

IN THE HIGH COURT OF JUDICATURE AT PATNA

**First Appeal No.78 of 1987**

Against the judgment and order dated 03.12.1986 passed by 3<sup>rd</sup> Additional District Judge, Siwan in Revocation Case No.165 of 1978.

Binod Kumar Gupta & Ors.

.... .... Opposite parties-Appellants

Versus

Vikramaditya Bhartee & Ors.

.... .... Petitioners-Respondents

**Appearance :**

For the Appellants : Mr. Binod Kumar Singh, Advocate.  
Ms. Vagisha Pragya Vacaknavi, Advocate.

For the Respondents : Mr. Vishwajeet Kumar Mishra, Advocate.

**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO**

**C.A.V. JUDGMENT**

**Date: 19-05-2015**

Opposite party, Srimati Janki Devi (deceased and substituted) had filed this first appeal against the judgment and order dated 03.12.1986 passed by learned 3<sup>rd</sup> Additional District Judge, Siwan in Revocation Case No.165 of 1978.

2. The aforesaid Revocation Case No.165 of 1978 was filed by Ramji Bharti (since deceased and substituted) under Section 263 of the Indian Succession Act for revocation of probate granted in favour of the original appellant i.e. Srimati Janki Devi in Probate Case No.55 of 1976. The said probate case was filed alleging that Late Haliwant Sahai has executed a Will with respect to 6 Kathas 19 Dhurs land of Siwan Town in favour of Janki Devi. The probate case was



allowed and probate certificate was granted. The present revocation case was filed alleging that the dispute relates to 6 Kathas 19 Dhurs of land comprised within Plot No.2908 belonged to Late Haliwant Sahai. 144 Cr.P.C. proceeding was initiated between the parties on the report of police, which was converted to proceeding under Section 145 Cr.P.C. on 04.04.1977. As Haliwant Sahai died on 08.08.1967 leaving behind no heir, the properties were inherited by his agnatic relations. The agnates of Haliwant Sahai had executed a registered Mahadanama on 13.08.1976 in favour of Ramji Bharti (the original applicant) and subsequently they executed a registered sale deed in favour of Ramji Bharti on 29.12.1976 and 15.01.1977. In 144 Cr.P.C. proceeding, which was converted to 145 Cr.P.C. proceeding, it was said that Haliwant Sahai had executed an unregistered Will. According to the applicant, at the time of execution of the alleged Will Haliwant Sahai was old and very weak and feeble in body and mind and was incapable of understanding. On 02.11.1976 the applicant of probate case filed application for grant of probate on the basis of Will alleged to have been executed by Haliwant Sahai on 19.07.1967. The present applicant had no knowledge about the probate proceeding as no notice had ever been served on him or his vendor. The applicant came to know on 22.08.1978 through one advocate clerk about the case and inspected the record and obtained

the order of probate dated 18.11.1977. The alleged Will is forged and fabricated document. It was never executed by Late Haliwant Sahai as he had no relation at all or connection with the opposite party-appellant herein. On these grounds it was prayed for revoking the probate granted in favour of opposite party-appellant herein.

3. A rejoinder was filed by the appellant herein taking various pleas alleging that the sale deeds are false and fabricated and that the applicant had full knowledge of the probate proceeding but he kept mum. With these grounds, a prayer was made to reject the application.

4. The learned court below framed the following three issues:

- (i) Whether the Will (executed on 19.07.1967) probated is forged and fabricated?
- (ii) Whether the order dated 18.11.1977 granting probate was obtained by committing fraud?
- (iii) Whether the applicant is entitled to the decree as prayed for?

5. The court below thereafter considering the materials available on record came to the conclusion that in the probate case the agnates of Late Haliwant Sahai were not made parties, which is admitted position and, therefore, no notice was issued to the agnates of Late Haliwant Sahai and it was essential for the grant of probate. The court below also held that the alleged Will dated 19.07.1967 said

to have been executed by Late Haliwant Sahai is a forged and fabricated document. Accordingly, the revocation application was allowed and the probate granted in favour of the appellant was revoked.

6. The learned counsel Mr. Binod Kumar Singh appearing on behalf of the appellants submitted that the court below could not have decided the case on merit and could not have given any finding with regard to the genuineness or otherwise of the alleged Will because the application for revocation was filed under Section 263 of the Indian Succession Act. The scope for exercise of jurisdiction under Section 263 of the Indian Succession Act is limited one. The court is required to see as to whether on the grounds mentioned in that section the probate certificate granted could be set aside or not? In the present case the court below decided on merits as if the court is deciding the application under Section 276 of the Indian Succession Act, which is not permissible, therefore, the judgment is vitiated. The learned counsel further submitted that in this case the probate certificate has been granted in favour of the appellant and the applicant never prayed for setting aside the probate certificate nor challenged the grant, therefore, the prayer for revocation of order only is not maintainable.

7. In support of his contention, the learned counsel placed

Sections 289 and 263 of the Indian Succession Act.

8. The learned counsel further submitted that the right to revoke the probate granted was with Ramji Bharti, therefore, on his death his widow could not have been substituted. Moreover, the right to get the probate revoked is personal right. His wife also died and, therefore, no substitution could have been made. In view of this fact the revocation application itself is now not maintainable and there is no cause of action, as such, the appeal be allowed and the impugned judgment be set aside and the revocation application be dismissed on the ground that it is now not maintainable.

9. On the other hand, the learned counsel appearing on behalf of the respondents submitted that the original applicant was the purchaser of the suit property and after purchase he came in possession of the property and on his death the property devolved on his heirs, therefore, what right the applicant had on him was inherited by his legal representatives/heirs. In such circumstances, it cannot be said that the right was personal right. So far the ground that the court below has decided on merit the genuineness of the Will is concerned, the learned counsel submitted that there is no bar in the Act, therefore, the court has decided the same. In such circumstances on this ground it cannot be said that the judgment is vitiated. The learned counsel further submitted that the certificate was issued on the basis of the

order passed by the court below and the applicant challenged the said order itself. Therefore, the applicant was not required to challenge the certificate. On these grounds, the learned counsel submitted that the first appeal be dismissed.

10. In view of the above contentions of the parties the point arises for consideration in this first appeal is as to whether the court below could have revoked the probate granted in favour of the appellant and whether the impugned judgment and order is sustainable in the eye of law?

11. In the present case, the application for revocation was filed by Ramji Bharti for revocation of the probate granted in Probate Case No.55 of 1976. His case is that the land belonged to Haliwant Sahai, who died issueless and, therefore, the property was inherited by his agnates but fraudulently and dishonestly in the probate case the agnatic relations of Haliwant Sahai were not cited. The agnatic relations of Haliwant Sahai are Raghunath Prasad, Biswanath Prasad, Kedarnath Prasad, Sukhdeo Prasad, Kapildeo Prasad, Gopalji Prasad, Parmatma Prasad, Baliram Prasad and Bacha Prasad. They inherited the property of Haliwant Sahai. This applicant Ramji Bharti had purchased the property of Haliwant Sahai by two registered sale deeds dated 29.12.1976 and 15.01.1977 and came in possession. So far this application of the applicant is concerned, there is no specific denial in



the objection petition filed by the appellant. On the contrary the witness, A.W.5 admitted the fact that Haliwant Sahai died leaving behind agnates mentioned in his evidence. He himself claimed to be one of the agnates. A.W.3 also supported the case of the claimant. The applicant has filed plaint of Title Suit No.104 of 1910, which has been marked Ext.2 in support of the fact that there was agnatic relations of Haliwant Sahai. A.W.6 and A.W.7 all have supported this fact. The probate application has been filed, which has been marked Ext.G on behalf of the opposite party. From perusal of this Ext.G, it appears that it was clearly mentioned that the testator has no relation. Therefore, this assertion made in the probate application by Janki Devi is entirely false and admittedly the agnatic relations were not cited in the application. She has been examined as O.P.W.6 and admitted in her evidence at paragraph-17 that she had not made the agnates of Haliwant Sahai as party.

12. In view of the above admitted position now it becomes clear that Haliwant Sahai was the owner of the property. He died leaving behind no issue and his property was inherited by his agnates. The applicant, who filed the probate case, had no relation with Haliwant Sahai. In the probate application the agnates were not made party.

13. Section 263 of the Indian Succession Act reads as

follows:

**Explanation.**--Just cause shall be deemed to exist where -

- (a) the proceedings to obtain the grant were defective in substance; or
- (b) the grant was obtained fraudulently by making a false suggestion, or by concealing from the Court something material to the case; or
- (c) the grant was obtained by means of an untrue allegation of a fact essential in point of law to justify the grant, though such allegation was made in ignorance or inadvertently; or
- (d) the grant has become useless and inoperative through circumstances; or
- (e) the person to whom the grant was made has wilfully and without reasonable cause omitted to exhibit an inventory or account in accordance with the provisions of Chapter VII of this Part, or has exhibited under that Chapter an inventory or account which is untrue in a material respect.

14. Now, therefore, in view of the above provision, the grant of probate can be revoked on any of the grounds mentioned above. Here as has been stated above, intentionally and fraudulently the applicant never made the agnates as party. They were never cited in the application. On the contrary, specific assertions were made that he died leaving behind no relation. This is entirely a false suggestion and the material fact was concealed from the Court.

15. Now, therefore, the act of the applicant is fully covered by clause (a), (b) and (c) of Section 263 of the Indian

Succession Act. This is sufficient for revocation of the grant of probate.

16. So far the submission of the learned counsel that it was personal right is concerned, it may be mentioned here that Ramji Bharti had purchased the property and on purchase he became the owner of the property and on his death, the ownership devolved on his heirs and, therefore, the right and interest of Ramji Bharti attached with the property was inherited by his heirs and, therefore, the heirs had the right to prosecute the proceeding initiated by Ramji Bharti. As stated above the agnates, who ought to have been cited, were not cited and the grant was made without citing the parties.

17. So far non-maintainability of the revocation application is concerned, according to the learned counsel, Section 289 provides for grant of probate to be in the seal of Court and in this case the probate has been granted after the order under the seal of the Court but so far this certificate has not been challenged by the applicant is concerned, it may be stated that this certificate which was granted under the seal of the Court is based on the order whereby the grant was made. Now if the order is recalled then automatically the probate granted under the seal of the Court will have no meaning. In other words, it cannot be said that ultimately the certificate has been granted under the seal of the Court, the order on the basis of which it

has been granted cannot be revoked. In my opinion, this submission of the learned counsel for the appellants has got no force. Once the order directing to issue the probate under the seal of the Court is revoked/recalled automatically the grant in favour of the appellant will be meaningless and will have no force.

18. So far the submission of learned counsel that the court below has decided the question on merit and recorded the finding regarding genuineness of the Will is concerned, it may be mentioned here that the application for revocation was filed under Section 263 of the Indian Succession Act. We have quoted the section itself for ready reference in the preceding paragraphs. In view of these paragraphs the scope before the Court was only to see as to whether the probate granted can be revoked or not on the grounds mentioned in Section 263 of the Indian Succession Act, i.e. whether any of the grounds exists or not. Once the Court found that the order granting probate is fraudulently obtained and revoked the same, the jurisdiction of the Court ceased. The Court revoking the grant under Section 263 of the Indian Succession Act should not have decided the merits of the case as if he was dealing the application under section 276 of the Indian Succession Act. In my opinion, therefore, that part of the judgment whereby the court below recorded the finding regarding genuineness or otherwise of the alleged Will is unsustainable in the eye of law.



Accordingly, it is hereby set aside. The original Probate Case No.55 of 1976 granted probate is hereby revived and the parties are directed to adduce evidence in support of their pleadings in the Court afresh. Since both the parties are present before this Court and they were heard through their advocates, no further notice be issued to the parties. The parties are directed to appear before the court below within two months and participate in the proceeding. The court below shall proceed to decide the probate case after giving opportunity to the parties to adduce the evidence in support of their respective case and pleading as early as possible considering the age of the probate case, which is of the year 1976.

19. In the result, this appeal is allowed in part. The part of the judgment whereby the court below has recorded the finding with regard to the alleged Will is hereby set aside. The part of the judgment whereby the grant of probate is revoked is hereby confirmed. However, Probate Case No.55 of 1976 is revived as indicated above. In the facts and circumstances of the case, there shall be no order as to cost.

**(Mungeshwar Sahoo, J)**

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