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**(2000) 05 GAU CK 0005**

**Gauhati High Court**

**Case No:** L.P.A. No. 8 of 2000

Hashida Khatoon

APPELLANT

Vs

Akhtar Hussain and Others

RESPONDENT

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**Date of Decision:** May 1, 2000

**Citation:** (2000) 2 GLT 680

**Hon'ble Judges:** P.G. Agarwal, J; N.C. Jain, J

**Bench:** Division Bench

**Advocate:** S. Medhi and K.L. Gupta, for the Appellant; None, for the Respondent

**Final Decision:** Dismissed

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### **Judgement**

N.C. Jain, J.

This Letters Patent Appeal against the judgment and order dated 22.2.2000 passed by the learned Single Judge in F.A. (Probate) No. 9/97 in our considered view deserves to be dismissed in limini.

2. On perusal of the judgment of the learned Single Judge two questions arose. The testator of the will having willed away only 2/3rd of the property, 2/3rd of the property is still available to all the heirs and therefore there is no violation of Clause 118 of the Mahomedan Law.

3. Adverting to the question whether the will was duly executed or not, we have examined the finding recorded by the Probate Court. The Probate Court after discussing the entire evidence of the scribe and the attesting witness has recorded a firm finding of fact that the will was duly executed and attested. The finding so recorded reads as under:

10. To prove execution of the Will the Plaintiffs have examined Plaintiff No. 1 Md. Akhtar Hussain, Topaswer Das (P.W. 2), Aftab Hussain (PW. 3) and Niajuddin Ahmed (PW.4). PW 2 Tapaswer Das avers in his evidence that he wrote the will marked Ext. 1 at the dictation of the testator Chakina Bibi on 24.8.87; that at that time Chakina Bibi was in good health and spirit; that the particulars of the properties of the Will and of

the parties relevant thereto were subscribed by said Sakina Bibi to him; that after reducing the Will in writing he read it over to Chakina Bibi who having admitted the contents thereof and executed the Will by putting her mark i.e. impressions of her left thumb in his presence and in presence of the witnesses thereof and that he wrote the endorsement under her thumb impressions. The documents of the Will (Ext. 1) shows that PWs. 4 and 5 Aftab Hussain and Niajuddin Ahmed are attesting witnesses thereof. According to them too the testator Shakina Bibi got the Will Ext. 1 written by scribe PW.2 Tapaswer Das at her own residence bequeathing her properties described therein. It is also stated by them that after reducing the documents of the Will PW2 read it over to Chakina Bibi who admitted the contents thereof and then executed it by putting her thumb impressions. It is also stated by them that they themselves put their signatures on the Will as witnesses after it was marked by Chakina Bibi. The Petitioner/Plaintiff No. 1 Md. Akhtar Hussain examined as PW. 1 is also found to have lent full support to PWs. 2, 4 and 5 as regards the fact of execution of the Will by Chakina Bibi. It is an admitted position that Chakina Bibi died on 29.9.87. The Will in question appears to have been executed on 24.8.87. Therefore, it appears that the Will is shown to have been executed one month five days before her death. It is an admitted position that Chakina Bibi knew how to put her signature. It is evident that the Will is shown to have been executed by her by putting her left thumb impressions thereon. It is also an admitted position that Chakina Bibi died at the age of 82 years. The PWs. 1, 2, 4 and 5 are of the version that at the time when the Will was executed Chakina Bibi was not in a position to write as her hands were trembling. The writer PW. 2 Tapaswer Das in clear words says that Chakina Bibi expressed that as her hands trembled she was not in a position to put her signature and hence she herself willingly put her thumb impression instead of putting her signature. PW. Narendra Ch. Das extends support in this regard to PWs. 1, 2, 4 and 5 stating mat he met Chakina Bibi once in Court and on that occasion he found Chakina Bibi putting her thumb impression on bail bond as her hands trembled and she could not write. The Defendant herself admits in her evidence that her (Chakina Bibi) hands were trembling during the period of two years before her death. The Defendant could produce absolutely no evidence in support of her contention mat the Petitioners/Plaintiffs obtained the thumb impression of Chakina Bibi on a blank sheet of paper which was later on converted to the instant Will and hence the Will in question is forged one. She herself also is found quite silent about her above contention in her evidence i.e. she is found to have given good bye to her above plea in evidence. Under above circumstances I find no scope to disbelieve the PWs in regard to the genuineness of execution of the Will. The evidence produced by the Plaintiff satisfactorily show that the testator put her mark on the Will; that at the relevant time she was in sound mind and disposing state of mind; that she understood the nature and effect of the disposition and put her mark on the document of her own free Will. There is no evidence to show that the persons who received the bequests took any prominent part in bringing about the execution of the Will in any manner whatsoever.

4. We are in respectful agreement with the finding recorded by the Probate Court which has been affirmed by the learned Single Judge. In our considered view there is no suspicious circumstance surrounding execution of the Will. Finding no merit in the appeal, the same is dismissed in limini.