

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.347 of 2012

Chhatia Devi, wife of Ram Narayan Singh, resident of village- Dhandhau, P.S.-
Charpokhri, District- Bhojpur.

.... Opposite Party-Appellant.

Versus

1. Sri Krishna Singh, son of Late Radha Singh.
- 2(i) Surendra Singh,
- 2(ii) Birendra Singh.
- 2(iii) Harendra Singh.
- 2(iv) Satyendra Singh.

All sons of Late Sripati Singh, resident of village- Bikramganj, P.O. & P.S.-
Bikramganj, District- Rohtas.

3. Sheojee Singh, son of Late Radha Singh.
4. Awadhesh Singh, son of Late Radha Singh.

All resident of village- Bikramganj, P.O. & P.S.- Bikramganj, District- Rohtas.

.... Applicants-Respondents.

Appearance :

For the Appellant : Mr. Dhanendra Chaubey, Advocate.

For the Respondents : M/s. Manish Kumar No.13 and Rohit Kumar, Advocates.

CORAM: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

ORAL JUDGMENT

Date: 17-04-2015

I.A. No.5996 of 2012:

Heard learned counsel for the appellant and the
Respondents.

This Interlocutory Application has been filed on behalf of
the appellants to condone the delay of about 2 years, 1 month and 30
days in filing the Instant Misc. Appeal.

For the reasons mentioned in this Interlocutory
Application, the delay of 2 years, 1 month and 30 days in filing the
instant Misc. Appeal is condoned and this Interlocutory Application

No.5996 of 2012 is, accordingly, disposed of.

Learned counsel for the parties are ready to argue the case on merit at the stage of hearing under Order 41 Rule 11 of the Code of Civil Procedure, as such, I proceed to consider this Misc. Appeal on its own merit.

Heard learned counsel for the appellant and the Respondents.

2. This Misc. Appeal under Section 299 of the Succession Act has been filed by the appellant against the Judgment and Order dated 19.12.2009 passed in Probate Case No.106 of 2002/Trial No.42 of 2009, whereunder the 3rd Additional District Judge, Rohtas at Sasaram, allowed the aforesaid Probate Case filed on behalf of the respondents with a direction to the office to issue Probate Certificate in favour of the respondents regarding the Will dated 04.10.1998 executed by Late Bali Singh in favour of the respondents.

3. Learned counsel appearing on behalf of the opposite party-appellant submits that it would appear from the impugned Judgment and Order that the trial court proceeded with the case for ex-parte hearing without service of notice upon the opposite party-appellant, who is the sole daughter of Late Bali Singh, the testator of the Will only on the basis of publication of notice in newspaper. It is also submitted that that before the death Late Bali Singh, father of the



opposite party-appellant, had executed the two gift deeds dated 05.02.1999 in favour of her sons, namely, Babloo Singh, Sanjay Singh and Dhananjay Singh regarding Plot No.1147 area 33 decimals of Khata No.256 and Plot No.86 area 3 decimals of Khata No.254 and also Plot No.1147 area 64 decimals of Khata No.256 but the same has been detailed in the Schedule-‘A’ property in the Probate Application.

4. On the other hand, learned counsel appearing on behalf of the Respondents submits that after sending the notice to the opposite party-appellant under ordinary process as well as Registered cover, the opposite party-appellant did not appear, then notice was published in the daily newspaper and, thereafter, the trial court proceeded with the case for ex-parte hearing and rightly passed the impugned Judgment and Order.

5. It appears that the applicants-Respondent Nos.1, 3, 4 and father of Respondent Nos.2(i) to 2(iv) filed Probate Case No.106 of 2002 under Section 276 of the Indian Succession Act in respect of the property as detailed in Schedule-I of the Probate Application for granting the probate with the contention that Late Bali Singh died on 5th May, 1999 and he had executed his last Will on 04.10.1998. He had given instruction to Md. Irshad Khan, resident of Bikramganj, P.S. Bikramganj, District-Rohtas to scribe the Will and on his instruction, Md. Irshad Khan scribed the Will and the same was read

over and explained to Late Bali Singh by Scribe. Thereafter, Late Bali Singh put his thumb impression in presence of the witnesses, Dhan Kumar Singh, son of Sheogobind Singh of village-Nonhar and Mundrika Singh, son of Lal Bihari Singh, of village-Nonhar and Jiut Sah also put his signature as attesting witness.

6. From perusal of the impugned Judgment and Order, it appears that the said Probate case was allowed in favour of the applicants-Respondents in which appellant was made opposite party. The trial court records show that after filing of the aforesaid Probate Case on 14.08.2002, the order was passed to take steps for sending the notice to the near relative, and also for general public. Thereafter, till 23.11.2007, the record was pending for service report on opposite party. On 23.11.2007 due to not receiving the service report order was passed for issuance of notice through registered post. On 16.05.2008/24.05.2008 on receiving the registered notice unserved upon the opposite party-appellant with report of residing of opposite party at other place order was passed to file the address of the opposite party-appellant and till then the record was pending for furnishing the address of the opposite party-appellant. Thereafter, on 06.12.2008, an application was filed on behalf of the applicants-Respondents to publish the notice in the newspaper and order was passed to publish the notice for appearance of opposite party in the



newspaper. Thereafter, on 24.11.2009, on the basis of publication of notice for appearance of opposite party in newspaper and at the prayer of the applicants-respondents order was passed for ex-parte hearing on 28.08.2009 without compliance of the earlier order to furnish the present address of the opposite party-appellant to send the notice and the impugned Judgment/Order was passed. As such, the trial court proceeded with the case for ex-parte hearing on the basis of substituted service of notice on the opposite party-appellant without recording the satisfaction to the effect that the opposite party-appellant is avoiding the service of summon as required under Order V Rule 20 of the Code of Civil Procedure. As such, there was no valid service of notice upon the opposite party-appellant before proceeding ex-parte hearing by the trial court and passing the impugned Judgment and Order by the trial court against the opposite party-appellant without service of notice upon the opposite party-appellant is illegal

7. Having regard to the facts and the circumstances of the case and the discussions made above, this Misc. Appeal is allowed. The impugned Judgment and Order dated 19.12.2009 passed in Probate Case No.106 of 2002/Trial No.42 of 2009 by the 3rd Additional District Judge, Rohtas at Sasaram, is set aside and the matter is remanded back to proceed with the aforesaid Probate Case

and passed the Judgment and Order in accordance with law after hearing the opposite party-appellant.

(Rajendra Kumar Mishra, J)

P.S./-

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