

IN THE HIGH COURT OF JUDICATURE AT PATNA
Civil Writ Jurisdiction Case No.10039 of 2015

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Surendra Prasad & Anr

.... Petitioner/s

Versus

Bacha Tiwari & Ors

.... Respondent/s

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Appearance :

For the Petitioner/s : Mr. Binod Kumar Singh

For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE MUNGESHWAR
SAHOO
ORAL ORDER

6 19-09-2016 Heard learned counsel Mr. Binod Kumar Singh for the
petitioners.

2. Perused the impugned order dated 04.04.2015 passed
by Subordinate Judge-III, Siwan in Title Suit No.376 of 2010
whereby the court below refused to mark the affidavit i.e.
examination-in-chief of defendant no.1, Ramapati Kuer @
Ramayan Kuer on the ground that it is not a public document.

3. Learned counsel for the petitioners submitted that
examination-in-chief of this defendant no.1 was filed before the
court below and for cross-examination Advocate Commissioner
was appointed but he did not cross-examine for seven months and
during this period defendant no.1 died. Therefore, the petitioners
filed an application for marking the examination-in-chief affidavit
as an exhibit but the court below refused to mark the same.

4. On the other hand, the learned counsel for the

respondents submitted that since there has been no cross-examination, it cannot be marked as exhibit.

5. The Hon'ble Supreme Court in the case of **Rasiklal Manickchand Dhariwal & Anr. Vs. M/s M.S.S. Food Products, (2012) 2 Supreme Court Cases 196** has held that it cannot be said that in **Ameer Trading Corpn. Ltd. case, (2004) 1 Supreme Court Cases 702** it has been laid down as an absolute rule that in the appealable cases though the examination-in-chief of a witness is permissible to be produced in the form of affidavit, such affidavit cannot be treated as part of the evidence unless deponent enters the witness box and confirms that the contents of the affidavit are as per his say and the affidavit is under his signature. Where the examination-in-chief of a witness is produced in the form of an affidavit, such affidavit is always sworn before the Oath Commissioner or the Notary or Judicial Officer or any other person competent to administer oath. The examination-in-chief is, thus, an oath already. There is no requirement in Order 18 Rule 5 CPC that in appealable cases the witness must enter the witness box for production of his affidavit and formally prove the affidavit. As it is such witness is required to enter the witness box in his cross-examination and, if necessary, re-examination. Since a witness who has given his examination-in-

chief in the form of affidavit has to make himself available for cross-examination in the witness box, unless the defendant's right to cross-examine him has been closed, such evidence (examination-in-chief) does not cease to be legal evidence.

6. In view of the above settled proposition of law when the examination-in-chief of the deceased defendant no.1 is already on oath on record, the reliability, legality, relevancy or otherwise can be considered at the time of final hearing of the case. So far marking of the same as an exhibit is concerned, in my opinion, since it is an evidence on oath, it is not required to be marked as an exhibit. So far other part rejecting to mark the affidavit of other persons is concerned, the learned counsel for the petitioners is not pressing because they are being examined as witness.

7. In view of the above settled proposition of law, in my opinion, there is no reason as to why the impugned order be interfered with in exercise of supervisory jurisdiction. Thus, this writ application is dismissed.

(Mungeshwar Sahoo, J)

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