

**ORISSA HIGH COURT : CUTTACK**

**F.A.O. NO. 96 OF 2012**

From a judgment dated 18.11.2011 passed by Shri B.K. Chand, learned Civil Judge, (Senior Division) Ist Court, Cuttack in R.C.C. Case No. 01 of 2009.

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Niranjan Prasad Mohanty ... Appellant

***-versus-***

Sucheta Mohanty & others ... Respondents

For Appellant: M/s. B.H.Mohanty, Sr. Advocate,  
D.P.Mohanty, R.K. Nayak,  
B. Das, T.K.Mohanty,  
P.K. Swain & M.Pal.

For Respondents: M/s. G.Mukherji,  
P.Mukherji, A.C. Panda,  
Suvalaxmi, S.Das, S.D.Ray &  
S.Panigrahi.

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***Decided on 30.10.2013***

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**P R E S E N T:**

**THE HONOURABLE SHRI JUSTICE M. M. DAS**

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**M.M. DAS, J.** This appeal has been preferred under section 299 of the Indian Succession Act, 1925 by the plaintiff – appellant in R.C.C. Case No. 1 of 2009. The said case was filed for grant of Letters of Administration in respect of the Will executed by one late Chittaranjan Mohanty in favour of the plaintiff – appellant Niranjan Prasad Mohanty and defendant-respondent no. 4 – Nihar Ranjan

Mohanty allegedly on 16.5.1976 in respect of the properties mentioned in the Schedule of property of the petition. By the judgment in the said R.C.C. Case No. 1 of 2009 dated 18.11.2011, the learned Civil Judge (Sr. Division), Ist Court, Cuttack rejected the prayer of the plaintiff – appellant. Hence this appeal.

2. In order to appreciate the contentions raised by the respective parties, it would be apt and proper to delineate the facts leading to the impugned judgment preferably in a tabular manner date-wise.

On 04.07.1973 the marriage between the respondent no. 1 Sucheta Mohanty and the testator of the alleged Will late Chittaranjan Mohanty was solemnized. Between 27.6.1973 and 31.8.1975, out of their wedlock, two daughters were born. In the month of January, 1976, Chittaranjan suffered from dis-function of Kidney and was admitted to the S.C.B. Medical College and Hospital, Cuttack, where he remained as an indoor patient from 5.2.1976 to 12.3.1976. Thereafter, he was carried to the P.G. Institute of Medical Education, Chandigarh, where he was under treatment from 10.4.1976 to 17.4.1976. However, he was brought back and admitted to the S.C.B. Medical College and Hospital, Cuttack, where he remained as an indoor patient from 14.5.1976 to 24.5.1976. The alleged Will was executed by him on 16.5.1976. Chittaranjan expired

on 8.6.1976. In 1977, the respondent no. 4 – Nihar Ranjan filed Misc. Case No. 10/1977-79 for grant of Letters of Administration. The respondents 1 to 3, who were the wife and daughters of late Chittaranjan, were impleaded as opp. parties and the appellant was impleaded as a proforma opp. party in the said case.

Notices were issued to the respondent nos. 1 to 4 on 29.03.1980. However, the matter was heard ex parte and Letters of Administration was ultimately issued. The respondent no. 1 thereafter made an application under section 263 of the Indian Succession Act, 1925 for revocation and annulment of the Probate/Letters of Administration granted ex parte. The said case for revocation of letters of administration was allowed on 31.10.1986 revoking the Letters of Administration granted earlier in favour of the legatees. Thereafter, the original Misc. Case No. 10/1977-79 was renumbered as O.S. No. 6 of 1987. On 25.7.1989, the said O.S. No. 6 of 1987 was dismissed for non-prosecution. Neither the respondent no. 4 nor the present appellant took any step for restoration of the said suit. After dismissal of the said suit, which was also filed for issuance of Letters of Administration, the present respondent no. 1 filed T.S. No. 194 of 1990 for partition claiming the share of her husband in the joint family properties. On 25.11.1995, the present appellant filed R.C.C. Case No. 1 of 2009, when the said T.S. No. 194 of 1990 was being

heard and evidence of plaintiff was already recorded. Upon filing of the Probate application, i.e., R.C.C. Case No. 1 of 2009, proceeding in the partition suit was stayed. By the impugned judgment, on 18.11.2011, the learned Civil Judge (Senior Division) dismissed the R.C.C. Case No. 1 of 2009 on merit. Hence this appeal.

3. The case of the appellant in R.C.C. Case No. 1 of 2009 was that the disputed land as described in the 'schedule of the property' of the petition is situated in mouza – Makhanpur, locally known as Kesharpur, having Khata No. 578, plot no. 528, Ac. 0. 044 decimals and plot no. 534, Ac.0. 036 decimals. Thus, in toto, an area of Ac. 0. 080 decimals with a building standing thereon, out of which, the subject-matter of the Will is undivided  $1/3^{\text{rd}}$  share of the testator late Chittaranjan Mohanty. According to the appellant, he (appellant) and the respondent no. 4 are brothers of late Chittaranjan Mohanty and the respondent nos. 1 to 3 are his wife and two daughters. The appellant further claimed that he was all along in Government service and was superannuated on 31.3.1995. His father Dayanidhi was a businessman dealing with inter-state sale of betel leaves and allied goods and in course of time, as Dayanidhi became old, the business almost came to a stand still. The respondent no. 4 - Nihar Ranjan was doing business in small scale and was maintaining his family and Chittaranjan started a business in wholesale dealership of various

kinds of Pan Masala in the district of Dhenkanal, which business is still going on. The three brothers were joint in respect of their ancestral properties though they were separate in mess having separate income of their own. All of them were residing in Cuttack residence, which was their only residence in the adjoining area of Cuttack. Chittaranjan from his own income acquired substantial property at his native place Purusottampur and Khairanga under Jagatpur Police Station. He acquired Ac.2.49 decimals of agricultural land at Purusottampur (his native place) and Ac.0. 57 decimals of homestead land, where he had his separate residential house. He also acquired Ac.1.29 decimals of agricultural land and all these properties are being enjoyed by respondents 1 to 3. Chittaranjan conducted his business at Dhenkanal in a rented house, where he was residing and was occasionally coming to Cuttack. His business is now being run by his widow-respondent no. 1, who is staying mostly in Dhenkanal and coming to Cuttack occasionally. She is also collecting usufructs from the agricultural land acquired by late Chittaranjan. It was also alleged that the respondent no. 1 took up the management of the business, which was carried on by late Chittaranjan and, consequently, all the income from such business and from agricultural lands remained with her. Chittaranjan fell seriously ill from young age during which period, he was staying at

Cuttack and was treated at S.C.B. Medical College and Hospital, Cuttack. Though he was separated in mess, still the relationship amongst the three brothers was very cordial and the expenses of his treatment were being shared by his brothers. The respondent no. 1, the widow, did not like to spend more money for his treatment and became indifferent leaving the entire burden on the brothers for which Chittaranjan being shocked at the conduct of his wife and considering the fact that two brothers took care of him and bore all the expenses for his treatment, before he expired on 8.6.1976, apprehending that his wife, after him, would claim partition and transfer of his share in the house at Cuttack to outsiders, resulting in breach of unity in the family, while he was in a sound state of mind, out of his own free will, he executed one Will, which was duly attested by the witnesses by which he bequeathed 1/3<sup>rd</sup> property in favour of his two brothers, i.e., his share in the joint family building at Cuttack. While bequeathing his share in the building at Cuttack, he also expressed that all his other properties will go to his wife and daughters in equal share after his death. It has further been pleaded that Chittaranjan took care of the interest of his wife and daughters while executing the Will.

4. As stated earlier, the said Will was put to Probate for issuance of Letters of Administration in Misc. Case No. 10 of 1977-79,

which was granted ex parte and subsequently on the application filed by the respondent no.1, the same was revoked and thereafter, the said Misc. Case, numbered as O.S. No. 6 of 1987, was dismissed for non-prosecution. The appellant further pleaded that after his retirement expecting that Sucheta – respondent no. 1 would behave properly and would maintain the same relationship as her deceased husband and finding that such expectation has failed as she has filed T.S. No. 194 of 1990 for partition, he (appellant) filed a fresh application, being R.C.C. No.1 of 2009, for grant of Letters of Administration on the self-same Will, which was under consideration earlier in Misc. Case No. 10 of 1977-79. The respondents 1 to 3, who were defendants 1 to 3 in R.C.C. Case No. 1 of 2009 on appearing in the said case, filed their written statement, inter alia, pleading that the present application is not maintainable and the same is not in proper form and substance and is not supported by an affidavit, which is statutorily required. The schedule of property, as per the requirement, has also not been given which makes the application incomplete for which it is liable to be rejected. They further claimed that the name of two daughters of late Chittaranjan have been wrongly mentioned which indicates the oblique motive of the appellant-plaintiff. Amongst other grounds, they also pleaded that even though they are separate in mess, but there has been no partition by metes and bounds of the joint family house

at Cuttack and the suit house is the only residential house of the parties. The residential house/building in the name of Chittaranjan at Purusottampur is in forcible possession of persons set up by the appellant – plaintiff and respondent - defendant no.4, for which they being ladies, are being compelled to suffer at the instance of the appellant – plaintiff and the respondent – defendant no.4. They have no other residential house except the suit house. They also denied the other allegations made in the plaint. According to them, the marital life of late Chittaranjan and the respondent no.1 lasted for very short span, i.e., less than three years during which period, she conceived twice and gave birth to two daughters. Therefore, it is highly improbable that within the short span of three years, she could manage to take over the management of the business of her husband and also managed the agricultural lands. It was, rather, claimed that they did not get any help or assistance from the brothers of late Chittaranjan, i.e., the appellant and the respondent no. 4, when Chittaranjan was critically ill and the respondent no. 1, the widow, alone looked after her ailing husband as well as two minor children, who were by that time only one year eleven months and ten months old respectively. In this background, it was pleaded by them that it was preposterous to suggest that during the life time of Chittaranjan,



the defendant- respondent no. 1 took over the management of the business and agricultural lands.

5. With regard to the Will, it was specifically pleaded that the brothers of late Chittaranjan never maintained cordial relationship with him and there was no occasion for Chittaranjan to execute the alleged Will on 16.5.1976 as he was not in a sound state of mind on the date of execution of the Will, which would be evident from the medical certificate and the prescriptions. The Will according to them was an out-come of forgery and the conduct of the appellant- plaintiff and the respondent – defendant no. 4 clearly shows that the Will has been created under suspicious circumstances. The other question raised in the written statement was that respondent no. 4 – defendant no.4 earlier filed Misc. Case No. 10 of 1977 (Probate), where near relations were impleaded as parties and the defendant nos. 2 and 3 though were minors, were not represented through their guardian. There was no proper service of notice and the defendant no. 4, who was the applicant in the said Misc. Case, managed to get the ex parte order of Probate. The defendants 2 and 3, i.e., the daughters were not impleaded in their real names, but with fictitious names. There was also no occasion for Chittaranjan to apprehend that after his death, his widow may marry some one else and may sell away the suit property. Hence, they claimed that if the Probate of the alleged Will is

granted, then the defendant no.1-respondent no. 1 will become a destitute in the street as in the meantime, her daughters have already been given in marriage and have some place of residence. But, so far as the defendant – respondent no.1 is concerned, she had no other place of residence and she will be driven to the street. They also disputed the execution and attestation of the Will on 16.5.1976 on which date late Chittaranjan was an indoor patient in the S.C.B. Medical College and Hospital, Cuttack and his condition was so critical, he could not have executed the alleged Will. They further disputed the market value of the property as valued by the appellant.

6. On the above pleadings, the learned court below framed as many as six issues. The appellant – plaintiff examined himself as P.W. 1 proving the Will as Ext. 1 and the signature of late Chittaranjan on the same as Exts. 1/a and Ext.1/b. He also proved the certified copy of the ROR in respect of khata No. 1102 as Ext. 2 and examined one Subash Chandra Jena as P.W. 2 and one Radhaballahva Debata as P.W. 3. On the other hand, the defendant – respondent no. 1 examined herself as D.W. 1 and the objection filed on 6.2.1996 in Misc. Case No. 503 of 2005 was marked as Ext. A and the signature of Niranjana Prasad Mohanty on the same was marked as Ext.A/1 from the side of the defendants-respondents.

7. Learned trial court took up the issue nos. 3, 4, 5 and 6 together, which were the main issues to be decided in the suit.

8. The learned trial court discussing the facts of the case and appreciating the materials on record and further taking into consideration the admission of the appellant in his deposition that he is the executor of the suit Will, but he does not remember when he learnt that he has been appointed as the executor of the Will and that he along with his brother Nihar Ranjan and their father were present, when Chittaranjan executed the suit Will and no other relation was present by that time and by the time of execution of the Will Ext.1, Chittaranjan was sick and was admitted as an indoor patient in S.C.B. Medical College and Hospital, Cuttack and Ext. 1 was executed in the Hospital, came to the conclusion that this statement of the appellant itself shows that the Will in question has not only been executed in presence of the beneficiaries, but also the same was done, while the executor was ill and was admitted in the hospital. The other admission of the appellant with regard to the execution of the Will under spurious circumstances has also been taken into consideration by the learned court below.

9. Discussing the evidence of the witnesses adduced on behalf of the appellant-plaintiff, the learned court below came to the conclusion that late Chittaranjan was not in a sound state of mind

when the Will was executed and he had no reason at all to deprive his widow and two daughters from getting his undivided share in the only residential house at Cuttack. The learned court below has also concluded that the appellant being aware of dismissal of the earlier application, i.e., O.S. No. 6 of 1987 on 25.7.1989 for default, after long lapse of seven years, filed the petition on 25.11.1995 and failed to give any satisfactory explanation as to why he remained silent for a continuous period of six years after dismissal of the previous suit. Relying upon various case laws, the learned court below following the ratio of the said decisions and applying the same to the facts of the present case concluded that the Will in question vide Ext. 1, where no provision has been made by the testator regarding his wife and minor daughters is unnatural and it causes a serious doubt on the genuineness of the Will, inasmuch as the plaintiff – appellant failed to prove the genuineness of the will and its due execution in accordance with section 68 of the Evidence Act, even though the onus lay on him to prove the same. He further took note of the fact that when the Will was executed, his widow and daughters were not present and, rather, the beneficiaries were present which creates further suspicion regarding execution of the Will and, in case, the beneficiaries have played an important role in the execution of the Will, the same is not only improbable, but unfair, as the natural heirs have been excluded

without any reason and the signature of the testator was also not duly proved. Accordingly, the learned court below held that the plaintiff-appellant is not entitled to any relief whatsoever as has been prayed for as the Will has been executed under suspicious circumstances. The petition was also not maintainable in view of the earlier dismissal order passed in O.S. No. 6 of 1987, where the present appellant himself was a party and filed a written objection vide Ext. A. Thus concluding, the learned court below has assigned the reason that the petition has been filed only to arrest the hearing of the C.S.(I) 194 of 1990, which has been filed by the present respondent no.1. The impugned judgment was accordingly passed dismissing the suit.

10. Mr. Mohanty, learned senior counsel for the appellant vehemently urged that the reasonings given by the learned court below are untenable as even though the testator was in the hospital, it cannot be presumed that he was not in a proper state of mind to execute the Will. The illness of the testator should not have been utilized against the plaintiff-appellant and, rather, it should have been held that due to such illness, late Chittaranjan thought it proper to execute the Will Ext. 1.

11. Mr. Mukherji, learned counsel appearing for the respondents 1 to 3, on the contrary, brought to the notice of this Court the circumstances which are clearly exhibited from the record

to hold that the Will alleged to have been executed by late Chittaranjan wholly appears to be under suspicious circumstances as concluded by the learned court below and the impugned order, being legal and valid, should not be interfered with.

12. The Hon'ble Supreme Court in the case of ***Kalyan Singh v. Smt. Chhoti and others***, AIR 1990 SC 396 categorically laid down that the executant of the Will cannot be called to deny the execution or to explain the circumstances under which it was executed and it would be open to the Court to look into the surrounding circumstances as well as the inherent improbabilities of the case to reach a proper conclusion on the nature of the evidence adduced by the party. In the facts and circumstances of the said case, the Hon'ble Supreme Court held that the Will constituting the plaintiff as the sole legatee with no right whatever to the testator's wife could be said to be unnatural and it casts a serious doubt on the genuineness of the Will. Further, the Will in the said case was not produced for very many years before the court or public authorities even though there were occasions to produce it for asserting plaintiff's title to the property. It was for the plaintiff to disprove such suspicious circumstances by placing satisfactory material on record.

***(emphasis supplied)***

13. This Court in the case of ***Sarada Charan Mishra v. Smt. Prafulla***, AIR 1985 Orissa 232, categorically laid down that the burden to prove due execution and attestation is on the propounder. The nature of proof required is the same as in the case of any other document and the usual test to be applied is that of satisfaction of the prudent mind. This Court further held that the obvious absence of the testator introduces an element of solemnity in the decision on the question as to whether the document propounded is proved to be the last Will and testament of the departed testator. In addition to the statutory requirements under section 63 of the Evidence Act, the propounder is bound to prove by satisfactory evidence that the testator signed the Will while in a sound and disposing state of mind and understanding the nature and effect of the dispositions and put his signature in the document of his own free will. The propounder is also bound to remove all doubts in the mind of the Court where the Will is surrounded by suspicious circumstances.

14. The Hon'ble Supreme Court in the case of ***Gurdial Kaur v. Kartar Kaur and others***, AIR 1998 SC 2861 reiterated that it is the duty of the person seeking declaration about the validity of the Will to dispel such suspicious circumstances.

15. As early as in 1959, the Hon'ble Supreme Court in the case of ***H. Venkatachala Iyengar v. B.N. Thimmajamma and***

**others**, AIR 1959 SC 443 authoritatively laid down that where the propounder was unable to dispel the suspicious circumstances, which surrounded the question of valid execution and attestation of the Will, no letters of administration in favour of the propounder could be granted. Whenever, there is any suspicious circumstance, the obligation is cast on the propounder of the Will to dispel such suspicious circumstances.

16. Recently, in the year 2009, in the case of **K. Laxmanan v. Thekkayil Padmini and others**, (2009)<sup>1</sup> SCC 354, the Hon'ble Supreme Court with regard to applicability of section 68 of the Evidence Act held that from the said section, it is crystal clear that the onus of proving the Will is on the propounder, who is to prove the legality of the execution and genuineness of the said Will by proving absence of suspicious circumstances surrounding the said Will and also by proving the testamentary capacity and the signature of the testator. It was held therein that when there are suspicious circumstances regarding the execution of the Will, the onus is also on the propounder to explain them to the satisfaction of the Court and only when such responsibility is discharged, the Court would accept the Will as genuine. The Hon'ble Supreme Court went to the extent of holding that even where there are no such pleas, but circumstances give rise to doubt, it is on the propounder to satisfy the conscience of



the Court. Suspicious circumstances arise due to several reasons, such as, with regard to genuineness of the signature of the testator, the conditions 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.

*(emphasis supplied)*

17. The Hon'ble Supreme Court in the case of ***Bharpur Singh v. Shamsher Singh***, (2009)3 SCC 687 has also held that the fact that the propounder took interest in execution of the Will is one of the factors which should be taken into consideration for determination of due execution of the Will. It was further held that the propounder must prove (i) that the Will was signed by the testator in a sound and disposing state of mind duly understanding the nature and effect of disposition and thereafter putting his signature on the document on his own free will, (ii) when the evidence adduced in support of the disinterested, satisfactory and sufficient to prove the sound and disposing state of testator's mind and his signature as required by law, Courts would be justified in making a finding in favour of propounder, who is required to remove suspicious

circumstances shrouding the making of the Will by cogent and convincing explanation. It was also laid down in the said case that suspicious circumstances like the following may be found in the execution of a Will: (i) the signature of the testator may be very shaky and doubtful or not appear to be his usual signature; (ii) the condition of the testator's mind may be very feeble and debilitated at the relevant time; (iii) the disposition may be unnatural, improbable or unfair in the light of relevant circumstances like exclusion of or absence of adequate provisions for the natural heirs without any reason; (iv) the dispositions may not appear to be the result of the testator's free will and mind; (v) the propounder takes a prominent part in the execution of the Will; (vi) the testator used to sign blank papers; (vii) the Will did not see the light of the day for long; and (viii) incorrect recitals of essential facts. ***(emphasis supplied)***

18. Taking the ratio of the aforesaid decisions into consideration and applying the same to the facts of the present case and the nature of materials brought before this Court, this Court is of the view that the learned court below was right in holding that the execution of the alleged Will under Ext. 1 is shrouded by suspicious circumstances and the disposition is also unnatural, improbable and unfair in the light of the relevant circumstances like execution of or absence of adequate provisions for the natural heirs without any

reason. The learned court below is also correct in concluding that the testator was not in a sound state of mind and has not executed the Will out of his own free will.

19. This Court, therefore, finds absolutely no error in the impugned judgment so as to interfere with the same in the present appeal. The appeal, being devoid of any merit, is dismissed, but in the circumstances without cost.

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***M. M. Das, J.***

***Orissa High Court, Cuttack.  
October 30th ,2013/Biswal.***

