

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.151 of 2016**

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Chakravarti Singh @ Chakarvarti Singh

.... Appellant/s

Versus

Laxmi Narayan Singh @ Laxmi Singh & Ors

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Sukumar Sinha, Sr. Advo.

: Mr. Abinash Kumar, Adv.

For the Respondent/s : Mr. Sri Prakash Kumar Roy,

: Mr. Rajeev Ranjan, Adv.

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**CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO**

ORAL ORDER

3 16-08-2016 Heard learned Senior counsel, Mr. Sukumar Sinha,

appearing for the petitioner and Mr. Sriprakash Srivastava, appearing

for the respondents.

2. Perused the order dated 08.04.2016 passed by he

learned VIIth Additional District Judge, Motihari in Probate Case

No. 33 of 2003, whereby the court below rejected the application

filed by the applicant-petitioner for comparing the disputed thumb

impression of the testator by an expert.

3. The learned Senior counsel, Mr. Sukumar Sinha for the

petitioner submitted that the probate application, under Section 276

of the Indian Succession Act, was filed by the petitioner for grant of

probate certificate of the *Will* executed by Ramashray Singh in

favour of the applicants. Defendants-respondents, herein, filed

objection alleging that the *Will* is forged and the thumb impression



on the Will is not of the testator. Both the parties adduced their evidences. After closure of the evidence, the petitioner filed the application for permission to get the thumb impression compared by an expert. The court below held that the thumb impression has already been compared by the expert at the instance of the defendants-respondents and that the expert opinion is not the conclusive group of fact. According to learned counsel, the petitioner's case is that it is the thumb impression of the testator and, therefore, the burden is on the petitioner to prove the fact and unless it is proved, the probate case will not be disposed and, therefore, if permission is not granted, it will seriously prejudice the petitioner and shall lead to multiplicity of proceeding.

4. On the other hand, learned counsel, Mr. Srivastava submitted that the petitioner adduced evidences first and, thereafter, the defendants-respondents adduced evidences. The petitioner never applied for comparison of the thumb impression by an expert. The defendants got it compared by an expert and expert has also been examined in the Court as witness. After closure of the evidence, this application has been filed. Therefore, the court below has rightly rejected the said application.

5. Learned counsel for the respondents relied upon a decision of Punjab & Haryana High Court rendered in the case of ***Kulwant Singh Vs. Makkhan Singh*** reported in ***1992 CJ (P&H) 350***

decided on 21.05.1992 and submitted that the plaintiff can be permitted to produce additional evidence, in case, he satisfies the Court that after the exercise of due diligence, the evidence sought to be produced was not within his knowledge or could not be produced by him at the time when the plaintiff was leading his evidence.

6. Admitted fact is that evidence of both the parties have been closed. The petitioner has filed the application under Section 276 of the Indian Succession Act. Now, the burden is on the plaintiff-petitioner to prove the due execution of the *Will* by the testator. The burden is on the plaintiff to prove this fact. The petitioner cannot be allowed to take advantage of the weakness of the respondents. Now, the main question to be decided in the suit is whether the thumb impression on the *Will* is of the testator or not, particularly, when the defendants are denying this fact. Now, on the ground that the case has been closed, if, the petitioner is not permitted to examine the expert then, it will naturally cause irreparable loss to the petitioner and shall occasion failure of justice.

7. So far the decision relied upon by the learned counsel, Mr. Srivastava for the respondents is concerned, it may be mentioned here that the decision relied upon by the respondents is prior to the amendment of the C.P.C. which took place with effect from 01.07.2002.

8. The Hon'ble Supreme Court in the case of **K.K.**

Valusamy Vs. N. Palaanisamy reported in *2011 (11) SCC 275* has held that in appropriate cases, the Court can exercise its discretionary jurisdiction under Section 151 of the Code of Civil Procedure and reopen the case of any party for doing justice between the parties although the provision as contained in Order 18 Rule 17A C.P.C. has been deleted by the Amendment Act.

9. Now, therefore, in the facts and circumstances of the present case, it is essential to permit the plaintiff-petitioner to get his expert examined in this case but the court below refused to exercise the inherent jurisdiction under Section 151 C.P.C. I, therefore, allow this civil miscellaneous application and the order impugned is, hereby, set aside and the petitioner is permitted to get the disputed thumb impression compared by his expert within six weeks so that the probate case, which is of the year 2003 can be disposed of expeditiously.

(Mungeshwar Sahoo, J)

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