

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.75 of 2011

IN

TITLE SUIT 3 of 2007

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Bhorik Pasi, son of Late Rasa Pasi, resident of village & P.O. –
Nawanagar, District – Buxar.

-----Defendant----Appellant

Versus

Bhagan Pasi, son of Lila Pasi, village & P.O. – Nawanagar, District –
Buxar.

-----Plaintiff---Respondent

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Appearance :

For the Appellant/s : Mr. Binod Kumar Singh, Advocate
Ms. Vagisha Pragya Vacak Navi, Advocate
For the Respondent/s : Mr. Bachchan Jee Ojha, Advocate

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CORAM: HONOURABLE MR. JUSTICE AKHILESH CHANDRA
ORAL JUDGMENT

Date: 12-02-2015

Heard learned counsel for the parties.

2. Delay in filing the present application is
condoned. Accordingly, Interlocutory Application No.
814/2011 stands allowed.

3. This appeal has been filed on behalf of
the sole appellant against order/judgment dated 14th
September, 2010 of Additional District & Sessions
Judge, Fast Track Court – II, Buxar, in Probate Case
No. 10/2006/Title Suit No. 3/2007 allowing the prayer
and granting probate of the registered Will dated 30th
June, 1999 said to be executed by one Sadan Pasi in
favour of the plaintiff respondent.

4. Admittedly, the testator Sadan Pasi was
a widower having no issue and parties present are his

nephews through two full brothers.

5. In view of the legal objections apparently substantiated by judicial pronouncement, there appears no need to go into the details of the case, which appears already mentioned in the judgment of the court below.

6. Learned counsel for the appellant submits that on the Will in question there are two attesting witnesses, but one of them, Ram Bali Singh, has also acted as identifier of the testator before the registering authority. Hence, in view of the decisions of the Apex Court in cases of ***Bhagat Ram and another Vs. Suresh and others reported in 2003 (12) SCC 35 and M.L. Abdul Jabbar Sahib Vs. H. Venkata Sastri & sons and others reported in AIR 1969 sc 1147***; his status now is diluted and cannot be said as the attesting witness. In that view of the matter, the mandatory requirement to establish a Will whereon two persons must appear as attesting witnesses since not fulfilled makes the Will invalid.

7. Another submission by learned counsel for the appellant is that in view of Section 280 and 281 of the Indian Succession Act, 1925, which reads as such:

“280. Petition for probate, etc., to be signed and verified. – The





petition for probate or letters of administration shall in all cases be subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, namely: -

“I (A.B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief.”

281. Verification of petition for probate, by one witness to Will. –

Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely:-

“I (C.D.), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence).”

8. It is mandatory to present the application for probate that the application should be verified by the applicant and at least one of the two attesting witnesses, but in the present case, neither the application is verified by the plaintiff applicant nor by

the attesting witness.

9. Thus, in view of the decision in a case ***in the matter of : Madhav Prasad Birla (D) reported in AIR 2005 Cal 1***; also, the application cannot be held maintainable.

10. Learned counsel representing plaintiff respondent has left with no option but to concede the legal position as stated above.

11. Having regard to the facts and circumstances, the impugned order appears not sustainable, consequently, it is set aside and appeal is hereby allowed.

Rajeev/-

(Akhilesh Chandra, J.)

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