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**(1991) 04 PAT CK 0018**

**In the Patna High Court**

**Case No : Appeal from Original Decree No. 28 of 1986**

Udeshwar Singh and Another

APPELLANT

Vs

Runa Devi and Others

RESPONDENT

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**Date of Decision : 30-04-1991**

**Acts Referred:**

**Citation : (1991) 04 PAT CK 0018**

**Final Decision : Dismissed**

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## **Judgement**

S.B. Sinha, J.—This first appeal u/s 299 of the Indian Succession Act arises out of a judgment dated 29th January, 1986 passed by Shri S. Narayan in Probate Case No. 1 of 1982, whereby and whether under the said learned Court allowed an application filed by the respondents for grant of Letters of Administration in relation to the will dated 14-9-1973 executed by Mst. Sundarmani Devi.

2. The fact of the matter lies in a very narrow compass.

3. Mst. Sundarmani Devi executed a registered will dated 14-9-1973. She died on 23-12-1981 at village Sikki Kala. According to the respondents, Mst. Sundarmani Devi had great love and affection for the petitioner, as she had rendered services to her husband. She out of her love and affection and in view of the services rendered, executed and registered the aforementioned will in her favour. On the other hand, the case of the appellants was that the testatrix had no authority to execute the said will. According to the appellants, Sundarmani Devi being the wife of Lalji Singh, had no concern with the lands under the will nor she had any interest therein.

4. It appears that prior to execution of the said will, Sundarmani Devi had filed an application u/s 46 of the Chotanagpur Tenancy Act for grant of permission to execute the said will and therein the appellants were heard and by an order dated 11-9-1973, permission was duly accorded to Sundarmani Devi to execute the said will in a case bearing No. 3 of 1973-74 and the aforementioned will was executed in terms of the aforementioned order.

5. An appeal was preferred by the appellants against the said order but the said appeal was dismissed by the Additional Collector, Palamau in terms of his order dated 10-10-1974.

6. The learned Court below found that the will was genuine and the same was validly executed.

7. Mr. K.K. Sahay, the learned Counsel appearing on behalf of the appellants submitted that the parties are cheros by caste and thus, they are governed in the matter of inheritance and succession by their own customary laws and not under the provisions of Hindu Succession Act, 1956.

8. It was submitted that even assuming that the parties were sufficiently hincuisd and were thus governed under the provisions of Hindu Law in the matter of inheritance and succession; but the provisions Of the Hindu Succession Act, 1956 having no application in relation to the members of the Scheduled Tribe, Sundarmani Devi, under the old Hindu Law had merely a limited interest in the property in question and in that view of the matter too she was not competent to execute the will in question.

The learned Counsel, in this connection, has relied upon a decision in Mohari Mahto and Others Vs. Mokaram Mahto, In Chotrai Manjhi v. Rupj Manjhian, reported in 1990 (1) BLJR 501 and in Daudwa Uraon and Another Vs. Karueluous Uraon and Others, .

9. The learned Counsel further submitted that it was obligatory on the part of the learned Court below to consider this aspect of the matter and it should have come to the conclusion that the aforementioned Sundarmani Devi had no authority to execute the will in question as she was a limited owner. In this connection, reliance has been placed in Jagdeo Singh and Others Vs. Mt. Raja Kuer, and in Shambhu Dayal and Others Vs. Pt. Basdeo Sahai, .

10. Mr. Sahay further submitted that the will in question (Ext. 1) was not legally proved inasmuch as in doing the same, the provisions of Section 68 of the Evidence Act were not complied with.

The learned Counsel, in this connection, relied upon Girja Datt Singh Vs. Gangotri Datt Singh, .

11. Mr. P.N. Sahu, the learned Counsel appearing on behalf of the respondents, on the other baud, submitted that in view of the fact that the respondents obtained prior permission of the Deputy Commissioner for executing the will, it must be held that the said will was genuine. It was further submitted that the will in question has validly been proved on behalf of the respondents.

The learned Counsel, in this connection, relied on Jai Narain Ram Lundia Vs. Kedar Nath Khetan and Others, , in Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others, and in Krishna Kumar Sinha v. The Kayastha Pathshala, reported in AIR 1966 All 570.

12. It was, further submitted that in this case the scribe himself was an attesting witness and thus he was competent to prove the will. In this connection the learned Counsel relied upon *Sita Ram Vs. R.D. Gupta and Others*,

13. Mr. Sahu next contended that in any event as the appellants did not question the proof of the will before the Court below; he should not be permitted to do so for the first time before the appellate Court. Mr. Sahu in this connection, relied upon *Krishna Kumar Sinha v. The Kayastha Pathshala*, reported in AIR 1967 All 570.

14. The learned Counsel further submitted that the scope of an enquiry in a proceeding for grant of letter of administration with a copy of will annexed thereto is a limited one and in such a proceeding a disputed question of title cannot be gone into. The learned Counsel, in this connection, has relied upon a Division Bench decision of this Court in *Rajeshwar Misser and Others Vs. Sukhdeo Missir*, ; in *Dukhu Mahato v. Shridhar Mahato* reported in 1989 BLT 534 and in *Jagojoti Bose and Another Vs. Bararuchi Bose and Others*, .

15. In view of the aforementioned rival contentions the following questions arise for consideration in this appeal:

(1) Whether the learned Court below could have enquired into the

(2) Whether the will in question has legally been proved ?

16. Re Question (1) :

Section 278 of the Indian Succession Act reads as follows :-

278. "Petition for letter of administration-(1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating

(a) the time and place of the deceased's death;

(b) the family or other relatives of the deceased and their respective residences;

(c) the right which the petitioner claims;

(d) the amount of assets which are likely to come to the petitioner's hands;

(e) when the application is to the District Judge that the deceased at time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the judge; and

(f) When the application is to a District Delegate that the deceased at the time of his death had a fixed place of abode, within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hand is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate. From a perusal of the aforementioned provision, it would appear that an application will be entertained

if the same has been filed in compliance with the requirements mentioned therein.

17. In *Rajeshwar Misser and Others Vs. Sukhdeo Missir*, , a Division Bench of this Court held as follows :

"The application was opposed by respondent Sukhdeo Missir who is the son of Padarath Missir another brother of Hazari Missir. The document in question purports to make a disposition of the property of Sarwan and Balgovind Missir in favour of six sons of Hazari. Sarwan and Balgobind died some time in the year 1928. The present application was filed on 13-9-1940, by the four applicants, the other two sons of Hazari Missir having died in the mean time. The application was opposed on the grounds, firstly, that the document is not a genuine document executed by Sarwan and Balgobind Misser, secondly, that it is not a will at all but is a deed of partition, thirdly that, at the time of the execution of the document, they were not in a sound disposing state of mind, and, fourthly, that, at the time of the execution of the alleged will, they were joint with Padarath Missir and as such had no right to execute the will. In an application for probate, the Court has no jurisdiction to enquire into the nature of the rights of the testator in the property covered by the will and so, the last point was rightly ignored by the learned Additional District Judge, and he has considered only whether the document was in fact executed by the alleged testators, whether, at the time of the execution of the document, they were in a sound disposing state of mind and whether the applicants are entitled to probate. He decided the first two points in favour of the applicants but, on the third point, he has decided against them, holding that the document in question is not a will at all. Hence, the present appeal." (Underlining is mine)

18. In *Mrs. Hem Nolini Judah* (since deceased) and after her Legal Representative *Mr. Marlean Wilkinson Vs. Isolyne Sarojbashini Bose and Others*, , the Supreme Court held that the questions of title are not decided in proceeding for grant of probate or letters of administration. It was further held whatever, therefore, might have happened in those proceedings, could not establish the title. In *Jagojoti Bose and Another Vs. Bararuchi Bose and Others*, , the aforementioned decision has been followed. Reference, in this connection, may also be made to *Chintaman v. Ram Chandra*, reported in ILR 34 Bom. 589 ; *Kashi v. Govinda*, reported in 1952 Calcutta Weekly Notes 914 and in *Panna Banerjee and Others Vs. Kali Kinkor Ganguli*, .

19. The effect of grant of probate, therefore, is that it does not prove the executrix's title of the property involved in the application for probate as derived from the deceased testator, nor does it prove that such property exists in facts. In an application for grant of probate, the Court has no jurisdiction to enquire into the nature of the rights of the testator in the property covered by the will. The question as to whether the testatrix Sundarmani Devi has any right in relation to the property in question or not, thus could not have been gone into by the learned Court below.

20. In *Dukhu Mahata Shridhar Mahata*, reported in 1989 BLT 534, this Court has held :

"It appears that the Court below had gone into the question of title which was wholly outside the scope of the probate Court. All that it was required to record was whether it was genuine and valid. For that firstly it was required to record a finding whether the will was executed keeping in view the provision of Section 63 of the Act and in the circumstances of this case proved in terms of Section 69 of the Evidence Act. Since there has been non-compliance of Section 69 of the Evidence Act, i.e. the will has not been proved in accordance with law, letters of administration could not have been granted in favour of the propounders.

21. In *Jagdeo Singh and Others Vs. Mt. Raja Kuer*, , it was held that under the Hindu Law, a legatee from a widow does not derive any interest. In that case the question which fell for consideration before the Division Bench was as to whether the legatee under the will derived any interest in the property or not and in that context it was held that the legatee of a Hindu widow did not derive any interest whatsoever in the property. In *Shambhu Dayal and Others Vs. Pt. Basdeo Sahai*, , the decision of the Patna High Court aforementioned and other decisions have been followed by a Full Bench of the Allahabad High Court.

22. In this case, as noticed hereinbefore, this Court is not concerned with the title of Sundarmani Devi in the property nor this Court is concerned with as to whether by reason of the will, the opposite party has derived any right, title and interest or not. Such a pure question of title can only be considered in an appropriate suit by a competent Civil Court did not by a testamentary Court in view of the settled principles of law, as noticed hereinbefore.

23. In this view of the matter, in my opinion, the submission of Mr. Sahay cannot be accepted.

24. Re : Question (2):

The word "attested" has been defined in Section 3 of the Transfer of Property Act in the following term :

"Attested"- "Attested in relation to an instrument, means and shall be deemed always to have meant, attested by two or more witnesses each of whom has seen the executant sign or affix his mark to the instrument, or has been some other person sign the instrument in the presence and by the direction of the executant, or has received from the executant a personal acknowledgment of his signature or mark, or of the signature of such other person, and each of whom has signed the instrument in the presence of the executant; but it shall not be necessary that more than one of such witnesses shall have been present at the same time, and no particular form of attestation shall be necessary."

Section 68 of the Indian Evidence Act, 1972 reads as follows:

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 defined."

Section 63(c) of the Indian Succession Act reads as follows:

"The will shall be attested by two or more witnesses each of whom has been the testator sign or affix his mark to the will or has seen some other persons 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 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."

25. In *Seth Beni Chand (Since Dead) Now by L.Rs. Vs. Smt. Kamla Kunwar and Others*, it was held :

"Section 68 of the Evidence Act deals with proof of the execution of documents required by law to be attested. It provides that such documents shall not be used as evidence until at least one attesting witness has been called to prove the execution, if there be an attesting witness alive and subject to the process of the Court and capable of giving evidence. Since by Section 63 of the Succession Act, 1925 a will has to be attested by two more witnesses, Section 68 of the Evidence Act would come into play and therefore it was incumbent on the propounder of the will to examine an attesting witness to prove due execution of the will. But this argument overlooks that Dwijendra Nigam is himself one of the three persons who made their signatures below the thumb impression of Jaggo Bai. None of the three is described in the will as an attesting witness but such labelling is by no statute necessary and the mere description of a signatory to a testamentary document as an attesting witness cannot take place of evidence showing due execution of the document. By attestation is meant the signing of a document to signify that the attestator is a witness to the execution of the document. And by Section 63(c) of the Succession Act, an attesting witness is one who signs the document in the presence of the executant after seeing the execution of the document or after receiving a personal acknowledgment from the executant as regards the execution of the document."

26. In *Smt. Jaswant Kaur Vs. Smt. Amrit Kaur and Others*, , the Supreme Court followed its earlier decision in *H. Venkatachala Iyengar Vs. B.N. Thimmajamma and Others*, , wherein the propositions relating to the nature and standard of the

evidence required to prove a will, were laid down.

27. AW 2 was the Sarpanch of the Sikki Kala Gram Panchayat, he happened to be a close neighbour of the testatrix. He stated that AW 3 scribed the will at the instance of Sundarmani Devi and the same was read over ? and explained to her whereupon she with conscious and clear understanding of the recitals of the deed, put her LTI thereupon. He also stated that after Sundarmani Devi put her L.T.I. he had also signed in her presence. The respondents had examined AW 3 who is an attesting witness as also the scribe. He was also a witness to the execution of the will by Sundarmani Devi and who had known the testatrix from before.

28. In *Girja Datt Singh Vs. Gangotri Datt Singh*, upon which reliance has been placed by Mr. K.K. Sahay the Supreme Court did not rely upon the oral testimony of the attesting witnesses as it was held that the said witnesses have no regard for truth. The Supreme Court, however, laid down the law in the following terms :

"Section 68, Indian Evidence Act requires an attesting witness to be called as a witness to prove the due execution and attestation of the will."

29. In this case, it has been held that the execution of the will has been proved by AW 2 as also AW 3 inasmuch as both of them stated that the scribing of the document and execution of the will by Sundarmani Devi took place in their presence and they have also put their respective signatures in the will. Thus, AW 2 and AW 3 were the competent witnesses to prove the due execution of the will in accordance with the provisions of Section 63(c) of the Indian Succession Act read with Section 68 of the Indian Evidence Act.

30. AW 3 is the scribe. He stated that he scribed the said will at the instance of the testatrix and read-over the contents thereof, thereafter the testatrix put her LTI after understanding the same. It, has thus to be held that the said will has duly been proved by AWs. 2 and 3.

31. In *Naresh Charan Das Gupta Vs. Paresh Charan Das Gupta*, , the Supreme Court held :

"When once it has been proved that a will has been executed with due solemnities by a person of competent understanding and apparently a free agent, the burden of proving that it was executed under undue influence is on the party who alleges it."

The Supreme Court further held :

"It cannot be laid down as matter of law that because the witnesses did not state in examination-in-chief that they signed the will in the presence of the testator, there was no due attestation. It will depend on the circumstances elicited in evidence whether the attesting witnesses signed in the presence of the testator. This is a pure question of fact depending on appreciation of evidence."

32. In *Sitaram v. R.D. Gupta*, reported in AIR 1981 P&H 88, it has been held that

a scribe can be treated an attesting witness.

33. Further the question as to whether the will was duly proved or not was not raised before the Court below. The learned trial Court considered the facts and circumstances of the case and particularly the fact that after permission was obtained by the testatrix from the Deputy Commissioner of the provision of Section 46 of the Chotanagpur Tenancy Act, 1908 which the appellant filed an objection and the said objection having been rejected, the appellants preferred an appeal against the said order but the said appeal was also dismissed.

34. Taking thus all facts and circumstances into consideration, I am of the view that it must be held that the will in question has duly been proved.

35. In this view of the matter, there is no merit in this appeal which is accordingly dismissed. However, in the facts and circumstances of this case there will be no order as to costs.