

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.129 of 2012

- =====
1. Smt. Radha Singh, wife of Sri Satrugan Singh and daughter of Late Shailendra Prasad Singh, resident of village-Mahisari, Police Station Jamui, P.O. Jamui and District-Jamui.
 2. Smt. Asha Singh, wife of Sri Anil Kumar Singh and daughter of Late Shailendra Prasad Singh, resident of village Mohanpur, Post office and Police Station-Dharhara, District Munger and presently residing at Mohalla Patrakarnagar Kankarbagh, Sector H, Plot No.C/27, Post Office and Police Station-Kankarbagh, in the town and District-Patna.

.... Defendants/ Appellants

Versus

1. Smt. Anuradha Singh, wife of Sri Manoj Kumar Singh, and daughter of Sri Ram Lakhan Singh, resident of village Mahimachak, Post Office Gangatamora, Police Station Haveli Kharagpur, District Munger at present residing at Mohalla Patrakar Nagar, Kankarbagh, Sector H, Plot No.C-27, Police Station Kankarbagh in the town and District of Patna.

.... Plaintiff/ Respondent

=====

Appearance :

For the Appellant/s	:	Mr. J. S. Arora-Advocate Mr. Ajay Kumar-Advocate Mr. Gaurav Kumar-Advocate
For the Respondent/s	:	Mr. Jitendra Kishore Verma-Advocate Mr. Anjani Kumar-Advocate Mr. Abhishek Anand-Advocate

=====

CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI
CAV JUDGMENT

Date: 19-05-2016

Challenged in this appeal is judgment and order dated 02.07.2011 passed by the Additional District Judge-VII, Patna in Title Suit No.04 of 2009 arising out of Letter of Administration Case No.94 of 2005 whereby and whereunder the learned lower Court had allowed the petition and further, directed to issue a probate relating to a Will dated 29.10.1999.

2. Respondent/ applicant filed a petition purported to be under Section 276 of the Indian Succession Act with a prayer to grant



letter of administration certificate in her favour relating to a Will dated 29.10.1999 executed by testator, Shailendra Prasad Singh (since deceased) and for that, recited that aforesaid Shailendra Prasad Singh, son of Ram Prasad Singh of Village-Mahimachak, P.S. Haweli Kharagpur, District-Munger was the father in-law of propounder as well as father of opposite party nos.2 to 4. His wife Dropadi Devi had predeceased him.

3. It has further been pleaded that aforesaid Shailendra Prasad Singh was an employee under Rajbhasha Parishad, Government of Bihar at Patna as Research Assistant and retired on 31.12.1987. It has also been pleaded that daughters have already been married and are living with their husband at their sasural, respectively.

4. It has further been submitted that testator, Shailendra Prasad Singh had only son Manoj Kumar Singh, husband of the propounder, who happens to be mentally ill and is of unbalanced mind and on account thereof, she was being specially cared by the testator. It has further been submitted that after marriage, the daughters became ungrateful to the testator, Shailendra Pd. Singh and on account thereof, was not at all maintaining good, harmonious relationship with the testator. Furthermore, it has also been submitted that one daughter, Sarika has begotten from her. Testator, Shailendra Pd. Singh had developed anxiety towards the well being of the



applicant as well as grand daughter on the ground of mental condition of his son, Manoj Kumar Singh. Furthermore, it has also been submitted that applicant happens to be sole member having attached with the testator, Shailendra Pd. Singh and further, was providing all sorts of nourishment, affection, service to testator, Shailendra Pd. Singh on account thereof, he was very much pleased with the applicant and that being so, testator, Shailendra Pd. Singh had executed his last Will under his fit, sound mental condition, voluntarily on 29.10.99 in favour of applicant in respect of his self-acquired property situated at Mohalla-Patrakar Nagar, Kankarbagh, Sector-H, Plot No.C/27, Holding No.3858, Circle No.8A of Patna Municipal Corporation and further, made applicant-owner of the said house on his death. Furthermore, it has been incorporated that testator Shailendra Pd. Singh by his last Will made the applicant, Anuradha Singh and the husband of the applicant namely Manoj Kumar Singh, owner of residential house as well as agricultural land situated at Village-Mahimachak.

5. It has further been pleaded that testator, Shailendra Pd. Singh under the aforesaid Will dated 29.10.1999, restricted the right of inheritance of his daughters relating to his self-acquired property located at Mohalla-Patrakar Nagar, but he had made provisions for residence of both the daughters providing accommodation in flat at

first floor, Northern Side as well as Southern Side with a further restriction that they will have no right to sell the said flat.

6. It has further been pleaded that tax of the aforesaid house was fixed in name of Manoj Kumar Singh at the instance of testator, Shailendra Pd. Singh himself and further, put a condition upon his daughters to pay 1/3rd share of Annual Tax in proportionate way under the aforesaid Will.

7. It has also been pleaded that seeing the mental condition of Manoj Kumar Singh sole heir, testator, Shailendra Pd. Singh had authorized the applicant to manage the property as, at the relevant moment, was aged about 76 years and further, Manoj Kumar Singh was not at all competent to manage the same. Therefore, testator, Shailendra Pd. Singh had authorized the applicant to act on his behalf during his lifetime and had also authorized the applicant to become owner and proprietor of his immovable property as well as to withdraw the amount deposited in the account of testator, Shailendra Pd. Singh by giving in writing in presence of the witnesses on stamp paper of Rs.5,00/- and got the same authenticated by a notary public, Patna by swearing an affidavit to that effect on 16.04.2003. It has also been pleaded that Will dated 29.10.99 executed by testator, Shailendra Pd. Singh happens to be the last Will. It has also been stated that testator, Shailendra Pd. Singh had ordinary place of residence at



Mohalla-Patrakar Nagar, who died on 10.05.2005 at that very place leaving behind two daughters and a son. Furthermore, apart from complying other formalities, it has been pleaded that there is no impediment in getting the relief so claimed for by the applicant and accordingly, prayed for grant of letter of administration as stated above.

8. The petition was verified by the attesting witness, Murari Lal Sharma as well as the applicant herself.

9. The daughters on account of citation appeared and filed caveat contesting plea of the applicant and on account thereof, the proceeding was controverted as Title Suit and since thereafter, the daughters/ appellants left whereupon the proceeding sailed smoothly and concluded by the judgment impugned which happens to be the subject matter of instant appeal.

10. It has been submitted on behalf of appellants that the purported Will dated 29.10.99, is neither the genuine Will nor the last. To substantiate the same, it has been submitted that on bare perusal of the so alleged Will dated 29.10.99, it is evident that alleged testator, Shailendra Pd. Singh had executed Will in favour of these two daughters/ appellants including his son Manoj Kumar Singh and further, there was no occasion for reconsideration, therefore, the alleged Will dated 29.10.99 smacks some sort of foul play.



11. Learned counsel for the appellants made extraneous submission on that very score and submitted that alleged Will dated 29.10.99 carries a disclosure to the extent that as the earlier Will of 10.11.97 happens to be defective one, therefore, requires execution of another Will, the alleged one. Discarding appearance of daughters in a way as identified in the Will dated 10.11.97, is not a defect as has been incorporated in the alleged Will dated 29.10.99 and so, submitted that the respondent/ applicant, who was living along with testator, Shailendra Pd. Singh might have duped the alleged testator, Shailendra Pd. Singh and succeeded in getting his signature which, in due course of time, with the collusion of the so alleged attesting witnesses transformed it as a Will. Alleged testator was an intellectual person and further, was well aware of the niceties of the document and so, would not have allowed the single page unregistered document instead of getting it registered to give an authenticity, reliability.

12. Furthermore, it has been submitted that presence of witnesses over the alleged Will clearly suggest the aforesaid action as the space in between two lines varies gradually in downward direction and in likewise manner, presence of signature of alleged testator also suggest that the same was obtained before script of the aforesaid document. In likewise manner, presence of attesting witnesses at the

margin, is another circumstance which creates doubt over genuineness of the document. Therefore, the document in question dated 29.10.99 is not at all the valid, legal, voluntarily executed document by the testator, Shailendra Pd. Singh.

13. It has further been submitted that reliability of the document in question is found duly sacked after going through evidences of the PWs. PW-1 alleged attesting witness had stated that none was present at the time of execution of alleged Will by the testator, Shailendra Pd. Singh, save and except, attesting witnesses. While PW-2, brother of PW-3, applicant/ respondent as well as evidence of PW-3, it is found that they have shown their presence at that very moment and in that capacity, they have exhibited the document.

14. Apart from this, it has also been submitted that fabrication of the document in question is found duly exposed when the verification having been done by the PW-1 of the petition as per requirement of law, is gone through. From the verification, it is evident that Will was executed by testator, Shailendra Pd. Singh in favour of applicant Smt. Anuradha Singh alone while the document in question happens to be in name of Smt. Anuradha Singh as well as Manoj Kumar Singh. So, certainly, he (witness) had not signed and verified the document in question having been executed in favour of



applicant/ respondent Smt. Anuradha Singh as well as Manoj Kumar Singh rather he stood as a witness over a document executed by testator, Shailendra Pd. Singh in favour of Smt. Anuradha Singh alone. In the aforesaid circumstance, it has been submitted that at parallel scrutiny of the aforesaid event, it is apparent that document in question, alleged Will dated 29.10.99 is not at all a genuine, valid, legal, last Will of testator, Shailendra Pd. Singh.

15. In its continuity, it has also been submitted that the statement made by PW-1 during course of verification of petition got much more importance in the background of the fact that in the petition itself, it has been incorporated that testator, Shailendra Pd. Singh had executed another document dated 16.04.2003 on a stamp of Rs.500/- which had not been produced and exhibited during course of trial. Had there been a fairplay at the end of the applicant/ respondent then, the aforesaid document would have been exhibited to show that the same was not a Will, therefore, not a last Will. Therefore, non-production as well as non-exhibit of aforesaid document dated 16.04.2003, is indicative of the fact that the same has purposely been withheld, as the same, if exhibited would have nullified the luminousness of assertion of the respondent/ applicant, being the last Will.

16. Now, coming to next leg of his argument, it has been



submitted that save and except, averments having been made in the petition, there happens to be complete absence of corroborative piece of evidence wherefrom it could be inferred that Manoj Kumar Singh, husband of the deceased was insane or an idiot. The alleged Will dated 29.10.99 is also silent on that very score. Had there been such eventualities persisting in the family, it was expected in ordinary course of nature that alleged testator, Shailendra Pd. Singh might have endorsed in the Will on account of mental deformity of his son, husband of applicant and further, to keep safeguard upon the properties possessed by him, he selected his daughter-in-law to be fittest person and further, cogent reasoning to discard earlier Will dated 10.11.1997. Not only this, had Manoj Kumar Singh suffered from any kind mental deformity, being sole son he would not have allowed Manoj Kumar Singh uncared rather must have been allowed to live under medical surveillance, but neither the witnesses deposed like so, nor any kind of prescription has been brought up on record to justify the same.

17. In the aforesaid background, it has been pleaded that there happens to be defective procedure adopted at the end of the applicant/ respondent, purposely, intentionally, surreptitiously so that anyhow she could be able to obtain letter of administration and during said course, Court has also been duped. Whenever suit is filed against



an insane person, then in that event, two eventualities visualize. The first one, either he should be represented under guardianship of another person of sound mental condition or under second option, to have prayed before the Court for appointment of guardian ad litem. Not only this, brushing aside the procedural law, a prayer was made on behalf of applicant/ respondent before the learned lower Court to wipe out Manoj Kumar Singh from proceeding on false pretext and the same was allowed vide order dated 13.08.2008 which, the learned lower Court ought not have done. On this score alone, the judgment impugned is fit to be set aside.

18. It has also been pleaded that apart from visibility of aforesaid major defect, deficiency, deformity, illegality, another kind of suspicious circumstance is also visualizing which the learned lower Court should have perceived on its own. Simultaneously, applicant-respondent was under obligation to explain the same. In order to buttress such plea, it has been submitted that typist has not been examined. Had it been a voluntarily act of testator, Shailendra Pd. Singh, then in that event, the document in question would have contained presence of name of typist. As, the statement of the witnesses go to the extent that testator, Shailendra Pd. Singh gone to the place of typist, got it typed, returned back and then, signed it before the witnesses, who also signed in his presence. Because of the



fact that it happens to be a fraudulent act at the end of applicant/respondent whereunder the Will was prepared secretly, so name of typist has purposely been withheld to shut the door of revelation of truthfulness. It has also been submitted that had there been genuineness in his conduct at the end of testator, Shailendra Pd. Singh, then in that event, there should not have been in consistency in between evidence of the witnesses on that very score. Furthermore, the learned lower Court failed to intercept the same, while allowing the prayer.

19. Though, the name of daughter has been disclosed in the petition as 'Sarika', but neither her age nor her status nay she has been impleaded as the citation reveals two daughters and a son.

20. Apart from this, it has also been submitted that as per amended Hindu Succession Act of the Year 2005, daughters have become coparcener and on account thereof, the applicant would not have pounced upon share of appellants and in the aforesaid background, one could perceive dishonest intention of applicant/respondent and further, under garb of greed and covetous, the details of the property under Schedule have been introduced, engulfing share of appellants which would not, as those property were not at all belonging to alleged testator, Shailendra Pd. Singh.

21. Furthermore, it has also been submitted that as after



conversion of instant petition as a Title Suit, even non-appearance of defendant would not seal their fate and disentitle them to file an appeal, under the banner of first appeal which happens to be statutory right of the parties and further, happens to be continuity of the suit and so, submitted appeal is maintainable. Also relied upon *A.I.R. 2009 SC 951*, *A.I.R. 1968 SC 1332*, *A.I.R. 1998 SC 2861*, *A.I.R. 1959 SC 443*, *(2010) 5 SCC 770*, *A.I.R. 2001 (M.P.) 250*.

22. Learned counsel for the respondent while repelling the submission made on behalf of appellants, has submitted that appellants, in the facts and circumstances of the case, are not at all legally competent to file an appeal and in likewise manner, the appeal filed on their behalf happens to be non-maintainable. To substantiate such plea, it has been submitted that after citation, appellants have appeared, filed objection and on the basis thereof, as they challenged, the proceeding was controverted as Title Suit. No sooner than conversation of the proceeding, appellants disappeared and on account thereof, the proceeding sailed without any hurdle ultimately meeting with its logical end. Therefore, the conduct of the appellants suggest that they have waived their right in getting the proceeding contested, as well as failed to challenge the Will and so, once they have waived their right, they are precluded from challenging the judgment impugned under theme of estoppel. So, submitted that instant appeal

is not maintainable.

23. It has further been submitted that because of the fact that there happens to be non-appearance of the appellants during trial before the learned lower Court, on account thereof, the evidence of all the three witnesses remained unshaken wherefrom it is duly substantiated that testator, Shailendra Pd. Singh had executed Will dated 29.10.99 under fit mental condition without any duress, coercion, influence. Furthermore, such event is further strengthened from the plain recital of the Will wherein the earlier Will dated 10.11.97 had also taken note of which, in the opinion of the testator, was defective one and on account thereof, necessitate another Will, the present one and so, submitted that in absence of any cogent and reliable evidence as well as having been failed to cross-examine the witnesses whereupon, absolutely, there happens to be no material to doubt over genuineness of the document, more particularly in the background of the evidence of PW-1, one of the attesting witness. Had it not been a genuine act, then in that event, no disclosure would have been made regarding presence of earlier Will dated 10.11.1997.

24. In its continuity, it has also been submitted that evidence of the witnesses should not be read in piecemeal manner rather it has to be read in its entirety. Though, certain variations are there amongst the evidence of the PW, but those variations are natural

as well as superficial and are not going to cast any sort of doubt over genuineness of the Will dated 29.10.1999.

25. It has further been submitted that respondent/propounder of the Will happens to be pious in her conduct who, instead of having been authorized at the end of testator during her lifetime to manage moveable and immoveable property, disclosed the same though would not which, now being treated by the appellants to be the last Will which ought not to be as, the validity of the aforesaid document lost sight of after death of testator, Shailendra Pd. Singh.

26. At the other end, the Will in question became alive after death of testator Late Shailendra Pd. Singh. Furthermore, on account of disappearance of appellants before the learned lower Court, nothing adverse was prevailing on record whereupon document dated 16.04.2003, could have been filed, nor the same was necessitated. Furthermore, the document dated 16.04.2003 was not at all recognizable after death of Shailendra Pd. Singh, hence there was no occasion to file the same. As such, raising hue and cry at the end of appellants on that very score, is not at all found having any sound, legal basis.

27. Furthermore, it has been submitted that on account of absence of appellants, nothing suspicious circumstance has been brought up on record whereupon the genuineness of the Will could be



doubted and in likewise manner, it has also been submitted that no suspicious circumstance is found with regard to genuineness of the Will in question. Furthermore, the judgment impugned also did not disclose presence of any kind of suspicious circumstance which rightly been held by the learned lower Court and so, it has been submitted that no suspicious circumstance was appearing on account thereof, neither the respondent/ propounder of the Will was expected to explain nor the Court been able to perceive, whereupon there was no question of discharging obligation by way of explaining the same.

28. Furthermore, the learned counsel for the respondent submitted that presence of daughter 'Sarika' has been disclosed in the petition and as her interest is found tagged with the interest of the respondent and therefore, she has not been shown as an heir left by deceased-testator, Shailendra Pd. Singh and further, on account of aforesaid event, no adverse impact is found over the fate of the proceeding. It has also been pleaded that respondent alone was competent and is competent to file petition of letter of administration on her behalf as well as on behalf of her husband as their interest are conjoint, interdependent, non-separable, non-identifiable, non-distinguishable as well as the petition for letter of administration was for the welfare of her husband also, as there was no inter se clash of interest. Apart from this, one of the propounders found competent to

file petition on behalf of others if not accepted, then to the extent of her interest is maintainable and for that, also referred relevant provisions of the Succession Act. Such as, Sections 215, 228, 234, 236, 244 and 246.

29. Then, it has been submitted that though Will in question is silent over mental condition of husband of the respondent Manoj Kumar Singh to be of abnormal mind, but the fact remains that he was insane and the same has been substantiated at her end during course of evidence which remained uncontroverted. It has also been submitted that as Manoj Kumar Singh was taken away by the appellants and since thereafter, became untraceable for that, a criminal prosecution was also launched against the appellants though acquitted and in the aforesaid background, it was not at all found prudent to allow the petition to be remained pending for infinite period over appearance of her husband, who is still untraceable. Therefore, erasing of her husband's name from the petition was not at all with oblique motive rather the circumstances prevailing at the relevant time did warrant and so, it has been submitted that no deficiency could be perceived during conduction of the proceeding on that score. Furthermore, in order to buttress his submission, the learned counsel for the respondent also relied upon *A.I.R. 2003 SC 3397*, *A.I.R. 1995 SC 1852*, *A.I.R. 1979 SC 1393*, *A.I.R. 1995 Patna 122*, (2000) 2

P.L.J.R. 120, A.I.R. 1963 Mysore 136, A.I.R. 1947 Patna 434, A.I.R. 1927 Bombay 387, A.I.R. 1929 Bombay 397, A.I.R. 1938 Rangoon 261, A.I.R. 1920 Patna 197, 1920 P.L.J. (5) 347.

30. From perusal of the original petition, it is evident that at one occasion, presence of 'Sarika' has been disclosed. However, she has not been shown as an heir, so detailed under Para-10 of the petition left by testator deceased Shailendra Pd. Singh. In the Will, Exhibit-1, it is apparent that testator-deceased Shailendra Pd. Singh had not identified his son Manoj Kumar Singh to be that of an insane. No documentary evidence has been adduced in order to substantiate mental condition of Manoj Kumar Singh. Then in that event, two circumstances are found visualizing from the conduct, pleading of the parties. The first one, presence of Manoj Kumar Singh has purposely been introduced to be that of an abnormal mind person/ insane/ idiot which ever may be, in the background of disclosure having in the Will itself that on 10.11.1997, a Will was executed in favour of Manoj Kumar Singh and these two appellants, which has been identified by the testator to be defective one. Therefore, respondent/ propounder of the Will might have been apprehensive from her husband's side that his presence in normal phenomenon will prejudice her case, in case, deflect there from and challenge authenticity of the present Will and so, the best option having

available to her was to identify the Manoj Kumar Singh as insane.

31. The second aspect, Manoj Kumar Singh rightly suffered from insanity. Testator, Late Shailendra Pd. Singh was not at all inclined to spare his son and on account thereof, Will was executed in favour of Manoj Kumar Singh and respondent jointly, withholding insanity of Manoj Kumar Singh and further, witnesses duly substantiating the aforesaid theme. So, the second event has to be accepted as no other option is found available much less for want of appearance of Manoj Kumar Singh as well as non-contested by the appellants, and further, being pleaded.

32. Admittedly, petition has been filed solely by the respondent and having minute observation of the main petition, it is evident that she had not claimed that instant petition is also being filed on behalf of her husband, who happens to be under her care, guardianship and further, is being represented by her nor till the day of erasing his presence from the record vide order dated 13.08.2008, he has been shown to be under guardianship of anybody nor guardian ad litem was prayed for and in likewise manner, the learned lower Court also failed to opt. It is further evident from the record that name of Manoj Kumar Singh has been deleted on the prayer made by the respondent/ propounder of the Will vide order dated 13.08.2008. So, citation was not at all effective one.



33. There happens to be prohibition for grant of letter of administration or probate in favour of minor or insane as per Section 223 as well as under Section 236 of the Indian Succession Act. Once, the Will is found in name of person apart from others, who happens to be insane, then in that event, the proceeding would not have sailed as, happens to be forbidden. Therefore, the learned lower Court should have taken precaution at that score, but, the successive order sheet as well as the judgment impugned indicate that the learned lower Court failed to deep down towards Section 223 as well as 236, and its impact, whether in that event, the proceeding was maintainable.

34. Apart from this, after presence of appellants, an objection having been filed on their behalf opposing the prayer whereupon matter became contentious and in terms Section 295 of the Indian Succession Act, converted as a regular suit and as per provision incorporated therein there happens to be applicability of C.P.C., Order-XXXII takes care of such eventualities and in terms of Rule-15 thereof, the Rule-1 to 14 except Rule-2-A has been made applicable relating to party being of unsound mind which has not been followed up.

35. Furthermore, as per Order-I, Rule-10(2) of the C.P.C. the Court can direct striking off names of plaintiff or defendant on a petition or on its own on such term as may appear is also not at all



found properly exercised as is evident from order dated 13.08.2008, which has been passed on a prayer made by the respondent/ applicant dated 11.07.2008 wherein it has been incorporated that as O.P. No.4, Manoj Kumar Singh is suffering from mental ailment and is traceless, therefore, his name should be deleted supported by an F.I.R. At the present stage, in order to justify action of the learned lower Court, the learned counsel for the respondent referred relevant Sections and submitted that as opposite party no.4 had renounced as well as citation had already been properly effected, therefore, the aforesaid infirmities are of no avail in putting hindrance over maintainability of the present petition. The aforesaid submission is found inadequate in the background of status of Manoj Kumar Singh as pleaded, being insane and further, keeping into account the contents of the original petition whereunder no prayer has been made to that extent nor during course of evidence, AW-3 Anuradha Singh had claimed like so.

36. At the present moment, it would be relevant to refer the case law having been referred at the end of the respondent themselves, *Illachi Devi (D) by L.Rs., and others, v. Jain Society, Protection of Orphans India and others reported in A.I.R. 2003 SC 3397* wherein the scope of Section 223, relating to probate as well as Section 236 relating to letter of administration prescribing the disqualification has been taken note of and explained under:-



“9. A perusal of sub-section (2) of Section 218 shows that it grants to the Court ample discretion in the matter of grant of Letter Administration where a testator dies intestate. The object behind granting discretion to the Court is that where a person dies intestate, the person in whose favour the Letter of Administration is granted, is required to carry out certain functions and duties being responsible to the Court, whereas Section 223 and 226, on the other hand, provide for disqualification. The Letter of Administration or probate can only be granted to those who are named in those Sections; the object being that the duties and functions of an executor in whose favour Letter of Administration is granted, is required to carry out the direction(s) contained in the Will faithfully, diligently and effectively. The executor can be discharged only as and when such directions given in the Will, are complied with or the desire of testator, as reflected in the Will, is fulfilled. The legislature, in its wisdom, has chosen to disqualify not only a minor or a person of unsound mind, but also an association of individuals, for carrying out the

wishes and directions of the testator. The only exception which has been made in the matter of grant of probate or Letter of Administration is a company, which satisfies the conditions prescribed in the Rules and not otherwise.”

37. Furthermore, once the instant proceeding has been converted as a Title Suit and further, permitting its procedure to be guided by the C.P.C., then in that event, on account of non-appearance of appellants/ defendants the proceeding should have sailed in terms of Order-IX, Rule-6(1)(A) of the C.P.C. which, from the successive order sheet appears not been complied with. Had there been proper application on that very score as well as had the proceeding being fixed for ex parte hearing in terms of Order-IX, Rule-6(1)(A) of the C.P.C., then in that event, the appellants could have an opportunity for asking the ex parte order set aside in terms of Order-IX, Rule-13 of the C.P.C. Apart from this, Section 299 of the Indian Succession Act prescribes the appeal against an order of the District Judge and during course thereof, the provisions governing the procedure of appeal so prescribed under C.P.C. has been directed to be applicable. That being so, it could be considered as a first appeal under Order-XLI which happens to be the right of the party or an appeal under Order XLIII, in case proceeding would have sailed under Order-IX, Rule-6(1)(A) of the C.P.C.



38. Furthermore, the submission having been made on behalf of respondent that for the benefit of Manoj Kumar Singh, O.P.No.4, instant petition has been filed and so, instant petition could not be said suffering from any kind of legal infirmity is not at all found convincing. Whether Manoj Kumar Singh would have supported the respondent is a matter of concern, more particularly in the background of the fact that the Will in question itself speaks that at an earlier occasion dated 10.11.1997, Will was executed in favour of son and two daughters, which was found defective one followed with present one and in the aforesaid background unless and until his presence was there with an assurance out of his conduct, the proprietary of the Will in question in consonance with the another Will dated 10.11.1997 was always hinging.

39. Furthermore, the case law referred by respondent as *Bhagwati Kuer v. Bahuria Ramsakhi Kuer reported in 1920 Vol. (V) P.L.J. 347* is not going to help, because of the fact that in the aforesaid case, the Will executed in favour of wife by the deceased along with commanding the future event whereupon the minors had filed petition, which was allowed, but the same was deprecated, however, the matter was remitted on account of having the minor applicant attaining the age of majority. None of the other decisions filed on behalf of respondent deal with the present controversy.

Because of the fact that the proceeding sailed before the learned lower Court suffered from inherent defect having adverse impact upon the prospect of ultimate result taken cared of by the learned lower Court by the judgment impugned and so, the same is set aside. Appeal is allowed. The matter is remitted back to the learned lower Court to proceed afresh and decide the same following correct legal preposition. However, in the facts and circumstances of the case, the parties will bear their own costs.

(Aditya Kumar Trivedi, J)

Vikash/-

AFR/NAFR	A.F.R.
CAV DATE	31.03.2016
Uploading Date	20.05.2016
Transmission Date	N.A.