

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Miscellaneous Appeal No.797 of 2010**

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RAM BILAS SINGH, SON OF LATE RADHA KOERI, RESIDENT OF  
VILLAGE-PUNAK, POLICE STATION-DARAULI, DISTRICT-SIWAN.

.... .... **APPELLANT/S**

**VERSUS**

RAMDHEYAN BHAGAT, SON OF RADHA KOERI, RESIDENT OF VILLAGE-  
PUNAK, POST OFFICE-PUNAK, VIA-MAIRWA, POLICE STATION-  
DARAULI, DISTRICT-SIWAN.

.... .... **RESPONDENT/S**

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**Appearance:**

|                      |   |                               |
|----------------------|---|-------------------------------|
| For the Appellant/s  | : | Mr. Raghav Prasad, Adv.       |
| For the Respondent/s | : | Mr. Rajendra Narain, Sr. Adv. |
|                      |   | Mrs. Anju Narain, Adv.        |
|                      |   | Mr. Umesh Kumar Roy, Adv.     |
|                      |   | Kunj Bihari Sharan, Adv.      |

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**CAV JUDGMENT**

**Date: 17-02-2016**

Appellant/opposite party has preferred instant appeal against the judgment/order dated 28.05.2010 passed by Additional District Judge, Fast Track Court-III, Siwan in Probate Case No.11 of 1996, Title Suit No.01 of 2005 whereby and whereunder granted probate with regard to a will executed by Kumar Koeri, since deceased dated 03.12.1949 in favour of respondent /applicant, Ramdheyman Bhagat with cost.

**2.** Succinctly the case of the respondent-applicant is that from the genealogical table, it will be evident that there was one Manogi Koeri, common ancestor who had three sons, Kumar Koeri, Jai Koeri and Sheonandan Koeri. Sheonandan Koeri had one son Sukkat Koeri who predeceased his father, being unmarried. In due course of time



Sheonandan Koeri also died in jointness with Kumar Koeri and Jai Koeri. Jai Koeri had one son Radha Koeri. Radha died leaving behind two sons Rambilas Koeri (Objector) and Ramdheyan Bhagat (applicant). Kumar Koeri was issueless and was taken cared of by Ramdheyan Bhagat, applicant and having been pleased with his service, Kumar Koeri had executed will in his favour on 03.12.1949 in presence of witness Ramsunar Kumar and Chhathu Teli who stood as witness thereupon. The aforesaid will got registered at the instance of Kumar Koeri wherein it was incorporated that after his death, the property will devolve upon Ramdheyan Bhagat applicant. Kumar Koeri died in the month of Ashardh, 1950. Applicant performed funeral, Shradh etc.

3. After death of Kumar Koeri, all the movable, immovable properties came under possession of applicant Ramdheyan Bhagat and since then, is continuing the same. It has further been asserted that Kumar Koeri had executed his last will on 03.12.1949 which was identified by Chhathu Teli of village Punak, P.S.-Darauli, District-Siwan while Ramsunar Kumar stood as a witness. It has also been stated that mutation had already been effected in his favour on the basis of aforesaid will. It has further been asserted that Kumar Koeri and Jai Koeri separated amongst themselves during their lifetime. The details of the property possessed by Kumar Koeri has been

detailed under Schedule-I of the plaint. It has further been asserted that total value of the property detailed under Schedule-I appertain to sixteen thousand and on account thereof, prayed for issuance of letter of administration/grant of probate in favour of applicant.

4. Appellant-objector put an objection after being impleaded as an objector vide order dated 11.06.2004 and basically controverted the averments of the petition, as well as also questioned the legality of the document in question. It has further been submitted that Kumar Koeri never executed will in favour of applicant Ramdheyman Bhagat rather it happens to be forged and fabricated document manufactured by the applicant Ramdheyman Bhagat and in likewise manner, the witnesses have been shown and that happens to be reason behind, that after death of both the alleged witnesses, petition for probate has been filed after long unexplained delay so that the act of forgery committed at the end of applicant could not be exposed. It has also been submitted that story of partition amongst Kumar Koeri and Jai Koeri happens to be false. Had there been partition as stated by the applicant, then in that event, separate identity would have been visualized and in likewise manner, their separate identity would have been recognized since long.

5. Furthermore, it has been submitted that Section 30 of the Hindu Succession Act came in the year 1956 and on account thereof,

Kumar Koeri was not in a position to execute will with regard to properties having jointly possessed by he himself along with his brother Jai Koeri.

6. Because of the fact that probate has been contested, on account thereof, it has been converted as Title suit whereupon, after taking into account the rival contention, learned lower court had framed following issues:-

- (i) Whether a suit as framed is maintainable?
- (ii) Whether proper court fee has been paid?
- (iii) Whether the will dated 03.12.1949 is genuine, legal and was executed by Kumar Koeri in his free will over which the witnesses have rightly put their signature and has been registered in favour of applicant and further, whether it happens to be free from suspicious circumstance?
- (iv) Whether the will dated 03.12.1949 executed by Kumar Koeri is his last will?
- (v) Whether applicant is over the land in terms of will dated 03.12.1949?
- (vi) Whether applicant is entitled for declaration of title along with other ancillary event in pursuance of will dated 03.12.1949?

(vii) What other relief or reliefs the applicant is found entitled for?

And decided the issue in favour of respondent-applicant whereupon granted probate by the judgment/order impugned. Hence this appeal.

7. The learned counsel for the appellant while challenging the judgment impugned has submitted that the learned lower court had committed gross error while granting probate relating to alleged will dated 03.12.1949.

8. The first and foremost argument happens to be that the alleged will is of the year 1949 while the petition has been filed in the year 1996. The delay in filing petition has not been properly explained. Apart from this, it has also been submitted that as has been held by the Hon'ble Apex Court in *Krishna Kumar Sharma Vs. Rajesh Kumar Sharma* reported in *2009(3) PLJR 80 (SC)* there happens to be applicability of Article 137 of the Limitation Act whereunder application for grant of probate is to be filed, prescribing period of 3 years. As the instant petition has been filed after lapse of three years therefore, learned lower court should have dismissed the petition on the ground of limitation alone.

9. It has further been submitted that from the evidence of the respondent-applicant who himself examined as AW-6, it is evident



that he had himself falsified the cause shown in the alleged deed of will because of the fact that in the will, it has been incorporated that being pleased with the service, hospitality, care rendered by the applicant, Kumar Koeri, the testator had executed will in his favour while from the evidence, it is apparent that applicant who was minor during the event was staying at his Mamhar. When the applicant was staying at his Mamhar, then in that event, there was no occasion available to him to render, service, hospitality and on account thereof, makes the will suspicious one.

**10.** Furthermore, it has also been submitted that learned lower court should have considered the conduct of the applicant and further, non-explanation of the delay in filing petition for probate. Delay causing disappearance of material evidences on account of death of both the witnesses is indicative of the fact that applicant knowingly and intentionally withheld himself in filing the petition for grant of probate, so that after death of the witnesses one should not be able to expose the forgery having committed and in likewise manner, on account of death of both the witnesses, the will in question is not at all found duly exhibited in accordance with law. That being so, the will in question could not have been considered by the learned lower court and on account thereof, the judgment passed by the learned lower court did not justify its subsistence.



**11.** It has also been submitted that respondent had failed to substantiate the plea of partition amongst testator Kumar Koeri with Jay Koeri by cogent, reliable evidence, and as such, during course of jointness, Kumar Koeri was not at all competent to execute will, without having consent from co-sharer. Neither there happens to be pleading on that score, nor the respondent had led evidence in support thereof. Furthermore, as has been submitted, for want of examination of identifier as well as attesting witness, it cannot be said that the document was executed by the Kumar Koeri though it happens to be registered one. In this context, it has also been submitted that mere registration of documents is not going to exonerate the respondent to substantiate that the will in question was executed by the Kumar Koeri under his free will and volition as well as was in fit mental condition to appreciate the event.

**12.** On the other hand, the learned counsel for the respondents-applicants strenuously opposed and controverted the submission made on behalf of appellant. It has been submitted that under Indian Succession Act, which happens to be the special law governing the provision of will, did not prescribe any time limit whereunder application of probate is to be filed nor the limitation act prescribe any time frame on that very score. That means to say application for grant of probate can be filed at any moment whenever circumstances

so necessitates, and that, period is found running till the day on which petition for probate of a will is filed. Also referred *AIR 1959 Cal. 81*, *AIR 1952 Pat.87* on this score.

**13.** It has also been submitted that the decision relied upon by the learned counsel for the appellant reported in *2009(3) PLJR 80 (SC)* also did not prescribe any sort of rigor and that being so, is not going to substantiate the plea of the appellant that Article 137 the Limitation Act is applicable with regard to filing of petition for probate or letter of administration.

**14.** It has further been submitted that the will in question happens to be registered one and on account thereof, there would be presumption with regard to genuineness of the will to be executed by the executor. Furthermore, presence of executor before the registrar endorsing the document is indicative of the fact that document has been executed by the executor under free will without any influence and in likewise manner, under the fit mental as well as physical capability regarding nature of document. Being so, there happens to be no question of suspicious circumstance visualizing during course of execution of the will in question.

**15.** It has also been submitted that when the application was presented for grant of probate with regard to will dated 03.12.1949 on 27.07.1996, unfortunately the identifier as well as the witness



were dead till then which has legally been brought up on record at the end of the applicant and further, the document being more than 30 years old, in light of Section 90 of the Evidence act it was to be admitted in evidence which, the learned lower court while recording the evidence of PW-6, Ramdheyan Bhagat observed so and got the document an exhibit of the record. Therefore, once the documents has been exhibited and further, there happens to be cogent and reliable evidence on that very score in terms of Section 69 of the Evidence Act whereunder, the witnesses have exhibited the signature of attesting witness as well as identifier whereupon, now no defects survives with regard to admissibility of the will in question.

**16.** Then coming to factual aspect, it has been submitted that there happens to be consistent evidence of the witnesses that Kumar Koeri separated from Jai Koeri, was looking after his affair independently. So Kumar Koeri was legally competent enough to execute will relating to the properties possessed by him on partition from Jayee Koeri. Furthermore, the lands so covered under the will has duly been inherited by the respondent-applicant as well as mutation has already been effected in his name on the basis of the will without any hitch and hindrance is indicative of the fact that the will in question happens to be genuine one. Furthermore, it has also been submitted that as the appellant /objector failed to object during

course of mutation proceeding hence, he was precluded in challenging the will and for that relied upon **2010 (4) PLJR 350**.

**17.** It has further been submitted that there happens to be complete absence of suspicious circumstance and on account thereof, respondent was not at all required to explain the same. Hence submitted that the appeal is fit to be dismissed.

**18.** Will is an incidence by which the normal line of succession is found duly barricaded and that happens to be reason behind that certain exigencies have been laid down which is required to be fulfilled in order to have probate or letter of administration, as the case may be, granted in favour of applicant relating to a will. In order to appreciate the rival contentions, it looks wise to have a look over the relevant provisions of law on this score.

**19.** Section 59 identifies the persons capable of making will whereunder it has been incorporated that every person of sound mind not being a minor may disposed of his property by a will. Having four exceptions identifying the property of married women in case is found capable to dispose of the same on its own, a person deaf, dumb or blind may also dispose of his proper in case is found having capable of due understanding, insane, may dispose of during the intermediary period while being under sound mind and lastly the person is found incompetent enough in case found incapable on

account of intoxication, illness or any other cause, fails to understand the event.

**20.** As per Section 61 of the Act, it has been laid down that creation of will by application of fraud, coercion, by such importunity as takes away the free agency of the testator makes the will void. Section 62 empowers the executant to revoke or alter the will at any time on the ground so enumerated.

**21.** Section 63 commands the mode of execution of unprivileged will whereunder three kinds of obligation have been prescribed.

(a) The testator should sign or affix his mark to the will or it should be signed by some other person in his presence and at his direction.

(b) It should be in such manner which could satisfy the intention of the testator in making the will.

(c) It should be tested by two or more witnesses each of whom has seen the testator sign or affix his mark to the will or has seen some other person sign the will in the presence and on direction of the testator or have personal acknowledgement of his signature/ mark/ signature of such other person by the testator. Furthermore, it has been clarified that all the witnesses

should not be present at the same time nor any particular form of attestation is necessary.

**22.** Section 74 did not prescribe any manner whereunder will is to be scribed rather the wording be such to disclose the intention of the testator.

**23.** Chapter-IV of the Indian Succession Act deals with procedural law. As per Section 276 certain requirements have been prescribed which has to be satisfactorily explained while filing a petition for grant of probate. As per section 279 of the Act further requirement has been prescribed whereunder applicant has to incorporate that to the best of his belief no application has been made to any other court for a probate of a same will, being the last will at an earlier occasion. As per section 280 the petition has to be verified and signed by the applicant for that format has been prescribed. In likewise manner as per Section 281 of the Act whenever an application for probate of will is filed, that has to be verified by at least one of the witnesses to the will and for that, a different and distinct format has been prescribed. In terms of Section 283 citation is to be made apart from other requirements so enumerated therein to be followed during course thereof.

**24.** Original petition, as is available on the lower court record has been looked into. When the aforesaid petition has been minutely



gone through, it is evident that place of abode of executor has not been disclosed. Disclosing the same to be within the original jurisdiction of the court appears to be mandatory to attract jurisdictional avenue. Furthermore, citation has not been made in the petition including that of appellant who stood on same pedestal than that of respondent. Furthermore, there happens to be complete absence of the disclosure that both the witnesses, as are dead on account thereof, no verification in terms of Section 281 of the Act is being furnished. Though, subsequently during course of trial the death of both the witnesses have come up. The learned lower court, as is evident had not considered the aforesaid deficiency inconsonance with its impact over maintainability of instant petition.

**25.** Furthermore, as is evident from lower court record nine witnesses have been examined on behalf of respondent /propounder but the will has not been exhibited by any of the witness. PW.6, the respondent propounder himself while was being examined, under para-7 of his deposition had stated that he has produced the original will from his custody and the learned lower court exhibited the same observing that the document happens to be more than 30 years old. At the present moment, it looks better to refer ***M.B. Ramesh (D) by LRs. v. K.M. Veeraje Urs (D) by LRs. & Ors.*** reported in ***AIR 2013 SC 2088.***

**“17.** At the same time we cannot accept the



submission on behalf of the respondents as well that merely because the will was more than 30 years old, a presumption under Section 90 of the Evidence Act, 1872 (“the Evidence Act”, for short) ought to be drawn that the document has been duly executed and attested by the persons by whom it purports to have been executed and attested. As held by this Court in *Bharpur Singh v. Shamsher Singh* 2009 (3) SCC 687, a presumption regarding documents 30 years old does not apply to a will. A will has to be proved in terms of Section 63(c) of the Succession Act read with Section 68 of the Evidence Act.”

26. It is further evident from the record of the learned lower court that issue was not at all framed on the score of limitation which has got pivotal role to play.

27. Contention on behalf of respondent applicant that the principle laid down in *Krishna Kumar Sharma Vs. Rajesh Kumar Sharma* reported in 2009(3) PLJR 80 (SC) is not applicable and referring the earlier decisions wherein the question of limitation found internment, is not at all tenable because of the fact that the Hon’ble Apex Court had specifically laid down that there would be application of Article 137 of the Limitation Act while filing the petition for probate. The relevant para, for better appreciation, is quoted below:

28. In *The Kerala State Electricity Board v. T.P. Kunhaliumma*, [(1976) 4 SCC 634] it was inter alia observed as follows:-

“18. The alteration of the division as well as the



change in the collocation of words in Article 137 of the Limitation Act, 1963 compared with Article 181 of the 1908 Limitation Act shows that applications contemplated under Article 137 are not applications confined to the Code of Civil Procedure. In the 1908 Limitation Act there was no division between applications in specified cases and other applications as in the 1963 Limitation Act. The words “any other application” under Article 137 cannot be said on the principle of ejusdem generis to be applications under the Civil Procedure Code other than those mentioned in Part I of the third division. Any other application under Article 137 would be petition or any application under any Act. But it has to be an application to a court for the reason that Sections 4 and 5 of the 1963 Limitation Act speak of expiry of prescribed period when court is closed and extension of prescribed period if applicant or the appellant satisfies the court that he had sufficient cause for not preferring the appeal or making the application during such period.

**22.** The conclusion we reach is that Article 137 of the 1963 Limitation Act will apply to any petition or application filed under any Act to a civil court. With respect we differ from the view taken by the two-judge bench of this Court in *Athani Municipal Council case* and hold that Article 137 of the 1963 Limitation Act is not confined to applications contemplated by or under the Code of Civil Procedure. The petition in the present case was to the District Judge as a court. The petition was one contemplated by the Telegraph Act for judicial decision. The petition is an application falling within the scope of Article 137 of the 1963 Limitation Act.

In terms of the aforesaid judgment any application to Civil Court under the Act is covered by Article 138. The application is made in terms of Section 264 of the Act to the District Judge. Section 2(bb) of the Act defines the District Judge to be Judge of Principal Civil Court.

6. Further in *S.S. Rathore v. State of M.P.*, [ (1989) 4 SCC 582] it was inter alia stated as follows:-

“5. Appellant’s counsel placed before us the residuary Article 113 and had referred to a few

decisions of some High Courts where in a situation as here reliance was placed on that article. It is unnecessary to refer to those decisions as on the authority of the judgment of this Court in the case of *Pierce Leslie & Co. Ltd. v. Violet Ouchterlony Wapshare* it must be held that Article 113 of the Act of 1963, corresponding to Article 120 of the old Act, is a general one and would apply to suits to which no other article in the schedule applies.”

7. Article 137 of the Limitation Act reads as follows:-

“137. Description of application-

Any other application for which no period of limitation is provided elsewhere in the Division.

Period of Limitation ;            Three Years

Time from which period begins to run:

When the right to apply accrues.”

The crucial expression in the petition is “right to apply”. In view of what has been stated by this Court, Article 137 is clearly applicable to the petition for grant of Letters of Administration. As rightly observed by the High Court in such proceedings the application merely seeks recognition from the application for grant of probate or letters of Administration is not covered by Article 137 of the Limitation Act. Same is not correct in view of what has been stated in **The Kerala State Electricity Board’s case (Supra)**.

9. Similarly, reference was made to a decision of the Bombay High Court’s case in Vasudev Daulatram Sadarangani vs. Sajni Prem Lalwani (AIR 1983 Bom.268).

Para 16 reads as follows:-

“16. Rejecting Mr. Dalapatrai’s contention, I summarise my conclusions thus:-

(a) under the Limitation Act no period is advisedly prescribed within which an application for probate, letters of administration or succession certificate must be made;

(b) the assumption that under Article 137 the right to apply necessarily accrues on the date of the death of the deceased, is unwarranted;

(c) such an application is for the Court's permission to perform a legal duty created by a Will or for recognition as a testamentary trustee and is a continuous right which can be exercised any time after the death of the deceased, as long as the right to do so survives and the object of the trust exists or any part of the trust, if created, remains to be executed;

(d) the right to apply would accrue when it becomes necessary to apply which may not necessarily be within 3 years from the date of the deceased's death.

(e) delay beyond 3 years after the deceased's death would arouse suspicion and greater the delay, greater would be the suspicion;

(f) such delay must be explained, but cannot be equated with the absolute bar of limitation; and

(g) once execution and attestation are proved, suspicion of delay no longer operates."

**29.** On account of presence of aforesaid basic infirmities, which go to the root, did not allow the judgment to survive. As such same is set aside. Appeal is allowed. The matter is remitted back to the learned lower court to proceed afresh and will pass judgment in accordance with law after giving due opportunity to both the parties. In the facts and circumstances of the case, parties will bear their own cost.

**(Aditya Kumar Trivedi, J.)**

Patna High Court  
Dated 17<sup>th</sup> day of Feb., 2016  
Prakash Narayan

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