

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.15 of 1986

1. Krishna Deo Prasad, son of Late Sukhdeo Narain Prasad, resident of village-Dulahpur Kathrahi @ Jaiki, P.S.-Asthawan, District-Nalanda.

2. Amrendra Mohan Prasad.

3. Anand Mohan Prasad.

Both sons of Krishnadeo Prasad.

4. Kanti Devi.

5. Jayanti Devi.

7. Radhika Devi.

All married daughters of Late Sukhdeo Narain Prasad.

All resident of village-Dulshpur Kathrahi @ Jaki P.S.-Asthawan New, P.S.-Bind, District-Nalanda.

... .. Appellant/s

Versus

1. Sita Mahto, son of Late Bhola Mahto, resident of village-Pagambarpur, P.O.-Korari, P.S.-Belchhi, District-Patna.

2. Smt. Bhatani Devi @ Kari Devi, resident of village-Kamal Bigha, P.O.-Bilari, P.S.-Giriyak, District-Nalanda.

3. Bimla Prasad.

4. Kedar Prasad.

5. Ajit Prasad.

6. Sanjeev Prasad.

7. Sujeet Prasad.

All 3 to 7 sons Late Ganauri Mahto, All resident of village-Choudharin Chak, P.S.-Belchhi, District-Patna, P.O.-Masathu.

8. Bhagwat Prasad.

9. Jawahir Prasad.

10. Beermani Prasad.

11. Tunha Prasad.

8 to 11 all sons of Ramjee Prasad, resident of village+P.O.-Gopalpur, P.S.-Belchhi, District-Patna.

12. Smt. Jai Rani Devi, wife of Late Doman Mahto, resident of village-Salempur, P.O.-Rahui, P.S.-Rahui, District-Nalanda.

... .. Respondent/s



Appearance :

For the Appellant/s : Mr. Rajeev Kumar Verma, Sr. Advocate
Mr. Rajneesh, Advocate
Mr. Rohan Verma, Advocate
For the Respondent/s : None

CORAM: HONOURABLE MR. JUSTICE RAJIV ROY

CAV JUDGMENT

Date : 08-12-2022

Heard Mr. Rajeev Kumar Verma, learned Senior Counsel for the appellant. No one appeared on behalf of the respondents despite notices and press publication that were done earlier.

2. The present appeal arises out of the judgment and order dated 04.10.1985 passed in Title Suit No.15 of 1973 by the court of learned Ist Additional District Judge, Nalanda by which the plaint put forward by the Plaintiff-Appellant was negated and the suit was dismissed.

3. The matrix of facts giving rise to present appeal is/are as follows:

4. One Babu Naman Mahto was blessed with two sons namely, Atwari Mahto and Bandhu Mahto. Further, with the passage of time, the two brothers separated and came in possession of their respective shares of land.



5. Atwari Mahto was blessed with three sons, namely, Shiv Sahay Mahto, Gopal Mahto and Harihar Mahto. Gopal Mahto was blessed with three sons namely, Sukhdeo Narain Prasad (the original plaintiff), Basudeo Mahto and Bisho Mahto. Further, Shiv Sahay Mahto was blessed with five daughters namely, Jagia Devi, Bhatni Devi @ Kari Devi, Savitri Devi, Jeera Devi and Jai Rani Devi. Jagia Devi was married nearer home to her father, Shiv Sahay Mahto and she was blessed with one son, Sita Mahto. Harihar Mahto died unmarried.

6. After the death of Shiv Sahay Mahto, his nephew Sukhdeo Narayan Prasad preferred Probate Case No.48 of 1970 before learned District Judge, Patna for grant of probate on the basis of Will dated 02.04.1961 executed by Shiv Sahay Mahto. Jagia Devi, one of the daughter of Shiv Sahay Mahto appeared and filed objection. This led to conversion of Probate Case No.48 of 1970 into Title Suit No.15 of 1973.

7. After the creation of Nalanda district, the case was transferred to the court of learned District Judge, Nalanda at Biharsharif.

8. Beside Jagia Devi and her son Sita Mahto, the other daughters of Shiv Sahay Mahto namely, Bhatni Devi @ Kari Devi, Savitri Devi, Jeera Devi and Jai Rani Devi also appeared in



the case on 25.03.1985 and adopted the written statement of Jagia Devi.

9. The case of the plaintiffs was that Shiv Sahay Mahto was in a state of jointness with the sons of Gopal Mahto and due to the care and attention that he used to take, out of love and affection, the Will was executed in his favour (with respect to the suit lands) on 02.04.1961.

10. In furtherance of the said claim, the plaintiff brought on record documents to show that after the death of Shiv Sahay Mahto on 27.12.1967, he performed '*Shraddh*' and filed receipts showing purchase of utensils, cloths, grains as also the documents showing account of expenditure for his treatment.

11. The defendants daughters on the other hand claimed that while Harihar Mahto died unmarried, the other two brothers namely Shiv Sahay Mahto and Gopal Mahto had separated by metes and bounds long ago. The '*Sasural*' of Jagia Devi being close to her '*Naihar*', she and her son, Sita Mahto used to look after Shiv Sahay Mahto and out of said love and affection, Shiv Sahay Mahto had also gifted some land to her son, Sita Mahto on 31.05.1963 through registered sale deed. Further, even Shiv Sahay Mahto had sold some of the property on 04-02-1962 and had mortgaged some other land to cater to his needs.



12. It was further case of the defendants that Shiv Sahay Mahto was bedridden prior to his death and on getting opportunity, the plaintiff, Shukhdeo Narayan Prasad may have obtained left thumb impression on blank paper and later manufactured Will in collusion with the 'Tayeed' Hari Narayan Prasad and it was thus the case of the defendants that the said Will cannot be treated as a valid one.

13. The learned court framed issues, the important amongst which is/are as follows:

(i) is the suit as framed maintainable?

(ii) is the Will dated 02.04.1961 the last Will and a valid document or it is a forged and fabricated document?

(iii) is the plaintiff entitled for letter of administration?

(iv) to what relief or reliefs, is the plaintiff entitled?

14. The learned Ist Additional District Judge, Nalanda thereafter vide an order dated 04.10.1985 came to a definite conclusion that:

(i) the 'Will' that the plaintiff produced is unregistered;

(ii) it does not contain any provision for maintenance of Gauri Devi, wife of Testator, Shiv Sahay Mahto despite the fact that she was alive when the alleged deed is said to have been executed by him;



(iii) the alleged LTI and signature of the Testator on Ext.2 (Will) is/are also in dispute;

15. The learned court further held that the plaintiff failed to explain why the deceased executed the Will in his favour in a joint family property when he was separate and had also sold some land to Bharat Prasad.

16. It was further held by the learned court that the inscribed and attesting witnesses failed to give the name of the lawyer with whom the deceased had sought legal advice to execute unregistered 'Will' in favour of the plaintiff.

17. The learned court thus held that all the circumstance create reasonable doubts regarding the genuineness of the Will and it appears that the plaintiff in collusion with the aforesaid inscribe and the attesting witnesses managed to manufacture the alleged Will after the death of Shiv Sahay Mahto to deprive his daughters and grand son from the properties left out by him.

18. It further held vide an order dated 04.10.1985 that the alleged Will dated 02.04.1961 cannot be said to be have been executed by the Testator, Shiv Sahay Mahto in favour of the plaintiff, Sukhdeo Narain Prasad rather it appears to be forged and



fabricated Will as pointed out by the defendants. Accordingly, the suit was dismissed with cost.

19. Aggrieved by the said order dated 04.10.1985 passed by the learned Ist. Additional District Judge, Nalanda at Biharsharif, the present appeal was filed.

20. During the pendency of the appeal, the plaintiff-appellant, Sukhdeo Narayan Prasad died and has been substituted by his heirs, Krishnadeo Prasad & Ors.

21. Heard learned Senior Counsel for the appellants. None appeared for respondents.

22. Mr. Rajeev Kumar Verma, learned Senior Counsel took this Court to the entire case from the genealogy to the date, the Testator, Shiv Sahay Mahto executed the Will on 02.04.1961 in favour of Sukhdeo Narayan Prasad.

23. Learned Senior Counsel contented that while continuing in joint family and in view of the fact that all the five daughters were happily married and nicely settled in life and further being fond of his nephew, Sukhdeo Narayan Prasad, Shiv Sahay Mahto executed the Will in question on 02-04-1961 with complete alertness of mind without there being any external influence.



24. The further submission of learned Senior Counsel was that on 27-12-1967, Shiv Sahay Mahto died whereafter on 14-03-1970, Probate Case was filed by Sukhdeo Narayan Prasad before the learned District Judge, Patna for the Will to be probated which resulted into Letters of Administration Case No.48 of 1970.

25. The five daughters of the Testator, Shiv Sahay Mahto were made parties and firstly Jagia Devi appeared and filed objection petition and later all the other four appeared and adopted the stand of Jagia Devi.

26. As a result, the case was converted to Title Suit No.15 of 1973. Further, the case of Jagia Devi was that her father, Shiv Sahay Mahto had grown old and was not keeping good health one year prior to his death, was confined to bed and had lost his power of understanding. All through his illness, Jagia Devi and her son, Sita Mahto were there to provide best treatment to her father but sometimes they used to go to their in-laws house which was nearer to her 'Maika' and taking advantage of the said absence, Sukhdeo Narayan Prasad may have taken thumb impression on blank paper and converted it into a Will.

27. Learned Senior Counsel submitted that this statement of Jagia Devi was quite contrary to the statement of her son, Sita Mahto (DW.16) who in his deposition submitted that his



‘Mausi’ Jira Devi frequented the house of Late Shiv Sahay Mahto to look after him which was followed by other ‘Mausis’ also and as such learned Senior Counsel submitted that there was no lonely hour for Sukhdeo Narayan Prasad to get a thumb impression of Shiv Sahay Mahto on blank paper as alleged and get it antedated for preparation of Will.

28. Learned Senior Counsel further submitted that DW.16 Sita Mahto, son of Jagia Devi in his further statement stated that ‘*Sardi, Garmi*’ had affected his ‘Nana’ and was bedridden. This statement of DW.16 is again contrary to the statement of Jagia Devi that one year prior to the death of Shiv Sahay Mahto, he was unconscious and unable to understand things.

29. Learned Senior Counsel submitted that out of five sisters, only Jagia Devi and Bhatni Devi were examined while other three sisters were not examined.

30. According to learned Senior Counsel, altogether twelve witnesses (from plaintiff side) were examined out of which PW.3 Santosh Kumar Chatterjee was Private Signature Expert while P.W.6 Kashi Lal was photographer of the signature and the Will as also the mortgaged bond (Ext.4) and according to them, the photograph and the signature / thumb impression on the



mortgaged bond and the Will were of the same person and this statement was not challenged by defendants.

31. Further case of Learned Senior Counsel was that the PW.11 Barber who used to look after Shiv Sahay Mahto had also participated/conducted his funeral and subsequently 'Shraddh' also supported the plaintiff's story.

32. According to learned Senior Counsel, PW.12, Sukhdeo Narayan Prasad narrated that it was joint family and Shiv Sahay Mahto was very fond of him being blessed with five daughters and he used to shower love and affection since childhood and accordingly, on 02-04-1961 he willed the suit property through unregistered deed in the presence of Janki Mahto, Guru Sahay Mahto and Ishwar Singh and the same was inscribed by Hari Narayan Prasad (PW.2).

33. Learned Senior Counsel submitted that the PW.2, Hari Narayan Prasad, stated that he was called by Shiv Sahay Mahto to draft the Will. However, he conceded that the inscribe could not remember the messenger who conveyed him the message of Shiv Sahay Mahto to him.

34. It was his further submission that after the death of Shiv Sahay Mahto, all the rituals were performed by Sukhdeo Narayan Prasad who also spent money for funeral and 'Shraddh'



and kept the account in his own handwriting which was presented and marked as Ext.5. Even the land involved in the Will which stood mortgaged by the Testator was redeemed by PW.12 on payment of Rs.769/-.

35. He submitted that it was a proper Will and denied that the thumb impression was taken on a blank sheet on which the Will was incorporated illegally.

36. The learned Senior Counsel further submitted that even the learned court held that DW.5 Jagia Devi failed to establish the fact that Shiv Sahay Mahto had lost consciousness one month prior to his death.

37. Learned Senior Counsel next submitted that the most important aspect of the entire case is that the defendant witnesses have not denied the signature/thumb impression of Shiv Sahay Mahto on the Will but have only objected that this may have been taken on a blank sheet during their absence and had converted it into a Will. It is his further submission that when the court itself held that the Jagia Devi failed to prove that the Testator was unconscious prior to his death, the natural inference will be that he was in a conscious state of mind and as such the learned court was duty bound to issue the letter of administration in favour of the defendant-appellant.



38. In support of his case, learned Senior Counsel has cited firstly a case of ***Sm. Chinmoyee Saha, vs. Debendra Lal Saha and others*** reported in AIR 1985 Calcutta 349 with special reference to para-8 which is as follows:

“The court is not justified to consider the terms of the Will for deciding whether the testatrix was justified in excluding her sons or daughters or the wives of Kishori or the son of Rajendra, when the propounder has been able to prove due execution and attestation of the Will as well as the sound disposing mind of the testatrix.”

39. The next case cited by learned Senior Counsel was **Sheogobind Singh and another vs. Mt. Rajeshwari Kuer** reported in AIR 1963 Patna 24 to show that the court only has to see whether the Will and testament was duly executed and attested properly and at the time of execution he had sound disposing mind. Whether the same is good or bad is not within the purview of the court.

40. The learned Senior Counsel has also referred to an order of Patna High Court in **Ram Prashad Sahu and another vs. Musummat Basantia** reported in 6 PLT 615 to submit that a



Testator can revoke Will in part under section 70 of the Indian Succession Act. Still the rest of the 'WILL' will remain unaffected.

41. The last case cited by learned Senior Counsel was **Smt. Indu Bala Bose and others vs. Manindra Chandra Bose and another reported in AIR 1982 SC 133** to show that it is not the job of the Probate Court to inquire as to in whose favour the Will is executed or not. It only has to examine whether the Will is genuine or not. Even in presence of wife, widow, grand mother children, daughter, sister and brother, who all are alive, Will can be executed in favour of nephew and the same can be considered genuine.

42. As noted, no one appeared for the respondents despite all steps taken in the matter.

43. This court took up the matter from the stage the issues were framed by the learned First Additional Sessions Judge, Nalanda and it would be appropriate to reproduce them once again.

44. The learned court framed issues, which included amongst the other the following:

(i) is the suit as framed maintainable?



(ii) is the Will dated 02.04.1961 is the last Will and a valid document or it is a forged and fabricated document?

(iii) is the plaintiff entitled for letter of administration?

(iv) to what relief or reliefs, is the plaintiff entitled?

45. The learned court thereafter took note of the facts and held that the documents that has been put forward by the plaintiff i.e. the receipts showing purchase of utensils, cloths, grains (Ext.6,6/A and 6/B respectively) for the 'Shraddh' of Shiv Sahay Mahto are all on plain papers and as such the same can be easily manufactured and these documents cannot show that it was the plaintiff who performed 'Shraddh'.

46. It was further held by the learned court that the Ext.5 which is the document/account of expenditure for treatment is again on loose sheets. It was further marked by the learned court that although the details of expenditure on different dates have been incorporated, it appears that the same ink and pen has been used for all the dates and thus this can also be termed a created document.

47. So far as the documents the plaintiff relied on (Ext.9, Ext.16, Ext.17) showing that Shiv Sahay Mahto and Sukhdeo Narayan Prasad as also his brothers as judgment debtors, the learned court took note of the plea of the defendants that



despite separation, they used to contest the cases together and thus these documents cannot prove that Shiv Sahay Mahto and Gopal Mahto as also the sons of Gopal Mahto were in state of jointness.

48. The learned court also took note of the statement of the defendants that in the Title Suit No.228 of 1970 which the plaintiff had unsuccessfully brought against the lands that her son, Sita Mahto was holding, he had filed certified copy of a document in which the District was described as 'Nalanda' whereas at that particular time, the area was under the jurisdiction of Patna district and not Nalanda which was not even in existence. The learned court hearing the Title Suit No.228 of 1970 had found the said document to be a forged one. Later, the plaintiffs surreptitiously brought the changed version in which it was shown as Patna. As such the said document cannot be relied upon.

49. The learned court further took note of Ext.D submitted by the defendants i.e. the sale deed dated 04.12.1962 by Late Shiv Sahay Mahto to show that he was separate and not in a state of jointness. The learned court further held that on the said sale deed, one of the brother of the plaintiff, namely Biso Mahto was a witness. It thus held that had it been a joint property, he would not have been a signatory on the witness side. The learned court further took note of Ext.E. i.e. the deed of gift in favour of



Sita Mahto against which, as stated, the plaintiff had unsuccessfully brought Title Suit No.228 of 1970.

50. The learned court also took note of the mortgaged deed dated 31.07.1946 (Exhibit F) executed by Gopal Mahto (father of the plaintiff) to show that the families were separate by metes and bounds and as such they were selling, mortgaging as well as executing gift deeds separately. Then another document Ext.F/1 was on record which was the mortgaged deed dated 14.09.1946 by Harihar Mahto, another brother of Shiv Sahay Mahto.

51. The learned court took special note of Ext.D/2 which is the sale deed dated 09.12.1966 by Bisho Mahto, brother of the plaintiff in favour of Bharat Prasad which clearly gave impression that even Shukhdeo Narayan Prasad and his brothers (sons of Gopal Mahto) were separated which enabled Bisho Mahto to execute sale deed separately.

52. So far as contention put forward by Mr. Rajeev Kumar Verma, Learned Senior Counsel about the statement of Sita Mahto vis-a-vis his mother Jagia Devi relating to presence of one or the other 'Mausis' coming to see his ailing maternal grand father (Nana) is concerned, in the considered view of this court the said statement of Sita Mahto is not different from his mother. He



has merely stated that one or the other 'Mausi' used to visit his 'Nana' and has not stated that one of her 'Mausi' always remained with him during the illness.

53. Again, so far as the submission of learned Senior Counsel about the illness of Shiv Sahay Mahto having been described as 'Sardi-Garmi' vis-a-vis his mother that he was unconscious, this Court is of the view that from the said statement it can be held that the Shiv Sahay Mahto was ill and not in good State of health and mind and thus does not find any contradiction in said statement either.

54. Further the finding of learned Ist Additional District Judge, Nalanda cannot be ignored that not only Shiv Sahay Mahto gifted some land to Sita Mahto, he himself sold some land in 1962 and thus it is clear that they were separate and not in a state of jointness.

55. The further finding of the learned court that Biso Mahto, brother of plaintiff Sukhdeo Narayan Prasad was a witness to the said sale deed (and not one of the executant) clearly proves that it was not a joint property.

56. Further, while challenging the gift Shiv Sahay Mahto made to his 'Nati', Sita Mahto vide T.S. No.228 of 1970, Sukhdeo Narayan Prasad resorted to fraud by producing a



document which recorded the district as Nalanda whereas at that time, the area was under the jurisdiction of Patna. Sukhdeo Narayan Prasad lost the said Title Suit No.228 of 1970.

57. Then another Sale deed executed by brother of Sukhdeo Narayan Prasad namely Bisho Mahto on 09.12.1966 cannot be ignored which proved that not only Shiv Sahay Mahto had separated, even the brother of Sukhdeo Narayan Prasad were in a State of separation.

58. Then there is absence of the name of the lawyer who gave advice to Shiv Sahay Mahto.

59. All these findings of the learned Ist Additional District Judge, Nalanda clearly shows that the plaintiff failed to conclusively prove the genuineness of the 'Will' that he claimed to have been executed by Shiv Sahay Mahto in his favour.

60. So far as the decision cited by the learned Senior Counsel ***Sm. Chinmoyee Saha vs. Debendra Lal Saha and others (Supra)*** is concerned, in that case, the Calcutta High Court had held that the court is not justified to consider the terms if the propounder has been able to prove the execution and testator of the Will in sound mind. However, in this case, the defendant witnesses made consistent stand that Shiv Sahay Mahto was ill and not in a good health and during the illness, Sukhdeo Narayan



Prasad on getting an opportunity may have taken signature/thumb impression on a blank paper which was later converted into a Will. In the backdrop of the consistent statement of the defendant witnesses, the onus was on the part of the plaintiff-appellant to prove due execution and attestation of Will including the fact that he was in sound state of mind.

61. However, the ascribed who appeared as a witness and stated that he was called upon by Shiv Sahay Mahto to pen down a Will in favour of Sukhdeo Narayan Prasad failed to bring on record the messenger who came with the said information.

62. Further, the lawyer who was part and parcel of the said Will too was not examined and in absence of that, it cannot be said that Sukhdeo Narayan Prasad was able to prove due execution and attestation of the Will.

63. So far as **Sheogobind Singh and another vs. Mt. Rajeshwari Kuer (Supra)** case is concerned, this Court holds that it is true that the Court has only to see whether the document put forward as last Will and testament of a deceased persons was duly executed or not and attested in accordance with law and whether he was in a sound disposing mind or not but the onus lies on the appellant to prove the same and if he fails to do so and the



overall circumstances are found against him, he cannot be extended the relief he has asked for.

64. In this particular case, the stand of the appellant was that the family was in state of jointness and due to care and attention, he used to take and out of love and affection, the Will was executed on 02.04.1961. The said statement is not supported by the facts as the documents/facts clearly proved that the family had separated long before and all of them were in possession of their separate lands.

65. This further gets fortified from the fact that Late Shiv Sahay Mahto had executed a deed of gift in favour of Sita Mahto (Nati) and had also executed sale deed dated 04.12.1962 in which one of the brother of the plaintiff-appellant namely Bisho Mahto was a witness which clearly shows that the families were separated with separate piece of lands.

66. So far as the case cited by learned Senior Counsel in **Ram Prashad Sahu and another vs. Musummat Basantia** (Supra), is concerned, the same was in a very different context inasmuch as in that case *the testator executed a Will in respect of his entire properties bequeathing them to his widow for life and after her death to her two brothers, reserving only a nominal maintenance allowance to his step mother, who raised a*



quarrel with him and in order to satisfy her he subsequently executed a sale deed in her favour in respect of two of the properties only, containing the following:-

“that the properties entered in this deed of absolute sale have been entered in the said deed of Will. I having cancelled the said Will and rendered it null and void, have executed this deed of absolute sale in respect of the properties specified below and have made over to the said vendee the documents specified below....”,

Held, - that the will had been revoked only to the extent of the properties conveyed by the sale deed and the will remained operative in respect of the other properties. In spite of the words ‘cancelling the will’ in the deed of sale, of which the plain object was to transfer the two properties only, the general scope or intent of the instrument could not be to revoke the entire will nor did the context justify that interpretation.

In the interpretation of deeds and written instruments the established rule of construction is to read the words in their ordinary and grammatical sense, and to give them effect, unless such a construction would lead to some absurdity or inconvenience or would be plainly repugnant to the intention of



the parties to be collected from other part of the deed.

67. A plain reading of the aforesaid observation of the Patna High Court shows that it was in a very different context where the Testator had clearly stated about rendering the Will null and void and thereafter executed the deed of absolute sale in respect of the properties.

68. Here the case of the other side is that Shiv Sahay Mahto was in state of separation and had not only executed deed of gift in favour of his maternal grand son Sita Mahto, he had also subsequently alienated some land in 1962 and as such the Will that was manufactured by the appellants is forged document. Thus, this also does not come to the appellant's rescue.

69. Regarding **Smt. Indu Bala Bose and others vs. Manindra Chandra Bose and another** (Supra) put forward by the learned Senior Counsel, this Court again holds that it is true that Will can be executed by a Testator in favour of anyone during the lifetime of his/her family members. However, it is a fact that on the day Shiv Sahay Mahto alleged to have executed the Will, his wife Sudama Devi was alive and died almost 27 years later on 22.6.1994 but the Will was completely silent on the care and attention that she needed after the death of Shiv Sahay Mahto and



once the Will is effected. Thus even the said judgment does not come to the rescue of the plaintiff-appellant.

70. Taking into account all the facts leading to passing of the order dated 04.10.1985 by the learned Ist Additional District Judge, Nalanda, this court holds that the same is just and proper and needs no interference.

71. The appeal fails and is accordingly dismissed.

(Rajiv Roy, J)

Prakash Narayan /-

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