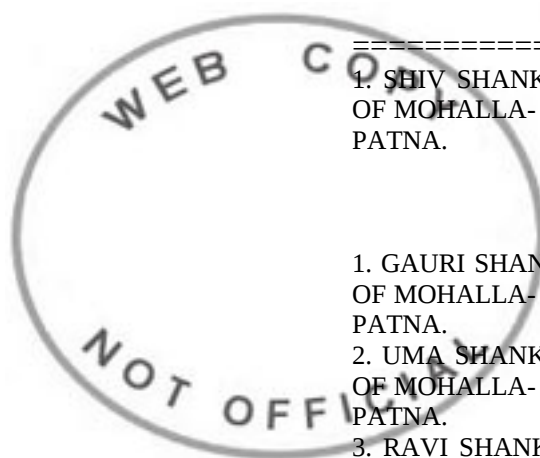




IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.433 of 2012

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1. SHIV SHANKAR GUPTA S/O LATE RAMCHANDRA PRASAD AGRAHANI RESIDENT OF MOHALLA- NAND GOLA, DEVIASTHAN, P.S- MALSALAMI, PATNA CITY, DISTRICT- PATNA.

.... APPELLANT

VERSUS

1. GAURI SHANKAR GUPTA S/O LATE RAMCHANDRA PRASAD AGRAHARI RESIDENT OF MOHALLA- NAND GOLA, DEVIASTHAN, P.S- MALSALAMI, PATNA CITY, DISTRICT- PATNA.
2. UMA SHANKAR GUPTA S/O LATE RAMCHANDRA PRASAD AGRAHARI RESIDENT OF MOHALLA- NAND GOLA, DEVIASTHAN, P.S- MALSALAMI, PATNA CITY, DISTRICT- PATNA.
3. RAVI SHANKAR GUPTA S/O LATE RAMCHANDRA PRASAD AGRAHARI RESIDENT OF MOHALLA- NAND GOLA, DEVIASTHAN, P.S- MALSALAMI, PATNA CITY, DISTRICT- PATNA.
4. SMT. ASHA GUPTA W/O SRI NAND KISHORE PRASAD AND D/O LATE RAMCHANDRA PRASAD AGRAHARI RESIDENT OF MOHALLA- NAND GOLA, DEVIASTHAN, P.S- MALSALAMI, PATNA CITY, DISTRICT- PATNA.
5. SMT. REKHA GUPTA W/O ALOK KUMAR GUPTA AND D/O LATE RAMCHANDRA PRASAD AGRAHARI RESIDENT OF MOHALLA- MADANMOHAN VERMA STREET, KOLKATA
6. SMT. RUPA GUPTA W/O LATE RAVI PRAKASH AND D/O LATE RAMCHANDRA PRASAD AGRAHARI RESIDENT OF MOHALLA- LOHARPATTI, PANI TANI MAIN ROAD, MOTIHARI, EAST CHAMPARAN.

.... RESPONDENTS

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Appearance :

For the Appellant/s : Mr. Shashi Shekhar Dwivedi-Sr. Advocate
Mr. Rakesh Chandra-Advocate

For the Respondent/s : Mr. Chandra Mauli Chaurasia-Advocate

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CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
ORAL JUDGMENT

Date: 17-05-2016

At the time of hearing argument, learned counsel for the appellant pointed out legal defects going to root of the proceeding having been conducted before the learned lower Court invalidating the proceeding having been conducted before the learned lower Court whereupon learned counsel for the respondents has also been heard and the respective counsels are of the view that those deficiencies are sufficient to undo the finding recorded by the learned Court below, on account thereof, detail discussion on merit of the case is being forbidden.

2. Instant appeal has been filed in terms of Section 299 of the



Indian Succession Act against the judgment dated 18.04.2012 passed by the Additional Sessions Judge-3rd, Patna in Probate Case No.20 of 2008 whereby and whereunder the learned lower Court had allowed the petition and further, directed to issue probate with regard to a Will dated 18.08.2007 executed by one Birendra Kumar Gupta.

3. As is evident from the pleading, it is evident that after the death of Birendra Kumar Gupta on 03.01.2008, learned counsel Sri R. P. Gupta transmitted the Will in question dated 18.08.2007 under registered cover which the propounder of the Will had received and after going through the same, he found that the Will was executed in favour of his three brothers excluding one Shiv Shankar Gupta (appellant). It has also been pleaded that the Will was executed by the testator, Birendra Kumar Gupta voluntarily, under his freewill, having duly acknowledged with its recital in sound, physical as well as mental condition and further, was capable to execute the same. It has also been pleaded that aforesaid Birendra Kumar Gupta, testator had shown his inclination to Mr. R. P. Gupta, learned advocate, who scribed the Will in presence of witnesses whereupon Birendra Kumar Gupta had put his signature in presence of witnesses and in likewise manner, witnesses had also put their signatures. It has also been pleaded that testator, Birendra Kumar Gupta had sworn an affidavit on 21.08.2007 in proof of last Will dated 18.08.2007 and handed it over to learned counsel Mr. R. P. Gupta, who had transmitted the same after his death. Then after dealing the property, value and further, completing other paraphernalia filed petition for grant of probate as in terms of propounder, he was shown to be executor of the Will. Furthermore, in Para-12 of the petition, had detailed the heirs having interest with the property of Birendra Kumar Gupta. After citation, the proceeding sailed after appearance of other brothers, evidences were recorded,

documents were exhibited and lastly, by the order impugned, the learned lower Court found the Will to be genuine and accordingly, directed to issue probate.

4. While going through L.C. Record, it is evident that the petition is not at all found duly verified by one of the witnesses. For better appreciation, Section 281 of the Indian Succession Act is quoted below:-

“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).”

5. Therefore, for want of non-verification at the end of one of the witnesses of the Will makes the petition, deficient one and that aspect has not been taken into consideration by the learned lower Court. During course of argument, learned counsel for the respondents could not be able to explain and further, for want of non-compliance of Section 281 of the Indian Succession Act, as referred above, being the petition defective one, would nor justify the finding recorded by the learned lower Court.

6. Furthermore, it is also evident that one of the brothers namely Shiv Shankar Gupta whose hostility is found duly detailed in the petition itself had filed caveat. That being so, in terms of Section 285 of the Indian Succession Act, it was incumbent upon the learned lower Court to have given a pause to the

proceeding and thereafter, noticed the caveator. As, the caveator was not noticed on account thereof, his presence was not at all secured till the judgment. Again, learned counsel for the respondents could not be able to explain that on account of aforesaid deficiency, depriving the caveator to contest the suit, the judgment impugned should be concurred.

7. Apart from this, it is evident from the successive order sheets of the learned lower Court that although, one Kanchan Kumari had appeared, but so far appellant is concerned, who happens to be caveator, the order sheet is silent over having the appellant noticed. Moreover, from perusal of the L.C. Record, it is evident that caveat is available, which is of dated 27.03.2009 without having reference in the order. Furthermore, from perusal of the aforesaid caveat, it is evident that the caveator had challenged genuineness of Will and on that very score, the proceeding became contentious and accordingly, should have been registered as a regular Title Suit in terms of Section 295 of the Indian Succession Act. That has also not been taken up at the end of the learned lower Court. Learned counsel for the respondents also could not able to justify the same.

8. Furthermore, from Para-1 of the petition, it is evident that wife of testator, Birendra Kumar Gupta namely Kanchan Kumari has been identified, but an explanation has been offered at the end of the respondents/ propounders of the Will that as per order passed in H.M.A. No.306 of 2006, she was no more in the world, hence has not been shown as heir under Para-12 of the petition. However, during course of trial, the aforesaid order has not been filed/ exhibited to substantiate the plea whereupon, presence or absence of Kanchan Kumari has become doubtful, more particularly, in the background of an incidence visualizing from the order sheet itself over presence of Kanchan Kumari, though, subsequently she appeared.

9. As such, the aforesaid deficiencies is found sufficient to annul the judgment impugned in the background of the fact that the learned lower Court had adopted wrong procedure while proceeding with the trial in haphazard manner and further, even failed to locate the same and explain with cogent, legal, reasonable explanation.

10. Accordingly, the judgment impugned is set aside. Appeal is allowed. The matter is remitted back to the learned lower Court to proceed afresh in accordance with law and for that, appellant is directed without waiting for a formal notice by the learned Court below to appear and filed written statement and contest the case if he so desires. However, in the facts and circumstances of the case, parties will bear their own costs.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	
Transmission Date	N.A.