

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.167 of 2011

Most. Saraswati Devi and Ors	Versus	 Appellant/s
Mithilesh Kr. Singh and Ors		 Respondent/s

Appearance :
For the Appellant/s : Mr.Sidhendra Narayan Singh, Adv
: Mr. Sanjeev Kumar, Adv
For the Respondent Nos.1&2: Mr.Vishwanath Pd. Sinha, Sr.Adv
: Mr.Sanjay Kumar Singh, Adv.

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 04-04-2019

Heard learned counsel for the parties.

2. This appeal has been preferred against judgment dated 31.01.2011 passed by the learned Additional District Judge-IV, Chapra in Probate Case No.18 of 1986, whereby the learned court below has granted probate in favour of respondent Nos.1 and 2 in respect of the Will dated 16.06.1985 said to be executed by Most. Motirajo Kuer wife of Rampat Singh.

3. Before considering the grounds of challenge, the background of the Will and nature of relationship between the parties, requires to be noticed. One Kishun Singh had two sons- Hardeo Singh and Bhuneshwar Singh. Hardeo Singh aforesaid had 5 sons-Ram Lachhman, Ram Bihari Singh, Jung Bahadur Singh, Deep Narain Singh and Rampat Singh. Most. Motirajo Kuer, the testator of the Will, was widow of Rampat Singh and respondent Nos.1 and 2, namely, Mithilesh Kumar Singh and Awadhesh Kumar Singh in whose favour Will was executed are



sons of Deep Narain Singh aforesaid. The cosharers of Most. Motirajo Kuer contested the probate case by challenging the genuineness of the Will and due execution of the Will as well as on the ground that Most. Motirajo Kuer has no right to execute the said Will. The right to property by Motirajo Kuer was said to be waived vide compromise petition dated 16.03.1978 (Ext.A) filed in Partition Suit No.237 of 1972, whereby Most. Motirajo Kuer only accepted a right of maintenance and the property of her husband was to be shared by other cosharers.

4. Learned counsel for the appellants submits that there is material on the record (Ext.A) to show that Most. Motirajo Kuer had already relinquished her property right in the year 1978 in favour of other cosharers. Therefore, she had no right to execute the Will. Moreover, the genuineness of the Will is doubtful for the reason that in the compromise petition, there is signature of Most. Motirajo Kuer, whereas the Will bears her L.T.I. His next contention is that none of the attesting witnesses were examined in this case and the learned court below has wrongly held that scribe of the Will was attesting witness. In his evidence, the scribe has nowhere stated that he was attesting witness.

5. On the other hand, learned counsel for the respondents submits that a probate court cannot go into the title of



the testator. It has only to see whether the Will which was subject matter of the probate case was duly executed and attested and was freewill of the testator. In other words, the same was not obtained by any undue influence or playing fraud or coercion etc., which is not a case herein. Contention is that whole purpose of execution of a Will is to change the course of natural inheritance. Evidence has come on the record and the learned court below has discussed the same in the impugned order that both the attesting witnesses were already dead. In the circumstance, non-examination of the attesting witnesses cannot come in the way of proof of the due execution. He next submits that Most. Motirajo Kuer died on 04.01.1986, and before execution of the Will, she had executed a registered sale deed dated 04.06.1985 in favour of one Balo Devi (Ext.3) and the said registered sale deed bears L.T.I. of Most. Motirajo Kuer. Since the sale deed is a registered document its due execution and presentation before the registering authority will be presumed under the law. Contrary has not been proved in this case.

6. The law is well settled that a probate court is not required to go into the title of the testator. The only requirement is to see that the Will produced is a genuine Will of the testator and has been duly executed and attested.



7. Section 59 of the Indian Succession Act deals with competency of the person making the Will and says that *every person of sound mind not being a minor may dispose of his property by Will*. Explanation-I to that section says that *a married woman may dispose by Will of any property which she could alienate by her own act during her life*.

8. Section 63 relates to manner of execution of the Will which provides that (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*.



9. Section 68 of the Evidence Act requires that *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.*

10. The record reveals that both the attesting witnesses were already dead, hence, compliance of Section 68 is there. The scribe of the Will, Ram Chandra Prasad, appeared before the court as P.W.3 and has deposed that Most. Motirajo Kuer called him at her residence for writing contents of the Will. As per dictate of Most. Motirajo Kuer, this witness drafted the Will. The Will was in favour of Mithilesh Kumar Singh and Awadhesh Kumar Singh. The contents were read over to Most. Motirajo Kuer and after finding it correct she put her thumb impression on the Will, and on being asked by Most. Motirajo Kuer, witnesses-Shatrughan Singh and Radha Sah had also signed on the Will as a witness. Since the scribe had stated before the court that the testator put her L.T.I. on the Will and the registered sale deeds also corroborated that testator had put her L.T.I. as a vendor on the sale deed. The burden was properly discharged by the respondents regarding due execution of the Will and it shifted on the appellants to get the



same rebutted. Only for the reason that the compromise petition filed in the civil suit and brought on the record as Ext.A bears signature said to be made by Most. Motirajo Kuer relinquishing her claim in the property of her husband would not lead to disbelieve her L.T.I. on the Will especially when a registered sale deed was brought on the record which bears presumption of due performance.

11. Therefore, it is held that the proposed Will was duly executed Will of Most. Motirajo Kuer. The proof of due attestation of the will and requirement of Section 68 of the Evidence Act is waived in view of the evidence coming on the record that attesting witnesses are dead and scribe supporting the execution of the Will. Therefore, I do not find any reason to interfere with the impugned judgment, hence, this appeal is dismissed as devoid of merit.

12. However, it is made clear that since probate court cannot go into title of the parties. The parties shall be at liberty to get their other disputes adjudicated by the appropriate forum.

(Birendra Kumar, J)

Nitesh/-

AFR/NAFR	NAFR
CAV DATE	NA
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