

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.307 of 2011

1. Bhulan Mahto, s/o Nageshwar Mahto, r/o Village- Salempur East,
P.O.- Salempur, P.S.- Sidhwalia, District- Gopalganj.

... .. Appellant/s

Versus

1. The State of Bihar through the Collector, Gopalganj.
2. Smt. Uma Devi, w/o Rameshwar Singh.
3. Chanpatia Kumari, d/o Late Chandrika Mahto, minor through Uma Devi mother and guardian. Both r/o Village- Baniapur, P.O. & P.S.- Baniapur, District- Saran.

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Shashi Shekhar Divededi, Sr. Advocate
Mr. Parth Gaurav, Advocate.
For the Respondent/s : None

CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR
ORAL JUDGMENT

Date : 07-02-2019

Heard Sri Shashi Shekhar Dvivedi, learned Senior
Counsel appearing on behalf of the appellant.

2. No one appeared on behalf of the respondents.

3. The appeal is proceeding ex parte against the respondents, as they did not appear even after valid service of notice. It has been informed that they had not appeared before the court below.

4. This miscellaneous appeal has been preferred, under Section 299 of the Indian Succession Act, against the judgment and order dated 28.02.2011, passed by the learned District Judge, Gopalganj in Probate Case No.22 of 2009.



5. By the impugned judgment, the learned court below has dismissed the prayer of the appellant to grant probate of the registered Will dated 01.06.1998 (*Exhibit 1*) executed by *Tapeshwar Mahto* in favour of the appellant.

6. *Tapeshwar Mahto* had one more full brother namely, *Nageshwar Mahto*. The appellant is son of *Nageshwar Mahto*. *Chandrika Mahto*, the son of *Tapeshwar Mahto* died during lifetime of *Tapeshwar Mahto* leaving behind his widow, *Uma Devi* and his daughter, *Chanpatiya*. *Uma Devi* and *Chanpatiya* were party before the court below and are respondents herein.

7. It is uncontroverted case of the appellant that after death of *Chandrika Mahto*, *Uma Devi* remarried with some other person and left the house. In the circumstances, the appellant was looking after and taking care of the testator and due to love and affection the testator with his free Will executed the registered Will aforesaid.

8. While refusing to grant probate, the learned court below recorded as follows:-

“On perusal of pleading and evidence, it appears that some vital facts is missing in pleading while it is stated by witnesses in their affidavit, but in absence of such avertment in pleading, there is no use of stating these facts in affidavit specially in ex parte evidence. It appears in pleading, it is nowhere averred that Tapeshwar Mahto offered to execute Will in favour of Bhulan Mahto and it was so accepted. Secondly, there is no averment that Shraddh of Tapeshwar Mahto was performed by Bhulan Mahto.



It is also not stated in pleading that Tapeswar Mahto (testator) executed deed of Will with his free Will and having good mental and physical health. In absence of pleading, there is no use of such statement in affidavit only.”

9. Learned senior counsel appearing on behalf of the appellant submits that the aforesaid finding is error of record. There is clear statement of such fact in para 3 of the petition filed under Section 276 of the Indian Succession Act before the court below, which reads as follows:-

“That out of love and affection, Tapeswar Mahto executed a deed of Will in favour of the petitioner on 01.06.1998 in presence of witnesses which is his last Will duly executed in the pen of Shri Rajeshwar Pd. (scribe) who read out the contents of the Will before Tapeswar Mahto and after hearing and understanding the contents of the deed of Will, Tapeswar Mahto put his thumb impression on the deed of Will in presence of witnesses and Chandrama Prasad (P.W.2) executed the execution portion at the instance of Tapeswar Mahto and attesting witnesses Chandrama Prasad (P.W.2) and Sheo Gobind Bhagat (not examined) signed into the Will as witnesses at the instance and presence of Tapeswar Mahto. Tapeswar Mahto himself presented the deed of Will before Sub-Registrar, Gopalganj and accepted the deed of Will and in this way the deed of Will was duly registered.”

10. The aforesaid statement in the petition would make it clear that there is sufficient averment to show that the Will was a free Will and executed and registered in good mental and physical health of the testator. The technical words used in the statute need not be repeated in the pleading. Therefore, the court below has apparently committed error of record in concluding that there is no pleading of free Will and disposable mental



condition of the testator. Genuineness of a Will cannot be tested on the basis of absence of evidence as to who performed the *Shraddh*. Offer and acceptance in the matter of Will is not required. Hence, statement of P.W.2 that before execution of the Will, testator offered and appellant accepted the offer has no relevance to decide the issue.

11. The learned court below noted that there is no detail of the property in Will as detailed in schedule 1 of the petition. In schedule 1 there are several plots. Non mentioning of plot nos. in the deed of Will creates doubt whether *Tapeshwar Mahto* was intending to make the Will in respect of these properties or not.

12. Learned senior counsel appearing on behalf of the appellant submits that disclosure of property is not necessary in the Will. The Will simply contains the last desire of the testator and the property left by the testator would be subject to title of the testator on the property and shall go to the person as desired in the Will.

13. In the petition, it is specifically stated that schedule 1 property are self acquired properties of the testator. The sale deeds in respect of those properties in the name of testator were also produced during probate proceeding. Therefore, the court



below has proceeded on assumption and against the requirement of law.

14. I do not find any reason that genuineness of the Will and disposing state of mind of the testator can be doubted only for the reason that details of the property is not mentioned in the Will. Non mentioning of the property leaves it open that all the property left by the testator would go to the person named in the Will. Moreover, the law does not require that what Will should contain, save and except that it should depict the last desire of the testator. Moreover, when the Will is a registered Will, the presumption of its genuineness is stronger and the burden of the rebuttal is heavier.

15. The court below doubted the genuineness of the Will on the ground that after examination of the first page of the Will, it found that the L.T.I. of the testator is at the top of the Will and on the second page it is on the right side but not at the end of the page. Neither the scribe has been examined, nor both the attesting witnesses were examined. Hence, according to court below, only for registration it cannot be presumed that the Will was properly executed as per requirement of law.

16. Section 63 of the Indian Succession Act, 1925 relates to execution of unprivileged Will, which reads as follows:-



“Execution of unprivileged Wills.- Every testator, not being a soldier employed in an expedition or engaged in actual warfare [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 been 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, of 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.

17. Section 68 of the Indian Evidence Act, 1872 provides for proof of execution of document required by law to be attested.

A Will is required to be attested. Hence, its proof can be affected as per Section 68 of the Indian Evidence Act, 1872, which 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:

3 [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.]

18. There is no doubt that initial burden is always on the propounder to prove due execution and attestation of the Will as well as a sound disposing state of mind of the testator. In the case at hand, the genuineness of the Will and disposing state of mental health of the testator has not been challenged by anyone. Thus, the propounder of the Will (appellant herein) has successfully appears to have proved by the evidence of P.W.2 that the Will was signed by the testator in his presence and by his direction, the witness also signed in presence of the testator on the Will. Since a Will is registered document and it was presented by the testator himself before the Registrar, the sound disposing mind of the testator is apparent on the record and registration of the Will gives it authentication in absence of evidence to the contrary. The testator has put his L.T.I. on each page of the Will which has been identified by P.W.2. The testator has also put L.T.I. on the last page of the Will at the end of the page and the learned court below has wrongly recorded that there is no L.T.I. at the end of the last page. For proof of the Will, examination of one of the attesting witness is necessary. Hence, the court below has erred in doubting the genuineness of the Will for non-examination of the scribe and for non-examination of both the



witnesses. I hold that the Will in question has been attested in the manner as required in Section 63 of the Indian Succession Act and it has been proved by examination of at least one attesting witness. Therefore, the contrary finding of the learned court below suffers from illegality and material irregularity.

19. P.W.1, *Bhulan Mahto* is appellant and beneficiary of the Will. P.W.2 *Chandrama Prasad* is attesting witness. In para 5 of his deposition, P.W.2 stated that *Tapeshwar Mahto* (testator) went to the Registry office on 01.06.1998 to execute registered deed of Will in favour of appellant in a good mental and physical health and he voluntarily asked his scribe, *Rajeshwar Prasad* to scribe the Will. The scribe read over to the executant and after finding it correct, the testator put his L.T.I. on the document in presence of this witness and in presence of witness *Sheo Gobind Bhagat*. This witness *Chandrama Prasad* identified the L.T.I. of the testator on the Will and on the request of the testator he and *Sheo Gobind Bhagat* signed on the Will in his presence. Thereafter, the testator took the document to the Sub-Registrar and admitted execution of the document. Then the document was registered.

20. The aforesaid evidence is sufficient to prove due execution of the deed of Will as required by the law. The law does not require that both the attesting witnesses should be



examined or the scribe of the Will should be examined. Therefore, the finding of the court below contrary to law, as stated above, is also not sustainable.

21. Accordingly, the impugned judgment is *set aside* and this appeal is *allowed* and the probate as prayed for by the appellant is directed to be issued in respect of registered Will executed by *late Tapshwar Mahto*.

22. With the aforesaid observation, this miscellaneous appeal stands disposed of.

(Birendra Kumar, J)

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