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**(2012) 08 PAT CK 0104**

**Patna High Court**

**Case No:** First Appeal No. 763 of 1991

Mahadeo Rai and Others

APPELLANT

Vs

Bhagwan Roy and Another

RESPONDENT

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**Date of Decision:** Aug. 28, 2012

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### **Judgement**

Mungeshwar Sahoo, J.

The plaintiffs have filed this First Appeal against the Judgment and Decree dated 14.8.1991 passed by Sri Nand Kishore Narain Sinha, 9th Addl. District Judge, Patna in Title Suit No. 6 of 1990 dismissing the plaintiff's suit. In fact the plaintiffs-appellant filed an application u/s 276 of the Indian Succession Act for the grant of letters of administration. The said application was registered as L.A. Case No. 134 of 1985. When the defendants filed contesting written statement denying the execution of the Will, the letters of administration case was converted to Title Suit No. 6 of 1990.

2. The plaintiff filed the aforesaid application alleging that Charan Rai died leaving behind his 3 sons, namely, Mishri Rai, Dahaur Rai and Teka Rai. There was complete partition between the 3 brothers in the year 1965. They were cultivating their lands separately. Since, Mishri Rai was old and issueless, he gave his half share land to Dahaur Rai and half share land to Teka Rai on condition that they will give him the produce of his land for his maintenance. Dahaur Rai died in the year 1977 leaving his two sons Bhagwan Rai and Bhagwat Rai. These two sons of Dahaur Rai did not give the produce to Mishri Rai, therefore, Mishri Rai took back his lands from them and entrusted the same in favour of Teka Rai as such Teka Rai came in possession of the entire land of Mishri Rai. Mishri Rai executed a Will on 2.2.1980 in presence of witnesses. Since Mishri Rai was illiterate the scribed read it over and explained to Mishri Rai and after explaining contents of the Will, Mishri Rai made endorsement of execution through Shobha Rai and put his thumb impression on each page. Mishri Rai died on 3.7.1983. The widow of Mishri Rai, namely, Dulari Devi has life interest in the Will but she did not joint the petitioner, therefore, the appellant filed the application for grant of probate and issuance of letters of administration.

3. Dulari Devi, the widow of Mishri Rai filed contesting written statement alleging that the alleged Will sought to be propounded is forged, fabricated, unnatural and improbable. The Will was never executed by Mishri Rai. She was being loved by him very much and after his death, she was the only heir and successor of property of Mishri Rai. She learnt that the thumb impression appearing on the Will are of Bhagwan Rai, S/o Rameshwar Rai which will be evident from comparison of the thumb impression but since it is not taken in her presence, therefore, she is not sure of the same. However, she emphatically asserted that thumb impression on the Will are not of Mishri Rai. She had filed Title Suit No. 286 of 1985 and then subsequently the Will was forged by Teka Rai. The suit was filed for partition to the extent of her 1/3rd share as there was no partition between the 3 brothers. In 144 Cr.P.C. proceeding, Teka Rai set up the story of partition by Panchayati and no case was made out regarding execution of Will by Mishri Rai. Teka Rai also filed mutation case before Circle Officer wherein also he did not claim execution of Will by Teka Rai. The Will was not filed alongwith probate application. She denied either separation in 1949 or partition in 1965. She also denied that she is living at Naiher. She also denied about entrustment of half land by her husband in favour of Dahaur and half of land in favour of Teka Rai. All other allegations were also denied.

4. The two sons of Dahaur Rai, namely, Bhagwan Rai and Bhagwat Rai also filed similar type of objection.

5. On the basis of the aforesaid pleadings of the parties, the following issues were framed by the trial Court--

(i) Is the suit as framed maintainable?

(ii) Has the applicant-plaintiff got valid cause of action for the suit?

(iii) Whether the Will in question dated 2.2.80 is the last genuine Will and testament of the testator Mishri Rai and was it executed by him out of his free will and consent?

(iv) Whether the objector-defendants have locus standi to oppose the grant of letter of administration to the propounder Teka Rai?

(v) Is the applicant-plaintiff entitled for the relief claimed?

6. After trial, the trial Court held that there are so many suspicious circumstances which has not been explained by the plaintiff which creates doubt about the execution of the Will as such recorded a finding that the propounder, Teka Rai has been unable to dispel the suspicious circumstances which surrounded the execution and attestation of the Will and, therefore, the issue was decided against the plaintiff and dismissed the plaintiff's suit.

7. The learned counsel appearing on behalf of the appellant submitted that suspicious circumstances mentioned by the trial Court are not at all suspicious

circumstances but the learned trial Court has wrongly held so. The trial Court wrongly held that none registration of the Will is also a suspicious circumstances. According to the learned counsel under the law, the Will is not compulsorily registrable and it is not at all a suspicious circumstances. The scribe executed the Will and read it over and explained the same to Mishri Rai and the attesting witnesses attested the Will. There are 3 attesting witnesses who have been examined in support of the execution of the Will but the trial Court wrongly held that the plaintiff failed to explain the suspicious circumstances. The learned counsel next submitted that according to Dulari Devi, the left thumb impression occurring on the Will is of one Bhagwan Rai, S/o Rameshwar Rai but the plaintiff got it examined by handwriting expert P.W. 4, who gave his opinion that it is not of Bhagwan Rai and, therefore, it is also not a suspicious circumstances. The widow was given life interest but the Court below wrongly held that it is also a suspicious circumstances. The trial Court has not properly appreciated the evidence on record. According to law if any one attesting witness is examined, it is sufficient to prove the due execution of the Will. On these grounds, the learned counsel submitted that the impugned Judgment and Decree are liable to be set aside.

8. On the other hand, the learned counsel appearing on behalf of the respondent submitted that the Will was not produced earlier in any proceeding, i.e., in the proceeding u/s 144 Cr.P.C. and before the Circle Officer where the plaintiff filed application for mutation alleging private partition only. When the widow of Mishri Rai filed the partition suit in the year 1985, this will was forged and for the first time, the story of Will was made by the plaintiff. The learned counsel submitted that the trial Court has mentioned in great detail the suspicious circumstances which have not been properly explained by the plaintiff as such rightly dismissed the application for the grant of probate/letters of administration. The objectors clearly mentioned that the left thumb impression occurring on the Will is not of Mishri Rai but the plaintiff never took any step to get it compared with admitted left thumb impression of Mishri Rai. Therefore, there is no evidence on record to show that in fact the left thumb impression appearing on the Will Ext-1 is of Mishri Rai. There is no illegality in the impugned Judgment and Decree, therefore, the First Appeal is liable to be dismissed.

9. In view of the above contentions of the parties, the main point arises for consideration in this appeal is as to whether the plaintiff has been able to prove the genuineness of the Will and due execution of it by Mishri Rai and whether there are any suspicious circumstances which the propounder is legally bound to explain to the conscience of the Court.

10. The parties have produced their respective evidences oral as well as documentary in support of their respective cases. P.W. 1, P.W. 2 and P.W. 5 have been examined on behalf of the plaintiff-appellant who claimed themselves to be the attesting witnesses. P.W. 1 has clearly admitted that at the time of execution of

the Will, the plaintiff Teka Rai was present whereas Dulari Devi was not present. P.W. 6 has been examined on behalf of the plaintiff to prove that Dulari Devi was not residing with Mishri Rai rather she was residing with her father. P.W. 9 is Teka Rai himself and P.W. 11 is the son of Teka Rai. Both of them have supported the statement made in the application u/s 276 of the Indian Succession Act. P.W. 4 is the handwriting expert who has proved his report Ext.-2. P.W. 3 is the photographer who has taken the photograph of one Bhagwan Rai, S/o Rameshwar Rai. The other witnesses are formal witnesses. The learned counsel for the appellant submitted that the attesting witnesses have deposed in terms of the requirement of law. These witnesses have stated that the scribe after writing the Will read it over and explain to Mishri Rai.

11. On the other hand, the learned counsel for the respondent submitted that the evidence of these witnesses are not in terms of Section 63 of the Indian Succession Act. None of the witness have stated that they saw Mishri Rai put his left thumb impression on the Will and that in presence of Mishri Rai and on his direction, all the witnesses put their signature on the Will.

12. From perusal of the evidence of P.W. 1, P.W. 2 and P.W. 5, it appears that their statement is only to the effect that the scribe read over and explained to Mishri Rai who put his left thumb impression. On his direction, the witnesses signed on Will in presence of each other. Therefore, it appears that there is no evidence to the effect that Mishri Rai put his left thumb impression in presence of each of the attesting witnesses and the attesting witnesses saw him, putting his left thumb impression and vice versa.

13. P.W. 9, the plaintiff Teka Rai himself has admitted that after the death of Mishri Rai. He has filed mutation case before the CO., Phulwari claiming half share in the property of Mishri Rai for mutation of his name on the ground that, in private partition, it was allotted to him. He has further admitted that his son was married with daughter of Pannu. He also admitted that he was present at the place where the Will was executed. It may be mentioned here that Pannu is P.W. 1. The learned counsel for the appellant submitted that Dulari Devi was residing in her Naihar at Village-Mohauli and, therefore, Mishri Rai was looked after by the plaintiff. In support of this fact, they have filed the deposition of Dulari Devi in Partition Suit No. 286 of 1985 which has been marked Ext.-4. They have filed Ext. 5, the certificate of Mukhiya. The other documentary evidences are not related to the Will. Ext.-1 is the Will itself. Ext.-3 series are rent receipt. Ext.-6 is also rent receipts. Ext.-7 is fardbeyan in criminal case. Ext.-8 is summon to the scribe. Ext.-9 is written report and 10 is F.I.R. Ext.-14 is final report and Ext.-12 is order-sheet of C.J.M., Patna. Ext.-15 has been filed to show that in fact in 144 Cr.P.C. proceeding, the plaintiff referred about the Will. The other documents as stated above are not relevant for the purpose of deciding the point involved in this case.

14. The defendants have also examined many witnesses. D.W. 1 is neighbour of the parties. D.W. 3 is also a villager of the parties. D.W. 7 has stated that he used to prepare food in the marriage and shradh. D.W. 8 is photographer, D.W. 9 is Purohit. All the witnesses have been examined on behalf of the defendants to prove the fact that in fact the shradh of Mishri Rai after his death and Dulari Devi was performed by the two sons of Dahaur Rai. D.W. 10 is Bhagwan Rai and D.W. 16 is son of Bhagwan Rai. D.W. 12 has been examined who has stated about the execution of gift deed by Dulari Devi in favour of objectors. The defendants have filed the documentary evidences also. Ext.-J is the plaint of Title Partition Suit No. 286 of 1985. Ext.-P is the death certificate of Dulari Devi. Ext.-"O" is death certificate of Mishri Rai. Ext.-"Q" is certified copy of order of the Circle Officer passed in Mutation Case No. 1035/85-86. This Ext.-"Q" has been filed by the defendant to prove that after death of Mishri Rai, the plaintiff Teka Rai filed a mutation case praying for mutation of his name wherein he claimed that he got the land in private partition and no reference of Will was made.

15. In view of the above evidences, it is clear that at the time of execution of the Will, the plaintiff Teka Rai was present there. The witnesses examined on behalf of the plaintiff who claimed themselves to be the attesting witnesses are closely related to the plaintiff. The Will was scribed not in the house of Mishri Rai. In the mutation case which was filed by Teka Rai after death of Mishri Rai, no reference of Will was made by him but on the contrary, he claimed mutation on the basis of private partition. Dulari Devi was the widow who filed partition suit claiming 1/3rd share in the entire suit property and then the present probate case was filed by the appellant during the lifetime of Dulari Devi. Although according to the plaintiff-appellant himself Dulari Devi had the lifetime interest in the property of Mishri Rai and thereafter, only he could have prayed for either probate/letters of administration. The left thumb impression on the Will was denied by the objectors respondent but no steps were taken by the appellant to get it compared with the admitted left thumb impression of Mishri Rai. It was the specific case of the appellant that earlier Mishri Rai gave his half land to the objectors and subsequently, he withdraw the same and then executed the Will, but no convincing and reliable evidence has been adduced on behalf of the appellant in support of this fact.

16. It is settled principle of law that where there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Will could be accepted as genuine. If the circumstance, give rise to doubts it is for the propounder to satisfy the conscience of the Court. The presence of the beneficiary and taking part in execution of the Will is an important suspicious circumstances. In this regard, the decision of the Apex Court in the case of [H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others](#), may be seen. This decision of the Apex Court is further followed in the case of [Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another](#),

17. Recently, the Apex Court in the case of [Bharpur Singh and Others Vs. Shamsheer Singh](#), has given some example about the suspicious circumstances which may be found to be surrounded in the execution of the Will vide paragraph 17 which is quoted hereinbelow:--

17. Suspicious circumstances like the following may be found to be surrounded in the execution of the Will:--

- i. The signature of the testator may be very shaky and doubtful or not appear to be his usual signature.
- ii. The condition of the testator's mind may be very feeble and debilitated at the relevant time.
- iii. The disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason.
- iv. The dispositions may not appear to be the result of the testator's free will and mind.
- v. The propounder takes a prominent part in the execution of the Will.
- vi. The testator used to sign blank papers.
- vii. The Will did not see the light of the day for long.
- viii. Incorrect recitals of essential facts.-

18. Now, therefore, in view of the above settled principle of law propounded by the Apex Court in the present case, it appears that the suspicious circumstances are--

(a) the thumb impression of Mishri Rai has not been proved to be the thumb impression of Mishri Rai. The plaintiff instead of comparing the disputed thumb impression with admitted thumb impression of Mishri Rai, he got examined disputed left thumb impression with the left thumb impression of one Bhagwan Rai, S/o Rameshwar Rai. It may be mentioned here that it was the case of Dulari Devi and the objector that the left thumb impression might be of Bhagwan Rai, S/o Rameshwar Rai and if it is not proved, then also the left thumb impression is not of Mishri Rai.

(b) Although the widow was alive, no adequate provisions was made for her and in the Will, Ext.-1, it was mentioned that she is entitled for maintenance only which appears to be unnatural and improbable.

(c) According to the plaintiff himself, half property was given to the objectors by Mishri Rai but the Will has been executed for the entire property in favour of the plaintiff-appellant. The witnesses examined on behalf of the objectors-respondent clearly mentioned that the Shradh was performed by the objectors. In view of these

facts, it appears that the disposition is not the result of the testator free will and mind.

(d) The propounder Teka Rai took a prominent part on the execution of the Will as the witnesses examined who claimed to be attesting witness are relatives and close man and as has been admitted by P.W. 1 and P.W. 9 himself that he was also present at the time of execution of the Will.

(e) After death of Mishri Rai in the year 1983, the appellant Teka Rai filed mutation application wherein he never claimed the entire property on the basis of the Will vide Ext.-"Q". He claimed on the basis of private partition. These are the glaring suspicious circumstances in the present case which have not been explained to the satisfaction of the Court.

(f) In Ext.-"J", Dulari Devi specifically stated that Teka Rai and his son were very much hostile to her. Therefore, it does not appear natural that Mishri Rai would have taken the land from the objector and given it to the appellant. Further what special service was being done by the appellant is absent.

19. In view of the above discussion and the facts and circumstances of the case, I find that the propounder appellant has failed to explain the aforesaid suspicious circumstances to the satisfaction of the Court. Therefore, the Will Ext.-1 in this present case has not been proved to have been validly executed by Mishri Rai. In other words, the appellant also failed to prove its due execution. I, therefore, do not find any reason to interfere with the findings recorded by the trial Court. Accordingly, the findings of the trial Court are hereby confirmed. In the result, this First Appeal is dismissed. In the facts and circumstances of the case, there shall be no order as to cost.