

(2012) 12 JH CK 0023

In the Jharkhand High Court

Case No : Appeal from Original Decree No. 02 of 2004

Sanjay Kumar Raha @ Sanjeev Kumar Raha and Others

APPELLANT

Vs

Michael Tigga and Others

RESPONDENT

Date of Decision : 21-12-2012

Acts Referred:

Chotanagpur Tenancy Act, 1908 — Section 46, 46(4A)
Constitution of India, 1950 — Article 342
Evidence Act, 1872 — Section 68
Succession Act, 1925 — Section 270, 276, 299, 59, 61

Citation : (2013) 3 AJR 581

Hon'ble Judges : P.P. Bhatt, J

Bench : Single Bench

Advocate : P.K. Prasad, V.K. Prasad and Debolina Sen, for the Appellant; Lalit Kr. Lal, Amar Kr. Sinha, K.K. Ambastha, Md. Abdul Wahab and Sandeep Verma, for the Respondent

Final Decision : Allowed

Judgement

P.P. Bhatt, J.—Heard the Learned Counsel for the appellant and the Respondent. Perused the records and proceedings.

2. The present appeal is preferred by the Appellant u/s 299 of the Indian Succession Act, 1925, being aggrieved and dissatisfied by the Judgment and order dated 05th May, 2003 passed by the Learned Additional judicial Commissioner, Ranchi in Probate Case No. 94 of 1995, Title Suit No. 1 of 1998, whereby the application for grant of probate has been dismissed.

3. The brief facts of the case, are as under:-

The applicant/appellant No. 1 initially filed an application for the grant of Probate under Sections 270 /276 of the Indian Succession Act on the basis of the Will dated 20th February, 1994 executed late Poulosh Oraon. Initially, it was registered as Probate Case No. 94 of 1995. According to the Appellant, the Will was duly executed by the deceased Testator and duly attested by the Attesting

Witness including Shri Kaushal Kishore, Advocate, who had also typed the said Will. It is the case of the Appellant that under the aforesaid Will, the Applicant/Appellant No. 1 was appointed as an executor. The Testator-Pouloush Oraon died on 19.07.1994 at Gutua, Barkakana, where he was temporarily residing along with his daughter, the Supporting Appellant No. 3, who was a Staff Nurse in C.C.L. Hospital at Barkakana. At the time of the death of the Testator, he has a fixed place of abode at village-Dibdih, P.S. Argora, District-Ranchi.

4. According to the Appellant, Pouloush Oraon; during his lifetime, had filed a Partition Suit No. 29 of 1975 against his brother Patrash Oraon and final decree was passed in the Partition Suit no. 29 of 1975 and Pouloush Oraon came in possession of his separate share in Execution Case No. 1 of 1984 of the Court of the then Sub-Judge, Ranchi. Patrash Tigga (Oraon), separated brother of Pouloush Oraon filed an objection, objecting to the grant of Probate on the grounds stated in the objection petition. On the basis of said objection made by the objector, Probate Case was converted and registered as Title Suit No. 1 of 1998 in the Court of Learned Judicial Commissioner, Ranchi. It appears from the record of the case that the Applicant/Appellant altogether examined five witnesses:

(i) P.W. 1-Prem Lakra, Treasurer, G.E.L. Church, Dibdih who proved the death of Pouloush Oraon @ Pouloush Tigga and the Death Certificate, issued by the Registrar, Birth & Death, Ranchi (Exhibit-1) and also the burials of the deceased (Exhibit-2/1).

(ii) P.W. 2-Kaushal Kishore, Advocate

(iii) P.W. 3-Amrit Minz

(iv) P.W. 4-U.K. Mishra

(v) P.W. 5-Sanjeev Kumar Raha, Attesting Witness.

5. On behalf of the Supporting Defendants Nos. 1 and 2 (Appellant Nos. 2 and 3), the following witnesses were examined:

(i) D.W. 1-Mariyam Tigga

(ii) D.W. 2-Sudarshan Kujur

(iii) D.W. 3-Satish Chandra

6. On behalf of the Objectors/Respondents, as many as eight witnesses were examined, which are as follows:-

(i) D.W. 1-Sohan Tigga

(ii) D.W. 2-Mangra Oraon @ Kujur Oraon

(iii) D.W. 3-Churwa Oraon

(iv) D.W. 4-Mahadev Tirkey

- (v) D.W. 5-Mangra Oraon
- (vi) D.W. 6-Abhiram Nayak
- (vii) D.W. 7-Surendra Prasad Tiwari
- (viii) D.W. 8-Michael Tigga

7. So far as documentary evidence is concerned, the Plaintiffs/Appellants have brought on record the following:

- (i) Exhibit-1: the death certificate of Pouloush Oraon.
- (ii) Exhibit-2: the Certificate of Church filed in order to prove that Pouloush Oraon was a Christian.
- (iii) Exhibit-2/1: signature of the person granting Exhibit-2.
- (iv) Exhibit-3: Burial Certificate of Pouloush Oraon.
- (v) Exhibit-3/1: Signature of B. Lakra on Exhibit 3.
- (vi) Exhibit 4: will dated 20th February, 1994, alleged to have been executed by Pouloush Oraon.
- (vii) Exhibit 4/1: signature of Kaushal Kishore, Advocate, alleged to have identified the thumb impression of Pouloush Oraon.
- (viii) Exhibit 4/2: signature of Kaushal Kishore, Advocate as one of the Attesting Witness in the alleged Will.
- (ix) Exhibit 4/3: signature of Murti Mini, another Attesting Witness in the Alleged Will.
- (x) Exhibit 4/4: signature of U.K. Mishra, another Attesting Witness in the alleged Will.

8. So far as objectors are concerned, they have brought on record, the following documentary evidence:-

- (i) Exhibit A: Marriage Certificate
- (ii) Exhibit B: the Agreement executed by Pouloush Oraon and Patrash Tigga in favour of Somu Oraon on 16.11.1987, to prove that Pouloush Oraon and Patrash Tigga have described themselves as by caste, Oraon.
- (iii) Exhibit C: certified copy of the order sheet in Permission Case No. 9 of 1994-95 of the Court of Rent Suit Deputy Collector, Ranchi
- (iv) Exhibit D: a certified copy of the Registered deed of sale, dated 16.05.1989, executed by Pouloush Oraon in favour of Smt. Rahil Kujur.
- (v) Exhibit E: signature of Pouloush Oraon in Thumb Impression Register with respect to Exhibit D.

(vi) Exhibit F: the application regarding acquisition of some lands for the purpose of road.

9. On the basis of the pleadings of the parties, following issues were framed by the court below for determination of the case in Paragraph 4 of the judgment:-

(i) Is the application filed by the Petitioner u/s. 270 and 276 of the Indian succession Act, 1925 maintainable?

(ii) Whether the provisions of Section 46 of the C.N.T. Act are to be applicable and whether Pouloush Oraon was required to obtain permission of the Deputy Commissioner, Ranchi for execution of the alleged Will dated 20.02.94?

(iii) Whether Pouloush Oraon executed his last Will and Testament on 20.02.94 as claimed by the Petitioner?

(iv) Whether the execution of the alleged will has been proved by the Petitioner in accordance with the law?

(v) Is the Petitioner entitled to grant of Probate with respect to the alleged Will?

10. The Learned Counsel for the Appellants made the following submissions:-

That Pouloush Oraon, the Testator was a Christian" and not a member of the Scheduled Tribes and this fact has been proven on the basis of the documentary as well as oral evidence, submitted by the Appellants. The learned counsel for the Appellants has referred to the documentary evidences produced by the Appellant/Applicant before the Court below namely, Exhibit-1, the death certificate and Exhibit-2, Certificate of Church which clearly proves that Pouloush was a Christian. Furthermore, Exhibit-2/1, Exhibit-3, Exhibit-3/1, Exhibit-4, Exhibit-4/1, Exhibit-4/2, Exhibit-4/3 and Exhibit 4/4 have also been adduced to prove the submissions made by the Appellants. The Learned Counsel for the Appellant/Applicant has also relied upon the oral evidence adduced by the Appellant Witness, P.W.-1, Prem Lakra who had identified the death certificate of Pouloush Oraon (Exhibit-1), the Burial Certificate written by C.A.B. Nag (Exhibit-2) and the signature of C.A.B. Nag (Exhibit-2/1). He has also proved another Burial Certificate (marked Exhibit-3), typed by Subodh Ekka bearing the signature of Bishop Bell Lakra (marked Exhibit-3/1). This witness in his cross examination has also stated that Pouloush Oraon had another son. He also had a daughter Mariyam who is married to S.K. Saha and has got 2 sons, Sanjiv Kumar Raha and the nickname of another is Babu. He has further stated in Para 9 of his deposition that no deed, was executed by Pouloush Oraon but he had told him that he would execute the Will. Further, he has also stated that 10-15 days before Pouloush died on 19.07.1994, he had gone to Barkakana. The learned counsel for the Appellant further submitted that P.W.-2, Kaushal Kishore, Advocate has proved the Left Thumb Impression of Pouloush Oraon (Exhibit-4/1) and he further proved that at the time of executing the will, Pouloush Oraon @ Tigga was physically as well as mentally fit. It is further submitted that P.W.-3 and P.W.-4, both are attesting witnesses and were examined by the Court to

prove the genuineness of the Will. The Supporting Defendants nos. 1 and 2, who were Appellant Nos. 2 and 3 in the present appeal were also examined as witnesses i.e. Mariyam Tigga, Subardhan Kujur Santosh Chandra and they have fully supported the Applicant's case for grant of probate. The learned counsel for the Appellant further submitted that on the bare perusal of the documentary evidence of the eight witnesses examined by the Objectors/Respondents, it would clearly suggest that Pouloush Oraon @ Pouloush Tigga and the other family members had converted into Christianity. It was further submitted that the Court below had not properly considered the oral and the documentary evidence and had erred in not believing Pouloush Oraon to be a Christian and not a member of the Scheduled Tribes and as being governed by the customary laws in the matters of succession and inheritance. The learned counsel for the Applicant/Appellant further submitted that according to the admissions of witnesses examined by the objectors/besides the documentary evidence, it is proved that Pouloush Oraon was a Christian and not a member of the Scheduled Tribes. The learned counsel has relied on the oral evidence of Defendant Witness No. 1, Sohan Tigga in paragraphs 5 and 6 and then Defendant Witness 2, Mangra Oraon in paragraphs 4 and 5, Defendant Witness 3, Churwa Oraon, in paragraphs 2 and 4 and Defendant Witness 4, Mahadeo Tirky in paragraph 2. According to the Learned Counsel for the Applicant, these witnesses have admitted that the Testator was a Christian and followed Christian traditions and customs. Also, that Patrash was a Christian and they had been Christians since over a generation. Over and above the learned counsel has also relied on the documentary evidence i.e. Exhibited documents mentioned above in addition to Exhibit-A exhibited by the Defendants proving that the marriage of Testator's daughter was held at G.E.L. Church, Dibdih, Ranchi. In the light of the admissions of D.W. 1, 2 and 3, the learned counsel for the Applicant/Appellant has submitted that Pouloush and Patrash were Christians. The Learned Counsel for the Appellants/Applicants has also relied on the judgment *Mrityunjoy Sett (D) by Mritunjoy Sett (D) by L.Rs. Vs. Jadunath Basak (D) by L.Rs.*, and has submitted that admission is the best piece of evidence. The learned Court below failed to consider this aspect and erred. Admissions made in a Court of Law are a valid and relevant piece of evidence to be used in other legal proceedings. Since an admission originates (either orally or in written form) from a person against whom it is sought to be produced, it is the best form of evidence. In a judgment of the Privy Council, *Kamavati v. Digbijai Singh*, 1922 PC 14, marriage certificate and Burial Certificates were considered as proof to the fact that a person was a Christian. Likewise, in *Ranbir Karam Singh Vs. Jogindra Chandra Bhattacharji and Others*, , similar view has been taken. The Learned Counsel has also referred to and relied upon the judgment reported in *State of Kerala and Another Vs. Chandramohanan*, which has distinguished *Kartik Oraon Vs. David Munzni and Another*, and held that on the basis of evidence it can be established that the convert has left all his previous customs and functions.

11. It is further submitted that the Applicant of a Probate Case is only required to

prove due execution and attestation. The Probate Court only has jurisdiction to see the genuineness of the Will. The question of right, title and interest are wholly beyond the jurisdiction of the Probate Court and even after grant of Probate, suit for title can be filed. The Probate Court also cannot decide as to whether the bequest is good, valid and as to whether they properly exist or not. Section 68 of the Evidence Act and Sections 59 and 63 of the Indian Succession Act are the only scope within which a Probate Court has to confine itself and for proving this, the Applicant has examined the Advocate, who scribed the Will as P.W. 2 and attesting witnesses P.W. 3 and P.W. 4. Thus, evidence shows that Pouloush went to P.W. 2 for drafting the Will. P.W. 2 typed the Will and thereafter, the same was executed and attested at the house of Pouloush, who read over and explained the contents of the Will and thereafter, he executed the same. In this context, the Learned Counsel for the Appellants has referred to and relied upon the following decisions:-

12. The next point which was argued by the learned counsel for the Appellants is with regard to suspicious circumstances. It is submitted that the propounder of the Will may be required to dispel any suspicious circumstance. By referring to the judgment reported in *Madhukar D. Shende Vs. Tarabai Aba Shedage*, wherein, it was held that wayward suspicion and pelting of stones is not permissible. By referring to paragraphs 16 and 18 of the judgment reported in *Savithri and Others Vs. Karthyayani Amma and Others*, the Learned Counsel for the Appellants submitted that once due execution and attestation is proved, onus of propounder stands discharged. Onus is on the objectors to prove non-genuineness. It is further submitted that it is not the most important factor is that it is not the case of the objector nor is there any such evidence to show that Mariyam and her children in whose favour Will was executed were either present or took any part in the making of the Will. It is further submitted that merely because other deeds have been executed after taking permission, is of no consequence, since no deed or document recorded in respect of Khatiyans containing the word "Oraon" is registered. Such Khatiyans were prepared either during 1910-1911 or 1932-1934. Further, the purchasers also want to feel safe and secure and insist for taking permission. This does not, however, decide the caste or religion, which has to be decided on evidence on record. The Learned Counsel for the Appellant further submitted that it is not necessary that the Testator must be in a perfect state of health and mind and on this context by referring to the judgment reported in AIR 1965 Punjab 204, it is submitted that merely because the testator is a literate, the Will does not become suspicious on the ground that the Testator has given his L.T.I. In this context, the Learned Counsel for the Appellants has relied on the following three decisions:-

(i) AIR 2010 (NOC) 913 (CAL)

(ii) *Misri Lal (dead) by LRs. and another Vs. Smt. Daulati Devi and another*,

(iii) *Sushila Bala Saha Vs. Saraswati Mondal*, ,

The Learned Counsel for the Appellant further submitted that the objectors are untrustworthy and are not entitled to any relief and for this purpose, the conduct of the objectors has been extremely improper and they have taken such stand which makes them wholly untrustworthy and the Court should consider their case with a law of caution. For this purpose, the Learned counsel for the Appellants invited attention to certain relevant facts which are as follows:-

(a) In the objection, the objectors have stated that Mariyam was not the daughter of Poulous and last rites were done by Michael, D.W. 3. However, in their evidence, all the objectors have admitted Mariyam as daughter of Poulous and that Pouloush was buried at G.E.L. Church, Dibdih by Mariyam. Thus, a false case was pleaded.

(b) Disputed properties were allotted to Poulous by final decree in partition suit followed by Execution Case against his brother Patras. Poulous executed a Power of Attorney (Exhibit-1) in favour of his daughter, Mariyam, giving her full power over his properties. Realizing that Mariyam lives at Barkakana, Poulous was apprehensive that Patras and his sons will create hurdles for Mariyam. As such Poulous executed the Will dated 20.02.1994 (Exhibit-4). He also wanted to sell his own property so that he may hand over the proceeds to his own (laughter and grandchildren. However, from Exhibit-C proved by the Defendants it is established that Patras filed objection in permission although he had no right to do so with respect to the properties of Pouloush. The said permission case was ultimately dragged so much that Pouloush died and was substituted by his daughter in presence of Patras even thereafter, Patras in his objection asserted that Mariyam is not related to Pouloush.

In this context, the learned counsel has referred to and relied upon the decision reported in (2012) SCCR 565.

13. The learned counsel for the Appellants further submitted that the Indian Succession Act is not applicable to the members of Scheduled Tribe but Pouloush and Patras were Christians so the Act should apply to them. It is further submitted that the Learned Trial Court even after recording an incorrect finding that Pouloush was a Oraon could not have given any further finding on any other question and therefore, all the other findings are without jurisdiction. By referring to Paragraph 16 of the judgment of the Learned Trial Court, it is lastly submitted that this point was also not raised in the objection and while deciding the Issue No. 1, the Learned Trial Court has also not taken any note of any such submission.

14. As against that, the Learned Counsel for the Respondents/Objectors has referred to the objections filed by Patras Tigga in the court below and in particular referred to paragraphs 7, 8, 9, 12, 13 and 16 of the said objections. The Learned counsel for the Respondents has referred to the documentary evidence produced by the Defendant, i.e. Exhibit A and Exhibit B wherein, according to the Learned Counsel, in these documents, Pouloush Oraon and

Patrash Oraon have described themselves as Oraon by caste. By referring to Exhibit C, it is submitted that this application was made on 04.04.1994 seeking permission u/s 46 of the C.N.T. Act and this date is subsequent to the execution of the Will and for which permission was sought u/s 46 of the Act, subject matter of the alleged Will. According to the Learned Counsel for the Respondents, Exhibit C and the factum of application made u/s 46 of the C.N.T. Act itself creates doubt about the authority of the Will. He has also referred to Exhibit D wherein Pouloush Oraon has been described by Caste as "Oraon". It is further submitted that in this document also, Pouloush Oraon has put his signature and not the thumb impression. It is submitted that the land, which has already been sold cannot be part of the Will and therefore, according to the learned counsel for the Respondents, this is also one of the suspicious circumstances. The Learned Counsel for the Respondents has also referred to Exhibit E, where Pouloush Oraon has put his signature against his thumb impression. Therefore, according to the Learned Counsel for the Respondents, Exhibit E clearly indicates that he was a literate person. By referring to Exhibit F, the learned counsel for the Respondents pointed out that this document is an application regarding acquisition of land for the purpose of development of a road and therefore, the land under acquisition cannot be bequeathed by the testator Pouloush Oraon under the Will. However, the said land has been bequeathed by Pouloush under the Will.

15. The Learned Counsel for the Respondents has also referred to the oral evidences given by P.W. 1 in paragraphs 9, 10, and 11; P.W. 2 in paragraphs 22, 23, 24 and 26; P.W. 3 in paragraphs 11, 12, 20 and 23; P.W. 4 in paragraphs 13, P.W. 5 in paragraphs 33, 36 and 45. The Learned Counsel for the Respondents by referring to the aforesaid documentary evidences submitted that it becomes clear that Pouloush Oraon was belonging to the Scheduled Tribe and was a literate person and permission of the Deputy Commissioner u/s 46 of the C.N.T. Act was required for transferring land to a member of the Scheduled Tribes. The transfer by Will also requires permission u/s 46 proviso (a) of the C.N.T. Act. The learned counsel for the Respondents further submitted that on the basis of documentary and oral evidence on record it is also proved that there was due execution of the Will and the Applicants have failed to dispel suspicious circumstances. The Learned Counsel for the Respondents also referred to the oral and documentary evidence produced by the Objectors and the oral evidences adduced by the defendant witnesses i.e. D.W. 1 in paragraphs 1, 2 and 3; D.W. 2 in paragraphs 3; D.W. 3 in paragraphs 2; D.W. 4 in paragraphs 1; D.W. 5 in paragraphs 1; D.W. 6 (formal witness); D.W. 7 and D.W. 8 in paragraphs 5, 9 and 14. The learned counsel for the Respondents further submitted that the Testator belongs to the Oraon community which in view of the notification issued under Article 342 of the Constitution of India classifies as Scheduled Tribe and therefore, the transfer is regulated by Section 46 of the CNT. Act. It is further submitted that the same is not valid u/s 59 of the Indian Succession Act. In this context, the learned counsel has referred to illustration 3 of the said provision. It is further submitted that

suspicious circumstances dispel from the material on record. It is further submitted that the Will, which is produced vide Exhibit 4; nowhere indicates that Pouloush Oraon was a Christian. It is also submitted that since it was not pleaded before the Learned Court below that Pouloush was a Christian, in the absence of pleadings it is not permissible to adduce evidence. In this context, the decision reported in 2011 S.C.A.R. 897 has been relied upon.

16. The learned counsel for the respondents has also relied upon the following decisions to support his case:-

(i) Kartik Oraon Vs. David Munzni and Another, , in absence of pleadings, evidence cannot be adduced.

(ii) Janki Missir and Another Vs. Dharamraj Missir and Others,

(iii) Rambriksha Gupta Vs. State of Bihar and Others, prior permission u/s 46 of the C.N.T. Act is required before transfer of any property.

(iv) 2011 (4) J.L.J.R. 337

(v) Madhu Kishwar and others Vs. State of Bihar and others,

(vi) Kalyan Singh Vs. Smt. Chhoti and Others,

(vii) 2012 SCR 621

It is further submitted that the testator had himself stated that Mariyam was his only daughter and therefore, as per the customary laws of the Oraons, of which Pouloush Oraon was himself a member, female members cannot inherit property by succession. It is further submitted by the Learned Counsel for the Respondents that as per section 46 proviso (a) of the C.N.T. Act, prior permission is required before the transfer of property including transfer by way of Will. Since no prior permission was obtained in this case, the alleged Will is in clear contravention of the said provision. It is also submitted that fraud has been played and in view of Section 61 of the Indian Succession Act, 1925, the Will obtained by fraud cannot be treated as a genuine Will. Also, the Will was in English whereas there is evidence to show that the Testator did not know English language. Further, there is no endorsement in the Will that it had been read and explained to the Testator in Hindi and on account of such suspicious circumstances, the Court below has rightly rejected the Probate Application. The learned counsel for the Respondents has pointed out by referring to paragraphs 19, 20 and 22 of P.W. 2, Paragraph 6 of P.W. 3 and paragraph 25 of P.W. 4 that there are suspicious circumstances and that the Will is not a genuine Will but forged and fabricated with a view to inherit the property of Pouloush Oraon. The learned counsel for the Respondents finally submitted that the learned court below after careful consideration of the oral as well as documentary evidence on record and after examining each and every issue raised in the proceedings had dismissed the Probate Application and there is no substance in the Appeal filed by the Appellant and the same deserves to be dismissed.

17. The learned counsel for the Appellant while replying to the issue raised by the opponent that there was no pleading in the Probate Application that Pouloush was a Christian, submitted that the application for grant of Probate Was filed u/s 276 of the Indian Succession Act, which clearly provides about the particulars, required to be stated in the application. There is no requirement to plead such a fact. u/s 276 of the Act, on objection being raised, the proceedings become contentious. According to the learned counsel for the Appellants, the objectors had raised a contention that Pouloush was a member of the Scheduled Tribe and not a Christian. So the contention raised was put at issue, parties entered trial, led evidences and then the trial court gave a finding. So, there is no requirement in law to plead such a fact in the application u/s 276, as the application made thereunder is not a plaint. It is further submitted that if the parties are not aware of the issue involved and have led evidence then deficiency in pleading, docs not cause any prejudice. In this context, the learned counsel for the Appellant has referred to and relied upon the decision reported in Shri Mundri Lal Vs. Smt. Sushila Rani and Another, .

18. In reply to the contention of the Learned Counsel for Respondents that since permission u/s 46 of the C.N.T. Act was not taken, the Will is void, the learned counsel for the Appellants submitted that the Testator was a Christian and a member of Scheduled Tribe and therefore, Section 46 is not applicable. Alternatively, it is submitted that if Will is a transfer, then for violation of Section 46, remedy lies by filing an application u/s 46(4-A) of the C.N.T. Act. It is also submitted that evidence can be led to show that Pouloush did not follow Tribal customs but followed Christianity. The Learned Counsel for the Applicant has shown several admissions of Objector"s Witnesses and several documents which prove that both Poulush and Patrash were Christian who followed Christianity and not tribal customs and such evidence is admissible in view of the following decisions:-

(i) Lakshmi Narayan Tudu @ Lakshmi Narayan Manjhi Vs. Smt. Basi Majhian and Others, .

(ii) Ram Nath Munda and Another Vs. Khaintu Munda and Another, .

(iii) State of Kerala and Another Vs. Chandramohanan, which has distinguished Kartik Oraon Vs. David Munzni and Another, .

19. Considering the aforementioned rival submissions and on perusal of the impugned judgment and order as well as the material on record i.e. the documentary as well as oral evidence of the parties, referred hereinabove, it appears that the court below has reached the conclusion that Pouloush Oraon was a Oraon by caste and a member of the Scheduled Tribe being governed by the customary laws of the Scheduled Tribes, though, documentary and oral evidence available on record clearly shows that Pouloush was a Christian by community. By referring to Exhibits 1 and 2, the death certificate of Pouloush Oraon and the Certificate of the Church respectively filed in order to show that

Pouloush was a Christian, Exhibit 2/1 and Exhibit 3, duly signed Burial Certificate of Pouloush Oraon shows that he was a Christian. The court below failed to appreciate the evidence produced by these documents. Furthermore, Exhibit A proves that the marriage of the Testator was held at G.E.L. Church, Dibdih in 1960. This is also suggestive of the fact that Pouloush Oraon was a Christian by caste and was following ceremonies of a Christian Community. The marriage of his daughter was also performed in G.E.L. Church Dibdih, Ranchi. Therefore, on perusal of the oral evidence of the plaintiff witnesses in this regard as well as the defendant witnesses i.e. D.W. 1 in paragraphs 5 & 6; D.W. 2 in paragraphs 4, 5 & 6; D.W. 3 in paragraphs 2 & 4 and D.W. 4 in paragraphs 2 have admitted that the Testator was a Christian and followed Christian traditions. Patrash was also a Christian and they were Christians since generations. The judgment relied upon by the Learned Counsel for Appellants reported in 2011 SCCR 660, wherein it is held that admission is the best piece of evidence, is applicable in this case as per the admissions made by the defendant witnesses. Moreover, another decision is also applicable to the facts and circumstances of this case reported in AIR 1922 14 (Privy Council) wherein it was held that Marriage Certificate and the Burial Certificate are considered as proof of the fact that the person is a Christian. Thus, it appears from the material on record that there was sufficient oral and documentary evidence on record to show that Pouloush Oraon was a Christian and had followed the Christian ceremonies throughout his lifetime including the marriage ceremony of his daughter which was performed in a Church. However, the court below has not properly appreciated the evidence which clearly establishes that Pouloush Oraon was a Christian.

20. The argument advanced by the learned counsel for the Respondents that there was no pleading in the Probate application that Pouloush was a Christian and therefore, plaintiff cannot be allowed to adduce any evidence in absence of any pleading, cannot be accepted looking to the facts of the present case. The present case has been arising out of a Probate application and therefore, the Application is required to be made in view of the provision contained in Section 276 of the Indian Succession Act, which specifies certain particulars which have to be furnished. On perusal of Section 276 and the particulars, which have been specified therein, it appears that there is no requirement to plead such a fact. The objectors had raised a contention that Pouloush was a member of the Scheduled Tribe and not a Christian. So, the contention raised in the objection was put at issue, parties entered trial, led evidences and then the trial court gave a finding, therefore, I found substance in the arguments advanced by the learned counsel for the Appellants that there is no requirement in law to plead such a fact in an application made u/s 276 of the Indian Succession Act, which is not a plaint. Further, if parties are aware of the issues involved and have led evidence, then deficiency in pleadings does not cause any prejudice as held in *Shri Mundri Lal Vs. Smt. Sushila Rani and Another*, . Moreover, I also found substance in the argument advanced by the learned counsel for the Appellants with regard to scope of proceedings before the Probate Court. The Applicant of a Probate Case

is only required to prove due execution and attestation. The Court dealing with Probate Case has jurisdiction to see only the genuineness of the Will. The question of right, title and interest are wholly beyond the jurisdiction of the Court dealing with Probate Case. Even after grant of Probate, the Suit for title can be filed by the party, claiming right, title and interest. The Probate Court cannot decide as to whether bequest is good, valid and as to whether the property exists or not. Section 68 of the Indian Evidence Act, 1872 and Sections 59 and 63 of the Indian Succession Act are the only scope which the Probate Case has to find itself. The same are reproduced below for ready reference:-

Indian Evidence Act, 1872-

68. Proof of execution of document required by law to be attested--If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence:

[Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.]

Indian Succession Act, 1925-

59. Person capable of making wills--Every person of sound mind not being a minor may dispose of his property by Will.

Explanation 7.--A married woman may dispose by will of any property which she could alienate by her own act during her life-

Explanation 2.--Persons who are deaf or dumb or blind are not thereby incapacitated for making a will if they are able to know what they do by it.

Explanation 3.-A person who is ordinarily insane may make a will during interval in which he is of sound mind

Explanation 4.--No person can make a will while he is in such a state of mind, whether arising from intoxication or from illness or from any other cause, that he does not know what he is doing.

63. Execution of unprivileged will--Every testator, not being a soldier employed in an expedition or engaged in actual warfare, 1 [or an airman so employed or engaged,] or a mariner at sea, shall execute his will according to the following rules:--

(a) The testator shall sign or shall affix his mark to the will, or it shall be signed by some other person in his presence and by his direction.

(b) The signature or mark of the testator, or the signature of the person signing

for him, shall be so placed that it shall appear that it was intended thereby to give effect to the writing as a will.

(c) The will shall be attested by two or more witnesses, each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will, in the presence and by the direction of the testator, or has received from the testator a personal acknowledgment of his signature or mark, or of the signature of such other person; and each of the witnesses shall sign the will in the presence of the testator, but it shall not be necessary that more than one witness be present at the same time, and no particular form of attestation shall be necessary.

21. Another issue with regard to suspicious circumstances, as raised by the learned counsel for the Respondents cannot be accepted in view of the judgment referred to an relied upon by the learned counsel for the Appellants is in the case of Savithri and Others Vs. Karthyayani Amma and Others, . Paragraphs 16 and 18 of the aforesaid judgment are relevant for the purpose of deciding this case and the same are reproduced herein below:-

16. It is not correct to contend that DW 2 could not have been attesting witness. He in his deposition categorically stated that he had seen the Will being read over to the propounded The Witnesses and he had seen Sankaran Nair putting his signature on the Will. Sankaran Nair had also seen the Witnesses putting their signatures. This satisfies the requirements of Section 63 of the Succession Act, 1925 and Section 68 of the Evidence Act, 1972. (See Apoline D'Souza v. John D'Souza)

18. We may, however, notice that according to the Appellants themselves, the signature of testator on the Will was obtained due to undue influence or coercion. The onus the same was on them. They have failed to do so. If the propounder proves that the Will was signed by the Testator and he at the relevant time was in sound disposing state of mind and understood the nature and effect of the disposition, the onus stands discharged. For the aforementioned purpose the background fact of the attending circumstances may also be taken into consideration." (See B. Venkatamuni v. C.J. Ayodhya Ram Singh).

In view of the above decision, once the due execution and attestation is proved, onus of the propounder stands discharged. The onus also is on objector to prove the non-genuineness. The most important factor is that it is not the case of the objector nor is there evidence to show that Mariyam and her children, in whose favour, the Will was executed were either present or took any part in the making of the Will. Merely because other deeds have been executed after taking permission, is of no consequence since no deed of document recorded in respect of Khatiyani containing the word Oraon is registered. Such Khatiyans were prepared either during 1910-11 or during 1932-34. Moreover, I also found substance in the arguments advanced by the learned counsel for the Appellants that the purchasers also want to feel safe and secure and thus insist for taking

permission, this does not, however, decide the caste or religion, which has to be decided evidence on record. From the evidence on record, it appears that for the purpose of proving the Will, the Applicant has examined the Advocate, who subscribed the Will as P.W. 2 and attesting Witness, namely, P.W. 3 and P.W. 4. Evidence shows that Pouloush went to P.W. 2 for drafting the Will. P.W. 2 typed the Will and thereafter, the same was executed and attested at the house of Pouloush, who read over and explained the contents of the Will and thereafter, executed the same.

Looking to the facts and circumstances discussed above, the following judgments appear to be relevant and applicable:-

The propounder of the Will may be required to dispel any suspicious circumstances. Paragraph 8 of the judgment reported in *Madhukar D. Shende Vs. Tarabai Aba Shedage*, , appears to be applicable for determination of the present case, which is reproduced herein below:-

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 68 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 way layers. What was told by Baron Alderson to the Jury in *R v. Hodge* 1838, 2 Lewis CC 227 may be apposite to some extent "The mind was apt to take a pleasure in adapting circumstances to one another and even in straining them a little, if need be, to force them to form parts of one connected hole; and the more ingenuous the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete." 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."

22. The Hon''ble Apex Court in the aforesaid judgment held that suspicion and pelting of stones is not permissible. Moreover, in view of the judgment referred to and relied upon by the learned counsel for the Appellants in the case of Chhanga Singh Indar Singh Vs. Dharam Singh and Others, , it is not necessary that the testator must be in a perfect state of health and mind. The learned counsel for the Respondents, tried to point out from the oral evidence adduced by some of the defendants witnesses that Pouloush Oraon was of a very old age and not keeping good health but in view of the aforementioned judgment, it is not necessary that a Testator must be in perfect state of health and mind. Moreover, according to the evidence of some of the Witnesses, it transpires that Pouloush Oraon was capable of executing the Will. Therefore, the argument advanced by the learned counsel for the Respondents in this regard cannot be accepted. Another argument regarding suspicious circumstances put forth by the learned counsel for the Respondents is that Pouloush Oraon was a literate person according to the oral evidences adduced by the defendant witnesses, but on the alleged Will he had not put his signature rather he had put his L.T.I. This further gives rise to suspicious circumstances. However, this argument cannot be accepted in view of the judgments reported in (i) AIR 2010 NOC 913 (Cal.), (ii) Misri Lal (dead) by LRs. and another Vs. Smt. Daulati Devi and another, and (iii) Sushila Bala Saha Vs. Saraswati Mondal, , wherein the Court has held that the Will docs not become suspicious merely on the ground that the Testator has given his left thumb impression even though he is a literate person.

23. Another argument advanced by the learned counsel for the Respondents regarding the applicability of Section 46 of C.N.T. Act is not applicable to the facts and circumstances of the present case because Pouloush Oraon cannot be treated as a member of the Scheduled Tribe and from the evidence on record, it is established that Pouloush Oraon was Christian and was following Christian customs and traditions. Thus, the question of the applicability of the C.N.T. Act does not arise. Some of the defendant witnesses have also admitted in their oral evidences that Pouloush Oraon and his daughter were following Christian religion and admission is the best piece of evidence as discussed earlier. Moreover, this Court also finds substance in the arguments advanced by the learned counsel for the Appellants that the objectors are untrustworthy and therefore, not entitled to any relief. The learned counsel for the Appellants has already brought within our observation the relevant facts which have already been mentioned in paragraph 14 of this judgment, according to which the conduct of the objectors appear to be improper and they have taken such stand, which makes them wholly untrustworthy. In this context, the decision which has been cited by the learned counsel for the Appellants reported in 2012 SCCR 565 is also relevant, looking to the facts of this case. The argument advanced by the learned counsel for the Respondents that the Indian Succession Act is not applicable to the members of the Scheduled Tribes has no relevance, since from the material on record, it is established that the Testator was a Christian and thus, the Indian Succession Act will be applicable to him.

24. In view of the above discussion, and more particularly in view of the above oral and documentary evidence discussed, hereinabove, this Court is of the view that the judgment and order passed by the learned court below, is contrary to the evidence and material on record and therefore liable to be set aside. The learned Court below ought to have applied the principle of the Indian Succession Act in view of the evidence brought on record by the parties, which went beyond all doubts to prove that Pouloush Oraon converted into a Christian and followed the Christian religion and practices. It also appears that the learned Court below failed to critically examine and scrutinize the document on record and has arrived at an erroneous finding. The learned Court below is required to examine only questions that are relevant for determination of grant of Probate and for that purpose, the Court below was required to examine as to whether the Will in question was genuinely executed in accordance with law or not but it appears that the learned Court below instead of examining the said aspect, has unnecessarily gone into irrelevant enquiries, which was alien to the proceedings for grant of Probate.

25. Moreover I also found substance in the argument advanced by the learned counsel for the appellants that a prudent father will bequeath property to his legal heir and successor. In the instant case Polous Oraon bequeathed property in favour of his only daughter, Mariyam. Pouloush Oraon acquired property as a result of partition. The Polous Oraon's brother Patras got his share in the partition. However, with a view to grab the property of Pouloush Oraon, attempt has been made. The court below failed to appreciate this very vital and material aspect of the case.

26. Under the circumstances, the judgment and order passed by the Learned Court below deserves to be set aside. Hence, the Judgment and order dated 05th May, 2003 passed by the Learned Additional Judicial Commissioner, Ranchi in Probate Case No. 94 of 1995, Title Suit No. 1 of 1998, is hereby ordered to be quashed and set aside. The Appeal, preferred by the present Appellant is allowed accordingly.