

(1989) 01 OHC CK 0009
In the Orissa High Court
Case No : First Appeal No. 135 of 1974

N.D. Samant (after him) Satyabhama Debi and Others	APPELLANT
Vs	
Kumari Jayashree Roy and Others	RESPONDENT

Date of Decision : 24-01-1989

Acts Referred:

Evidence Act, 1872 — Section 59, 63, 67
Succession Act, 1925 — Section 278, 283(1), 284(1), 295, 299

Citation : (1989) 67 CLT 537

Hon'ble Judges : S.C. Mohapatra, J; P.C. Misra, J

Bench : Division Bench

Advocate : B.L.N. Swamy, for the Appellant; R.K. Mohapatra, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Mohapatra, J.—This is an appeal by the Defendant u/s 299 of the Indian Succession Act, 1925 (hereinafter referred to as "the Act").

2. Letter of administration granted in respect of the Will (Est. 10) dated 12-2-1972 written in Telugu language in favour of the Plaintiff by her father Kamalnath Roy is assailed in the present appeal which is being continued by the legal representatives of the original Appellant who died during pendency of the appeal.

3. Trial court accepted the English translation of the Will as follows;

Maharaja Kumar Shri Kamalnath Roy Jeypore Dt. 12-2-72. The money which I have now with me by this dated 12-2-1972 is Rs. 4,303.63 p. Some amount is yet to come from Srikakulam. All these are to be given to my daughter Jayashree. This is written out of my free Will. I have written this in my own hand. As I am suffering from Paralysis, I am not able to write more. There are no heirs. My daughter is the absolute owner. This is my free Will. It shall thus be determined. Kamalnath Roy, 12-2-72.

This translation has not been disputed before us.

4. Kamalnath is the son of Late Vikram Dev, the intermediary of Jeypore Estate. He was residing in the palace at Jeypore. P.W. 2 is the only surviving son of Kamalnath through Susila who died two to three months before Ext. 10. Plaintiff is his eldest unmarried daughter through Jagmohini (P.W. 6), They have two sons and two other daughters. Defendant is the sister's son of Kamalnath. Kamalnath suffered from illness in 1964 to be treated at Vizag. In 1971, he had a paralytic stroke, as a result of which his capacity to write was partially affected and he could not freely move about. P.W. 2 has been employed as driver in All India Radio Station at Jeypore. In the aforesaid background, Kamalnath died on 12-4-1972 leaving some amount in deposit in State Bank of India, Jeypore branch and compensation payable to him by the Estates Abolition Tribunal, Srikakulam in Andhra Pradesh. Plaintiff applied to the State Bank of India, Jeypore with the help of P.W. 2 for payment of the deposits of Kamalnath to her on the basis of the Will (Ext. 10) in her favour. Being advised to obtain authority from the Court, Plaintiff filed the application for a letter of administration with the Will annexed.

5. In the application u/s 278 of the Act, Plaintiff claimed that her father on account of love and affection executed the Will (Ext. 10) in her favour on 12-2-1972 bequeathing his savings in the State Bank of India, Jeypore Branch amounting to Rs. 73,393. 63 paise and the compensation amounting to Rs. 79,618.79 Paise in deposit with the Estates Abolition Tribunal, Srikakulam in Andhra Pradesh. Kamalnath having died on 12-4-1972, Plaintiff would be entitled to grant of letters of administration.

6. On receipt of the application citations were issued by the learned District Judge u/s 283(1)(e) of the Act, calling upon all persons claiming to have interest in the Estate of the deceased. On the basis of such citation, Defendant lodged caveat u/s 284(1) of the Act and filed written statement claiming that the Will is not genuine. It was stated that deceased Kamalnath was suffering from Paralytic stroke before the date of alleged execution of the Will and was not able to write or sign properly. As regards conduct of the Plaintiff, he asserted that the Plaintiff, her sisters and the Defendant filed applications for substitution as legal representatives in Srikakulam Court where she did not make any claim on the basis of the last Will of Kamalnath in her favour.

7. There being contention, the proceeding for letters of administration was registered as a suit as required under the rules made by this Court and was heard in the form of a regular suit according to the provision of the CPC as provided u/s 295 of the Act. Plaintiff examined six witnesses in support of her prayer and proved eleven documents including the Will Defendant remained satisfied by examining himself only. On consideration of the materials on record trial court held that the Will is the last Will of the deceased which is genuine and was executed by Kamalnath in a sound state of mind and had been duly attested. This appeal has been filed against the said decision of the trial court. It

was earlier heard and was disposed of by a Division Bench See N.D. Samant v. Kumari Jayasree Roy ILR (1980) 1 Cutt. 500. Plaintiff filed an application for review of the judgment on the basis of which the Division Bench vacated the judgment and accordingly I this appeal has been again heard by us to be disposed of by this judgment.

8. In order to succeed in the application for grant of letters of administration, Plaintiff is to prove that the Will in her favour was the last Will of the testator her father which was executed while he was capable of making the testament to dispose of his property being of a sound mind and knowing what he was doing. She has to prove that the document has been duly attested. Besides she has to explain the suspicious circumstances in the case.

9. Execution of a Will is to be proved like any other document as provided u/s 67 of the Evidence Act. An unprivileged Will like Ext. 10 is required to be attested as provided u/s 63 of the Act. Such attestation is to be proved in the same manner as in case of other documents u/s 68 of the Evidence Act. Disposing capacity of the person executing the Will as provided u/s 59 of the Act is to be proved. Since the propounder cannot succeed unless he proves the due execution of the Will, onus lies on him to prove the same by explaining the suspicious circumstances. Where the caveator questions the genuineness or validity of the Will alleging fraud or undue influence practised on the testator he is to prove the same. Even if the caveator is not able to prove fraud or undue influence, suspicious circumstances arising in the case are to be clarified by the applicant. Court is required to keep in mind these general principles while considering the application for probate or letters of administration. These principles have been well settled by the Supreme Court in the decisions repeated in H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, . AIR 1962 S.C. 67. Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, , Ramchandra Rambux Vs. Champabai and Others, , Smt. Sushila Devi Vs. Pandit Krishna Kumar Missir and Others, , Surendra Pal and Others Vs. Dr. (Mrs.) Saraswati Arora and Another, , Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others, , Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, . This Court has also expressed the same principle in the decisions reported in Nilambar Bewa v. Fagu Prusty ILR 1951 Cutt. 141, Hrushikesh Panda and Anr. v. Bralimananda Panda ILR 1965 Cutt. 15, Puna Bewa v. Baban Sahu and Ors. 38 (1972) C.L.T. 387, Suresh Chandra Bal and others v. Niranjana Bal 41 (1975) C.L.T. 644, Kirtan Bihari Sahu and Anr. v. Urmila Sahu and Ors. ILR (1979) 1 Cutt.509, Gopal Charan Mohanty and Anr. v. Adarmani Debi and Ors. ILR (1983) 1 Cutt. 1 and Debendranath Das and Ors. v. Smt. Ushalata So0 and Ors. 56 (1983) C.L.T. 439. In the decision reported in N.D. Samant's case ILR (1980) 1 Cutt. 500 (supra) which has since been reviewed and vacated, the same principles have been laid down. Applying the aforesaid principles to the facts and circumstances, each case is to be considered on its own merit. A finding of fact on the basis of materials in a particular case is not a precedent having either

persuasive value or binding effect.

10. In the premises, first question to be considered is whether Kamalnath executed the Will (Ext. 10). P.Ws. 3 and 4 who are the attestors and P.W. 5 the Plaintiff claim to be present when the Will was written by Kamalnath in his own hand. There is no effective cross-examination to those witnesses that Kamalnath did not write the Will (Ext. 10). Defendant intends to create a suspicion in mind that on account of illness of Kamalnath having paralytic stroke, he was not able to write. This suspicion is clarified by P.W. 2 his son and P.W. 5 the propounder by proving the account book of Kamalnath written by him in the year 1971. P.W. 2 asserted on oath that Kamalnath was operating his bank account by writing or signing cheques. The last cheque drawn by Kamalnath was on 10-4-1972, two days before his death. Trial court who had the opportunity to see the witness and mark their demeanor accepted these statements. There does not seem to be sufficient reason to differ with the trial court. In the Will (Ext. 1) it has been clearly stated that the same is short on account of the paralysis of the testator. Defendant has not taken any step to call for the cheques which P.W. 2 stated to have been written by Kamalnath to prove that Ext. 10 has not been written by Kamalnath. He has not taken any steps to get the handwriting examined by an expert in Telugu script in which the Will was written to prove that the handwriting is such that a man suffering from paralysis cannot write such hand as the Will (Ext. 10) depicts. Thus, there is no suspicion circumstance with respect to the writing of the Will. Whatever suspicion might be there, the same has been explained by the witnesses apart from the statement in the Will itself.

11. The next question to be considered is the mental capacity of the testator to dispose of his property by making the Will. There is no dispute that Kamalnath had paralytic stroke. However, there is no evidence that the said illness had affected his mental condition to such an extent that he would not be able to know what he was doing to draw an inference that he cannot make a Will as provided in Explanation 4 to Section 59 of the Act. Illustration (iii) to the section makes it clear that a person being very feeble and debilitated but capable of exercising a judgment as to proper mode of disposing of his property can make a Will which shall be valid. In the present case there is no evidence that Kamalnath was feeble and debilitated. Rather evidence of P.Ws. 2, 3, 4, 5 and 6 clearly indicate that he was writing accounts, daily diary drawing cheques talking with others and was also discussing about making Will disposing of his assets. P.W. 6 who was his life companion clearly stated that they had discussion how to dispose of the assets. She suggested to provide for all children, Kamalnath stated that sons would squander away money and in case the same is given to P.W. 5, she would take care of all since she is of good conduct and was liking equally to all her brothers and sisters. Although P.W. 5 present at the time Kamalnath executed the Will, there is no evidence that she influenced him or dominated the Will. Immediately after execution of the Will, Kamalnath told about it to P.W. 6 Jagmohini. P.W. 2 also knew of the same that night itself. They were satisfied about the genuineness of the arrangement of his assets by Kamalnath. P.W. 2

helped P.W. 5 for payment of the amount to her from the bank which itself indicates that he was satisfied that the disposition by Kamalnath was just. In the evidence it has been brought out by the Defendant that Jagmohini had property of her own, which she disposed of after death of Kamalnath. In such circumstances absence of providing for all children and Jagmohini and disposing of property in favour of P.W. 5 alone cannot be a suspicious circumstance.

12. A statement in the Will (Ext. 1) that he has no heirs is not an accurate statement. The testator was making cryptic statement on account of his paralysis. It is clear on the face of the Will itself that Kamalnath has not accurately and completely expressed his meaning by the words he used. Case of the Defendant is that both Sushila mother of P.W. 2 and Jagamohini (P.W. 6) are his concubines. It is thus clear that Kamalnath wanted to say that he has no legitimate heirs which he omitted. If this omission is supplied there can be no comment on account of this inaccurate statement. Court can supply the same as in the decision reported in Smt. Pramod Kumari Bhatia Vs. Om Prakash Bhatia and Others, . In this decision it was omitted in the Will to state that son would take the property after death of the wife of the testator which was found by the Court on reading the whole of the Will. The omission was supplied by the Court to express out the intention of the testator. In the present case also such omission can be supplied by Court to give a meaning of a document than to throw out the same merely because there is an inaccuracy specially when the intention of the maker is dear. Accordingly, I am satisfied that the inaccuracy is not a suspicious circumstance which can be explained by reading into it the word "legitimate".

13. Mr. B.L.N. Swamy, learned Counsel for the Appellants submitted that the witnesses are so discrepant in their visions that genuineness of the Will cannot be accepted. It is true that the witnesses have not spoken parrot-like. It is not uncommon that witnesses at times, exaggerate or suppress so as to be acceptable to every one. At times they speak in a manner a fact has been imprinted on their minds. It is to be remembered that they speak of a fact long after it happened. With much happenings in their day to day life, the overlapping of facts in the mental faculty to give rise to confusion is not uncommon. Court is to read the evidence as a whole and get an impression of the correctness of the facts stated by a Witness. That is why witnesses are examined normally in the Court itself so that the Presiding Officer shall have an impression of the witness. Appreciation of a witness by the trial court is not to be discarded by the appellate court which is a Court of record only easily unless trial court having failed to give weight to a particular fact or on reading the evidence as a whole, the view taken by the trial court becomes unreasonable. Assessed in the aforesaid standard, I am not satisfied that the appreciation of evidence by the trial court is to be interfered with in the present case. For the reasons stated by the trial court and in view of the discussions as made in this judgment, I am satisfied that Kamalnath executed the Will (Ext. 10) in his own hand and made the disposition of his property understanding what he was doing. Requirement of attestation of

the Will is also satisfied. Circumstances which might have created suspicion have been explained in the Will and by the witnesses. Added to it, P.W. 2 the step brother of the propounder P.W. 5 and the evidence of P.W. 6. the mother who is equally interested in all children is such that the Will (Ext. 10) cannot be doubted in any manner.

14. In the result, this appeal has no merit which is accordingly dismissed with costs.

P.C. Misra, J.

I agree.

Appeal dismissed.