

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.24 of 2011

(Against the judgment and order dated 04.10.2010 passed by District Judge, Gopalganj in Probate Case No.24 of 2009)

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Surya Nath Bhagat

..... Applicant-Appellant

Versus

The Collector, Gopalganj & Ors.

..... Opposite parties-Respondents

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Appearance :

For the Appellant : Mr. S.S. Dwivedi, Senior Advocate,
Mr. Ranjan Kumar Dubey, Advocate with him.
For the Respondents : Mr. Nityanand Mishra, Advocate,
Mr. Balmiki Pandey Bhaskar, Advocate.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR SAHOO

C.A.V. JUDGMENT

Date:10-02-2015

This miscellaneous appeal has been filed by the applicant against the judgment and order dated 04.10.2010 passed by the learned District Judge, Gopalganj in Probate Case No.24 of 2009 dismissing the probate case.

2. The appellant filed the aforesaid probate case for grant of probate with respect to registered Will dated 16.07.2004 executed by Bhrigun Bhagat in his favour. According to the appellant, Parapat Mahto had three sons, namely, Bijadhar, Goverdhan and Padarath. Bijadhar had a son Jaipal, who had two sons and two grandsons. Likewise Padarath had two sons Kishundeo and Kuber Nath. Surya Nath, the applicant, is the first son of Kishundeo. Kishundeo had six



sons. Further Goverdhan had a son Deoki, who had three sons, namely, Bhrigun, Gopal Jee and Kanhaiya. Bhrigun is the testator of the Will. He had three daughters, Sudama Devi, Prabhawati Devi and Raspati Devi. Sudama died leaving behind Anup and Kamlesh. The further case of the applicant is that Class-I heirs were added as party in the probate application. Although Bhrigun had his wife and daughters but even then being pleased by the service of the appellant he executed the Will in favour of the applicant. He also went to registration office where he got the Will scribed. Later on he died at Lucknow on 24.04.2008. Thereafter in spite of notice none appeared on behalf of the opposite parties. By the impugned order the court below rejected the probate application.

3. The learned senior counsel Mr. S.S. Dwivedi submitted that although there was no objection on behalf of the heirs of Bhrigun, the court below rejected the application on untenable and flimsy grounds. None of the grounds on which the probate application has been rejected are the grounds on which the application could have been rejected. According to the learned counsel, since Class-I heirs were made opposite parties, there was no necessity to add the other Class-II heirs but the court below held that Class-II heirs are necessary party and this is one of the grounds for rejection. The second ground for rejection is that the L.T.I. of Bhrigun should have



been put in the bottom of the Will but it is in the marginal side. The third ground for rejection is that Ext.1 is a blanket Will and no details of property is there. According to the learned counsel the details of the property have been mentioned in the probate application and so far description in Will is concerned, Bhrigun was the only owner of the property, therefore, he executed the Will with respect to his property. On these grounds, the learned counsel submitted that the court below has wrongly rejected the probate application, therefore, the appeal be allowed and the probate application filed by the appellant also be allowed.

4. On the other hand, the learned counsel for the opposite parties-respondents submitted that in fact no notice was ever served on them in the court below. The probate case was filed in 2009 and hastily the judgment was passed in October, 2010 without there being any valid service. According to the learned counsel, Bhrigun had his wife and daughters and grandsons, therefore, in such circumstances without making any provision he could not have executed the Will in favour of the applicant, who is distantly related with Bhrigun because the applicant is the grandfather's brother's grandson. In fact the L.T.I. on the Will is not the L.T.I. of Bhrigun and at the time of execution of the Will he was not understanding the affairs of the world. A counter affidavit to this effect has also been filed by the respondents. The

learned counsel submitted that the testator was well literate person and always used to sign the documents. He had already gifted part of the property in favour of Hanuman Mandir by registered gift deed dated 17.07.1990. Therefore, there was no question of execution of Will in favour of the applicant-appellant arises.

5. In reply to this submission the learned senior counsel submitted that from the order sheet of the court below dated 21.07.2010 it would be evident that notice was served validly on the opposite parties-respondents, therefore, the court below proceeded ex-parte to hear the application. When they did not appear in the court below and filed any objection, now in appeal they cannot be heard. If at all they have got any objection then they may file application under Section 263 of the Indian Succession Act for revocation of the probate. Because of the fact that on wrong grounds application has been rejected, the High Court sitting in appeal should grant probate in this miscellaneous appeal. Further according to the learned counsel as soon as the respondents were noticed, they could have filed revocation application but they did not avail the said opportunity. In such circumstances, the question as to whether notice was validly served or not cannot be examined in this miscellaneous appeal.

6. In view of the above contentions of the parties the point for consideration is as to whether the applicant has been able to

prove the due execution of the Will and whether the Will is genuine and executed by testator, Bhrigun?

7. From the genealogy given by the appellant it is clear that Bhrigun had Class-I heirs. The court below has rejected the application under Section 276 of the Indian Succession Act on the grounds mentioned above. In my opinion, on these grounds the court below could not have rejected the application. It further appears that the court below did not record any finding as to whether the Will is a genuine Will duly executed by Bhrigun only a suspicion has been raised. Whether the document has been proved by the attesting witnesses according to Section 68 of the Evidence Act? It may be mentioned here that since the application itself was rejected by the court below, the respondents herein could not have applied for either revocation of the probate certificate or for setting aside ex-parte order, which was in their favour. However, before this court on affidavit the respondents, i.e. Class-I heirs of Bhrigun specifically alleged that no notice was ever served on them, therefore, they had no opportunity to file any objection to the probate application filed by the appellant.

8. In the present case as stated above the court below has rejected the application filed by the appellant for grant of probate on untenable grounds without recording the genuineness of the Will. Further the respondents are before this court, who are alleging that

because of non-service of notice they could not contest the probate case. In my opinion, the purpose will be served if the matter is remanded back to the court below after setting aside the judgment and order passed by the court below.

9. In view of the above facts and circumstances as discussed above I find that the judgment and order impugned is unsustainable in the eye of law.

10. In the result, this miscellaneous appeal is allowed. The impugned judgment and order is set aside and the matter is remanded back to the court below for a fresh decision according to law after giving an opportunity to the respondents herein to file objection. Since the respondents are present before this Court, no further notice be issued on them. The respondents are directed to appear before the court below and do the needful.

11. In the facts and circumstances of the case, there shall be no order as to cost.

(Mungeshwar Sahoo, J)

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