

(2002) 11 OHC CK 0034
In the Orissa High Court
Case No : F.A. No. 397 of 1990

Madhab Bohora (dead) by LR and Others	APPELLANT
Vs	
Braja Kishore Nanda and Others	RESPONDENT

Date of Decision : 21-11-2002

Acts Referred:

Evidence Act, 1872 — Section 154, 68
Succession Act, 1925 — Section 218, 63

Citation : AIR 2003 Ori 107

Hon'ble Judges : R.K. Patra, J;P.K. Misra, J

Bench : Division Bench

Advocate : A.K. Rath, P. Mohanty, B.B. Mohanty, R. Samal, A.N. Routray and M. Mohanty, for the Appellant; A. Mukherjee, D.K. Sahu and B.S. Tripathy, for the Respondent

Judgement

R.K. Patra, J.—This appeal filed by caveator-defendants 2 to 5 is directed against the order dated 22-9-1990 of the learned District Judge, Puri granting letter of administration in favour of respondent No. 1.

2. Respondent No. 1 made an application for grant of letter of administration (with the copy of the will annexed to the estate of the deceased Sarajumant Dashi) to the learned District Judge, Puri which was registered as O.S. No. 1 of 1986-II.

3. The case of respondent No. 1 is that the deceased Sarajumani Dashi was a disciple of late Taponidhi Ramakrushna Bharati Goswamy. She had entered into the religious order of Vaishnav Cult and was residing at Bharati Math, Badhoibanks Chhak, Old Bhubaneswar. She was the owner and in possession of agricultural as well as homestead lands. On 15-1-1982, she executed a will in his (respondent No. 1's) favour bequeathing her agricultural land measuring Ac. 4.187 and homestead land along with house standing thereon. The will was registered on the very day before the District Sub-Registrar, Bhubaneswar. Although the registered will was handed over to him, the same having been lost,

a certified copy thereof was obtained and was filed along with the application. Sarajumani Dashi died on 5-6-1983. During the period between the execution of the will and her death, she had disposed of some properties bequeathed under the will. Therefore, at the time of her death, she only left behind Ac. 3.597 of agricultural land and Ac. 0.046 decimals of homestead land. These lands have ultimately come to his (respondent No. 1 's) hands, by virtue of the will who is the sole legatee under the will and no executor was appointed. Death duty on the value of the estate of the testatrix as assessed by the Assistant Collector of Estate Duty, Orissa, had been paid by him and clearance certificate was obtained on 4-3-1985.

Although there were two sets of caveators, this appeal has been filed by only one set. Their common case is that the testatrix was not a Sanyasini and was not residing in Bharati Math. She had never executed any will and the properties mentioned therein have not come to the hands of respondent No. 1 at any time. According to them, the will is a forged and fabricated one. It was also not duly and properly executed nor attested. The death certificate of the testatrix is also a fabricated one. According to the appellant, the testatrix was staying in the house of appellant No. 1 during her life-time and after her death, the estate is in his possession. The other appellants claim that the testatrix was being maintained by them and appellant No. 1 jointly who was residing with them and died in their residence.

4. In support of his case, respondent No. 1 examined nine witnesses and filed number of documents. Appellants examined only two witnesses in support of their case.

5. On consideration of the evidence, the learned District Judge granted Letters of Administration in favour of the respondent No. 1 by recording the following findings:

(i) There is no specific pleadings by the contesting caveators that the will was brought out by exercise of fraud, undue influence and impersonation. Particulars of undue influence, fraud and impersonation have neither been set forth in the pleadings nor is there any proof thereof;

(ii) Respondent No. 1 has successfully explained and cleared the suspicious circumstances with which the will was alleged to have been shrouded;

(iii) The will was duly executed and attested;

(iv) The will was executed by Sarajumani Dashi out of her own free will and volition. She had full testamentary capacity and validly executed the last will in favour of respondent No. 1; and

(v) In the facts and circumstances, it cannot be said that the will is unconscionable because the sole legatee does not belong to the natural born family of the testatrix.

6. Counsel for the appellants urged the following points in support of the appeal :

(a) The will being a solemn document, unimpeachable evidence was to be adduced to establish its genuineness. Respondent No. 2 has not adduced any such evidence and the circumstances raise suspicion and serious doubt about its due execution, one of the circumstances being non-production of the original will;

(b) Respondent No. 1 had adduced secondary evidence, i.e. xerox copy of the will (Ext. 13/a) and certified copy of the will (Ext. 13). Secondary evidence is not permissible in law unless the foundation for acceptance of it is laid.

7. Law is now fairly settled that a will has to be proved like any other document. Since Section 63 of the Indian Succession Act, 1925 requires a Will to be attested by two or more witnesses, it cannot be used as evidence until as required by Section 63 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. We may in this connection profitably refer to the recent judgment of the Supreme Court in *Madhukar D. Shende Vs. Tarabai Aba Shedage*, In Paragraphs 8 and 9 of the judgment, the Supreme Court observed as follows :

"Para 8. 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 63 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..... ".....The conscience of the Court has to be satisfied by the propounder of Will adducing evidence so as to dispel any suspicions or unnatural circumstances attaching to a Will provided that there is something unnatural or suspicious about the Will, The law of evidence does not permit conjecture or suspicion having the place of legal proof nor permit them to demolish a fact otherwise proved by legal and convincing evidence. Well founded suspicion may be a ground for closer scrutiny of evidence but suspicion alone cannot form the foundation of a judicial verdict-positive or negative.

Para-9. It is well-settled that one who propounds a Will must establish the competence of the testator to make the Will at the time when it was executed. The onus is discharged by the propounder adducing prima facie evidence proving the competence of the testator and execution of the Will in the manner

contemplated by law. The contestant opposing the Will may bring material on record meeting such prima facie case in which event the onus would shift back on the propounder to satisfy the Court affirmatively that the testator did know well the contents of the Will and in sound disposing capacity executed the same. The factors, such as the will being a natural one or being registered or executed in such circumstances and ambience, as would leave no room for suspicion, assume significance. If there is nothing unnatural about the transaction and the evidence adduced satisfies the requirement of proving a will, the Court would not return a finding of "not proved" merely on account of certain assumed suspicion or supposition, who are the persons propounding and supporting a will as against the person disputing the will and the pleadings of the parties would be relevant and of significance."

8. Keeping the above pronouncement of law in view, let us now proceed to examine the evidence on record.

Respondent No. 1 got himself examined as P.W. 1. He stated that while he was a school student, he was staying in Bharati Math which is situated at Badheibank Chhak, Old Town, Bhubaneswar. Sarajumani Dasi was a Sanyasini and was staying in that Math. She was a disciple of Sri Ramakrushna Bharati Goswamy (since dead) who happened to be his (respondent No, 1's) great grandfather. Sri Sudarsan Bharati Goswami was the Mahant of the Math. Sarajumani was aged about 70 years whom she executed the will in his favour on 15-1-1982 and got the same registered in the office of the Sub-Registrar, Bhubaneswar. In her old age, he was looking after her comforts and serving her and in consideration of that she executed the will in his favour. He further testified that she expressed her desire to will away the properties in his favour on 1-1-1982. He used to accompany her while she was visiting temples and other places. He accordingly informed his father about this. On 15-1-1982. he accompanied Sarajumani to the Bar Association, Bhubaneswar. His father also went along with them. There they consulted advocate Purna Chandra Rath (P.W. 4). Leaving her and his father with the advocate, he left for the school. After return from the school he was informed that Sarajumani had executed the will in respect of her properties in his favour endorsing the registration ticket in his name. In his evidence he stated that she was in good health and sound disposing state of mind before her death on 5-6-1983. On account of her old age she was suffering from arthritis at times and Dr. Jagannath Mohapatra was her treating physician. Being examined as P.W. 2, the said Dr. Jagannath Mohapatra stated that in 1975 he retired from Government service on superannuation and thereafter he set up private medical practice at Bhubaneswar. He was treating Sarajumani for about 3 years from 1980. She was mostly suffering from rheumatical troubles. On many occasions, he attended her in the Math.: At times she was coming to his clinic for treatment. Most of the time respondent No. 1 was coming to him to give calls. The doctor asserted that mentally Sarajumani was alert although she had joint pains and bowel disorders because of old age. She died in the middle of 1983. She was of sound mind and body. In his cross-examination, he further stated that

Sarajumani was able to walk and move about. Some-times she was confined to bed due to rheumatic pain. He asserted in his cross-examination that from the talk of the patient with regard to her disease he could know that she was mentally sound. Nothing has been brought out in his evidence to discredit :his solemn testimony. P.W. 4 is Purna Chandra Rath, an advocate of Bhubaneswar Bar. He stated in his evidence that he know Sarajumani who was staying in Bharati Math. She was the Mata (Sanyasini) of the Math. About 10 to 12 days prior to the execution of the will Sarajumani along with respondent No. 1 had come to his chamber for consultation regarding execution of the will. She expressed before him that she would execute a will in favour of respondent No. 1, she being a Sanyasini she had no other relation and respondent No. 1 was looking after her. At that time Sarajumani was mentally sound. It was decided that she would come to him for execution of a sale deed also in favour of Surendra Panda, Advocate, (P.W. 7). As regards the execution of the Will, he advised her to bring all the necessary documents. On 15-1-1982 Sarajumani came to the Bar Association being accompanied by respondent No. 1 and his father Janmejaya Nanda and met him. She expressed before him that she would execute the Will and also a sale deed. On her instruction, he made a gist of the Will and asked Banabihari Upadhyaya, his Mohrrir (P.W. 9) to scribe the Will. As per her instruction, P.W. 9 scribed the Will and read over and explained the contents of the same to Sarajumani. She acknowledged the same to be true and correct. When she affixed her L.T.I, on the Will, he himself, Bansbihari Upadhyaya (P.W. 9) and advocate Surendra Panda (P.W. 7) and Chandramani Das Mohapatra and Janmejaya Nanda were present. She voluntarily executed the Will. Banabihari Upadhyaya (P.W. 9) attested the L.T.I, of Sarajumani. He (P.W. 4) and other witnesses, namely, Banabihari Upadhyaya (P.W. 9) and Chandramani Das Mohapatra (not examined) attested the document as witnesses in presence of the executant. All of them went to the office of the District Sub-Registrar where the Will was presented for registration by Sarajumani. He was present at the time of registration of the document. The District Sub-Registrar asked Sarajumani if she executed the document voluntarily to which she replied in the affirmative. After registration of the document, the L.T.I, of the executant Sarajumani was taken by Benudhar Pradhan (P.W. 3), Clerk in the office of the District Sub-Registrar, Bhubaneswar, on the Thumb Book. Along with the Will, a sale deed in favour of Surendra Panda (P.W. 7) was also presented for registration. Registration ticket in respect of the Will was endorsed in favour of respondent No. 1. P.W. 7 Surendra Panda is an advocate of the Bhubaneswar Bar. He corroborated the evidence of P.W. 4 by stating that on 15-1-1982 Sarajumani came to the Bar Association, Bhubaneswar being accompanied by respondent No. 1 and his father. That day she expressed her desire before her lawyer P.W. 4 to execute a Will in favour of respondent No. 1. Her lawyer made a rough draft of the Will. He thereafter asked Banabihari Upadhyaya (P.W. 9) to scribe the Will. Accordingly, the Will was scribed by P.W. 9. After it was over, contents of the document were read over and explained to Sarajumani. At that time, Purna Chandra Rath (P.W. 4), the scribe himself (P.W. 9). Janmejaya Nanda and

Chandramani Das Mohapatra were present. Sarajumani acknowledged the contents of the document to be true and correct and gave her L.T.I. thereon. The attesting witnesses Purna Chandra Rath (P.W. 4), Chandramani Das Mohapatra and Banabihari Upadhyaya (P.W. 9) were present when she affixed her L.T.I, on the Will. All the three attesting witnesses signed the Will in presence of Sarajumani. This witness stated that Sarajumani executed a sale deed in his favour on 15-1-1982 and on that day she presented the Will as well as the sale deed before the District Sub-Registrar, Bhubaneswar for registration. The District Sub-Registrar asked her about the execution of sale deed and if she received the consideration money to which she replied that she executed the sale deed in his (P.W. 7) favour and the entire consideration amount of Rs. 5000/- would be received at the time of endorsements of registration ticket. He further deposed that after registration of the sale deed (Ext. 16), the Will was registered. To the query made by the District Sub-Registrar, Sarajumani Dashi replied that she was executing a Will in favour of respondent No. 1. She also replied to the District Sub-Registrar that the Will was written as per her instruction and she was bequeathing the properties as per the schedule furnished in the Will. Bansbihari Upadhyaya (P.W. 9) identified Sarajumani Dashi before the District Sub-Registrar who acknowledged before him that she executed the Will. Thereafter, the Will was registered. After the District Sub-Registrar endorsed the Will and the sale deed, the two documents were sent to the Thumb Clerk, who took the L.T.I, of Sarajumani Dashi in the Thumb Book (vide Exts. 12/d and 12/e of the Thumb Book). The registration ticket for the Will was endorsed in favour of respondent No. 1 and the registration ticket for the sale deed was endorsed in his (P.W. 7's) favour. The District Sub-Registrar was examined as P.W. 8. He deposed that on 15-1-1922 the Will No. 2 and sale deed No. 543 were presented before him for registration by Sarajumani Dashi, disciple of Taponidhi Bharati Goswamy of Badadanda Sahi, Bhubaneswar. Ext. 14 is the copy of the Will No. 2 copies in Book No. III, Volume I. The District Sub -Registrar further deposed in his evidence that at the time of presentation of the Will, he asked the executant her name, the nature of the document and the name of the person in whose favour the said document was executed. The executant disclosed her name as Sarajumani Dashi and stated that she was executing the Will in favour of Brajkishore Nanda (respondent No. 1). After checking, the Will was again presented before him for admission of the execution of document. Bansbihari Upadhyaya (P.W. 9) identified the executant before him. She admitted before him that she executed the Will after understanding the full import of the contents of the document. He accordingly recorded the admission of the execution of the Will. The Will was thereafter sent to the Thumb Clerk (P.W. 3) who used to sit in front of the dais at 5 to 6 feet away. The Thumb Clerk took the L.T.I. of the executant as well as the identifier on the Thumb Impression Book in his presence. The District Sub-Registrar has proved his signature vide Ext. 12/b and Ext. 12/awas the entry made by the Thumb Clerk. He further stated that the same procedure was followed in respect of the sale deed No. 543 executed in favour of Surendra Panda (P.W. 7). Although this witness was cross-examined,

nothing was brought out to discredit his testimony. P.W. 3 was the Junior Clerk in the office of the District Sub-Registrar. He corroborated the evidence of the District Sub-Registrar by stating that he know Sarajumani Dashi who was coming to the District Sub-Registrar's office for 20 to 30 times. He deposed that on 15-1-1982 he was in-charge of the Thumb Register. Ext. 12/a is the entry dated 15-1-1982 showing the L.T.I, of Sarajumani Dashi for registration of deed No. 543 (sale deed) of Book No. 1 and registered deed No. 2 in Book No. 3. Book No. 1 is meant for entering Wills. He made endorsement in the entry Ext. 12/a regarding L.T.I, of Sarajumani. Since the executant was illiterate, the signature of the Sub-Registrar was obtained in the entiy. He identified the signature of the District Sub-Registrar (Ext. 12/b). He further slated that one Bansbihari Upadhyaya identified Sarajumani Dashi before the Sub-Registrar at the time of registration of the documents. The identifier has also signed in the next entry of the Thumb Book. He made the entry Ext. 12/e and Ext. 12/d is the signature of Bansbihari Upadhyaya. The witness further stated that at the time of registration of the Will and the sale deed, the District Sub-Registrar asked Sarajumani about the nature of the documents to which she replied that she executed a Will and a sale deed. Both the District Sub-Registrar (P.W. 8) and P.W. 3, the Thumb Clerk are independent official witnesses. There is nothing on record to suggest that they would speak falsehood in the Court against any person or in favour of any person except deposed on the basis of official documents. From the aforesaid analysis of the evidence, we have no doubt that Sarajumani Dashi was of sound mind and body at the time of execution of the Will. She bequeathed the propertie.s under the Will in favour of respondent No. 1 on her own volition without being influenced or pressurised from any quarter.

9. Before recording further finding with regard to the execution of the Will, we may note here the conduct of the scribe of the Will, who was examined as P.W. 9. Although initially he deposed in favour of respondent No. 1, later in his evidence he tried to play truant and turned hostile to him (respondent No. 1). The learned District Judge in Paragraph 47 of the judgment has observed that from the very beginning he avoided to attend the Court to give evidence. Therefore, coercive steps were taken against him and he attended the Court after he was arrested by the bailiff and produced on the strength. of theailable warrant Issued against him. He first stated that Sarajumani Dashi executed the sale deed in favour of Surendra Panda (P.W. 7). It was registered on 15-1-1982 before the Sub-Registrar, Bhubanes-war. He Identified the vendor, i.e. Sarajumani Dashi and attested her L.T.I, on the sale deed. Ext. 16/a is his signature identifying the vendor (Sarajumani Dashi) before the Sub-Registrar. He further stated that on 15-1-1982 Sarajumani Dashi executed a Will in favour of Brajakishore Nanda (respondent No. 1) which was scribed by him. He made this statement with reference to the photostat copy of the Will (Ext. 13/a). He also stated that he identified Sarajumani Dashi before the Sub-Registrar when the Will was registered. This he stated with reference to Ext. 13/a. He identified his own signature as Ext. 12/d on the Thumb Mark book. Thereafter, he tried to exhibit

his hostility against the respondent No. 1 by stating that he did not remember if he signed on the Thumb Book as the identifier of both documents (sale deed and the Will). He even claimed to have remembered nothing that happened on 15-1-1982 except that he could depose with reference to the documents. He fully ignored the role of advocate Puma Chandra Rath (P.W. 4) with regard to execution of the Will. On the contrary he stated that it was Surendra Panda (P.W. 7) who brought Sarajumani Dashi to him and on his direction he scribed the Will. Though he could not deny that he wrote the certificate of attestation at the end of the Will, he tried to make out a case; that Sarajumani Dashi was not present at the time the document was scribed. It does not stand to reason why a scribe would give a false certificate of attestation to the L.T.I. of the executants and at the same time admit to have attested the certificate at the end of the Will. He even posed that he was a stranger to respondent No. 1, but later admitted that he knew him by his nick name Tilu as he was coming to the Court premises in connection with the affairs of the Math. This witness although turned hostile to respondent No. 1. his evidence cannot, as a matter of law, be regarded as washed off the record altogether, It is for the Court to decide whether as a result of cross-examination and contradiction, if any. such witness stands thoroughly discredited or can still be believed in regard to a part of his testimony. If it is found that in the process, the credibility of the witness has not been completely shaken, the Court may after reading and considering the evidence of the witness as a whole with due care and caution, accept in the light of other evidence on the record that part of his testimony which is found to be credit-worthy and set upon it. On perusal of his entire evidence, we have no doubt that although he exhibited animus against respondent No. 1 on whose behalf he was examined as a witness, he scribed the will and also attested the L.T.I. of Sarajumani Dashi. Having regard to other circumstances and evidence of P.Ws. 4, 7 and 8, we unhesitatingly come to hold that the Will executed by Sarajumani Dashi in favour of respondent No. 1 was scribed by P.W. 9 and duly attested in accordance with the requirements of law.

10. It was argued on behalf of the appellants that no foundation was laid for recipient of secondary evidence with regard to the Will. Respondent No. 1 as P.W. 1 in his examination-in-chief stated that the original Will was lost. In his cross-examination he could not say as to where and how and under what circumstances the original Will was lost. He stated in his evidence that after receipt of the Will from the office of the Sub-Registrar he showed it to Sarajumani Dashi who asked him to keep it. That the Will was with respondent No, 1 is evident from his evidence when he stated that he filed return in respect of the properties of the executrix before the Assistant Collector, Estate Duty, Shubaneswar. Damodar Mishra (B), Advocate, Puri was his lawyer in the state duty case and by the time they consulted him, the original Will was with him. The lawyer advised him to keep a xerox copy of the Will as the original would be filed in Court. Accordingly he obtained a xerox copy. He stated in his evidence that although he did not lodge any report regarding loss of the Will but a missing

advertisement was published in the Samaj. There is no reason as to why the beneficiary of the Will would withhold the original if it was not lost. Therefore, clear foundation was laid for reception of secondary evidence with regard to the Will.

11. It was also argued that there was discrepancy between the xerox copy of the registered Will and the certified copy of the Will marked Ext. 13. The document marked "X" is the xerox copy of the registered Will executed by Sarajumani Dashi in favour of respondent No. 1. It contains an endorsement at its feet to the following effect :

"Certified that the executant is my client and is written by my Clerk in my office on my direction.

P.C. Rath, Advocate, 15-1-1982."

This endorsement is absent in Ext. 13, the certified copy of the Will. The District Sub-Registrar was examined as P.W. 8. The appellants could have asked him about the absence of so-called endorsement in Ext. 12. But for the reasons best known to them, they did not put any question on that. Be that as it may, the document marked "X" contains the seal of the Sub-Registrar. It Indicates that xerox copy was made after registration of the document. The so-called endorsement appears to be otherwise superfluous and there is no law that the advocate is required to give a certificate that the executant was his/her client and was written by his clerk in his office on his/her direction. It might be that the Copying Department in the Registration Office while making entry in the registration book might have excluded such a redundant endorsement in the registration book or it might be due to over-sight or inadvertence the concerned staff might have omitted to copy it.

12. It was also submitted on behalf of the appellants that the Will was the outcome of undue influence and misrepresentation. On going through the pleadings, we find that the appellants have not pleaded that the Will was brought about by exercising fraud, undue Influence and mis-representation. There is also no evidence on that score, the Will was executed on 15-1-1982 and the executant Sarajumani died on 5-6-1983, i.e. after one year and five months. If the Will was obtained by exercising fraud, undue influence or mis-representation on her, there was enough time to revoke/cancel the Will.

13. Learned counsel for the appellants submitted that the Will (Ext. 13) does not contain the certificate of the scribe that it was read over and explained to Sarajumani. Such a Certificate was not necessary in the facts and circumstances of the case. There is evidence on record that after the Will was written, the name was read over and after Sarajumani Dashi said that it was in order, she put her L.T.I.. Moreover, it is in the evidence of P.Ws. 1 and 4 that she (Sarajumani) could read if the letters were bold and big that she could not write. In view of these things, furnishing of certificate is redundant.

There is, therefore, no merit in this appeal which is accordingly dismissed.

P.K. Misra, J.

14. I agree.