

IN THE HIGH COURT OF ORISSA AT CUTTACK

R.S.A. NO. 323 OF 2015

In the matter of an appeal under Section-100 of the Code of Civil Procedure has assailed the judgment and decree passed by the learned Addl. District Judge, Rairangpur in RFA No.05 of 2012 by dismissing the judgment and decree passed by the learned Civil Judge (Senior Division), Rairangpur in Title Suit No.114 of 2001 and Title Suit No.116 of 2001.

Narayan Mohanta

:::

Appellant

-versus-

Krupasindhu Mohanta & Others

:::

Respondents.

**Appeared in this case by Hybrid Arrangement
(virtual/physical mode)**

For Appellant

:::

M/s.Jagjit Panda, P. Das,
Advocates.

For Respondents

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M/s. S.K. Nayak-2, Kintara,
G.C. Ray, A. Behera,
S.K. Nayak, Advocate.

CORAM:

MR. JUSTICE D.DASH

DATE OF HEARING::13.07.2022, DATE OF JUDGMENT::25.07.2022

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 preliminary decree passed by the learned Addl. District Judge, Rairangpur in RFA No.05 of 2012.

By the same, the Appeal filed by the present Appellant under Section-96 of the Code being the unsuccessful Plaintiff in the suit has been dismissed and thereby the common judgment and preliminary

decree passed by the learned Civil Judge (Senior Division), Rairangpur in Title Suit No.114 of 2001 and Title Suit No.116 of 2001 have been confirmed.

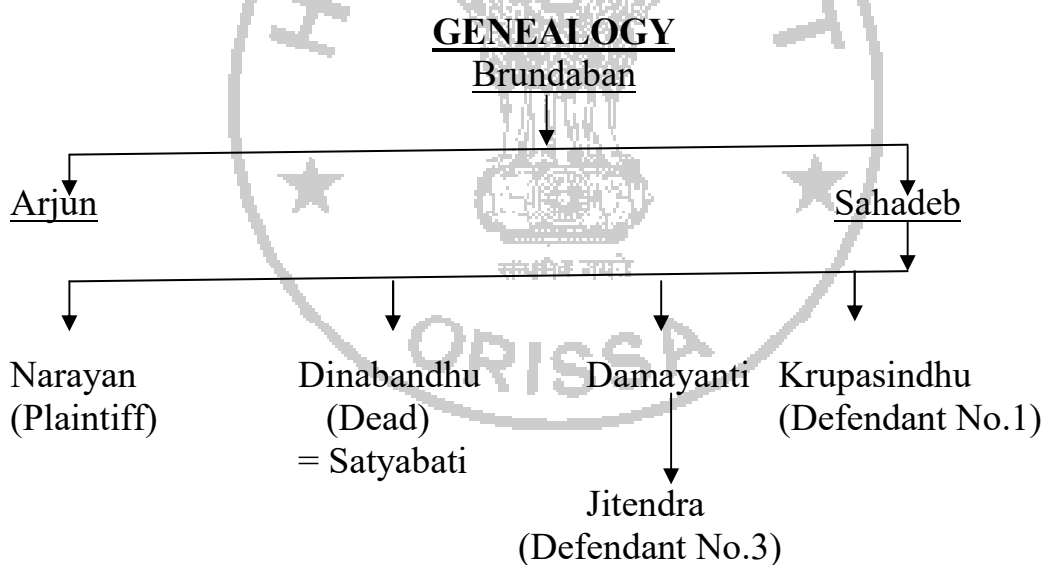
2. This Appellant as the sole Plaintiff had filed the suit i.e. Title Suit No.114 of 2001 for partition of the property described in Schedule-‘B’ and ‘B-1’ of the plaint arraigning the Respondents as the Defendants. The Defendant No.3 as the Plaintiff filed Title Suit No.116 of 2001 seeking declaration of his right, title and confirmation of possession over KA Schedule land claiming the same to have come to his hands consequent upon the bequeath made by the Satyabati in her favour by executing a Will. The Trial Court had taken up two suits for analogous hearing. The suit i.e. Title Suit No.114 of 2001, being preliminary decreed; the Plaintiff (Respondent), the Appellant No.1 (Defendant No.1) and Respondent No.2 have been held entitled to 1/4th share each over the suit land. The Title Suit No.116 of 2001 has been decreed partly. The Respondent No.3 (Plaintiff No.2) has been held entitled 1/4th share over the land which is the subject matter of the said suit. The present Appellant being aggrieved by the common judgment and preliminary decree passed by the Trial Court having carried the Appeal has been unsuccessful.

The Appellant having died during pendency of the First Appeal, his legal representatives are come on record and are pursuing this Second Appeal.

The Respondent No.1 having died during pendency of the First Appeal, his legal Representatives are on record.

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 Title Suit No.114 of 2001.

3. As per the case of the Plaintiff; the inter se relationship of the parties run as under:-



Brundaban who is the common ancestor of the parties had lands at mouza Ichinda. On his death, his two sons namely, Arjuna and Sahadev succeeded to all those properties and as such the said lands were recorded in their names under Sabik Khata No.2. In course of time, Arjun and Sahadev separated themselves in metes and bounds and

possessed land separately as of their shares being the owners. On the death of Sahadev, his three sons and one daughter Damayanti inherited the properties. They also purchased some land at village Redam in the name of Damayanti. It is stated that Damayanti being satisfied with the same had relinquished her right over the land of her father. So the Plaintiff and his brothers cultivated the land in separate portions for their convenience without there being any partition in metes and bounds. In the record of the Hal settlement, the land allotted to Sahadev out of the land under Sabik Khata No.2 stood jointly recorded in the name of Plaintiff and his brother under Khata No.174. Besides the above, some homestead land allotted to Sahadev out of Sabik Khata No.2 was wrongly recorded in Khata No.55. But the property is the property of the brothers. On 30.04.2001, the Plaintiff asked Defendant No.1 for partition of the Schedule-B and B-1 properties coming under Hal Khata No.74 and Khata No.55 respectively. Since, the Defendant No.1 turned down the offer, Plaintiff filed the suit for partition.

4. The Defendant Nos.2 & 3 contested the suit by filing separate written statement.

While traversing the plaint averments, the Defendant No.2 states that her brothers had never purchased any land in her name. She also denies to have ever relinquished her right over the suit land. It is stated that after Sahadev, his sons had partitioned his land in metes and

bounds. On 17.12.1993, Dinabandhu died and his widow Satyabati succeeded to the share of Dinabandhu. During lifetime of Dinabandhu, the Defendant No.2 with her family were staying with him. After Dinabandhu, Defendant No.3 namely, Jitendra was looking after Satyabati. So Satyabati executed the Will in favour of Defendant No.3, who happens to be the son of Defendant No.2 and as such the Defendant No.3 based on such bequeath under the Will stepped into the shoes of the Satyabati on her death in respect of the interest that Satyabati had over the land which her husband had.

5. The Defendant No.3 in his written statement has stated that the three sons of Sahadev had partitioned amongst themselves without giving any share to Damayanti. Dinabandhu is stated to be in occupation of Ac.2.60 decimals of land. He being issueless had brought the parents of Defendant No.3 to his house. The land under possession of Dinabandhu has been better described in Schedule-M of the written statement. On the death of Dinabandhu, Satyabati being the wife succeeded to his properties. She had executed a Will on 21.12.1993 bequeathing her land in favour of Defendant No.3. On the death of Satyabati, the Defendant No.3 being the owner of the land has remained in possession of those lands.

6. At this stage, it may be stated that Defendant No.3 as the Plaintiff has also filed the suit i.e. Title Suit No.116 of 2001 seeking declaration

of his right, title and interest over the land covered under the said Will with further prayer to confirm his possession over the same. The Plaintiff being the Defendant in Title Suit No.116 of 2001 in that suit, challenged the factum of partition of the properties amongst the brothers in metes and bounds. It is stated that they with Dinabandhu had jointly purchased land at Rendam in the name of Damayanti and Damayanti had relinquished her right over the suit land. It is also stated that after death of Damayanti, Satyabati suffered from various chronic diseases and they were looking after her. She was never in a position to implication of Will nor was able to move and execute the Will as projected by Defendant No.3 and that execution of the so called Will is also questioned to be without any authority by the Testatrix namely, Satyabati.

7. In the above situation, the Trial Court had rightly taken both the suits for analogous hearing. In framing nine issues on the rival pleadings; coming to answer issue no.6 with regard to relinquishment of the share of Damayanti over the property left by Sahadev, upon examination of evidence and their evaluation, the answer has been returned that there was never any relinquishment by Damayanti. Next proceeding to answer issue no.5 with regard to complete partition amongst the children of Sahadev upon detail discussion of evidence and

their assessment, the Trial Court has answered the same in saying that there was no such partition in metes and bounds.

Then proceeding to answer the other important issue with regard to the execution and effect of the Will executed by Satyabati on 21.12.1993 admitted in evidence and marked Ext.A, the evidence let in by the parties have been scanned. The Trial Court has finally answered that Satyabati had validly executed the Will bequeathing her interest over the suit land in favour of the Defendant No.3 namely, Jitendra.

Having said as above, by applying the provision of Hindu Succession Act, 1956 as it stood after amendment introduced by the Amendment Act No.39 of 2005, the Plaintiff, Defendant No.1, their brother-Dinabandhu and Defendant No.2 have been held entitled to 1/4th share each over the suit land.

8. The Plaintiff being aggrieved by the said common judgment and preliminary decree had carried Appeal. The First Appellate Court in answering contentions raised before it with regard to the valid execution of the Will and its effect has affirmed, the finding of the Trial Court favouring Will to be given due effect to. Answers to the other issues as have been rendered by the Trial Court having been so affirmed. The Appeal has been dismissed.

9. This Appeal has been admitted to answer the following substantial questions of law:-

- (a) Whether the Courts below are right in recording the finding that the Will (Ext.A) has been duly executed by the Testatrix namely, Satyabati and it was so attested as required under law?
- (b) Whether the Courts below are right in holding that the execution of the Will (Ext.A) is free from any such suspicious circumstances so as to be given effect to as has been done?

10. Learned Counsel for the Appellant submitted that the Courts below are not right in holding that Defendant No.3 has established the claim over the property by virtue of the Will Ext.A said to have been executed by Satyabati. He submitted that the evidence on record when are wholly insufficient to record the finding that the Defendant No.3 as the beneficiary under the Will has proved the due execution and attestation of the Will, the Courts below have gone wrong in accepting the Will, Ext.A, as a Will executed by Satyabati so as to be given effect to. He submitted that the suspicious circumstances surrounding will having not been removed by the Defendant No.3 by leading, clear, cogent and acceptable evidence, the Courts below ought to have answered that issue in saying that the Will is not acceptable in the eye of law and therefore, the same ought to have been eschewed from consideration in support of the claim over the suit property as advanced by Defendant No.3.

11. Learned Counsel for the Respondents on the other hand submitted all in favour of the concurrent finding rendered by the Courts below. According to him, the circumstances which had been highlighted before the Courts below and are also highlighted here are not at all suspicious and on the basis of the evidence on record, the Defendant No.3 having duly proved the execution of the Will by Satyabati and its attestation as required under law, the Courts below did commit no mistake in recording the finding in favour of the Will.

12. Keeping in view the submissions made, I have carefully read the judgments passed by the Courts below.

13. In the instant case, the substantial questions of law standing to be answered concern with the sustainability of the Will said to have been executed by the Testatrix, Satyabati by bequeathing the properties in favour of the Defendant No.3 who is the beneficiaries under it.

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

15. 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.3 has succeeded in establishing that the will was duly executed and attested and there is no such suspicious circumstance coming to stand on the way.

16. 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. Thirnmajamma & 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.”

17. 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".

18. 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."

19. 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.

The Will has been admitted in evidence and marked Ext.A and it is in Odia. The Testatrix, Satyabati has signed on each page of the Will

which consists of three pages. The Will has been written on stamp papers but not registered. the document Will being not compulsorily registerable for that reason, no such suspicion over the document can be entertained when for that the Will cannot be said to be having no legal sanction/backing for taking effect. The Testatrix Satyabati has signed in Odia and she is also the purchaser of the stamp papers which have been purchased on that very day of execution of the Will i.e. on 21.12.1993 and she has signed on the reverse side of the stamp papers in taken of said purchases. Besides Satyabati, the Testatrix, four other witnesses have signed on the said Will and the scribe of the Will being an Advocate's Clerk has signed with his endorsement at the foot of the document. All the four witnesses have signed on each page of the Will. True it is that there is no endorsement at the foot of the document that the contents of the Will were read over and explained to the Testatrix and she put her signatures after having understanding those to have been correctly written under her instructions, but that in my view is not of much significance in the case since here it is found that the Testatrix is not illiterate. She has signed in Odia and the Will too has been written in Odia. The scribe of the document examined as D.W. 3 and the attesting witness examined as D.W. 4 have deposed on oath that the contents of the Will were read over and explained to the Testatrix. That part of the evidence has neither been shaken no any such features to entertain doubt

over his version has come to surface. When also no any other feature surface in their evidence to infer even remotely that they are lying on that score. So, this does not stand as a suspicious circumstance surrounding execution of the Will, when through evidence of D.Ws. 3 and 4, that aspect stand explained.

20. True it is that here the Testatrix has died after about 13 days of execution of the Will. Given a look at the age of the Testatrix at that time which stood at forty five, normally a doubt would have arisen in mind as to why at such age she would be executing the Will. But with the pleading that she was suffering from chronic diseases and when here admittedly the death has taken place within two weeks of the execution of the Will, rather that circumstance in my view stand to provide justification for the Testatrix in her action of execution of the Will. The evidence of D.W.3 & 4 having been carefully gone through the Courts below have concurrently found that Satyabati was in a free state of mind to consciously execute the Will. The evidence on record are there to show that Dinabandhu and Satyabati were issueless and for that they had brought Damayanti, the mother of Defendant No.3 with her family, who used to stay with them and look after them. This however is said to be an introduction by relying on the recital in the Will that their stay was of recent origin. But if we go through the evidence of P.W. 2, it becomes clear that they were staying from the time when Defendant

No.3 was five years old and therefore the recital in the Will on that score which too appears to be ambiguous is not a circumstance to adversely view the execution of the Will.

With the facts and circumstances as those emanate from the evidence and discussed as above; this Court is led to answer the substantial questions of law in saying that the Courts below are right in holding the Will, Ext.A to have been duly proved by the Defendant No.3 by leading clear, cogent and acceptable evidence with regard to its execution and attestation as required under Section-63 of the Indian Succession Act read with Section-68 of the Evidence Act. The substantial questions of law are answered accordingly which run to confirm the judgments and decrees passed by the learned Courts below.

21. In the result, the Appeal stands dismissed. There shall however no order as to cost.

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