

(2009) 09 PAT CK 0026

In the Patna High Court

Case No : Letters Patent Appeal No. 911 of 2001

Harkesh Thakur

APPELLANT

Vs

Smt. Lalita Devi and Smt. Ramawati Devi

RESPONDENT

Date of Decision : 09-09-2009

Acts Referred:

Citation : (2009) 09 PAT CK 0026

Final Decision : Dismissed

Judgement

S.K. Katriar, J.—The objector of Testamentary Suit No. 2 of 1987 (Smt. Lalita Devi and Anr. v. Sri Harkesh Thakur), has preferred this appeal under Clause 10 of the Letters Patent of the High Court of Judicature at Patna, and is aggrieved by the judgment dated 3.8.2001, whereby a learned Single Judge of this Court has rejected the objection raised by the objector (the appellant herein) to the will propounded by the two daughters-in-law of the testator. We shall go by the description of the parties occurring before the learned Single Judge.

2. A brief statement of facts essential for the disposal of the appeal may be indicated. One Jagannath Prasad Thakur died on 17.8.1985, leaving behind his widow (Parwati Devi), three sons (Harkesh Thakur, Kalika Prasad Thakur, and Narbadeshwar Prasad Thakur), and three daughters (Kaushalya Devi, Sumitra Devi and Janki Devi). The three families are reproduced hereinbelow:

Jagannath	Prasad	Thakur	Parwati	Devi	(wife)	/
						/ / / /
Harkesh Thakur Prof. Kalika Pd. Thakur Narbadeshwar ! (objector, & the appellant						
Lalita Devi (wife)(plaintiff Pd. Thakur ! herein) No. 1, & respondent No. 1						
Ramawati Devi ! herein) (wife)(plaintiff ! No. 2, & respondent ! No. 2 herein) !						
						/ / /
Kaushalya Devi Sumitra Devi Janki Devi (Daughter) (Daughter) (Daughter)						

The ancestral properties were in the hands of Jagannath Prasad Thakur. Partition in the family by metes and bounds had taken place earlier. According to the

plaintiffs, Jagannath Prasad Thakur was an old and chronic patient of gout, whereas the case of the objector was that he was paralysed for quite some time, was completely immobilized towards the end of his life without any vision, unable to comprehend anything and was not in sound mental condition. He executed the registered deed of will, which is the subject-matter of the present proceedings whereby he bequeathed his own share, which he received in family partition, in favour of his two daughters-in-law, who are the plaintiffs to the exclusion of his widow and his eldest son (Harkesh Thakur) and daughter-in-law, as well as the three daughters. He died on 17.8.1985 in Patna. The two legatees propounded the will and sought probate of the will by instituting the aforesaid Testamentary Suit No. 2 of 1987 in this Court. 3. Notices were issued to the widow, Harkesh Thakur, and the three daughters. Only Harkesh Thakur entered appearance and objected to the grant of probate. The widow died during the pendency of the proceedings before the learned Single Judge, and the three daughters did not enter appearance at all. It may be stated for the sake of completion of record that the case was originally registered as Testamentary Case No. 1 of 1986, and was, on account of the objection set up by the appellant herein, renumbered as Testamentary Suit No. 2 of 1987.

4. The plaintiffs examined 13 witnesses who are as follows:

(i) P.W.1 (Raghav Choudhary) (ii) P.W.2 (Shiva Nand Sahay) (iii) P.W.3 (Sitaram Rai) (iv) P.W.4 (Raghunath Sharma) (v) P.W.5 (Chhathu Pandey) (vi) P.W.6 (Surajdeo Mishra) (vii) P.W.7 (Basudeo Pandey) (viii) P.W.8 (Ramawati Devi, plaintiff No. 2) (ix) P.W.9 (Lalita Devi, Plaintiff No. 1) (x) P.W. 10 (Chuni Lala) (xi) P.W.11 (Hari Prasad Singh) (xii) P.W.12 (Pasupati Nath Upadhaya) (xiii) P.W.13 (Tarkeshwar Prasad)

4.1) The plaintiffs brought on record the following documents:

(i) Exhibit-1 Original will (ii) Exhibit-2 Signatures of the series Testator on the back of the 1st page of the will (iii) Exhibit-2/a Signature of the Testator on the last page of the will. (iv) Exhibit-2/b Signature of the Testator on the 2nd page of the will. (v) Exhibit-2/c Signature of the Testator on the 1st page of the will. (vi) Exhibit-2/d Signature of the Testator on the back of the 1st page of the will. (vii) Exhibit-3 Signature of Raghav Choudhary on back of the 1st page of the will (viii) Exhibit-4 Signature of Jai Bahadur Rai on the last page of the will (ix) Exhibit-5 Signature of Shiva Nand Sahay on the 1st page of the will. (x) Exhibit-6 Signature of Sita Ram Rai on margin of the 2nd page of the will. (xi) Exhibit-7 Signature of Raghu Nath Sharma on the margin of 2nd page of the will. (xii) Exhibit-8 to Photographs taken at 8/o (in series) the time of cremation of testator Jagannath Pd. Thakur. (xiii) Exhibit-9 Letter of Harkesh Thakur. (xiv) Exhibit 9/A Certified copy of W.S. relating to Jagannath Thakur in Title Partition Suit No. 101 of 1965. (xv) Exhibit-9/B Certified copy of deposition of Harkesh Thakur relating to T.S. No. 74/65. (xvi) Exhibit-10 Signature of Keshav (in series) Singh on the rent receipts. (xvii) Exhibit-10/A Signature of Keshav Singh on the rent receipt. (xviii) Exhibit-10/B Signature of Keshav Singh on the rent

receipt. (xix) Exhibit-10/C Signature of Keshav Singh on the rent receipt. (xx) Exhibit-11 Signature of Vijay Nath Mishra on the cash receipt of Land Development Bank, Dumraon Branch. (xxi) Exhibit-12 C.C. of order sheet of Consolidation Rev. No. 1353 of 1989. (xxii) Exhibit-12/a C.C. of Rev. petition of the said case. (xxiii) Exhibit-13 to C.C. of voter list of 13/e the year 1966, 1970, (in series) 71, 76, 80, and 1983. (xxiv) Exhibit-14 C.C. of the petition to the CO., Brahmpur in Case No. 2 of 1983-84 Under Section. 10B. (xxv) Exhibit-15 to Photograph taken at 15/O (in series) the time of cremation of the testator. (xxvi) Exhibit-16 C.C. of order passed in F.A. No. 51/76. (xxvii) Exhibit-17 Threatening letter of Harkesh Thakur dt. 12.2.65. (xxviii) Exhibit-18 C.C. of Suit Register of T.S. 101/65. (xxix) Exhibit-19 to C.C. of Survey Khatian 19/c (in series) of Khata Nos. 22, 23, 185K, 149K and 329 of Mauza Rajpur. (xxx) Exhibit-20 C.C. of Survey Khatian of Khata No. 8 of Mauza Rajpur. (xxxi) Exhibit 20/a C.C. of Register D, Tauzi No. 1476, Thana No. 257. (xxxii) Exhibit-21 C.C. of judgment dated 27.9.75 in T.S. No. 74/1 of 1965/75 (xxxiii) Exhibit-21/a C.C. of Decree dated 29.8.80 above mention T.S. (xxxiv) Exhibit 21/b C.C. of Compromise petition of abovementioned case (xxxv) Exhibit-22 C.C. of order with petition dated 25.9.79 by A.C.O. Brahampur in Case No. 44 of 1978-79. (xxxvi) Exhibit-23 C.C. of order dated 25.9.85 and 19.9.79 in Case No. 43K/31 of 79-80. (xxxvii) Exhibit-24 C.C. of final chak panji in the name of late Jagannath Pd. Thakur. (xxxviii) Exhibit-25 C.C. of petition and order of Anchala Adhikari in Mutation Case No. 211 of 1984-85. (xxxix) Exhibit-26 C.C. of order dated 9.9.1966 in Suit No. 46M of 1966 passed by SDO, Buxar Under Section 144 Cr. P.C. (xl) Exhibit-27 Chakbandi Case No. 270 of 85-86

5. The defendant examined the following nine witnesses:

(i) D.W.1 (Harendra Nath Mishra) (ii) D.W.2 (Ram Bilash Pandey) (iii) D.W.3 (Baikunt Singh) (iv) D.W.4 (Raj Nath Bhagat) (v) D.W.5 (Brahamdeo Pandey) (vi) D.W.6 (Jagarnath Bhagat) (vii) D.W.7 (Lalan Kumar Mishra) (viii) D.W.8 (Sheo Muni Yadav) and (ix) D.W.9 (Harkesh Thakur, the objector)

5.1) The defendant brought on record the following exhibits:

(i) Exhibit-A Prescription dated 16.5.85 of Dr. L.K. Mishra. (ii) Exhibit-B Prescription of Dr. J.N. Pandey dated 22.6.85. (iii) Exhibit-C) Certified copy of the deposition of Jagarnath Pd. Thakur in T.S. No. 74/65. (iv) Exhibit-D Certified copy of the deposition of Sheo Govind Pandey. (v) Exhibit-E Certified copy of the Sale-deed executed by Jagarnath Thakur in favour of Raghunath Pathak. (vi) Exhibit-F Death Certificate of Jagarnath Pd. Thakur issued by P.M.C. Office at Bansghat on 2.12.86. (vii) Exhibit-G Certified copy of another death certificate of Jagarnath Pd. Thakur granted by P.M.C. stating therein reason of death.

6. The suit was allowed by a learned Single Judge of this Court by the impugned judgment dated 3.8.2001, whereby he held that the will is admittedly a registered document, the testator was in sound state of mind, was in the position

to alienate his own share which he had received in the family partition, in favour of the two daughters-in law, for valid reasons, to the exclusion of his widow, and the other children. He has also held that the will is free from the blemish of fraud, misrepresentation, forgery, impersonation or the like.

7. The defendant (objector) is aggrieved by the judgment and submits that, in view of the materials on record, the letters of administration could not have been granted in favour of the plaintiffs. He submits that the will is surrounded by suspicious circumstances which renders its execution apocryphal and are enumerated hereinbelow:

(i) The line of succession has been completely ignored. The wife, eldest son or the daughter-in-law, and the three daughters have been completely ignored without assigning any reason. He relies on the judgment of the Supreme Court reported in *Gurdial Kaur and others Vs. Kartar Kaur and Others*,

(ii) The propounders of the will took active part in execution of the will which create serious doubts. He relies on the judgment of the Supreme Court in *Yumnam Ongbi Tampha Ibemma Devi v. Yumnam Joykumar Singh and Ors.* reported in 2009 (2) BBCJ 388 .

(iii) The testator was the resident of Village Rajpur which was closer to Buxar, but the registration took place at Arrah without any valid explanation. All Courts (judicial and administrative) are situate at Buxar where family has been considerably known socially as well as on account of their litigations.

(iv) The signatures of the testator on different pages of the will are different. He relies on the judgment of the Supreme Court in *Yumnam Ongbi Tampha Ibemma Devi v. Yumnam Joykumar Singh* (Supra).

(v) The testator was in very bad health, in weak state of mind, without eye-sight on the date of execution and registration of the document, and died only 25 days thereafter.

(vi) Kalika Prasad Thakur, husband of Lalita Devi, had filed partition suit against his father and others.

(vii) It is incorrect to state that the two legatees have served the testator during the period of his prolonged illness.

(viii) Kalika Prasad Thakur and his family were present at the time of registration of the will, which they suppressed in their evidence.

(ix) The entire onus is on the propounder of the will to remove all doubts and dispel the suspicious judgment. He relies on the judgment rendered in the case of *Yumnam ongbi Tampha Ibemma Devi v. Yumnam Joykumar Singh* (Supra), paragraphs 9 and 10.

(x) The conditions of Section-63 of the Succession Act must be satisfied.

(xi) The learned Single Judge has not at all referred to the vital evidence of

D.Ws.1 to 6 and D.W.8. He also submits that Kalika Prasad Thakur, the husband of Smt. Lalita Devi (plaintiff No. 1), has all through been employed in Patna as Professor in a College, has been living here all through with his family members and, therefore, there was no occasion for Smt. Lalita Devi to serve her father-in-law who all through lived in his village.

(xii) He lastly submitted that the legatees kept the will in wraps.

8. Learned Counsel for the plaintiffs has supported the impugned judgment. He submits that the onus is on the propounder of the will to prove the genuineness of the will which has been duly discharged in this connection. He relies on the provisions of Section 63(3) of the Succession Act read with Section 68 of the Evidence Act, in the following manner:

(i) The will must be proved by one of the attesting witnesses and his deposition must satisfy the Court that the will was executed in the presence of the witnesses. In fact, all the three witnesses to the will have been examined in the present case.

(ii) It is a registered will and, therefore, there is always a presumption of genuineness, unless proved to the contrary in which case the onus will be on the person who assert to that effect.

(iii) The registered deed ex-facie shows that the testator had appeared, and has recorded his signature, in the presence of the Registering Officer.

(iv) P.Ws.1 to 5 and 7 to 9 have supported this part of the plaintiffs' case.

(v) P.Ws.1 to 5 and 7 have clearly deposed about the sound mental condition of the testator at the time of execution of the will.

There is no allegation of forgery, impersonation, fraud, misrepresentation or such other suspicious circumstances.

8.1 Counsel also sought to explain the circumstances which worked in the mind of testator to alienate his property in favour of his two daughters-in-law to the exclusion of the rest.

8.2 D.W.7 (the Vaidya) has falsely deposed to the effect that the testator was not in good state of mind and health at the time of execution of will.

8.3 He lastly submitted that P.W.5 deposed to the effect that Arrah and Buxar are equidistant from the village.

9. We have perused the materials on record and considered the submissions of learned Counsel for the parties. At the outset we wish to make it clear that we are hearing this appeal against the judgment of a learned Single Judge of this Court tried on the original side. This is the first forum available to the parties to challenge the impugned judgment.

10. Law is well settled that it is incumbent on the propounder of the will to prove

that testator was in a fit state of mind, capable of understanding the act of alienation, and the contents of the will, was not subjected to fraud, misrepresentation, duress or the like. It is, therefore, imperative that the propounder of the will (the respondents herein) should remove the doubts, and dispel the suspicious circumstances, surrounding the will. The testator has alienated his property in favour of his two daughters-in-law. The husband of one of them is a professor in a college in Patna and seems to be better off than his two other brothers, notwithstanding which the widow, one son, and three daughters have been disinherited. There are materials on record including Exhibit-27 to show that Parwati Devi was also allotted share in the family partition. We are mindful of the judgment of the Supreme Court in *Gurdial Kaur and Ors. v. Kartar Kaur and Ors.* (supra). However, in the peculiar facts and circumstances of the present case, we found adequate justification for disinheriting them. First of all the testator alienated his own share which was allotted to him in family partition between himself, his wife, and his sons. The wife was also allotted one share. There is adequate evidence on record to show that the testator was a chronic and old patient of gout, was a paralytic patient, and was confined to bed. In such a situation, the two daughters-in-law had really nursed him, earning his blessings and gratitude. Alienation of the property in favour of the two daughters-in-law would, therefore, be in the natural course of human affairs. Secondly, he seems to have died at the ripe old age of 82 years, and may not have thought it fit to give a portion of the same to his wife so that complications do not arise in parcelling out her share between the children in future. This seems to show his sagacity and foresight in a situation where the two sons and two daughters-in-law had proved their credentials by nursing him over a prolonged period which must have generated confidence that they will look after his widow also. He may not have felt the need to provide for his wife in the will, because she was already allotted one share in the family partition. In so far as Harkesh Thakur is concerned, there is adequate evidence on record to lead to the conclusion that he was consistently and for a prolonged period at logger-heads with the father. Harkesh Thakur has constructed his own house in the village and was living separately.

11. We must deal with Exhibit 9/A proved by the plaintiffs. Harkesh Thakur had instituted Case No. 101 of 1965, in the Court of learned Subordinate Judge, Arrah. The testator had filed his written statement wherein he took the stand that, in order to avoid the rigors of Bihar Land Reforms Act, certain joint family properties were shown in the name of Chandrahar Thakur (the defendant's Sala). The statement further goes to show that the same are really joint family properties but taking undue advantage of the situation, the defendant (objector) is trying to arrogate it to himself because it stands in the name of his Sala. The written statement seems to have been filed on 24.7.1967, and seems to be the first evidence on record showing enmity between the testator and his eldest son.

Exhibit 9/B is the deposition of Harkesh Thakur in T.S. 74 of 1965/1 of 1975 in the court of learned 2nd Additional Subordinate Judge, Arrah recorded on

11.9.1975, and deposed as follows:

eS bl eqdnek esa izfroknh uEcj 2 gwWa A izfroknh uEcj 1] 3] 4 ,oa 5 ,d lkFk jgrs gS ,oa vkil esa ,d nwljs ds esy es gS A bl eqdnes dks oknh ls esjs firk us nkf[ky dj;k;k gS A bl eqdnek dk [kpZ cpZ oknh dh vksj ls esjs firk gh djrs gS ,oa nsrs ysrs gS A

Exhibit 21 is the judgment dated 27.9.1975, passed in the said suit by the learned 2nd Additional Subordinate Judge, Arrah, wherein he has commented on the conduct of Harkesh Thakur in paragraph 31 of the judgment that "...It is really unfortunate that a son has adduced evidence against his father to this extent that his father who was Ex. Landlord and who was having about 100 bighas of lands was selling Lungi and Gamachha in Raghunathpur Bazar on foot-path...". It has further been held in paragraph No. 61 of the judgment that Harkesh Thakur had set-up Chandrahar Thakur (his Sala) against the remaining members of his family. It has further been found in paragraph No. 86 of the judgment that "...D.W.14 Harkesh has emphatically said that Chandrahar is not his sala but from the conduct of Harkesh Thakur it appears that Harkesh had no good intention with his brothers and the possibility of his having set up Chandrahar under the circumstances cannot be over ruled....

Exhibit 26 is the order dated 9.9.1966 of the Executive Court u/s 144 Cr.P.C. in Suit No. 46M of 1966 (Harkesh Thakur v. Chandrahas Thakur and Ors.).

Exhibit-27 is the certified copy of the order sheet in Consolidation proceedings bearing Case No. 270/85-86. The order dated 3.3.1986 records that:

---vkosfndk ikoZrh nsoh @ vkosfnr tehu gekjs fgLIk esa feyk @ eS viuk fgLIk jkeorh nsoh ifr ujens"oj Bkdqj ,oa yfyk nsoh ifr dkfydk izlkn Bkdqj dks cD"kh"k djuk pkgrh gS A eS jkth [kq"kh ls ,oa fcuk ncko ds ns jgh gwWa A eS iwjh rjg ls lksp le> dj ns jgh gwWa A fyf[kr c;ku esjk gS tks vkifRr ds ?ij fo:) fn;k gwWa A cM+k yM+dk ls eq>s dksbZ eryc ugh gS A ges fnekx lgh gS A eq>s ijs"kku djus dks vkifRr nsrs gS A

Exhibit-13 is the copy of the Voter list of Brahmpur Nirvachan Kshetra. Jagarnath Thakur, Kalika Thakur, Lalita Devi and Parwati Devi are shown as one family, and Harkesh Thakur and his wife have been as a distinct family. There is adequate oral evidence on record to show that the relationship of Harkesh Thakur on the one hand, and the remaining members of the family on the other were extremely bitter and hostile.

11.1) It is thus evident on a perusal of the documents on record that Harkesh Thakur was engaged in various litigations with his father, is a greedy and unscrupulous person, and became hostile to his father and two brothers. Harkesh Thakur's objection in this proceeding further corroborates the situation of hostility. On the other hand, there is no material at all on record to show that there were any differences between the testator, the legatees and their husbands.

12. The appellant has further submitted that the propounder of the will have

taken active part in execution of the will and is also a cause for suspicion. In view of the evidence on record, we find no basis for such a suspicion. It is correct to state that Kalika Prasad Thakur and Narbadeshwar Prasad Thakur were present at the time of registration of the documents. This by itself cannot cause any suspicion in a situation where Jagannath Prasad Thakur was extremely pleased with the services rendered by the two daughters-in-law, and Harkesh Thakur was extremely hostile to the whole family.

13. The appellant has next contended that the testator was resident of village Rajpur which is closer to Buxar and is the headquarter of the district, than Ara, and yet the will was registered at Ara, which causes suspicion. It appears from the evidence on record that Rajpur is at equal distance from Buxar and Ara. Furthermore, in view of the position that Harkesh Thakur being such a rabid litigant and hostile to the family, they might have thought it fit to register the document at Arrah to avoid the obstruction apprehended at his instance. Furthermore, there is no legal bar to the registration of a will at any registration office.

14. We have also examined the signatures of the testator on the three pages of the will and do not find any significant change or difference in the same. The contention really raises a chimerical issue and has been advanced for the sake of argument.

15. The appellant has also contended that the testator was in extremely bad health, was paralysed for a protracted period, was not in a fit state of health and mind to execute the documents. It is undoubtedly correct to state that the evidence of both sides do suggest that he was a patient of gout, had been paralysed and confined to bed for a fairly long time before his death. The evidence also clearly indicates that he was mentally sound and alert, capable to understanding the implications of his act and the contents of the document. Furthermore, aged 82 years at the time of execution of the will, must have got accustomed to handling his affairs over his long period of illness/ poor health. We also observe that the evidence of all the D.Ws. are parrot-like and repetitive, and do not inspire confidence.

16. We must, however, seriously consider the deposition of D.W.7, the local Vaidya, who seems to be the family physician, and claimed to have been treating the testator for a long time. He has deposed to the effect that the testator was in a state of semi-consciousness when he was brought to him in the clinic for treatment. He has also deposed to the effect that the testator had talked to him about his ailment which shows alertness of mind. The deposition of D.W.7 is inherently contradictory and does not inspire confidence.

17. We are thus of the view that the testator was in a fit state of mind and health, capable of understanding the implications of his act and the contents of the will at the time of its execution. Though he was in very bad health for a long time, but had been mentally alert all through and also at the time of execution of

the documents. The appellant (objector) has not levelled any allegations of fraud, misrepresentation, impersonation, forgery or the like.

18. We must now consider the provisions of Section 63(c) of the Succession Act which provides that two or more attesting witnesses must prove execution of the will in the presence of the witnesses. In the present case, all the three witnesses to the will have been examined and consistently proved execution of the will. P.W.1 had accompanied the testator to Arrah. P.W.5 is the own Mama of the testator and also supported the case of the legatees. P.W.7 is an Advocate and related to both sides and has supported execution of the will. P.W.11 is the junior to the scribe who had prepared the will. The scribe was dead at the time of evidence, and P.W.11, being his junior, had proved the hand-writing and the contents of the will. It is an important circumstance that the will in question is a registered document and rebuttable presumption of genuineness attaches to it. The objector has failed to disprove its correctness. It is further relevant to state that none of the notices other than the objector came up to oppose the will.

19. On a consideration of the entire documentary and oral evidence on record, we come to the conclusion that the testator was in a bad state of health for a long time and also at the time of execution of the will, but was in sound state of mind, capable of understanding the implication of his action and the contents of the will. There are further materials on record to show that on account of the nursing and devoted services of his two daughters-in-law (the plaintiffs), he had decided to reward them with his own share of property allotted to him in family partition. There was adequate justification to deprive his wife of any share in the same and equally his eldest son. It is still usual in our middle class and lower middle class people in Bihar to deprive the daughters of any share of movable or immovable property because of the heavy expenses incurred in the marriage and other customary practices. It is so also for the reason that they want to keep a respectable distance from the daughter's family and, therefore, immovable property is not allotted to the daughter, otherwise it would be inviting involvement of outsiders to their properties which is their primary source of livelihood. No fraud, misrepresentation, forgery, impersonation etc. have been alleged against the plaintiffs. The testator's signature on the three pages of the will do not create any suspicion. The plaintiffs have been able to remove and dispel the doubts and the surrounding circumstances brought to our notice by the defendants.

20. In the result, we uphold the order of the learned Single Judge and dismiss this appeal. However, there shall be no orders as to costs.