
(2013) 05 MP CK 0096
In the Madhya Pradesh High Court
Case No : S.A. No. 111 of 1996

Sitaram Dubey (since deceased) by LR.s. Smt. Geeta Dubey and Others APPELLANT

Vs

Manaklal (since deceased) by LR.s. Smt. Raina Bai and Others RESPONDENT

Date of Decision : 02-05-2013

Acts Referred:

Evidence Act, 1872 — Section 114, 45, 47, 67, 68
Registration Act, 1908 — Section 58
Succession Act, 1925 — Section 59, 63

Citation : (2013) ILR (MP) 1406 : (2013) 4 MPHT 48 : (2013) 3 MPLJ 114

Hon'ble Judges : R.S. Jha, J

Bench : Single Bench

Advocate : T.S. Ruprah, with Harpreet Ruprah, for the Appellant; Manoj Sanghi and Sankalp Sanghi, for the Respondent

Final Decision : Partly Allowed

Judgement

R.S. Jha, J.—The appellants/defendants have filed this appeal being aggrieved by the judgment and decree dated 25-11-1995 passed by the IXth Additional Judge to the Court of District Judge, Jabalpur in Civil Appeal No. 20-A/95 whereby the judgment and decree dated 31-7-1984 passed by the Civil Judge Class-II, Patan, District Jabalpur, in Civil Suit No. 15-A/1983 has been set aside and reversed and the suit filed by the respondent No. 1/plaintiff has been decreed. The brief facts, relevant for deciding this appeal, are that one Mannu (since deceased) had three sons; Nathuram, Tikaram and Udaylal. Udaylal died before he could get married while Nathuram had two sons, Manaklal, the plaintiff/respondent No. 1 (since deceased) and Gokul Prasad. Gokul Prasad died long back leaving behind his son Rameshwar Prasad Dubey, defendant No. 11, the present respondent No. 10. Tikaram, the second son of Mannu, though unmarried, had kept one Kaushalya Bai, widow of Ramdhani, with him.

Manaklal, plaintiff/respondent No. 1, Rameshwar Prasad Dubey, defendant/

respondent No. 10 and Tikaram were jointly in possession of Khasra No. 50, Area 3.994 Hectares of village Khairi. After the death of Tikaram about 20-25 years prior to filing of the suit, the plaintiff/respondent No. 1 Manaklal, Rameshwar Prasad Dubey, defendant No. 11/respondent No. 10 and Kaushalya Bai continued to remain in possession of separate portions of the land comprising Khasra No. 50 Area 3.994 Hectares of village Khairi and in addition Kaushalya Bai also retained possession of Khasra No. 92 Area 1.817 Hectares of Village Hirapur Bandha which she got from her husband Ramdhani as well as part of the house of Tikaram. Kaushalya Bai was staying in the said house alone when she fell down and suffered serious injuries pursuant to which the present appellants/defendants, who are the sister of Kaushalya Bai and the children of Hira Bai, her sister, took her to their house whereafter it is alleged that she executed a registered Will on 27-1-1983 at Jabalpur bequeathing the land bearing Khasra No. 92 Area 1.817 Hectares of Village Hirapur Bandha and the other land situated in village Khairi along with her house to her sister Hira Bai.

Plaintiff Manaklal, being aggrieved, filed a suit for declaration to the effect that they be declared the owner of Khasra No. 50 Area 3.994 Hectares of village Khairi and the land situated at Khasra No. 92 Area 1.817 Hectares Patwari Halka No. 56 of Village Hirapur Bandha as well as the house situated in Village Hirapur Bandha belonging to Tikaram and a declaration to the effect that the Will executed by Kaushalya Bai on 27-1-1983 was fraudulent. The respondents/plaintiffs also sought permanent injunction in respect of the properties in question.

The trial Court dismissed the suit in toto but the First Appellate Court has allowed the appeal filed by the respondents/plaintiffs by the impugned judgment by recording a finding to the effect that Kaushalya Bai was not the legally wedded wife of Tikaram and had no right or interest in his property and, therefore, could not have executed a Will and that the Will, Exhibit D-1, was fraudulent and did not confer any right on the appellants, being aggrieved by which the appellants have filed the present appeal before this Court.

2. This appeal, filed by the appellants, was admitted by this Court on the following substantial questions of law:--

1. Whether the Court below wrongly held that in order to prove the Will dated 27-1-1983, the appellants should have compulsorily examined the scribe of the Will even though the Will was a registered document?
2. Whether the lower appellate Court wrongly refused to consider the cross-objection filed by the appellants and not noticed the fact that Smt. Kaushalya Bai was living as wife of Tikaram for considerable years?
3. Whether under the facts and circumstances of the case, the respondents should claim the property inherited by Kaushalya Bai from her first husband?
4. Whether the Will dated 27-1-1983 was made in suspicious circumstances as

held by the lower appellate Court?

3. The learned Senior Counsel for the appellants, on the strength of the decisions of the Supreme Court rendered in the cases of Sobha Hymavathi Devi Vs. Setti Gangadhara Swamy and Others, and Tulsa and Others Vs. Durghatiya and Others, , submits that as it is an admitted and undisputed fact that Kaushalya Bai lived with late Tikaram as his wife for quite a long period of time, therefore, on the basis of the said long cohabitation she had acquired the status of a wife and was, therefore, entitled to inherit the entire property of Tikaram and was also entitled to Will it to her sister Hirabai and her children, the present appellants.

4. The learned counsel for the appellants, by relying on the decision of the Supreme Court rendered in the cases of H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, ; Shashi Kumar Banerjee and Others Vs. Subodh Kumar Banerjee since deceased and after him his legal representatives and Others, ; Smt. Indu Bala Bose and Others Vs. Manindra Chandra Bose and Another, and N. Kamalam (Dead) and Another Vs. Ayyasamy and Another, , further contended that the First Appellate Court has grossly erred in law in decreeing the suit only on the ground that the appellants failed to examine the scribe of the Will totally overlooking the fact that the law does not require that the scribe be examined and has also not taken into consideration the fact that the Will executed by Kaushalya Bai on 27-1-1983 was a registered Will and was duly proved by the two attesting witnesses, D.W-2 Sharda Prasad and D.W-3 Kishan Singh, as required by the statutory provisions of section 63 of the Indian Succession Act, 1925 (hereinafter referred to as "the Succession Act") and section 68 of the Indian Evidence Act, 1872 (hereinafter referred to as "the Evidence Act") and in such circumstances the Will executed by Kaushalya Bai having been proved, could not have been set at naught on the basis of extraneous consideration.

5. The learned Senior Counsel for the appellants has further submitted that Kaushalya Bai was in possession of the property from two different sources; firstly from her first husband Ramdhani she had inherited Khasra No. 92 Area 1.817 Hectares Patwari Halka No. 56 of Village Hirapur Bandha and secondly, from her second husband Tikaram she had inherited Khasra No. 50 Area 3.994 Hectares of village Khairi. It is submitted that the plaintiff Manaklal could at best claim right to the property that Kaushalya Bai received from Tikaram but he had no claim to the property received by her from her first husband Ramdhani as it is specifically contended by him that she was not the wife of Tikaram, but the appellate Court, without taking into consideration the aforesaid aspect, has decreed the suit filed by the respondents in toto therefore the impugned judgment suffers from perversity and deserves to be set aside.

6. The learned Senior Counsel for the appellants submits that the First Appellate Court has also committed illegality in allowing the appeal filed by the respondents without taking into consideration the cross-objection filed by the

appellants against the finding recorded by the Court below to the effect that Kaushalya Bai was not the wife but the keep of Tikaram.

7. The learned counsel for the respondents, per contra, submits that the First Appellate Court has properly appreciated the evidence of the witnesses and has arrived at a finding that the Will was executed in suspicious circumstances and that Kaushalya Bai had no right to execute the same and, therefore, no substantial question of law arises for adjudication in the present appeal which deserves to be dismissed.

8. I have heard the learned counsel for the parties at length. From a perusal of the judgment of both the Courts below as well as the oral and documentary evidence on record it is evident that there is no evidence on record to indicate or establish that Kaushalya Bai had ever married Tikaram and on the contrary from a perusal of the Will, Exhibit D-1, produced by the appellants/defendants themselves, it is clear that Kaushalya Bai has herself proclaimed and stated that she is the widow of Ramdhani and the keep of Tikaram. This fact has been reiterated by all the witnesses of both the plaintiff and the defendants. In the circumstances it is evident and clear that there is no evidence, proof or assertion on the part of the appellants that Kaushalya Bai was the legally married wife of Tikaram and that the claim of the appellants is based only on the assertion of long cohabitation of Kaushalya Bai with Tikaram. Thus, it is clear and undisputed that Kaushalya Bai was the widow of Ramdhani, her only husband, and that she was never married to Tikaram and, therefore, did not acquire the status of a legally married wife.

9. The contention of the learned Senior Counsel for the appellants to the effect that Kaushalya Bai should be presumed to be the legally married wife of Tikaram on the basis of the undenied and undisputed long cohabitation, cannot be accepted in the absence of any assertion of a legally valid marriage. The decisions of the Supreme Court in the cases of Sibha Hymavathi Devi (supra) and Tulsa and others (supra) relied upon by the learned Senior Counsel for the appellants also do not render any assistance to the appellants as the said decisions lay down the law that in cases where there is a clear and emphatic assertion of marriage followed by long cohabitation, treatment as husband and wife, giving birth to children out of the relationship and proof of the fact that the spouses had no subsisting earlier marriage, then it would give rise to a presumption u/s 114 of the Evidence Act, of a valid marriage.

10. In the instant case, in the absence of any assertion of a legal marriage with Tikaram and on the contrary a clear admittance on the part of Kaushalya Bai herself in the Will that she is the widow of Ramdhani and the keep of Tikaram, a presumption of a legally valid marriage with Tikaram, on the basis of long cohabitation as claimed by the appellants cannot be made and, therefore, the judgments of the Supreme Court relied upon by the appellants do not come to their aid as admittedly Kaushalya Bai was not the legally married wife of deceased Tikaram.

11. In view of the aforesaid undisputed facts, I am of the considered opinion that as Kaushalya Bai had no right in the property of Tikaram i.e. Khasra No. 50 Area 3.994 Hectares of village Khairi, therefore, she could not have executed a Will in that respect in favour of the appellants. On the basis of the aforesaid analysis, it is also clear that as Kaushalya Bai was not related to the respondent No. 1 as asserted by Manaklal himself, therefore, the property inherited by Kaushalya Bai from her husband Ramdhani i.e. Khasra No. 92 Area 1.817 Hectares Patwari Halka No. 56 of Village Hirapur Bandha was her own property and that Tikaram had no right or share in the same and in such circumstances the claim of respondent Manaklal in the said property on the strength of an assertion that it was his ancestral property or the property of Tikaram was and is misplaced and, therefore, the judgment of the First Appellate Court as far as it relates to decreeing of the suit filed by the respondent Manaklal in respect of Khasra No. 92 Area 1.817 Hectares Patwari Halka No. 56 of Village Hirapur Bandha suffers from perversity and non-application of mind.

12. In view of the aforesaid finding recorded by me, substantial question of law Nos. 2 and 3 framed by this Court are answered accordingly.

13. It is next contended that the Will was duly proved by the two attesting witnesses D.W-2 Sharda Prasad and D.W-3 Kishan Singh, as required by section 63 of the Succession Act and, therefore, the First Appellate Court could not have reversed the well reasoned finding recorded by the trial Court dismissing the claim of the respondents/plaintiffs in that regard.

14. The learned counsel for the respondents, per contra, has pointed out several suspicious circumstances and relied upon the decision of the Supreme Court rendered in the case of B. Venkatamuni Vs. C.J. Ayodhya Ram Singh and Others, , to contend that mere proof of execution in terms of section 63 of the Succession Act and sections 67 and 68 of the Evidence Act, is not sufficient as the Courts cannot ignore and, on the contrary, have to take into consideration any suspicious circumstances pointed out by the parties with regard to the genuineness or otherwise of the Will.

15. Before I proceed to decide this question, it is necessary to consider the law in this regard. The law in respect of proof of Wills has been discussed and laid down in detail by the Supreme Court in the case of H. Venkatachala Iyengar (supra) in the following terms:--

18. What is the true legal position in the matter of proof of wills? It is well known that the proof of wills presents a recurring topic for decision in Courts and there are a large number of judicial pronouncements on the subject. The party propounding a Will or otherwise making a claim under a Will is no doubt seeking to prove a document and, in deciding how it is to be proved, we must inevitably refer to the statutory provisions which govern the proof of documents. Sections 67 and 68 of the Evidence Act are relevant for this purpose. u/s 67, if a document is alleged to be signed by any person, the signature of the said person

must be proved to be in his handwriting, and for proving such a handwriting under sections 45 and 47 of the Act the opinions of experts and of persons acquainted with the handwriting of the person concerned are made relevant. Section 68 deals with the proof of the execution of the document required by law to be attested; and it provides that such a document shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution. These provisions prescribe the requirements and the nature of proof which must be satisfied by the party who relies on a document in a Court of law. Similarly, sections 59 and 63 of the Indian Succession Act are also relevant. Section 59 provides that every person of sound mind, not being a minor, may dispose of his property by Will and the three illustrations to this section indicate what is meant by the expression "a person of sound mind" in the context. Section 63 requires that the testator shall sign or affix his mark to the Will or it shall be signed by some other person in his presence and by his direction and that the signature or mark shall be so made that it shall appear that it was intended thereby to give effect to the writing as a Will. This section also requires that the Will shall be attested by two or more witnesses as prescribed. Thus the question as to whether the Will set up by the propounder is proved to be the last Will of the testator has to be decided in the light of these provisions. Has the testator signed the Will? Did he understand the nature and effect of the dispositions in the Will? Did he put his signature to the Will knowing what it contained? Stated broadly it is the decision of these questions which determines the nature of the finding on the question of the proof of Wills. It would prima facie be true to say that the Will has to be proved like any other document except as to the special requirements of attestation prescribed by section 63 of the Indian Succession Act. As in the case of proof of other documents so in the case of proof of Wills it would be idle to expect proof with mathematical certainty. The test to be applied would be the usual test of the satisfaction of the prudent mind in such matters.

19. However, there is one important feature which distinguishes Wills from other documents. Unlike other documents the Will speaks from the death of the testator, and so, when it is propounded or produced before a Court, the testator who has already departed the world cannot say whether it is his Will or not; and this aspect naturally introduces an element of solemnity in the decision of the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. Even so, in dealing with the proof of Wills the Court will start on the same enquiry as in the case of the proof of documents. The propounder would be called upon to show by satisfactory evidence that the Will was signed by the testator, that the testator at the relevant time was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions and put his signature to the document of his own free will. Ordinarily when the evidence adduced in support of the Will is disinterested, satisfactory and sufficient to prove the sound and disposing state of the testator's mind and his signature as required by law, Courts would be

justified in making a finding in favour of the propounder. In other words, the onus on the propounder can be taken to be discharged on proof of the essential facts just indicated.

20. There may, however, be cases in which the execution of the Will may be surrounded by suspicious circumstances. The alleged signature of the testator may be very shaky and doubtful and evidence in support of the propounder's case that the signature, in question is the signature of the testator may not remove the doubt created by the appearance of the signature; the condition of the testator's mind may appear to be very feeble and debilitated; and evidence adduced may not succeed in removing the legitimate doubt as to the mental capacity of the testator; the dispositions made in the Will may appear to be unnatural, improbable or unfair in the light of relevant circumstances; or, the Will may otherwise indicate that the said dispositions may not be the result of the testator's free will and mind. In such cases the Court would naturally expect that all legitimate suspicions should be completely removed before the document is accepted as the last Will of the testator. The presence of such suspicious circumstances naturally tends to make the initial onus very heavy; and, unless it is satisfactorily discharged, Courts would be reluctant to treat the document as the last Will of the testator. It is true that, if a caveat is filed alleging the exercise of undue influence, fraud or coercion in respect of the execution of the Will propounded, such pleas may have to be proved by the caveators; but, even without such pleas circumstances may raise a doubt as to whether the testator was acting of his own free will in executing the Will, and in such circumstances, it would be a part of the initial onus to remove any such legitimate doubts in the matter.

21. Apart from the suspicious circumstances to which we have just referred, in some cases the Wills propounded disclose another infirmity. Propounders themselves take a prominent part in the execution of the Wills which confer on them substantial benefits. If it is shown that the propounder has taken a prominent part in the execution of the Will and has received substantial benefit under it, that itself is generally treated as a suspicious circumstance attending the execution of the Will and the propounder is required to remove the said suspicion by clear and satisfactory evidence. It is in connection with Wills that present such suspicious circumstances that decisions of English Courts often mention the test of the satisfaction of judicial conscience. It may be that the reference to judicial conscience in this connection is a heritage from similar observations made by ecclesiastical Courts in England when they exercised jurisdiction with reference to Wills; but any objection to the use of the word "conscience" in this context would, in our opinion, be purely technical and academic, if not pedantic. The test merely emphasizes that, in determining the question as to whether an instrument produced before the Court is the last Will of the testator, the Court is deciding a solemn question and it must be fully satisfied that it had been validly executed by the testator who is no longer alive.

22. It is obvious that for deciding material questions of fact which arise in applications for probate or in actions on Wills, no hard and fast or inflexible rules can be laid down for the appreciation of the evidence. It may, however, be stated generally that a propounder of the Will has to prove the due and valid execution of the Will and that if there are any suspicious circumstances surrounding the execution of the Will the propounder must remove the said suspicions from the mind of the Court by cogent and satisfactory evidence. It is hardly necessary to add that the result of the application of these two general and broad principles would always depend upon the facts and circumstances of each case and on the nature and quality of the evidence adduced by the parties. It is quite true that, as observed by Lord Du Pareq in 50 CWN 895 (Privy Council) "where a Will is charged with suspicion, the rules enjoin a reasonable skepticism, not an obdurate persistence in disbelief. They do not demand from the Judge, even in circumstances of grave suspicion, a resolute and impenetrable incredulity. He is never required to close his mind to the truth". It would sound platitudinous to say so, but it is nevertheless true that in discovering truth even in such cases the judicial mind must always be open though vigilant, cautious and circumspect.

16. This decision of the Supreme Court has been referred with approval by the Five Judges Bench of the Supreme Court in the case of Shashi Kumar Banerjee (supra) and has been summarized in para-4 as under:--

4. The principles which govern the proving of a Will are well settled; [see H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others, and Rani Purnima Devi and Another Vs. Kumar Khagendra Narayan Dev and Another, The mode of proving a Will does not ordinarily differ from that of proving any other document except as to the special requirement of attestation prescribed in the case of a Will by section 63 of the Indian Succession Act. The onus of proving the Will is on the propounder and in the absence of suspicious circumstances surrounding the execution of the Will, proof of testamentary capacity and the signature of the testator as required by law is sufficient to discharge the onus. Where however there are suspicious circumstances, the onus is on the propounder to explain them to the satisfaction of the Court before the Court accepts the Will as genuine. Where the caveator alleges undue influence, fraud and coercion, the onus is on him to prove the same. Even where there are no such pleas but the circumstances give rise to doubts, it is for the propounder to satisfy the conscience of the Court. The suspicious circumstances may be as to the genuineness of the signature of the testator, the condition of the testator's mind, the dispositions made in the Will being unnatural improbable or unfair in the light of relevant circumstances or there might be other indications in the Will to show that the testator's mind was not free. In such a case the Court would naturally expect that all legitimate suspicion should be completely removed before the document is accepted as the last Will of the testator. If the propounder himself takes part in the execution of the Will which confers a substantial benefit on him, that is also a circumstance to be taken into account, and the propounder is required to remove the doubts by clear and satisfactory evidence. If the

propounder succeeds in removing the suspicious circumstances the Court would grant probate, even if the Will might be unnatural and might cut off wholly or in part near relations. It is in the light of these settled principles that we have to consider whether the appellants have succeeded in establishing that the Will was duly executed and attested.

17. This legal proposition has again been reiterated by the Supreme Court in the case of B. Venkatamuni (supra), after taking into consideration several judgments of the Supreme Court including H. Venkatachala Iyengar (supra), in the following terms:--

24. The Division Bench of the High Court was, with respect, thus, entirely wrong in proceeding on the premise that compliance of legal formalities as regards proof of the Will would subserve the purpose and the suspicious circumstances surrounding the execution thereof is not of much significance.

25. The suspicious circumstances pointed out by the learned District Judge and the learned Single Judge of the High Court, were glaring on the face of the record. They could not have been ignored by the Division Bench and in any event, the Division Bench should have been slow in interfering with the findings of fact arrived at by the said Courts. It applied a wrong legal test and thus, came to an erroneous decision.

18. Similar view has also been taken by the Supreme Court in the case of S.R. Srinivasa and Others Vs. S. Padmavathamma, and on taking the same view has further observed in the case of Balathandayutham and Another Vs. Ezhilarasan, as follows:--

19. The law, thus, laid down in H. Venkatachala is still holding the field and this Court has followed the same in various other judgments. [See. Madhukar D. Shende Vs. Tarabai Aba Shedage, ; Niranjan Umeshchandra Joshi Vs. Mrudula Jyoti Rao and Others, and Savithri and Others Vs. Karthyayani Amma and Others,

19. In view of the law laid down by the Supreme Court in the aforecited decisions it is clear that while generally a Will is required to be proved in accordance with the provisions of sections 59 and 63 of the Succession Act and sections 67 and 68 of the Evidence Act, apart from being required to be proved like any other ordinary document, however in cases where the execution of the Will is surrounded by suspicious circumstances, the propounder, apart from the statutory requirements is also required to remove all legitimate suspicions to the satisfaction of the judicial conscience of the Court and whether it is necessary or otherwise to examine the scribe or any other witness apart from the attesting witnesses of the Will, would depend on the facts and circumstances of each case.

20. This Court is required to examine the facts of the present case in the light of the aforesaid parameters and principles of law. In the instant case there are several suspicious circumstances surrounding the execution of the Will which have been taken into consideration by the First Appellate Court and have been

highlighted by the respondents before this Court. From a perusal of the record it is clear that the Will dated 27-1-1983 is a registered Will but the Registering Officer or any other personnel from the office of the Registrar has not been examined. There is no endorsement in the Will by the Registering Officer as required by section 58 of the Registration Act nor is there any statement to the effect that Kaushalya Bai was of sound mind and that the Will was read out to and was understood by her. The Advocate, who is said to have drafted the Will Shri Chunnilal Soni has also not been examined nor has he made any endorsement in the Will to the effect that it was drafted in accordance with her instructions and it was read out to Kaushalya Bai who was of sound mind and that she understood and approved it. In fact, the only endorsement on the Will is to the effect that the Will is drafted in the office of the said Advocate. It is also clear from the statement of D.W-1 Hirabai that Kaushalya Bai was about 100 years old and extremely sick and the statement of defendant No. 11/respondent No. 10 Rameshwar Prasad Dubey that when he went to visit Kaushalya Bai who had suffered injuries on account of her fall, she was not in a fit mental state. It is also clear that though D.W-1 Hirabai has stated that Kaushalya Bai was examined by a doctor at the village and that she was extremely sick, the statement of the doctor who examined her locally or the doctor who subsequently examined her at Jabalpur to whom Kaushalya Bai was taken for treatment, have not been recorded to establish that she was of sound mind or in a fit mental state and was able to understand things at the time when the Will was executed. The facts also establish that Kaushalya Bai died within 10 days of execution of the Will.

21. On a perusal of the statements of D.W-1 Hirabai and D.W-2 Sharda Prasad, it is also clear that while D.W-1 Hirabai states that she had sent her sister Kaushalya Bai to Jabalpur only for treatment, D.W-2 Sharda Prasad has stated that he took her to Jabalpur for execution of the Will after informing some persons in the village but no such person has been examined. There is material contradiction in the statement of the two attesting witnesses D.W-2 Sharda Prasad and D.W-3 Kishan Singh to the extent that while D.W-2 Sharda Prasad stated that he called D.W-3 Kishan Singh to his house and he accompanied them to Jabalpur in the tractor to execute the Will, D.W-3 Kishan Singh in his statement has specifically and categorically denied this assertion and on the contrary has stated that he had gone to Jabalpur on his own with one Mahesh on a motorcycle where he came to know that Sharda Prasad had brought Kaushalya Bai to Jabalpur for treatment and on that count he visited the clinic of the doctor concerned from where they took Kaushalya Bai for execution of the Will to the Advocate and, thereafter for registration. It is also clear from a perusal of the statement of D.W-3 Kishan Singh that though he states that the Will was dictated by Kaushalya Bai and was read out to her and was signed after she approved it, before him but he does not know as to when and who purchased the stamp paper, which incidentally is said to have been purchased on the same day by Kaushalya Bai herself, or as to where the Will was typed. From a perusal of the

Will, Exhibit D-1, it is also clear that while Khasra No. 92 Area 1.817 Hectares Patwari Halka No. 56 of Village Hirapur Bandha has been mentioned in the Will, surprisingly and unusually, there is no mention of Khasra No. 50 Area 3.994 Hectares of village Khairi except for identifying it as the land situated in village Khairi, which in the surrounding suspicious circumstances indicates that the person drafting the Will was someone other than Kaushalya Bai and was someone who did not know the particulars of the land situated in village Khairi belonging to Tikaram as this fault of having a selective memory of remembering the details of the land situated in village Hirapur Bandha, which Kaushalya Bai got from her erstwhile husband Ramdhani and forgetting the details of the land situated in village Khairi belonging to Tikaram, could not in normal circumstances be attributed to Kaushalya Bai, and had the Will been prepared on her dictates this discrepancy and omission would not have occurred.

22. From an analysis of the evidence on record it is also undisputed that Kaushalya Bai was about 100 years of age at the time of execution of the Will and was living alone; that she was extremely sick on account of her injuries and though there is assertion by both the parties that they were looking after her however it is also admitted that it is only after her accident and injury that the appellants took her away and thereafter within 2-3 days got the Will executed by bringing her to Jabalpur and that she died within 10 days thereafter.

23. In view of the aforesaid analysis of the oral and documentary evidence on record, it is clear that while the two attesting witnesses have stated that the Will was prepared on the instructions of Kaushalya Bai, that it was read out to her and that she affixed her thumb impression on the same in front of the attesting witnesses who thereafter signed it, there is total absence of any evidence to the effect that she was in a sound state of mind at the time of execution of the Will in spite of the fact that she was extremely sick and more than 100 years of age nor has any person been examined to explain the absence of any endorsement in the Will either by the Registering Officer or by the Advocate to the effect that the Will was read out to Kaushalya Bai who was of sound mind; that she understood it and thereafter signed it. It is also clear that the appellants did not get the evidence of the doctor who examined Kaushalya Bai locally or the doctor who examined her at Jabalpur recorded to establish that she was in a sound state of mind and that they have not even produced the medical prescription of Kaushalya Bai prepared by the doctor at Jabalpur which in itself could have indicated her state of mind and her physical condition.

24. It is, therefore, apparent that there is no evidence of any independent witness clearly stating that Kaushalya Bai was of sound mind at the time of execution of the Will, that she dictated the Will which on being drafted was read out to her and was understood by her or that she affixed her thumb impression with full comprehension of what she was doing. Surprisingly, though the doctors, the Advocate and the officers and other persons of the Registrar's office who could all have clarified this aspect, were all available and would have been the

best witnesses, they have not been examined nor has any explanation for the same been furnished.

25. The aforesaid circumstances when considered with the fact that Kaushalya Bai inspite of being 100 years of age lived in her own house alone and that she was shifted to the house of the appellants only after she suffered the injury and that within 3 days of shifting the Will was executed and that she died within 10 days thereafter, establish the existence of several suspicious circumstances surrounding the execution of the Will which were required to be dispelled but have not been satisfactorily explained by the appellants/propounders.

26. In view of the aforesaid analysis of the evidence and the law laid down by the Supreme Court in the above cited cases, I am of the considered opinion that the appellants have failed to dispel the suspicious circumstances surrounding the execution of the Will and, therefore, the finding recorded by the First Appellate Court in respect of the aforesaid issue cannot be found fault with as it does not suffer from any perversity and is based on proper analysis of the evidence on record.

27. As a result, the appeal filed by the appellants is partly allowed only to the extent that the judgment and decree of the First Appellate Court and the claim of the respondents/plaintiffs in respect of Khasra No. 92 Area 1.817 Hectares of Village Hirapur Bandha which was the property acquired by Kaushalya Bai from her erstwhile husband Ramdhani is set aside and stands rejected, while the remaining claims made by the respondents/plaintiffs, as decreed by the First Appellate Court by the impugned judgment and decree dated 25-11-1995, i.e. in respect of Khasra No. 50, Area 3.994 Hectares of village Khairi and the house of Tikaram and the finding regarding the Will, are hereby upheld and affirmed. The judgment and decree of the First Appellate Court stands modified accordingly to the extent stated above. In the facts and circumstances, there shall be no order as to the costs.