IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.128 of 2017

CNR No. BRHC010972642017

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1.1. Jayant Vishnu Prabhakar Bhardwaj Son of Surya Narayan Singh and Late Shanta Sinha, Resident Village - Ghoswari, Police Station - Bakhtiyarpur, District- Patna, at present residing at Flat No. 423 Ara Garden, Rupaspur Patna, Police Station - Rupaspur, District- Patna.

1.2. Surya Narayan Singh Son of late Jai Sharan Prasad Singh, Resident Village - Ghoswari, Police Station - Bakhtiyarpur, District- Patna, at present residing at Flat No. 423 Ara Garden, Rupaspur Patna, Police Station - Rupaspur, District- Patna.

... ... Appellant/s

Versus

1. Ruma Devi and Anr Wife of Sri Ajay Kumar, Daughter of Sri Bijali Prasad Singh, Resident of Village and P.O. Manjhaul, P.O. Manjhaul, P.S. Cheriya Bariyarpur, District Begusarai. At present residing at Suhird Nagar, P.S. and District Begusarai.
2. Prabha Devi, Wife of Sri Digvijay Prasad Singh, Daughter of Sri Bijali Prasad Singh, Resident of Village and P.O. Gangia, P.S. Katra, District Muzaffarpur.
3. Nilu Ashok D/o Late Shanta Sinha, Wife of Ashok Kumar, Resident of U-2/G6 Aprapali Royal Indirapuram Gajiyabad (UP).
4. Renu Arun D/o Late Shanta Sinha, Wife of Arun Kumar, Resident of 203 Dwarikesh Apartment, Peace Road, Lalpur, Ranchi - 834001.

... ... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Jitendra Pd. Singh, Senior Advocate Mr. Varun Krishna Singh, Advocate
For the Respondent/s	:	Mr. Shri Nandan Prasad Singh, Senior Advocate Mr. S.P. Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT

Date : 29-10-2026

Heard learned counsel for the appellants and the learned counsel for the respondents.

2. This First Appeal has been filed under Section 299 of the Indian Succession Act, 1925 (hereinafter referred to as the

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'Act') against the judgment dated 05.07.2017 passed by the learned VIIIth Additional District Judge, Begusarai (hereinafter referred to as 'Trial Court') in Title Suit No. 02 of 2007 (arising out of Probate Case No. 01 of 1995).

3. For the sake of convenience, the parties where required shall be referred to in terms of their status before the learned Trial Court.

4. The facts of the case, in brief, are that Ruma Devi and Prabha Devi (daughters of Bijali Prasad Singh) filed Probate Case No. 01 of 1995 under Section 276 of the Act before the learned Trial Court. They sought probate of the last will and testament dated 17.12.1994 (Exhibit 3), purportedly executed by Mosst. Sabujwati Kunwari, wife of late Haribansh Narayan Singh, resident of village Ratanpurawali *alias* Sakhmohan, P.S. Bibhutipur, Subdivision Dalsinghsarai, District Samastipur. Ruma Devi prayed for probate in her favour with respect to the property in Schedule I of the application, Prabha Devi with respect to the property in Schedule II, and both jointly with respect to the property in Schedule III. According to the petitioners, the properties in Schedules I, II and III were owned and possessed by Sabujwati Kunwari, who had acquired them from her husband, late Haribansh Narayan Singh. He died in

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1920, leaving her as his sole heir, and her right in the properties became absolute after the enforcement of the Hindu Succession Act, 1956.

5. It was further pleaded that Sabujwati Kunwari was the full sister of the petitioners' father, Bijali Prasad Singh. She had no issue of her own, and there was none in the family of her husband. While managing and controlling her properties, she took assistance from her *Naihari* (maternal home) relations. From an early age, Sabujwati Kunwari showed great love and affection towards them, and the petitioners treated her as their own mother and rendered her all services. The same relations continued even after the petitioners' marriage. Because of this relationship, she bequeathed her properties to the petitioners by the Will (Exhibit 3). The Will was attested by Uday Shankar Kumar of village Binodpur, Begusarai, Krishnadeo Prasad Singh of village Pakra, Nawgachhia, Bhagalpur, and Dr Binoy Kumar, son of Bijoy Kumar. Her brother, Bijali Prasad Singh, identified her L.T.I. on the Will. It was also averred that she was not illiterate, but because of her advanced age, her hands trembled, so she put her L.T.I. instead of her signature. The testatrix died on 20.01.1995. Thereafter, on 14.03.1995, the application for the grant of probate was filed by the two

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legatees, stated to be in compliance with the required formalities.

6. On 25.07.1995, Baban Devi @ Rukmini Devi, claiming to be the full sister of the husband of the testatrix, filed a petition praying to be impleaded as a party and opposing the grant of probate. After her death, her daughter, Shanta Sinha, was substituted and continued the proceeding as defendant/objector. In her written statement, the defendant/objector raised several objections such as; the probate petition was framed contrary to Sections 280 and 281 of the Act, the probate application was not supported by the affidavit of the witnesses or the scribe as required by law, and the Will was was forged, fabricated and antedated and was in contravention of Section 16(2)(iii) of the Bihar Land (Ceiling) Act. The objector further asserted that Land Ceiling Case No. 10 of 1994-95 was pending before the Collector, Samastipur, with respect to the property covered by the Will. In that case, the petition of Ruma Devi and Prabha Devi to be made parties was turned down by the Collector, while Baban Devi, being the full sister of the husband of the testatrix, was made a party and defended the ceiling case. It was pleaded that Sabujwati Kunwari had no right or authority to execute a Will with respect to all the land

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involved in the ceiling proceeding. At best, she was competent to bequeath only the land which would have been allotted to her under Section 10(2) of the Bihar Land Ceiling Act. The objector also pleaded that, even if the L.T.I. of Sabujwati Kunwari on the Will were proved genuine by a legal expert, it might have been obtained by the father of the plaintiffs after her death. The defendant's case, as it emerges from her own deposition (D.W. 6) and the First Information Report lodged by Sabujwati Kunwari on 08.12.1994 (Exhibit A), is that Bijali Prasad Singh got her land sold through eight registered sale deeds by practising fraud and coercion and misappropriated the sale proceeds. She also stated that the L.T.I. of Sabujwati Kunwari was taken by Bijali Prasad Singh on blank paper at the Teghra Registry Office, and was later converted into the alleged Will or obtained after her death. On the objection being filed, the probate proceeding was converted into a regular Title Suit and registered as Title Suit No. 02 of 2007 (arising out of Probate Case No. 01 of 1995). The parties then went to trial on the pleadings.

7. In view of the pleadings of both parties, the learned Trial Court framed the following issues for determination:

I. Whether the probate case, as filed and

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framed, is maintainable?
II. Whether the plaintiffs have a valid cause of action for filing the petition for probate?
III. Whether the Will in question is the last testament of the testatrix?
IV. Whether the Will in question is legal, valid and duly executed by the testatrix, the deceased Sabujwati Kunwari, in a fit state of her mental and physical health?
V. Whether the plaintiffs are entitled to the grant of letters of probate?

8. In support of their case, the plaintiffs adduced oral as well as documentary evidence. They examined altogether seven witnesses, namely, PW-1 Abhishek Kumar (on facts), PW-2 Uday Shankar Kumar (attesting witness to the Will dated 17.12.1994), PW-3 Radhey Shyam Prasad (scribe of the Will), PW-4 Bijali Prasad Singh (father of the plaintiffs, brother of the testatrix, and also a witness and identifier of her L.T.I.), PW-5 Dr. Binoy Kumar (attesting witness, who proved Exhibit 3), PW-6 Ruma Devi (plaintiff no. 1) and PW-7 Prabha Devi (plaintiff no. 2).

9. Moreover, the plaintiffs, in support of their case, also produced documentary evidence, which was marked as follows:

- *Exhibit 1: Signature and writing of the scribe, Radheyshyam Prasad, on the Will dated 17.12.1994.*
- *Exhibit 2: Signature and writing of Bijali Prasad Singh on the first page of the Will dated 17.12.1994, in the*

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execution portion.

- *Exhibit 2/A: Signature and writing of Bijali Prasad Singh on the second page of the Will, as witness.*
- *Exhibit 2/B: Signature and writing of the witness Uday Shankar Kumar on the Will dated 17.12.1994.*
- *Exhibit 3: The original Will dated 17.12.1994, executed by Sabujwati Kunwari in favour of Ruma Devi and Prabha Devi.*

10. Similarly, the defendant, in support of her case, examined altogether seven witnesses, namely, DW-1 Narayan Paswan, DW-2 Satto Paswan, DW-3 Tribhuwan Rai, DW-4 Binda Singh, DW-5 Gopi Prasad Singh, DW-6 Shanta Sinha (the defendant herself) and DW-7 Sanjay Kumar (Advocate Commissioner, who recorded the evidence of the defendant on commission).

11. The defendant also produced documentary evidence, which was marked as follows:

- *Exhibit A: Certified copy of the F.I.R. dated 08.12.1994 lodged by Sabujwati Kunwari.*
- *Exhibit B: Certified copy of the order sheet of Ceiling Case No. 2 of 2007 (Ruma Devi and others v. State of Bihar and others).*
- *Exhibit C: Certified copy of the order sheet dated 02.03.1988 of Probate Case No. 27 of 1979, passed by the learned District Judge, Bhagalpur.*
- *Exhibit D: Certified copy of the probate application in Probate Case No. 27 of 1979, filed by Ruma Devi and*

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Prabha Devi.

12. After considering the facts and circumstances of the case and upon perusal of the materials available on record, the learned Trial Court held, *inter alia,* that the objection regarding non-compliance with Sections 280 and 281 of the Act was not tenable, as the probate application stood verified and signed by both plaintiffs, and was also verified by Bijali Prasad Singh, a witness and identifier of the Will, on 14.03.1995. It also noted that an affidavit sworn by him was already on record. The objection that the Will, being unregistered, could not be probated in view of Section 16(2)(iii) of the Bihar Land (Ceiling) Act was also rejected, relying on the Division Bench ruling of the Patna High Court reported in ***1979 BBCJ 16***, which overruled the earlier Single Bench ruling reported in ***1976 BBCJ 27***. The learned Trial Court held that probate cannot be refused merely because the Will is not registered. The plea of lack of territorial jurisdiction was rejected as well, since it was neither pleaded in the written statement nor spoken of in the defendant's deposition, and since, once the probate case was converted into a title suit, Section 17 of the Code of Civil Procedure allowed the suit to be filed where part of the property was situated, namely in Begusarai district.

13. On merits, the learned Trial Court held that the

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Will (Exhibit 3) bore the L.T.I. of the testatrix, identified by her brother Bijali Prasad Singh (PW-4), and that the attesting witnesses Uday Shankar Kumar (PW-2) and Dr Binoy Kumar (PW-5), as well as the scribe Radhey Shyam Prasad (PW-3), fully supported its execution. It was observed that the testatrix was literate but had put her L.T.I. because her hands trembled on account of advanced age, and that the use of an L.T.I. instead of a signature lends little support to an allegation of forgery. It further held that the plaintiffs' onus of proving the L.T.I. had been lightened by the defendant herself, who, in her own deposition as DW-6 and through DW-1 to DW-4, admitted that the testatrix's L.T.I. was taken by Bijali Prasad Singh on papers, which were allegedly later converted into the Will. The learned Trial Court found the defendant's case that Bijali Prasad Singh obtained the L.T.I. by fraud to be unbelievable in view of Exhibit A (the F.I.R.) lodged by the testatrix herself, in which there was no complaint against her brother. It also held that the plaintiffs' failure to get the disputed L.T.I. compared with an admitted L.T.I. was of no negative consequence, and that Bijali Prasad Singh, whose daughters were married and who had his own family, would not have been expected to grab the property for himself rather than for his daughters.

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14. As to the remaining circumstances relied upon by the defendant, the learned Trial Court held that the Collector, Samastipur, had no jurisdiction to decide whether a Will was genuine, and that his refusal to implead the plaintiffs in the ceiling case could not invalidate the Will. It also held that the plaintiffs' earlier claim through a Will of their grandmother (Exhibits C and D) was not reasonable or cogent as a ground for doubting this Will. Accordingly, the learned Trial Court concluded that it could not hold that the Will had not been executed by Sabujwati Kunwari, and that the Will was duly executed and attested and was her last testament. Issue Nos. I, III and IV were decided in favour of the plaintiffs. Issue No. II was also decided in their favour, as they, being the legatees, had a valid cause of action, and Issue No. V was decided in their favour as they were held entitled to a grant of probate.

15. Aggrieved by the aforesaid judgment dated 05.07.2017 passed by the learned Trial Court in Title Suit No. 02 of 2007 (arising out of Probate Case No. 01 of 1995), the defendant has preferred the present First Appeal challenging the findings recorded by the learned Trial Court and seeking reversal of the impugned judgment.

16. Learned counsel for the appellant submits that the

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impugned judgment dated 05.07.2017 is bad in law and on the facts and is fit to be set aside. It is submitted that the testatrix, Sabujwati Kunwari, was about 90 years old and unwell. On the pretext of taking her to a doctor at Begusarai, her brother Bijali Prasad Singh (PW-4), the father of the plaintiffs, took her on 05.12.1994 to the Teghra Registry Office. There she was allegedly forced at gunpoint to sign various documents and a few blank papers, and her brother also signed those documents as a witness. She returned to her village, Sakhmohan, in a state of shock and lodged an F.I.R., Teghra P.S. Case No. 198 of 1994 (Exhibit A), on 08.12.1994. Being a literate lady, she signed the F.I.R. herself. Learned counsel for the appellants further submits that the Will is forged and fabricated and was never executed by the testatrix. It is wholly improbable that an ailing lady of about 90 years, who had just been taken to an unknown place on a false pretext and forced to sign blank papers, would within twelve days of that incident, and nine days after lodging the F.I.R., voluntarily bequeath her property to the daughters of the very brother against whom she had complained. The Will is alleged to have been executed at the house of one of the beneficiaries in Begusarai, a place far from her native place and unknown to her. She was surrounded by the beneficiaries and

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their close relatives, who had planned the whole affair, as well as witnesses and a scribe, all of whom were strangers to her.

16.i. Learned counsel for the appellant further submits that the Will (Exhibit 3) has not been executed in accordance with Section 63 of the Act. The L.T.I. of the testatrix appears at the top of the right side of every one of its 8 pages. Although she was literate and had signed the F.I.R. herself only days earlier, she is said to have put her L.T.I. on the Will. This raises serious suspicion about how the document was created and does not reflect the natural conduct or intention of the testatrix. The Will was also not registered, although the Begusarai Registry Office is within one kilometre of the house of plaintiff no. 1, and no cogent reason has been given for this. He further submits that the attesting witnesses and the scribe are not independent. The scribe, Radhey Shyam Prasad (PW-3), was an unlicensed scribe. Uday Shankar Kumar (PW-2) admitted in para 23 of his cross-examination that he is the business partner of Ajay Kumar, the husband of plaintiff no. 1, Ruma Devi. Dr Binoy Kumar (PW-5) is the brother-in-law of Ajay Kumar. The third attesting witness, Krishnadeo Prasad Singh, died before his deposition. The L.T.I. of the testatrix was identified by Bijali Prasad Singh (PW-4), the father of the beneficiaries, and no person from the testatrix's

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own village, Sakhmohan, took part in the preparation of the Will. The Will was therefore created in suspicious circumstances and does not reflect the intention of the testatrix.

16.ii. Learned counsel for the appellant further submits that, as shown by Exts. C and D, the plaintiffs, in connivance with their father Bijali Prasad Singh (PW-4), had earlier set up a Will dated 15.04.1977 with respect to the property of their grandmother, Jagdamba Devi. That Will was rejected by the learned District Judge, Bhagalpur, by order dated 02.03.1988 in Probate Case No. 27 of 1979. This shows that they have a habit of forging Wills to seize property. It is further submitted that the defendant had specifically pleaded in para 14 of her written statement that Bijali Prasad Singh (PW-4) created the Will after the death of Sabujwati Kunwari by antedating it, without the signature of the landholder, who had signed the F.I.R. on 08.12.1994. Learned counsel next submits that it is well settled that in a grant of probate, the genuineness of the Will must be examined. In the present case, the testatrix, a literate lady who had signed the F.I.R. on 08.12.1994, is said to have put her L.T.I. on all 8 pages of the Will on 17.12.1994. This itself shows that the Will was created in suspicious circumstances and is a forged and fabricated document. In this

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regard, reliance is placed on the judgment of this Hon'ble Court in ***Smt. Bimla Devi v. Uma Devi*** reported in ***M.A. No. 145 of 2013***, where this Court, while observing that the absence of a thumb impression at the foot of a Will would not by itself make it illegal, held (para 42) that the thumb impression at the top right of every page, taken together with the other circumstances, raised serious suspicion about the manner in which the Will was created.

16.iii. Learned counsel for the appellant further relies on the judgment of the Hon'ble Supreme Court in ***Pazhanathal v. Alamathal***, (***2026 INSC 860***) para 15, in which it was held that three distinct acts are required for proof of the genuineness of a Will: first, the testatrix must sign or affix her mark to the instrument; secondly, the placement of the signature or mark must indicate her intention; and thirdly, the Will must be attested by at least two witnesses. Para 123 of the said judgment illustrates the suspicious circumstances surrounding a Will. Reliance is also placed on ***Malli Bewa v. Natabar Naik and others***, reported in ***AIR 1980 Orissa 34***, para 8, where the circumstances that appear suspicious for a Will have been illustrated. He next submits that the probate petition is contrary to Sections 280 and 281 of the Act, as it was not properly signed

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and verified in accordance with the Act, and that the Will contravenes Section 16(2)(iii) of the Bihar Land (Ceiling) Act, since Land Ceiling Case No. 10 of 1994-95 was pending before the Collector, Samastipur, in which the plaintiffs' prayer for impleadment was rejected. The learned Trial Court did not properly consider these aspects. He further submits that the learned Trial Court did not appreciate the oral and documentary evidence adduced by the defendant, namely Exts. A to D and the depositions of DW-1 to DW-7, and has granted probate in a mechanical manner on the basis of the testimony of the plaintiffs' interested witnesses, proceeding on surmises and conjectures. Learned counsel for the appellant accordingly submits that the Will is not genuine and was created in suspicious circumstances, and that the appeal deserves to be allowed and the impugned judgment set aside.

17. Learned counsel on behalf of the respondents submitted that the appeal is not tenable and is devoid of merit, and that the impugned judgment dated 05.07.2017 does not call for any interference. He submitted that the main contention of the appellants at the time of argument is that the Will (Exhibit 3) is unregistered and that the thumb impression of the testatrix has been put at the top of the right-hand side of the Will, which

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makes the entire Will doubtful. It is submitted that this question was never raised by the defendant in her pleadings before the learned Trial Court. It is a settled position that a party cannot be allowed to travel beyond its pleadings, and the appellants cannot be permitted to argue this point for the first time in appeal. In this regard, reliance is placed on ***Ram Swarup Gupta v1. Bisun Narayan Inter College and others***, reported in ***AIR 1987 SC 1242*** , where it was held that evidence which is not supported by pleadings cannot be considered, and that no party can be permitted to go beyond its pleadings.

17.i. Learned counsel for the respondents further submitted that, in any event, the contention is wholly uncalled for. On a perusal of Exhibit 3, the right side of the page has been left blank, as is usual, and the signatures of the witnesses and the L.T.I. of the testatrix have been placed on that side. This is a normal practice. Even in registered deeds, signatures are placed in the same manner, and there is no illegality in placing a signature or L.T.I. at the top of the right-hand side of the page. As to the Will being unregistered, it is submitted that the learned Trial Court examined this objection and rejected it, relying on the Division Bench ruling of this Hon'ble Court reported in ***1979 BBCJ 16***, which held that probate cannot be refused

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merely because a Will is not registered.

17.ii. Learned counsel for the respondents further submitted that the second contention of the appellants, that Sections 280 and 281 of the Act were not complied with, is also not based on facts. The point was raised before the learned Trial Court and has been dealt with in para 10 of the impugned judgment. The learned Trial Court found that the probate application was verified and signed by both applicants, Ruma Devi and Prabha Devi, and that the signature of Ruma Devi was also verified by her advocate, Sri Arun Kumar Singh. Bijali Prasad Singh, the witness who identified the Will, also gave a verification on the last page of the application on 14.03.1995. The learned Trial Court therefore rightly found that Sections 280 and 281 were fully complied with. He next submitted that the L.T.I. of the testatrix on the Will stands admitted by the defendant herself and by her own witnesses. The learned Trial Court, in para 13 of the impugned judgment, quoted the statements of DW-6 (the defendant), DW-1 Narayan Paswan, DW-2 Satto Paswan, DW-3 Tribhuwan Rai and DW-4 Binda Singh. All of them admitted that the thumb impression of Sabujwati Kunwari might have been obtained by Bijali Prasad Singh at the Teghra Registry Office. The appellants, having

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admitted the L.T.I., cannot now contend that it is not genuine.

17.iii. Learned counsel for the respondents further submitted that the genuineness of the Will has also been proved by the attesting witnesses and the scribe, namely Dr. Binoy Kumar (PW-5), Radhey Shyam Prasad (PW-3, scribe) and Uday Shankar Kumar (PW-2). The learned Trial Court, on the basis of this evidence, has rightly held that the genuine thumb impression of the testatrix is present on the Will. He further submitted that the contention of the appellants that the testatrix signed the F.I.R. (Exhibit A) dated 08.12.1994, only a few days before the Will, and made allegations in it against Bijali Prasad Singh, was considered by the learned Trial Court and found to be incorrect. In Exhibit A, the informant and her brother were kidnapped by some persons, and there is no allegation against Bijali Prasad Singh. As to the L.T.I. on the Will in place of a signature, it has been explained that after the kidnapping, the testatrix became mentally and physically weak and disturbed, and her hands used to tremble. In any case, the thumb impression on the Will has been admitted by DW-2, DW-3, DW-4 and DW-6. Learned counsel submitted that the argument of the appellants that the Will was a creation of Bijali Prasad Singh in his own interest has also been examined by the learned Trial

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Court in para 12 of the impugned judgment. The learned Trial Court found that there was no reason for Bijali Prasad Singh to get the Will executed in favour of his daughters, because in 1994, both plaintiffs were married and living with their husbands, and Bijali Prasad Singh had his own family of wife and sons. If he had wanted to grab the property, he would have got the Will executed in favour of his sons and not his daughters. Learned counsel accordingly submitted that the plaintiffs (respondents herein) have proved that the Will in question is genuine and natural, and that the learned Trial Court rightly granted probate. The appeal is therefore fit to be dismissed with costs.

18. In view of the above contentions submitted by both parties, the following points arise for consideration:

i. Whether the objections regarding non-compliance with Sections 280 and 281 of the Indian Succession Act, 1925 and contravention of Section 16(2)(iii) of the Bihar Land (Ceiling) Act, and the appellants' objection to the Will on grounds not pleaded before the learned Trial Court, are tenable?

ii. Whether the Will dated 17.12.1994 (Exhibit 3) was duly executed and attested by the testatrix, Sabujwati Kunwari, in accordance with Section 63 of the Act, and is genuine, or

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whether it was created in suspicious circumstances?

19. This Court has considered the submissions advanced on behalf of the parties, perused the Trial Court record and re-appreciated the oral and documentary evidence. The three issues formulated in paragraph 18 are taken up in seriatim. Since all three revolve around the proof of a Will, the governing principles are first examined.

20. The law on proof of a Will is well settled by ***H. Venkatachala Iyengar v. B.N. Thimmajamma***, ***AIR 1959 SC 443***. A Will must be proved in accordance with Section 63 of the Indian Succession Act, 1925 and Section 68 of the Indian Evidence Act, 1872 (para 18). The propounder must show by satisfactory evidence that the Will was signed by the testator, that he was in a sound and disposing state of mind, that he understood the nature and effect of the dispositions, and that he put his signature or mark of his own free will; where the evidence on these points is disinterested, satisfactory and sufficient, the onus stands discharged (para 19). Where the execution is surrounded by suspicious circumstances, the onus becomes heavier, and the propounder must remove all legitimate suspicions before the document is accepted as the last Will (paras 20 and 22). Which circumstances are suspicious cannot

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be exhaustively defined, and is a question of fact in each case (para 39). If the caveator alleges fraud, undue influence or coercion, he must prove it, but even without such pleas the circumstances may raise a doubt which it is part of the propounder's initial onus to remove (para 20). A prominent part taken by the propounder in the execution of a Will conferring a substantial benefit on him is itself a suspicious circumstance (paras 21 and 31). At the same time, the scepticism of the Court must be reasonable and not an obdurate refusal to believe (para 22). These principles were reaffirmed in ***S.R. Srinivasa v. S. Padmavathamma***, ***(2010) 5 SCC 274***, which holds that registration of a Will by itself does not remove suspicion (para 57) and that where suspicious circumstances exist, the propounder must offer a cogent and convincing explanation (paras 63 and 65, applying ***Jaswant Kaur v. Amrit Kaur***, ***(1977) 1 SCC 369***).

21. A probate application is non-contentious and summary only until it is opposed. Once it is contested, Section 295 of the Act requires the proceeding to take, as nearly as may be, the form of a regular suit under the Code of Civil Procedure. In the instant case as well, the matter was tried as Title Suit No. 02 of 2007, and it was not a summary proceeding. The probate

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Court decides only whether the instrument is the last Will of the testatrix, duly executed and attested, and does not decide title or the legality of the bequest. **(*Ishwardeo Narain Singh v. Kamta Devi*, *AIR 1954 SC 280; Kanwarjit Singh Dhillon v. Hardyal Singh Dhillon*, *(2007) 11 SCC 357; Chiranjilal Shrilal Goenka v. Jasjit Singh*, *(1993) 2 SCC 507.)*** A grant operates in rem and binds persons who are not before the Court and the same calls for exacting scrutiny.

22. The respondents contend that the L.T.I. in place of a signature, its placement at the top right of the pages, and the non-registration of the Will were never pleaded, and they rely on ***Ram Sarup Gupta v. Bishun Narain Inter College***, ***AIR 1987 SC 1242***. The general rule is accepted. A party cannot be allowed to set up a new case at the appellate stage, and relief cannot be founded on a case that was neither pleaded nor put in issue. (***Bachhaj Nahar v. Nilima Mandal, (2008) 17 SCC 491***.) The objection fails here for the reasons stated in the upcoming paragraphs.

23. The defendant pleaded that the Will was forged and fabricated. She also pleaded that even if the L.T.I. were found genuine by an expert, it might have been obtained by the father of the plaintiffs. How the testatrix's mark came to be on

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the paper was therefore in issue from the outset. Both sides adduced evidence on it (PW-2 to PW-5; DW-1 to DW-4 and DW-6; Exhibit A). The learned Trial Court itself considered, at para 11 of its judgment, why an L.T.I. was used in place of a signature, and it dealt with the unregistered character of the Will. The plaintiffs knew the case they had to meet and suffered no prejudice. ***Ram Sarup Gupta (supra)*** itself looks to the substance of the case, and it does not insist on the form of the pleadings. ***Bachhaj Nahar (supra)*** is of no help to the respondents, because this Court grants no relief outside the case pleaded. It examines the proof of a Will on the pleaded case of forgery and misuse of the testatrix's mark.

24. Section 63(a) and (b) of the Act require that the testatrix sign or affix her mark and that the mark be so placed that it appears to be intended to give effect to the writing as a Will. These are ingredients of due execution which the propounder must prove, and they are not a defence that the contestant must plead. (***Pazhanathal (supra)*** para 51.) Even where the contestant has not pleaded a suspicious circumstance with particularity, the Supreme Court has held that the Will is not thereby proved if the circumstance is inherent in the document, because the propounder must then convince the

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Court and dispel the suspicion. (***Derek A.C. Lobo v. Ulric M.A. Lobo***, ***2023 SCC OnLine SC 1893***, para 16.) The circumstances relied upon here are inherent in Exhibit 3 and in the plaintiffs' own evidence. These are the L.T.I. in place of a signature, its position, the relationship of the attesting witnesses to a beneficiary, and the absence of registration. Further, the Court of probate must itself be satisfied of the genuineness of the Will whether or not a plea has been taken. (***H. Venkatachala Iyengar (supra)***, para 20).

25. The respondents' reliance on ***Chitturi Subbanna v. Kudapa Subbanna, AIR 1965 SC 1325***, is misplaced. The observations about waiver and the function of an appellate Court on which they rely are from the dissenting opinion of Mudholkar J. The majority permitted a new ground to be raised in appeal where it arose on facts already on record and caused no prejudice to the other side. The same is true here. The objection that the grounds were unpleaded is rejected, and this part of point (i) is answered against the respondents.

26. In addition to the principles in para 20, Section 63(c) of the Act requires attestation by at least two witnesses. Each must have seen the testatrix affix her mark, or have received her personal acknowledgement of it, and each must

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sign in her presence. Section 68 of the Evidence Act requires at least one attesting witness to be called to prove execution, and this applies to a registered Will as well as to an unregistered one. The witness must be able to prove the whole of the statutory ceremony, including attestation by the other witness. (***Pazhanathal***, (***supra***) paras 53-59) Proof that the mark is the testatrix's own is not proof that she executed this Will. Where suspicion survives, even proof of attestation is not proof of genuineness. These principles accord with ***S.R. Srinivasa v. S. Padmavathamma, (2010) 5 SCC 274***, which holds that registration does not, by itself, remove suspicion (para 57) and requires a cogent and convincing explanation for each suspicious circumstance.

27. The standard of proof is not the formal standard of proof beyond reasonable doubt in a criminal trial. The Hon'ble Supreme Court has said that proof is not required with mathematical certainty. But where a Will displaces natural succession, and the contestant alleges forgery, fabrication or antedating, the Court is called upon to decide a solemn question and must be fully satisfied that the Will was validly executed, as observed in ***Jaswant Kaur v. Amrit Kaur, (1977) 1 SCC 369***. In the same precedent, it was significantly observed that:

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> "6. *If a caveator alleges fraud, undue influence, coercion etc. in regard to the execution of the will, such pleas have to be proved by him, but even in the absence of such pleas, the very circumstances surrounding the execution of the will may raise a doubt as to whether the testator was acting of his own free will. And then it is a part of the initial onus of the propounder to remove all reasonable doubts in the matter."*

Thus, if a genuine and legitimate doubt remains, probate cannot be granted, and the benefit of the doubt goes to the natural line of succession and not to the propounder. In this respect the caution required of the Court is no less than that of a criminal court.

28. Section 63 of the Act is mandatory in nature. A testator "shall" execute the Will according to its rules. The testatrix must sign or affix her mark, and the mark must be so placed that it appears she intended thereby to give effect to the writing as a Will. These are statutory requirements which cannot be dispensed with, and the mark must therefore clearly show her testamentary intent. Additionally, testamentary capacity is part of the propounder's burden, whether or not the contestant has pleaded incapacity. The propounder must show by satisfactory evidence that the testatrix, at the relevant time, was in a sound and disposing state of mind, understood the nature and effect of

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the dispositions, and put her mark knowing what the document contained. It is for the propounder to establish that the testator, at the time of the disposition, knew and understood the property he was disposing of and the persons who were to be the beneficiaries. Producing the scribe and the attesting witnesses, or proving the genuineness of the testator's thumb impression, is not by itself sufficient unless the suspicious circumstances are ruled out and the Court's conscience is satisfied not only about execution but about authenticity. Issue No. IV before the learned Trial Court, which asked whether the Will was executed by the testatrix "in a fit state of her mental and physical health", placed this question squarely in issue. The learned Trial Court erred in treating it as outside the enquiry because the defendant had not pleaded unsoundness (para 9).

29. The explanation which the respondents themselves offer for the L.T.I. bears directly on this. Their case in appeal is that after the kidnapping the testatrix "became mentally and physically weak and she was a bit disturbed", and that her hands used to tremble (para 14 of the respondents' written notes). Counsel's submission is not evidence, and this Court does not treat it as evidence. But it is the case that the propounders themselves advance to explain the central feature of the

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document they must justify. Having advanced it, they cannot ask the Court to presume that the same testatrix was in full command of her faculties when, twelve days after the kidnapping and nine days after the F.I.R., she is said to have disposed of her entire estate. On their own showing, her state of mind at the relevant time was not the state that the law requires the propounders to establish. If she was weak and disturbed as they say, it was for them to show by satisfactory evidence that this did not impair her understanding, that she knew what property she was disposing of and who the beneficiaries were, and that the contents were read over and explained to her. No such evidence is recorded in the impugned judgment.

30. The respondents' explanation is also self-defeating. If the weakness was such that she could not sign, it is contradicted by Exhibit A, which she signed nine days earlier and which gives a detailed and coherent account of the events of 05.12.1994. If she was fit enough to lodge that complaint and sign it, no reason is left for the mark in place of a signature. And if she was disturbed in the sense now described, capacity and understanding remain unproved. Whichever way it is taken, the explanation deepens the doubt and does not remove it. The Court does not find that the testatrix lacked capacity. It finds

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that the propounders have failed to discharge their burden of proving that she was in a sound and disposing state of mind and understood the nature and effect of the Will, and that the enquiry therefore includes both whether the specific circumstances on record have been removed and whether capacity and understanding have been proved. Both are answered against the plaintiffs.

Point (ii)

31. An FIR (Exhibit A) was lodged by the testatrix herself on 08.12.1994, nine days before the date of the Will and long before any dispute over the Will could arise. Both sides rely on it. The learned Trial Court records (para 12 of its judgment) that, according to Exhibit A, she and her brother were kidnapped by one Dani Rai and his group, that eight *kewalas* were taken from her, and that her brother was forced to sign as an identifying witness. As this Court reads the original of Exhibit A, she also states that on 05.12.1994 she was made to sign and to put her mark on several papers, including plain and stamped papers, at the Teghra Registry office, and that her signature and mark could be misused. The Trial Court read Exhibit A as exculpating Bijali Prasad Singh, because no allegation is made against him. This Court need not decide

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whether Bijali Prasad Singh had any part in the events of 05.12.1994. It is enough that, nine days before the date of the Will, the testatrix herself recorded that her signature and mark had been taken on papers whose contents she did not know and that she feared their misuse. On that record, the possibility that a mark of hers taken on papers during those days was later used for another purpose is not fanciful. The learned Trial Court, having held that the defendant's case is unbelievable because Exhibit A makes no allegation against the brother, did not ask this question at all.

32. The learned Trial Court itself finds that Sabujwati Kunwari was not illiterate and used to give her signature. Exhibit A, lodged nine days before the date of the Will, appears to bear her signature. The Will, by which she is said to have disposed of her entire estate, bears no signature of hers anywhere and carries only an L.T.I. on every page. In the language of the defendant's case, her signature is established on the record, and the L.T.I. on Exhibit 3 is not admitted as the mark of a Will.

33. The explanation accepted by the learned Trial Court is that the testatrix's hands trembled on account of advanced age, and it was pleaded in the probate petition. A

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pleading by the propounder is not evidence. The explanation also cannot be reconciled with the fact that she signed Exhibit A nine days earlier. A person who could sign a complaint to the police could sign her Will. General weakness or old age, without evidence, cannot be accepted as a ready-made explanation for a departure from the way the testatrix ordinarily authenticated her documents. Where a literate testator affixes a mark in place of a signature, the propounder must adduce satisfactory evidence of why. (***Smt. Guro v. Atma Singh, (1992) 2 SCC 507***.) The plaintiffs have not done so.

34. The Court is conversant of the precedent set in ***Lachhmi Narain Singh v. Sarjug Singh (AIR 2021 SUPREME COURT 3873)***, where the Hon'ble Supreme Court cautioned against drawing an adverse inference merely because a literate person had affixed a thumb impression. The case is distinguishable. There, the thumb impression was the executant's habitual mode of execution, because every deed he executed in his lifetime bore it. The impugned deed was registered, and expert evidence supported it. Here, the learned Trial Court itself finds that the testatrix habitually signs, the Will is not registered, and there is no expert evidence. The principle that literacy alone does not make a thumb impression suspicious

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does not help propounders where the testatrix's established practice was to sign and where she had signed a document nine days earlier.

35. The L.T.I. and the witnesses' signatures appear at the top of the right-hand margin of the pages. Although no format is prescribed for a Will, the position is not illegal. But Section 63(b) requires that the mark be so placed that it appears intended to give effect to the writing as a Will. In ordinary practice, the testator's signature or mark appears at the close of the testamentary text or at the foot of the page, so that it closes and authenticates what is written above it. A mark at the head of each page, in the margin, does not necessarily serve that purpose. It is also the position in which a mark may be taken in advance on papers which are later written upon, and that is the defendant's case. Standing alone this would not be decisive, but it must be read with paragraphs 30-32. No witness is recorded as explaining why the marks were taken in this manner.

36. The learned Trial Court held that the defendant, DW-6, and DW-1 to DW-4 had admitted the L.T.I., so that the plaintiffs' onus was lightened. This cannot be accepted. The defendant's case is that the testatrix's mark was taken on papers at the Teghra Registry office and was later converted into the

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alleged Will, or obtained after her death. That is a denial of the Will and not an admission of it. DW-6's statement is expressed as a surmise ('it appears'). DW-1 to DW-4 repeat only what the testatrix is said to have told them, and they cannot supply an admission of execution. An admission must also be read as a whole. Even if the mark is hers, execution of the Will under Section 63 is not thereby proved. The propounder must prove that she affixed it on this Will, with knowledge of its contents, and that it was attested as the law requires. The weakness of the defence does not discharge the propounders' burden.

37. Bijali Prasad is the father of both beneficiaries and the brother of the testatrix. He identified her L.T.I. (PW-4). His signature and writing appear in the execution portion of the first page (Exhibit 2) and on the second page as a witness (Exhibit 2/A). He also verified the probate application and swore an affidavit in support. Where a person closely connected with the beneficiaries takes a prominent part in the execution, that is a recognised suspicious circumstance. (***Smt. Guro* (*supra*)**). The rationale applies equally to a father acting for his daughters. The law does not ask what the person who arranged the execution might have preferred. It asks whether independent evidence removes the suspicion. In the instant case, there is none.

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38. PW-2, Uday Shankar Kumar, admitted in para 23 of his cross-examination that he is the business partner of Ajay Kumar, the husband of plaintiff no. 1. PW-5, Dr. Binoy Kumar, is the brother-in-law of Ajay Kumar. The third attesting witness, Krishnadeo Prasad Singh, died before he could be examined. The scribe, PW-3, was not a licensed scribe. Relationship does not disqualify an attesting witness, but the evidence of interested witnesses must be examined with care. The learned Trial Court did not examine independence at all. It treated PW-5 as respectable because he is a doctor, which says nothing of his independence. No person from the testatrix's own village, Sakhmohan, was examined on her condition, her intention or the circumstances of execution. The whole of the evidence of execution comes from the circle of the beneficiaries.

39. The plaintiffs pleaded that none survived in the family of the testatrix's husband. The defendant's pleaded genealogy shows Baban Devi @ Rukmini Devi as the full sister of the testatrix's husband, with the defendant as her daughter. The learned Trial Court made no finding. The Court does not hold the disposition in favour of the testatrix's nieces to be unnatural. But where a Will excludes those through whom the property came, the evidence must show that the exclusion was

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the testatrix's own conscious decision and not something arranged around her. Such evidence is absent.

40. Registration of a Will is optional, and the learned Trial Court rightly held that probate cannot be refused only because the Will is unregistered. But registration, where it exists, supplies an independent assurance, and the Supreme Court has held that even registration does not by itself remove suspicion. (*S.R. Srinivasa*, para 57.) Here the testatrix had been taken to the Teghra Registry office on 05.12.1994 and complained of it three days later. The Will executed twelve days later was not registered. No reason was shown. The propounders therefore have no assurance of that kind to offer.

41. The learned Trial Court found the application signed and verified by both plaintiffs and by Bijali Prasad Singh. Section 281 requires verification by a witness to the Will "when procurable", and High Courts have treated the provision as directory. (***Nand Kishore Rai v. Mst. Bhagi Kuer, AIR 1958 All 329***) After a full trial in which execution was tested on evidence, any defect would be a curable irregularity. This Court does not rest its decision on this ground and answers it against the appellant. A verification by the father of the beneficiaries adds no independent assurance of genuineness.

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42. The contention that the bequest offends Section 16(2)(iii) of the Bihar Land (Ceiling) Act, and the effect of the Collector's refusal to implead the plaintiffs, concern the legality of the bequest and title to land. A probate Court does not decide those questions. The learned Trial Court rightly held that the Collector has no jurisdiction to decide whether a Will is genuine, and that his order neither supports nor invalidates it.

43. In a probate matter, the question is not only whether the mark on the paper is the testatrix's, which is how the learned Trial Court framed the case. It is whether the propounders have proved, by evidence that satisfies the conscience of the Court, that she executed this document as her Will, knowing what it said, and that every suspicion surrounding the execution has been removed. By asking the first question, and answering it from the weakness of the defence, the learned Trial Court reversed the burden that the law places on the propounder. It treated the defendant's surmise as an admission, it filled gaps in the plaintiffs' evidence with conjecture about the motive of Bijali Prasad Singh, and it did not examine the independence of the attesting witnesses, the explanation for the thumb impression in place of the signature, or the testatrix's own complaint nine days before the date of the Will. This is not

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a case in which the learned Trial Court's finding rests on the demeanour of witnesses. It rests on documents and on inferences, which this Court is equally able to draw. A finding reached by applying the wrong test, and without considering circumstances that go to the root of the matter, cannot be sustained merely because it is a finding of fact.

44. The findings of the learned Trial Court on Issue Nos. III and IV, namely that the Will is the last testament of the testatrix and was duly executed by her in a fit state of mental and physical health, are set aside. The Trial Court correctly noted that no unsoundness of mind had been pleaded, but it was wrong to treat that as the end of the enquiry. Testamentary capacity and understanding of the nature and effect of the disposition form part of the burden on the propounder, whether or not the contestant has pleaded incapacity. The plaintiffs have not discharged that burden on the case they themselves put forward, namely that the testatrix was weak and disturbed at the relevant time. The finding on Issue No. I (maintainability) is upheld only to the extent that the probate case was not liable to be dismissed in limine on the technical objections raised. The finding on Issue No. II (cause of action) does not require disturbance, as the legatees have a cause to seek probate. Issue

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No. V (entitlement to letters of probate) is answered against the plaintiffs, because the Will is not proved.

45. The observations in this judgment concern only whether the Will is proved. They do not decide title to the properties, and the rights of the parties in them shall be determined in accordance with law.

46. Accordingly, the present appeal is allowed. The judgment dated 05.07.2017 passed by the learned VIIIth Additional District Judge, Begusarai in Title Suit No. 02 of 2007 (arising out of Probate Case No. 01 of 1995) is set aside. Probate of the Will dated 17.12.1994 (Exhibit 3) is refused, and the probate case is dismissed.

(Ramesh Chand Malviya, J)

Sunnykr/-

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