

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. No.81 of 2005

In the matter of appeal under Section 100 of the Code of Civil Procedure assailing the judgment and decree dated 23.11.2004 and 08.12.2004 respectively passed by the learned Adhoc Additional District Judge, Gunupur in R.F.A. No.12 of 2002 confirming the judgment and decree dated 21.09.2000 and 28.09.2000 respectively passed by the learned Civil Judge, Senior Division, Gunupur in Title Suit No.46 of 1996.

Smt. Roma Panigrahi

....

Appellant

-versus-

***Smt. Sosirekha Panigrahi &
Another***

....

Respondents

**Appeared in this case by Hybrid Arrangement
(Virtual/Physical Mode):**

For Appellant - M/s.A.K.Nanda, D. Rath,
R.R.Muduli & S.K. Bhanjadeo
(Advocates)

For Respondents - M/s.B.Pal, A.Pal and
B.P.Mohapatra
(Advocates)

CORAM:

MR. JUSTICE D.DASH

Date of Hearing : 25.07.2022 : Date of Judgment:01.08.2022

D.Dash,J. The Appellant, by filing this Appeal under Section-100 of the Code of Civil Procedure, 1908 (for short, 'the Code'), has assailed the judgment and decree dated 23.11.2004 and 08.12.2004 respectively passed by the learned Adhoc Additional District Judge, Gunupur in R.F.A. No.12 of 2002.

By the same, the judgment and decree dated 21.09.2000 and 28.09.2000 respectively passed by the learned Civil Judge, Senior Division, Gunupur in Title Suit No.46 of 1996 have been confirmed.

The Appellant, as the Plaintiff, had filed the suit seeking declaration that the registered Will dated 07.04.1979 executed by one Maguni Pangrahi in favour of Respondent No.1 (Defendant No.1) is null and void and for declaration of her right, title and interest over Schedule-A & B land as well as the house standing over Schedule-B with further relief of recovery of possession of the same from the Respondents (Defendants) and correction of the record of right. The suit, having been dismissed, the present Appellant, being the unsuccessful Plaintiff, had carried the Appeal under section 96 of the Code, which too has been dismissed.

2. For the sake of convenience, in order to avoid confusion and bring in clarity, the parties hereinafter have been referred to, as they have been arraigned in the Trial Court.

3. The Plaintiff's case is that one Bolobhodro Pangirahi had three sons, namely, Krushna, Goda and Chakra. Goda died issueless. Krushno had two sons, namely, Magata & Deenabandhu. Magata and Deenabandhu both died issueless. Maguni is the son of Chokro. It is stated that Purnobasi is the legally married wife of Maguni and the Plaintiff is the only daughter of Maguni through that Purnobasi. After one year of death of Purnobasi, the mother of the Plaintiff Maguni is said to be have kept Defendant No.1 Sosirekha as mistress and Bijayalaxmi (Defendant No.2) is said to have been born to Defendant No.1 through Maguni. The properties in the suit (Schedule-A & B) belonged to Bolobhodro and finally Maguni came to succeed the same.

In the year 1984, Maguni converted the mud walled house standing over Schedule-B land to a kacha house by utilizing the income that he derived from Schedule-A property. The Plaintiff states to have been taking care of Maguni. But the Defendants, exercise controlled over Maguni and created hindrances on the path of the Plaintiff in taking care of her father during his life time. It is stated that while Maguni was sick and bed ridden and not in a fit state of health and mind to understand anything and the Defendant No.1 having an eye over the suit properties in order to deprive the Plaintiff of her right, title and interest over the same in collusion with the witnesses, who have been projected in the Will to be attesting witnesses got the Will executed by Maguni in her favour and register it before the Sub-Registrar, Gunupur. The Will is said to be a void document and it is said that the same came to the knowledge of the Plaintiff sometime in the month of September, 1996. Plaintiff's further case is that during the life time of Maguni, he was giving the share of produce that he was getting from Schedule-A land to her and after his death, the Defendants had also given said share to the Plaintiff for about six to seven years. The Plaintiff states that she asserted her right over Schedule-A property the sometime in the month May, 1998 before the Defendants, Although they promised to decide the same, they, on some pretext or other postponed the matter. It is further stated that in the year 1990, the Defendants, by filing a mutation case have got the suit land recorded in their favour and in the said proceeding, the objection raised by the Plaintiff was erroneously overruled. Thus, the Plaintiffs' claim of title over the suit properties being declined by the Defendants, she filed the suit.

4. The Defendants, contesting the suit, in their written statement, have stated that the Plaintiff has no right, title and interest over the suit

properties. They admitted the Plaintiff to be the daughter of Maguni through Purnobasi. It is, however, stated that one year after the death of Purnobasi, Maguni remarried Sosirekha (Defendant No.1) as per the caste, custom and tradition and out of the said wedlock, the Defendant No.2 Bijayalaxmi was born. The status of Defendant No.1, as stated by the Plaintiff to be the mistress of Maguni has been refuted and it is claimed that she is the legally married wife of Maguni. It has been specifically pleaded that when the Plaintiff attained the age of marriage, she was given in marriage with one Gopinath Panigrahi and similarly, the Defendant No.2 was given in marriage with Nrusingha panigrahi. They state that Chakra Panigrahi was living separately from his two brothers and was possessing his share of land exclusively. He had adopted Maguni as his son. Chakra never succeeded to the share of Krushna and Goda and that also was not succeeded to by Maguni. Chakra when adopted Maguni, had expressed that his share of property would devolve on his adopted son Maguni after his death and the death of his wife. The suit properties thus stood recorded in the name of Maguni in the settlement record of the year 1956 and it was his absolute in his hands. It is next stated that after the death of Maguni, his widow, the Defendant No.1, by selling her gold ornaments and taking financial assistance from her son-in-law Nrusingha, remodeled the kuchha house described in Schedule-B of the plaint. Maguni is said to have executed the Will on 07.04.1979 in favour of Defendant No.1 bequeathing his properties and as such execution of the Will was out of his free will and he was in a fit state of mind being able to understanding everything and that to it was with the knowledge of the Plaintiff. The Will is said to be valid and genuine. The mutation order is said to be well in order and that being challenged by the Plaintiff in Appeal is said to have rightly been

upheld. It is thus stated that the Defendant No.1 has the absolute right, title and interest over the suit schedule properties by virtue of the Will as the properties have been duly bequeathed in her favour by Maguni, the owner in possession of the suit land.

5. On the above rival pleadings, the Trial Court, in total, has framed ten issues. Answering the crucial issues, as to the status of Sosirekha (Defendant No.1), upon examination of the evidence and their evaluation, it has been held that the Defendant No.1 is the legally married wife of Maguni. Then coming to answer issue no.5 with regard to the challenge to the Will dated 07.04.1979 (Ext.E), the Trial Court, on discussion of evidence on record as to the execution of the same by the testator (Maguni) and attestation as established by the propounder in accordance with the provision of Section 63 of the Indian Succession Act read with section 68 of the Evidence Act, has held the Will to be valid and genuine so as to have its play. Practically, the answers on these issues have led the Trial Court to dismiss the suit.

The unsuccessful Plaintiff, having carried the First Appeal, the First Appellate Court, on re-appreciation of evidence on record has found all the reasons for at its level in favour of affirmation of those findings returned by the Trial Court.

6. The Appeal has been admitted on 19.09.2006 to answer the substantial questions of law as indicated in (A), (B) & (D) of the Memorandum of Appeal which are the followings:-

“A. Whether the findings of the learned courts below holding the will-name dated 7.4.1979 (Ext.E) is valid and genuine one are sustainable in law in view of the fact that the said Will-nama lacks the certificate explaining the contents of the

Will to the testator and that the testator had no knowledge about the contents of the Will?;

B. Whether the impugned judgments and decrees are legally sustainable in view of the fact that D.W.1 has deposed to have no personal knowledge about the execution of the will in question, in her favour and that the specific admission of the scribe of will-name (D.W.2) that he has not given any certificate or endorsement in Ext.E nor the executants has made any endorsement that he read over the same and knowing the contents to be correct and further that at the time of execution the executants was suffering from high blood pressure and rheumatism and was facing difficulty in walking?; and

(D) Whether the findings of the learned courts below holding the suit properties of Maguni Panigrahi and he had every right to bequeath the same in favour of defendant no.1 are legally sustainable in view of the fact that on death of Chakra Panigrahi, Indumati Panigrahi, the widow had equal interest in the properties to the share of her son Maguni and further that after coming to the share of her son Maguni and further that after coming into force of Hindu Succession Act, 1956, her limited interest has become the absolute interest?"

A bare reading of the above leads to say that first two substantial questions of law concern with the sustainability of the findings of the Courts below on the validity of the Will (Ext.E) and the third one relates to the nature of property in the hands of the Testator so as to give a ruling upon his authority to bequeath said property.

7. Learned Counsel for the Appellant submitted that with the available evidence on record, when the very Will (Ext.E) does not contain the certificate that the contents of the said Will was explained to the Testator and he, having understood the same, to have been correctly written as per his instruction, has signed on the same, the Courts below ought to have been held the same to be a grave suspicious circumstance

surrounding the Will and that having not been removed by the propounder by leading clear, cogent and acceptable evidence, the Courts below have erred in ruling in favour of due and conscious execution and attestation of the said Will to hold the field. He further submitted that the evidence of D.W.2, the scribe of the Will when read as a whole, clearly goes to show that it was not a conscious one by the Testator being in a fit state of health and free state of mind and as such suspicious circumstances when have not been repelled through evidence by the propounder, the Defendant No.1, the Courts below ought to have rejected the Will as having no force in the eye of law.

He next submitted that the findings of the Courts below that the property is the absolute property of Maguni and as such, he had the right, title and interest to bequeath the same under Ext.E as has been rendered by the Courts is below without taking into account the fact that on the death of the Chakra, his widow Indumati and Maguni succeeded to the property in equal share and after coming into force of the Hindu Succession Act, 1956, the limited interest of Indumati over the half share matured to absolute and thus that could not have been bequeath by Maguni.

8. Learned counsel for the Respondents, on the other hand, supported the findings of the Courts below. According to him, the Courts below, upon elaborate discussion of the evidence, both oral and documentary on record, have found no such suspicious circumstance to be remaining without being removed through evidence. He submitted that it being concurrently found by the Courts below that there was due execution of the Will by the Testator and the attestation of the same as required under law and as in that exercise, no such perversity is coming to surface, it is not permissible for this Court to interfere with the same

in seisin of the Second Appeal. In highlighting the submission, he has invited the attention of the Court to the relevant portions of the judgments of the Courts below as to the discussion of evidence on record in side by side placing the oral documentary evidence in proving the aspect of execution and attestation of the said Will. He further submitted that Indumati, the mother of Maguni having pre-deceased Maguni, the property remained in his hands as his absolute property and, therefore, that substantial question of law does not survive on the obtained facts and circumstances.

9. This Court is now called upon to answer the first two substantial questions of law in addressing the rival submission of the parties and in the touch stone of the settled principles of law. The Will (Ext.E) is said to have been executed by Maguni, the testator. The Will is dated 07.04.1979 and it is a registered one.

10. At this juncture, before going to have a look at the evidence on record in judging the sustainability of the Courts below in holding the Will in Ext.E, the settled position of law are required to be taken note of.

11. In case of ***H. Venkatachalla's Iyengar Vrs. B.N. Thimmajamma***; AIR 1959 SC 443, which has been reiterated in case of ***Rani Purnima Debi Vs. Kumar Khagendra Narayan Deb***; AIR 1962 SC 567 and in case of ***Shashi Kumar Banerjee v. Subodh Kumar Banerjee***; AIR 1964 SC 529, the Hon'ble Apex Court has held that:-

“The mode of proving a will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a will by S.63 of the Indian Succession Act. The onus of proving the will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the will, proof of testamentary capacity and the signature of the testator as

required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indication in the will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last will of the testator. If the propounder himself takes part in the execution of the will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the will might be unnatural and might cut off wholly or in part near relations”.

The matter would thus stand for examination as to whether the beneficiary under the Will i.e. the Defendant No.1 has succeeded in establishing that the Will was duly executed and attested and no such suspicious circumstance is coming to stand on the way.

12. In case of *Jaswant Kaur v. Amrit Kaur*; AIR 1977 SC 77, it has been said that:-

“There is a long line of decisions bearing on the nature and standard of evidence required to prove a will. Those decisions have been reviewed in an elaborate judgment of this Court in *R. Venkatachala Iyengar v. B.N. Thirumajamma & Others*. (1) The Court, speaking through Gajendragadkar J., laid down in that case the following positions:-

1. Stated generally, a will has to be proved like any other document, the test to be applied being the usual test of the satisfaction of the prudent mind in such matters. As in the case of proof of other documents, so in the case of proof of wills, one cannot insist on proof with mathematical certainty.
2. Since Section 63 of the Succession Act requires a will to be attested, it cannot be used as evidence until, as required by section 68 of the Evidence Act, 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.
3. Unlike other documents, the will speaks from the death of the testator and therefore the maker of the will is never available for deposing as to the circumstances in which the will came to be executed. This aspect introduces an element of solemnity in the decision of the question whether the document propounded is proved to be the last will and testament of the testator. Normally, the onus which lies on the propounder can be taken to be discharged on proof of the essential facts which go into the making of the will.
4. Cases in which the execution of the will is surrounded by suspicious circumstances stand on a different footing. A shaky signature, a feeble mind, an unfair and unjust disposition of property, the propounder himself taking a leading part in the making of the will under which he receives a substantial benefit and such other circumstances raise suspicion about the execution of the will. That suspicion cannot be removed by the mere assertion of the propounder that the will bears the signature of the testator or that the testator was in a sound and disposing state of mind and memory at the time when the will was made, or that those like the wife and children of the testator who would normally receive their due share in his estate were disinherited because the testator might have had his

own reasons for excluding them. The presence of suspicious circumstances makes the initial onus heavier and therefore, in cases where the circumstances attendant upon the execution of the will excite the suspicion of the court, the propounder must remove all legitimate suspicions before the document can be accepted as the last will of the testator.

5.It is in connection with wills, the execution of which is surrounded by suspicious circumstance that the test of satisfaction of the judicial conscience has been evolved. That test emphasises that in determining the question as to whether an instrument produced before the court is the last will of the testator, the court is called upon to decide a solemn question and by reason of suspicious circumstances the court has to be satisfied fully that the will has been validly executed by the testator.

6.If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution' of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter.”

13. In case of *Radha Mohan Vr. Hari Bandhu*; (1991) 1 OLR 551, examining the matter of execution and attestation as contained in the provisions of Section-68 of the Evidence Act; it has been held that:-

“Execution means valid, proper and voluntary execution by signing the document out of free will with intention to give effect to it. Simply signing does not mean that the document has been executed. The executants should have appreciated an understood the contents. The mind should have moved with the pen. Whereas ‘attestation’ is for the purpose ensuring that the executants was the free agent and there was

no fraud or pressure. When a document is required to be attested, the attesting witness shall be present to testify execution. It is meant to ensure that there has been no fraud or other vitiating circumstances”.

14. In case of *Madhukar D. Shende Vrs. Tarabai Abe Shedage*; AIR 2002 SC 637, which it has again been stated as under:-

“The requirement of proof of a will is the same as any other document excepting that the evidence tendered in proof of a will should additionally satisfy the requirement of Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872. If after considering the matters before it, that is, the facts and circumstances as emanating from the material available on record of a given case, the court either believes that the will was duly executed by the testator or considers the existence of such fact so probable that any prudent person ought, under the circumstances of that particular case, to act upon the supposition that the will was duly executed by the testator, then the factum of execution of will shall be said to have been proved. The delicate structure of proof framed by a judicially trained mind cannot stand on weak foundation nor survive any inherent defects therein but at the same time ought not to be permitted to be demolished by wayward pelting of stones of suspicion and supposition by wayfarers and waylayers.”

15. In the light of the aforesaid settled principles and with those as the touchstones, the case in hand has to be approached by having a look at the evidence so as to answer the substantial questions of law.

16. It is stated that Maguni, at the time of execution of the said Will (Ext.E), was not in a position to move due to ill health and as such was not in a fit state of mind to understand the things/acts, which he was doing. It is further stated that Defendant No.1 managed to get the Will somehow executed and register so as to grab the properties said to have been bequeathed thereunder and it was in collusion with attesting witnesses of the said Will. The Will has been produced by Defendant

No.1 and admitted in evidence and marked Ext.E. The scribe of the Will is D.W.2 and the identifying witnesses has been examined as D.W.3. It has been stated by D.W.2 that he had prior acquaintance with Maguni. It is his evidence that on 06.04.1979, Maguni had been to his house and expressed his desire to go for a Will and requested him to scribe the Will as he intended to bequeath his properties to Defendant No.1. He further submitted that on 07.04.1979, he himself, Maguni, one Padma Charan and Defendant No.3 came to the Office of Sub-Registrar, Gunupur where Will was scribed as per the instruction of Maguni, the Testator and he read over and explained the contents of the Will to Maguni in presence of the witnesses. Maguni also read the Will himself and finding the contents to have been correctly written, signed in presence of the attesting witness whereafter the attesting witnesses put their signatures. This witness has proved his signatures on the said Will (Ext.E) as also the signature of Maguni as Ext.2. The signature of Padma Charan, not examined, has been proved as Ext.3/E. The attesting witness examined before the Trial Court, i.e., D.W.3 has stated to have known Maguni before. He has stated that being called by Maguni, he had gone to the office of the Sub-Registrar with him and others and in his presence and in presence of other attesting witnesses Padma, Maguni executed the Will bequeathing the properties in favour of Defendant No.1. It is his evidence that the Will had been scribed by D.W.2. The evidence of D.W.2 finds corroboration from the evidence of this D.W.3 that after the Will was scribed, D.W.2 had readover and explained the contents of the same to Maguni and then Maguni had also read the same and having found the same to have been correctly written, signed on it in their presence. He has said that then, it was presented for registration, where he identified Maguni before the Sub-Registrar. It is his evidence that

Maguni then was in a sound state of health and mind. During that period, Maguni being in sound state of health and mind, has also been deposed to by the Defendant during her examination as D.W.1. The Will Ext.E being gone through, there appears no such adverse features in it. With such evidence on record, no such certificate being provided in the Will that the contents of the Will were explained to the Testator and he, having full knowledge of the same and finding the same to have been correctly written, signed on it, is of no such adverse significance. Some stray evidence that Maguni was having high blood pressure and rheumatism and was facing difficulty in walking being not of such serious nature, it is not to be said that Maguni was then not in a condition to understand anything as to the acts and deeds he was doing. Suffering of Maguni from high blood pressure and rheumatism even if accepted for a moment, the same cannot be taken to be a suspicious circumstance surrounding the Will when in the given case that Maguni died nine years after the execution of the Will. Furthermore, on this score, except the evidence of the Plaintiff, no other corroborative evidence stands.

The Will being registered, the presence of Maguni at the time of registration, is presumed and the fact that he before the Registering Authority had admitted the execution of the Will while presenting the Will and on that score too there is no other evidence to raise doubt. In view of all these, the answer to the first two substantial questions of law are rendered in favour of the findings of the Courts below holding the Will to be valid and as such to have been duly executed by the testator and attested under section 63 of the Indian Succession Act read with section 68 of the Evidence Act.

In connection with the third substantial question of law, it would be profitable to straight away refer to the evidence of P.W.1 (the Plaintiff), which run as under:-

“Chakra Panigrahi who is dead now is my paternal grandfather. My father Maguni Panigrahi is the only son and legal heir of my grandfather late Chakra Panigrahi. Bolobhodra Panigrahi and three sons, namely, Krushna, Gokda and Chakra. Magata Panigrahi @ Kankodo Mogata and Dinabondhu were the two sons of Krushna and both died issueless. Goda Panigrahi also died issueless. After the death of Mamata, Dinabondhu and Balabhadra Panigrahi devolved to Chakra Panigrahi. The suit lands are the ancestral properties of late Chakra Panigrahi, my paternal grandfather. After the death of Chakra Panigrahi, my father inherited the suit lands, both A and B schedule properties and in the Survey and Settlement the same have also been recorded in his name.”

On going through the above evidence, this Court finds that Maguni had all the authority to bequeath the said property as he was then the absolute owner in possession of the same. The third substantial question of law is accordingly answered the claim/case of the Plaintiff.

17. Resultantly, the Appeal stands dismissed. There shall, however, be no order as to cost.

**(D. Dash),
Judge.**