

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.543 of 2010

Against the Judgment and Order dated 09.03.2010 passed by 3rd Addl. District Judge, Gopalganj in Probate case No.1 of 1997 / Title Suit No.2 of 2004.

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Rang Nath Tiwary & Ors.

Versus

.....Defendnats-Appellant/s

The State of Bihar & Anr.

.....Plaintiffs-Respondent/s

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Appearance :

For the Appellant/s : Mr. VISHWAJEET KUMAR MISHRA, Advocate

For the Respondent/s : Mr. Bandeo Pandey, Advocate

Mr. Prithivi Nath Mishra, Advocate

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Dated : 30th day of January, 2015

P R E S E N T

CORAM : THE HON'BLE MR. JUSTICE MUNGESHWAR SAHOO

ORAL J U D G M E N T

1. This Misc. Appeal has been filed by the defendant appellant under Section 299 of the Indian Succession Act, 1925 against the Judgment and Order dated 09.03.2010 passed by learned 3rd Addl. District Judge, Gopalganj in probate case No.1 of 1997 / Title Suit No.2 of 2004.

2. It appears that the plaintiff respondent initially filed probate case No.1 of 1997 under Section 276 of the Indian Succession Act for



grant of probate with respect to Will dated 18.03.1980 executed by Ramsurat Tiwari in favour of Ram Niwas Tiwari, respondent No.2 herein. It is alleged that Kishun Tiwari had four sons, namely, Lalji Tiwari, Shyambihari Tiwari, Rampravesh Tiwari and Ramsurat Tiwari. The appellants are the grand son of Lalji Tiwari, being the son of Srikant Tiwari. The respondent No.2 is son of Shyam Bihari Tiwari.

3. The objector appellants appeared and filed objection to the probate application alleging that in fact the alleged Will is forged and fabricated document and that Ramsurat Tiwari was Sanyasi, therefore, he had no right to execute the Will. Secondly, the objection was that the property is joint property, therefore, Will could not have been executed by the testator, Ramsurat Tiwari.

4. The appellant filed contesting written statement and the probate case was converted to title suit according to provision as contained in Section 295 of the Indian Succession Act and, thereafter, the parties adduced evidences in support of their respective cases. Thereafter, the Court below by the impugned Judgment allowed the probate application recording a finding that the testator was not a Sanyasi and that it has been proved that the Will has been executed by the testator Ramsurat Tiwari.



5. The learned counsel, Mr. Bishwajeet Kumar Mishra, appearing on behalf of the appellant raised three grounds. Firstly, the learned counsel submitted that the Will was forged and fabricated but the Court below wrongly recorded the finding that the Will was a genuine Will. Secondly, the learned counsel submitted that a Sanyasi has no right to execute the Will because he renounced the world, therefore, had no relation with the property. Thirdly, the learned counsel submitted that the testator had no right to execute the Will with respect to the joint family property.

6. On the other hand, the learned counsel appearing on behalf of the respondent submitted that in fact there had been partition between the brothers and they were residing separately, and therefore, the testator, Ramsurat has rightly executed the Will in favour of respondent No.2. According to the learned counsel, the Court below on the basis of the evidences recorded the finding that the testator was not a Sanyasi and moreover there is no bar that a Sanyasi has no authority to execute Will with respect to his property.

7. So far the contention of the appellant regarding Will is forged and fabricated is concerned, the learned counsel submitted that except the bald statement of the appellant, no reliable evidence has been produced, therefore, the impugned Judgment and order cannot be

interfered with and the appeal is liable to be dismissed.

8. In view of the rival contentions of the parties, the points arises for consideration in this Appeal is :-

- a) As to whether the Will in question was genuine and whether it has been executed by the testator, Ramsurat Tiwari.
- b) Whether Ramsurat Tiwari had right to execute the Will or not and whether the impugned Judgment and order is sustainable in the eye of law.

9. The specific case of the respondent No.2 is that Ramsurat Tiwari executed the Will dated 18th March, 1980 in favour of the respondent No.2 which was the last Will. To prove the genuineness of the Will, the applicant has examined the attesting witness as P.W.1. The scribe has been examined as P.W.2 who scribe the defendant. The applicant has been examined as P.W.4. The other witnesses of the Will has been examined as P.W.3. All of them have stated that Will was scribed and it was read over and explained to the testator who after knowing the contents thereof signed the Will and the witnesses also signed in their presence at the instance of the executator. It appears that the Will has been proved according to Section 68 of the Evidence Act. Will has been marked as ext.1.

10. On the contrary, the defendants have examined many



witnesses in support of the fact that the testator became the Sanyasi. Regarding the objection of forged and fabricated, the defendants have not examined any witness nor they got the signature compared by any expert. It is settled principle of law that once the applicant discharged his onus and proved the due execution of the Will, the onus shifted on the appellant to show that in fact it is not executed by the testator. As stated above, no steps have been taken for comparison of the signature on the Will, only bald statement have been made by the witnesses that the Will is forged and fabricated. I, therefore, find that the Will dated 18.03.1980, ext.1, is a genuine document, i.e., Will executed by Ramsurat Tiwari.

11. So far the submission of the learned counsel that Sanyasi had no right to execute the Will is concerned, it may be mentioned here that this question do not relate to the genuineness of the Will. It is settled principle of law that in a probate case filed under Section 276 of the Indian Succession Act, the right and title of the parties cannot be gone into. In this matter, reference may be made to the decision of the Hon'ble Supreme Court in the case of **Krishna Kumar Birla Vs. Rajendra Singh Lodha .2008 (4) SCC 300**. In that case also the probate case was converted to title suit under Section 295 of the Indian Succession Act. Section 295 of the Indian Succession Act only says that the proceeding shall take as nearly as may be the forum

of a regular suit. Therefore, in view of this provision, the probate Court will not get any jurisdiction to decide the right and title of any party.

12. So far the submission of the learned counsel for the appellant that the testator Ramsurat Tiwari could not have executed the Will with respect to joint family is concerned, Section 30 of the Hindu Succession Act clearly provides that any Hindu may dispose of by Will or other testamentary disposition any property which is capable of being so disposed of by him or by her in accordance with the provisions of the Indian Succession Act, 1925, or any other law for the time being in force and applicable to Hindus. According to the explanation to this Section, the interest of a male Hindu in a Mitakshara coparcenary property or the interest of a member, a tarward shall notwithstanding anything contained in this Act or in any other law for the time being in force be deemed to be property capable of being disposed of by him or by her within the meaning of this Section. Therefore, the point raised by the lenred counsel for the appellant has got no force.

13. In view of my above discussion, both the points are answered against the appellant and in favour of the respondent. The finding of the Court below on this question is, therefore, confirmed.

Accordingly, this Misc. Appeal is dismissed. In the facts and circumstances of the case, no order as to cost.



(Mungeshwar Sahoo, J)

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