masjid and after death of Sita Ram Yadav his son Ram Dev Yadav is also following the terms and conditions of Will. He is not related to Syed Serajul Haque.

15. Basanti Devi has been examined as Witness No. 7 on behalf of applicant who is the widow of Sita Ram Yadav.

16. Ram Deo Yadav has been examined as Witness No. 8 on behalf of applicant. In his examination in chief he has stated that Serajul Haque was issueless and his household was managed by his family who also looked after him and served him.

17. Md. Mujtaba Ansari has been examined as witness no. 9 on behalf of applicant, who is the formal witness and has proved the entry made with respect to registered deed of Will in the records maintained in the Registry Office.

18. Mansoor Khan has been examined as Witness No. 1 on behalf of objectors who is an advocate clerk and formal witness.

19. Shamim Ahmad has been examined as Witness No. 2 on behalf of objectors who in his examination-in-chief has stated that Mubarak Ali was their ancestor who had three sons Mokarram Hussain, Abdul Wahab and Wali



Mohammad. Mokarram Hussain had one son Wakil Ahmad. Wakil Ahmad had three sons Akil Ahmad, Shamim Ahmad and Naseem Ahmad (Objectors) and one daughter Bibi Sehnaz Begum @ Bunni. Abdul Wahab had one son Serajul Haque (testator) and one daughter Hussana Ara. Serajul Haque (testator) died issueless. Bibi Hussana Ara had one son Manzoor Hasan and Wali Mohammad had one son Syed. Habib who was issueless. Serajul Haque died on 05.10.1975 and he never executed any deed of Will in favour of Sita Ram Yadav as alleged on 01.10.1975. In the alleged Will there is no witness of locality or any relative of Serajul Haque. Serajul Haque due to old age was ill 15 days prior of alleged Will and was unable to move and was not in a fit mental condition and same was prepared by the executor and his associates to grab the property of Serajul Haque. Original Will was never produced in the court. Executor Sita Ram Yadav had executed registered deed of relinquishment on 20.04.1977 with respect to lands of said Will.

In his cross-examination he stated that he was in Government service and retired in the year 2002. Serajul Haque was his cousin uncle. He came to know about the Will 10 days after death of Serajul Haque. He obtained certified copy of the Will and in 1977 Sita Ram Yadav executed deed of



relinquishment. The property in Will was personal property of Serajul Haque. Name of his sister is Sahnawaz Begum.

20. Md. Amim Zaman has been examined as Witness No. 3 on behalf of objectors who has stated about the relationship of respondents with Serajul Haque. He stated that respondents are nephews of Serajul Haque. Serajul Haque died issueless on 05.10.1975. Serajul Haque used to live alone and they visited his residence and looked after him. He never executed any Will and the alleged Will is forged and fabricated. He had met Serajul Haque lastly in the year 1974.

21. Md. Gulam Rabbani has been examined as witness No. 4 on behalf of objectors, who has stated that Mokarram Hussain had one son Wakil Ahmad and Wakil Ahmad had three sons Akil Ahmad, Shamim Ahmad and Naseem Ahmad(objectors). Abdul Wahab had one son Serajul Haque (testator). Akil ahmad, Shamim Ahmad and Naseem Ahmad(objectors) are nephews of Serajul Haque. Serajul Haque died on 05.10.1975 and his nephews used to look after him. He did not execute any Will in his lifetime. He never met Serajul Haque at any point of time.

22. Syed Faiaz Anwar was examined as witness no.5 on behalf of objectors, who in his examination-in-chief, stated



that Mubarak Ali had three sons namely, Mokaram Hussain, Abdul Wahab and Wali Mohammad. Mokaram Hussain had one son Wakil Ahmad and Wakil Ahamd had three sons namely, Akil Ahmad, Syed Shamim Ahmad and Syed Nasim Ahmad (objectors). Abdul Bahab had one son Serajul Haque (testator) and one daughter Hussina Ara. The objectors are nephew of Serajul Haque, who died issueless on 05.10.1975. Serazul Haque had become old and remain ill and mostly remain alone. Nephew and other relatives used to visit him. He had not executed any deed of Will to anyone. Sitaram Yadav used to come as he was his *Bataidar*. He was looked after by his nephew, his property was looked after by Sitaram Yadav.

23. Nasim Ahmad has been examined as witness no.6, who in his examination-in-chief, has stated that he is objector no.3. He has denied that Serazul Haque has executed the Will as neither any local person nor any family member is witness to said will. They used to look after Serazul Haque. They are his close relative. The Will is forged and fabricated. Serazul Haque was old and was suffering from fever for last 15 days. He had lost his mental balance. Sitaram Yadav on 24.05.1977 had executed a deed of relinquishment in their favour. After relinquishment deed was executed by Sitaram Yadav on



24.05.1977, the land were mutated in their name and rent receipt was granted. The Will is forged and fabricated document.

In his cross-examination, he has stated that he was an employee in Electricity Department and retired in 2009. He remained posted in Patna for 36 years. Serazul Haque was not suffering from any disease, he was old and weak. Serazul Haque used to live alone. Serazul Haque used to take care of himself till his death. At the time of death of Serazul Haque none of the three brothers were present there. 15 to 20 days prior to his death three brothers met him at the that time he was ill, he told to bring the medicine and he went away after giving him medicine.

24. Anil Singh is witness no.7, on behalf of objectors, who is the formal witness.

25. The court of Probate is only concerned with the question as to whether the document put forward as last Will and testament of a deceased person was duly executed and attested in accordance with law and whether at the time of last execution the testator had sound disposing mind. The title of the property which is the subject matter of the Will cannot be decided by the Probate Court. The Probate Court has limited



jurisdiction to decide the authenticity and genuinity of the Will.

The Apex Court in the case of ***Pasupati Nath Das (Dead) Vs. Chanchal Kumar Das(Dead) by L.Rs. and Ors.*** since reported in ***2018(13) SCALE 486*** in para 12 has held as follows:-

“We must, at the outset, say that the scope of the matter arising from Probate proceedings is very limited. The scope of the matter is primarily and principally regarding the genuineness of the execution of the testament or Will. This part has been succinctly dealt with in a decision rendered by this Court in ***Krishna Kumar Birla v. Rajendra Singh Lodha and Ors*** since reported in ***(2008) 4 SCC 300***. Paragraphs 57 of the said decision spell out the scope of the enquiry in Probate proceedings as under:

57. The 1925 Act in this case has nothing to do with the law of inheritance or succession which is otherwise governed by statutory laws or the custom, as the case may be. It makes detailed provisions as to how and in what manner an application for grant of probate is to be filed, considered and granted or refused. Rights and obligations of the parties as also the executors and administrators appointed by the court are laid down therein. Removal of the existing executors and administrators and appointment of subsequent executors are within the exclusive domain of the court. The jurisdiction of the Probate Court is limited being confined only to consider the genuineness of the will. A question of title arising under the Act cannot be gone into the (sic probate) proceedings. Construction of a will relating to the right, title and interest of any other person is beyond the domain of the Probate Court.”

26. On appreciation of evidence the trial Court found that applicants have been able to prove that the Will was duly executed by the testator in sound disposing state of mind after fully understanding its contents in presence of two attesting



witnesses satisfying the requirement of Section 63(c) of the Indian Succession Act as well as Section 68 of Evidence Act and same was duly registered. The applicant has been able to successfully satisfy the Probate Court that the Will was prepared by the Deed Writer Kameshwar Nath who drafted the contents of the Will on the instruction of testator Serajul and same was read over and explained to him in presence of witnesses and thereafter testator himself read the contents of the Will and on being satisfied put his signature on the Will in presence of attesting witnesses Dayanand Gupta and Sishu Prasad who saw the testator putting his signature on the Will and thereafter on his instruction attesting witnesses put their signature on the Will. The Will was drafted and prepared on 01.10.1975 and thereafter its due execution was accepted by the testator before the Sub-registrar on 02.10.1975 in presence of other witnesses where Karu Sah identified testator Serajul before the Sub-registrar and put his signature as an identifying witness. The witnesses examined on behalf of applicant have been cross-examined by the other side but there is nothing in their cross-examination to disbelieve their testimony which appears to be trustworthy and reliable. This Court also on re-appreciation of evidence finds that the applicant has been able



to establish the due execution of Will satisfying the requirement of Section 63(c) of Indian Succession Act as well as Section 68 of Evidence Act.

27. The other ground on which the genuinity of Will was assailed that at the time of execution of Will the testator was not in a fit state of mind and body and was ill and as such execution of Will is shrouded under suspicious circumstances. Witnesses examined on behalf of applicant have stated that testator although was old and sick but was mentally alert and sound and was fully aware of the consequences of the document executed by him and was in a sound disposing state of mind whereas the witnesses examined on behalf of objectors stated that the testator used to reside alone and they visited him occasionally. There is nothing on record or any evidence led by objectors that they visited testator at the time of his death or served and took care of him. The applicants have able to prove that Will was duly executed by the testator in a sound disposing state of mind and after fully understanding its contents and the evidence adduced on behalf of objectors is inadequate to dispel the validity of Will or any suspicious circumstances shrouding the execution of Will.

28. The objectors have pleaded that Will was obtained



by fraud and if fraud is pleaded it is the party who alleges fraud has to establish it. The Apex Court in ***Jagdish Chand Sharma versus Narain Singh Saini (dead) through legal representative and others*** since reported in ***(2015) 8 SCC 615*** has held in paragraph no.47 which is quoted below:-

“47. That a propounder has to demonstrate that the Will was signed by the testator and that he was at the relevant time in a sound disposing state of mind and that he understood the nature and effect of the disposition and further that he had put his signature to the testament on his own free will and that he had signed it in presence of two witnesses who had attested it in presence and in the presence of each other, in order to discharge his onus to prove due execution of the said document was reiterated by this Court amongst others in *Surendra Pal and Ors.* (supra) It was held as well that though on the proof of the above facts, the onus of the propounder gets discharged, there could be situations where the execution of a Will may be shrouded by suspicious circumstances such as doubtful signature, feeble mind of the testator, overawed state induced by powerful and interested quarters, prominent role of the propounder, unnatural, improbable and unfair bequests indicative of lack of testator's free will and mind etc. In all such eventualities, the conscience of the Court has to be satisfied and thus the nature and quality of proof must be commensurate to such essentiality so much so to remove any suspicion which may be entertained by any reasonable and prudent man in the prevailing circumstances. It was propounded further that where the caveator alleges undue influence, fraud and coercion, the onus, however, would be on him to prove the same, and on his failure, probate of the Will must necessarily be granted if it is established that the testator had full testamentary capacity and had in fact executed it validly with a free will and mind. (emphasis is mine)



29. The Apex Court in the case of ***Jagdish Chand Sharma vs Narain Singh Saini*** since reported in ***(2015) 8 SCC 615***, has held as follows:-

"A Will as an instrument of testamentary disposition of property being a legally acknowledged mode of bequeathing a testator's acquisitions during his lifetime, to be acted upon only on his/her demise, it is no longer res integra, that it carries with it an overwhelming element of sanctity. As understandably, the testator/testatrix, as the case may be, at the time of testing the document for its validity, would not be available, stringent requisites for the proof thereof have been statutorily enjoined to rule out the possibility of any manipulation. This is more so, as many a times, the manner of dispensation is in stark departure from the prescribed canons of devolution of property to the heirs and legal representatives of the deceased. The rigour of Section 63 (c) of the Act and Section 68 of 1872 Act is thus befitting the underlying exigency to secure against any self serving intervention contrary to the last wishes of the executor."

30. The Will was a registered Will and as such there is presumption of its correctness as it is presumed that official work has been performed in a rightful manner. The Apex Court in case of ***Rabindra Nath Mukherjee and another versus Panchanan Banerjee (Dead) By Lrs. and others*** since reported in ***(1995) 4 SCC 459*** has held in paragraph no.6 as follows:-

"6. Insofar as the third circumstance is concerned, we may first observe that witnesses in such documents verify whether the same had been executed voluntarily by the person concerned knowing its contents. In case where a will is registered and the Sub-Registrar certifies that the same had been read over to the executor who, on doing so, admitted the contents, the fact that the witnesses to the



document are interested loses significance. The documents at hand were registered and it is on record that the SubRegistrar had explained the contents to the old lady. So, we do not find the third circumstance as suspicious on the facts of the present case.”

31. It has been submitted on behalf of appellant that the application for grant of Probate/Letter of Administration, was not maintainable as the application was not properly verified according to Section 281 of the Indian Succession Act and the document is not a Will but a simple deed of bataidari and deed of endowment. "Will" has been defined under Section 2(H) of the Indian Succession Act, 1925, which reads as follows:-

"Section 2(h) "Will" means the legal declaration of the intention of a testator with respect to his property which he desires to be carried into effect after his death."

32. The Apex Court in the case of *Ishwardeo Narain Singh Vs. Kamta Devi* since reported in *AIR 1954 SC 280*, has held as follows:-

“The dismissal of the application for probate on the ground that the disposition in favour of Thakurji is void for uncertainty can on no principle be supported and indeed learned counsel appearing for the respondent has not sought to do so. The Court of Probate is only concerned with the question as to whether the document put forward as the last will and testament of a deceased person was duly



executed and attested in accordance with law and whether at the time of such execution the testator had sound disposing mind. The question whether a particular bequest is good or bad is not within the purview of the probate Court. It is surprising how this elementary principle of law was overlooked by both the Courts below. However, as learned counsel appearing for the respondents has not sought to support this ground nothing further need be said on that.”

33. Under Mohammedan Law the form of Will is immaterial and there is no prescribed Rules as to how the Will of Mohammedan shall be carried out. In the deed, testator has clearly expressed his intention that the main legatee of the Will shall carry out the division of sale proceeds as he was maintaining for several years and he will take his share as per the provisions of Bataidari Law of Govt. Of Bihar and the rest of the income shall be contributed to charitable organization which is the basic ingredient of WAKF Law. Under Section 40 of Mulla Principles of Mohammedan Law, it has been stated that a Mohammedan may deduct the whole of his property by way of WAKF that cannot be more than 1/3rd of the assets without consent of his heirs.

34. It has been further submitted on behalf of appellants that the certified copy of Will has been produced and in absence



of original Will the attestation and execution of the Will cannot be proved. Original Will was in custody of the applicant Sitaram Yadav but somehow or the other he lost the custody of original Will and as such applicant filed certified copy of the Will which was duly proved and same is acceptable as secondary evidence. Original applicant Sitaram Yadav died during pendency of suit as such non-production of original Will could be satisfactorily explained by him only, however, his wife Basanti Devi has given the details for loss of possession of the original Will. Under the provisions of Evidence Act, if the original document is lost or destroyed, same can be proved by producing certified copy of the document which is acceptable and admissible in evidence. The opposite parties also in their evidence have accepted the due execution of Will. Two admitted documents were on the record establishing the existence which are the deed of civil court of Basanti Devi is Exhibit-3, certified copy of agreement is Exhibit-4, and contents whereof establishes the existence of deed of Will and its admission by the opposite parties is proof of due execution of Will.

35. It has been argued on behalf of appellant that the Will was executed on 01.10.1975 and testator died on 05.10.1975 but application for grant of Probate and Letter of Administration



was filed in the year 1989 and as such the application was barred by limitation under Article 137 of the Limitation Act. The limitation starts running from the time the right to apply accrues and in the present case the applicant has given details of factual aspect and the date from which right to apply accrued, as such the application was not barred by limitation. The starting point of limitation begins from the right to apply accrues and not from the date of death of testator.

36. The issue of limitation is mixed question of law and fact and no such objection was raised by the Objectors before the trial court nor any such issue was framed, as such the appellants are precluded to raise said issue at the appellate stage.

37. The Apex Court while considering the question of application of Limitation Act for grant of Letter of Administration in the case of ***Kunvarjeet Singh Khandpur Vs. Kirandeep Kaur and Ors*** since reported in ***(2008) 8 SCC 463*** has held as follows:-

“15. Rejecting Mr. Dalapatrai's contention, I summarise my conclusions thus:

- (a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;
- (b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;
- (c) such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can



be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death.

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates.

The conclusion 'b' is not correct while the conclusion 'c' is the correct position of law.”

38. There is no merit in this appeal and is, accordingly, dismissed.

LCR of this case be returned to the court concerned forthwith.

(S. Kumar, J)

ranjan/-

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