

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.588 of 2012**

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1. Anand Mohan Poddar S/O Late Ram Raksha Poddar R/O Village- Chhoti Ballia,  
P.S.- Ballia, District- Begusarai

.... .... Appellant/s

Versus

1. Kailash Poddar S/O Late Chandradeo Poddar R/O Village- Chhoti Ballia, P.S.-  
Ballia, District- Begusarai

.... .... Respondent/s

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**Appearance :**

For the Appellant/s : Mr. AJAY KUMAR SINGH, ADVOCATE

For the Respondent/s : MR. PRAMOD MAN BANSI, ADVOCATE

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

**Date: 12-08-2016**

Appellant/ Objector being aggrieved by judgment dated 16.07.2012, decree dated 03.08.2012 passed by Adhoc Additional District and Sessions Judge-IV, Begusarai in Title Suit No. 03/1978 originated on the basis of Probate Case No. 54/1977 allowing the petition, filed instant appeal.

2. Shorn of unnecessary details, it is evident from the lower court record that Respondent/Propounder of the 'Will', Kailash Poddar had filed a petition for grant of Probate with regard to unregistered 'Will' dated 30.04.1977 allegedly executed by testatrix, Sushila Devi wife of late Ram Raksha Poddar in his favour. It has been averred that aforesaid 'Will' happens to be the last 'Will' of testatrix, Sushila Devi. It has further been stated that testatrix, Sushila Devi died on 19.08.1977. Then thereafter, it has been stated that the aforesaid 'Will' at the instance of testatrix, Sushila Devi was scribed

by Baidyanath Sah and during course of execution, testatrix, Sushila Devi was identified as well as witnessed by Satyanarayan Poddar, Baidyanath Sah. The petition was verified by Satyanarayan Poddar apart from propounder of the 'Will'/respondent Kailash Poddar.

3. From the petition it is evident that no details of persons having interest in the property was there, that means to say, even in absence thereof, appellant along with others appeared and filed objection. As pleaded thereunder, it has been submitted that common ancestor, Kesari Poddar died leaving behind four sons, Mahadev, Bulaki, Ram Raksha and Kapil Deo. It has also been stated that a partition took place and during course thereof, Mahadev and Bulaki remained joint at one side while Ram Raksha and Kapil Deo remained joint at other side. It has further been submitted that Bulaki had one son, Chandradeo whose son is Kailash, the legatee.

4. It has also been narrated that Ram Raksha was married to Sharda Devi after whose death he again married with Sushila Devi, the alleged testatrix. Kapil Deo had four sons and it is the branches of Kapil Deo who are objectors. Then it has been submitted that the aforesaid 'Will' happens to be forged and fabricated one which, the alleged legatee, Kailash Poddar managed to fabricate taking the witnesses, his own men at his side. Sushila Devi never executed 'Will' in favour of Kailash Poddar. As the aforesaid



‘Will’ is not a genuine ‘Will’ executed by the aforesaid Sushila Devi under sound mental, physical condition as well as out of her own volition, therefore, the alleged ‘Will’ could not be said to be the pious expression of the wish of the legator. Apart from this, it has also been pleaded that Ram Raksha and Kapil Deo remained joint whereupon after death of Ram Raksha, it was the family member of Kapil Deo who was taking care of Sushila Devi the alleged legator by rendering all sorts of service, and so there was no occasion for the legatee to render service and in likewise manner, there was no occasion for the legator to receive service at the end of legatee whereupon the contents of the ‘Will’ whatever recited happens to be false, frivolous and imaginary.

5. It has also been submitted that Sushila Devi had adopted objector, Anand Mohan Poddar and on account thereof, he became her adopted son who performed his obligation satisfactorily. So submitted that the ‘Will’ in question happens to be a forged and fabricated document whereupon the instant proceeding is fit to be dismissed.

6. At the present moment, one more incident visualizes. The ‘Will’ in original was filed along with the petition whereupon directed to be kept safely. A copy thereof, was not at all attached therewith. On its own, the copy was filed subsequently with a prayer to reconstruct the record by admitting the aforesaid document which

the learned lower court vide order dated 10.09.1993 though entertained the aforesaid typed copy with a limitation that the plaintiff will have the burden of proving its genuineness and validity.

7. The learned lower court had framed following issues:-

- (i) Is probate/suit as framed maintainable?
- (ii) Is the deed of will genuine and valid executed by Sushila Dev?
- (iii) Has the plaintiff got valid, right and causes of action to sue?
- (iv) Is the plaintiff entitled to an order of probate?

8. The learned lower court decided the same in favour of respondent/legatee ultimately allowing the suit directing to grant probate, hence this appeal.

9. During course of argument at the end of appellant, it has been submitted that the judgment and decree impugned has been passed without following the right legal procedure and on account thereof, finding so recorded by the learned lower court vitiates. To substantiate such plea, it has been submitted that learned lower court should have considered that instant petition has been filed with mischievous game just to grab the property belonging to Ram Raksha Poddar depriving the original claimant, the appellant/objector, Anand Mohan Poddar who, on account of having been adopted by Sushila Devi, the alleged testatrix became adopted son whereupon was entitled to inherit property left by Ram Raksha Poddar. Because of the

fact that there was no partition in between appellant as well as the alleged testatrix, Sushila Devi, on account thereof, she was not at all legally entitled to have her independent existence and that being so, was not at all competent enough to execute the 'Will' relating to the property which never belonged to her.

10. It has also been submitted that the learned lower court failed to properly identify the distinction in between Probate as well as Letter Of Administration. The alleged legatee/respondent was not at all appointed as an executor in the alleged 'Will' and so, petition of Probate was not at all required. Contrary to it, the petition for Letter of Administration was expected to be and as, the alleged legatee was cunning and mischievous fellow and further tried to avoid the challenge, objection at the end of the appellant/objector who was adopted son of late Sushila Devi, that being so, purposely, filed the petition for Probate as the presence of proper citation with regard to the persons having interest of the property of the legator was not required and the same has purposely been withheld in the petition. Had there been it a petition for grant of Letter of Administration, then in that event, in terms of Section 278 of the Indian Succession Act, the legatee has to divulge the presence of persons having interest in the property which could have, after their appearance might have caused hurdle. It has also been submitted that according to Section 283 of the



Indian Succession Act proper citation in this regard was expected to be which never occurred. The appellant and others put their presence after getting the same verified on account of rumour being floated in the surroundings. Therefore, it has been submitted that as petition for Probate was not at all maintainable and as the learned lower court failed to construe properly, therefore, the judgment and decree passed by the learned lower court is fit to be set aside.

11. It has also been submitted that there was not effort at the end of the legatee to have the original document on record and in case sincere effort would have been taken, the aforesaid document would have come up because of the fact that the aforesaid document was filed before the Sub-Judge where it was directed to be kept in safe custody. After appearance of the appellant/opposite party, and on account of objection having been filed at their end, the proceeding became contentious whereupon transposed as title suit and accordingly, was sent to the court of District Judge would have annexed with the original 'Will' but the record did not accompany the same. Had there been proper direction as well as exercise at the end of the ministerial staff, the document would have come up but the same was purposely left out because of the fact that the same was not containing the genuine LTI of the alleged testatrix, Sushila Devi.

12. Furthermore, it has been submitted that typed copy of



the alleged 'Will', Ext-1 is on the record, however, from perusal of the same it is evident that it did not satisfy the ingredients of secondary evidence nor the witnesses so examined on this very score substantiated the same. Consequent thereupon, the learned lower court would not have accepted the document in question to be true copy of the alleged 'Will' dated 30.04.1977. So submitted that the findings so recorded by the learned lower court happens to be cryptic, perverse and accordingly is fit to be set aside.

13. On the other hand, while substantiating the judgment and decree passed by the learned lower court, it has been submitted on behalf of respondent/legatee that even from cursory perusal of the judgment impugned, it is evident that the learned lower court had considered and decided each and every question including that of reliability of the secondary evidence.

14. In this regard, it has been submitted on behalf of respondent/legatee that once copy of the 'Will' was entertained, then in that event, its presence could not be doubted. It has also been submitted that no objection could be allowed to be raised with regard to authenticity of the copy of the 'Will' in the background of the fact that the 'Will' in question lost while it was under custody of the court. Therefore, neither its reliability nor its genuineness could remain under controversy. Whatever deficiency surviving on that very score,



that is found duly removed through the oral evidence whereunder the witnesses, attesting witnesses, more particularly, have stated that in their presence 'Will' has been executed in favour of Kailash Poddar by Sushila Devi whereupon she had put her LTI in their presence and at her instance Satyanarayan had identified while Baidyanath and Dinesh stood as witnesses.

15. Not only this, the remaining witnesses PW-4, PW-5 and PW-6, more particularly, PW-4 had disclosed and further fulfilled the necessary ingredients of the secondary evidence and so, the copy of the 'Will' has rightly been accepted, admitted and relied upon by the learned lower court.

16. In its continuity, it has also been submitted that although two nomenclatures have been found relating to adjudication of the 'Will' (a) Probate (b) Letter of Administration but those two are not distinct to each other rather have been used in more narrow prospect and so, even filing petition for grant of Probate will not defeat the interest of the legatee.

17. Apart from this, it has also been submitted that non citation of necessary party having interest with the property left by the deceased legator would be a good ground for revocation of the 'Will' in terms of Section 263 of the Indian Succession Act but the same has not been identified as one of the grounds to reject the petition even

considering the submission having been made on behalf of appellant though legally not perceptible. As such, grant of Probate by the learned lower court happens to be out of legal perversity whereupon the appeal is fit to be dismissed.

18. On perusal of the records, it appears that at the end of appellant/objector altogether six witnesses have been examined out of whom PW-1 is Kailash Poddar, PW-2 is Satya Narain Poddar, PW-3 is Dinesh Mahto, PW-4 is Kaushal Kishor Singh, PW-5 is Kedareshwar Prasad and PW-6 is Brahamdeo Narain. Side by side exhibits have also been furnished as Ext-1, Typed copy of Will, Ext-2, Sign of Raghubansh Prasad, Advocate over the list of documents, Ext-2/1, signature of Baidyanath over list of document, Ext-2/4, marked 'X' for identification: is the signature of Sheristadar over list of document. Ext-2/5, Marked 'Y' for identification: list of document. Ext-3, Power of Shri Awadhesh Kumar Verma, Advocate, Ext-4 is the statement of Anand Mohan Poddar recorded in T.S. No.72/71. , Ext-5 is the deed of cancellation, Ext-6, Registration receipt, Ext-7 is the voter list.

19. On the other hand, respondent has examined altogether 14 witnesses out of whom DW-1 is Dayanand Kesri, DW-2 is Tirpati Narain Rai, DW-3 is Durga Jha, DW-4 is Ram Subhag Mishra, DW-5 is Ganga Prasad Yadav, DW-6 is Abdul Bari, DW-7 is Ram Udgar



Singh, DW-8 is Anand Mohan Poddar, DW-9 is Ram Narain Poddar, DW-10 is Madan Mohan Poddar, DW-11 is Bijo Yadav, DW-12 is Dhruv Pd. Rastogi, DW-13 is Natraj Sah and DW-14 is Ranjan Sahay. Exhibits have also been exhibited as Ext-A and Ext-A1 to Ext-A3 are rent receipts, Ext-B is the post card, Ext-C, Sudverna of Anand Mohan Poddar, Ext-D, Signature of witness, Abdul Bari on Sudverna, Ext-E-Malikana receipt, Ext-F, Death certificate of Sushila Devi, Ext-G, report of the Advocate Commissioner, Ext-H, c.c. of the order sheet dated 06.07.1974 from the office of Circle Officer, Ext-I, Certified copy of Registration case no. 240/74-75, Ext-J, Certified Copy of Voter list of Ballia Assembly, Ext-K, Certified copy of Register-II.

20. From perusal of the original petition, it is evident that status of Satya Narain Poddar and Baidyanath Sah were shown as attesting witnesses. Furthermore, Satya Narain Poddar has also been shown to be identifier over the 'Will' against alleged testatrix, Sushila Devi. As stated above, the original 'Will' is not present, even then, from perusal of the Ext-1, it is evident that status of all the three witnesses, that means to say, Satya Narain Poddar, Baidyanath Sah and Dinesh Mahto have incorporated the fact that Sushila Devi had put her LTI in their presence whereupon they stood as witness as per her direction. That means to say, none of them stood as an identifier.



Alleged testatrix, Sushila Devi being illiterate was to be properly identified over the document wherein they failed. At the present moment, the evident of Satya Narain Poddar is to be looked into who has been examined as PW-2. He had stated that he knew Kailash Poddar, Anand Mohan, Ram Raksha. Sushila Devi wife of Ram Raksha had executed deed of gift (Daan-Patra) in favour of Kailash Poddar which Sushila Devi got scribed by, Baidyanath Sah. The aforesaid document was read over to Sushila Devi in their presence. Sushila Devi gave her thumb impression. As per direction of Sushila Devi, he became identifier. Dinesh Mahto and Baidynath Sah stood as attesting witnesses. Therefore, assertion of the respondent that Satyanarain Poddar was an attesting witness along with Baidyanath Sah under petition has not been substantiated by Satyanarain Poddar (PW 2) whose evidence is found inconsistent with Ext-1 (with objection), copy of the 'Will'.

21. As per Section 281 of the Indian Succession Act, the petition for Probate is to be verified by at least one of the witnesses to the 'Will'. As disclosed above, verification of the petition happens to be at the end of Satya Narain Poddar (PW 2) who during course of his examination-in-chief did not support the same, even then, as per his evidence, he was not at all an attesting witness over the 'Will' rather he was mere an identifier and that being so, the original petition is

found not verified by one of the witnesses of the 'Will' whereupon there happens to be non compliance of the mandatory provision of Section 281 of the Indian Succession Act.

22. Apart from this, as per original petition, it is evident that only Satya Narain and Baidyanath Sah were shown to be attesting witnesses. As stated above, PW-2 stood as identifier. As such, now the only one witness Baidyanath Sah remained who has not been examined. Instead thereof, one Dinesh Mahto, PW-3 has turned up who had stated that Sushila Devi had executed 'Will' in favour of Kailash Poddar. Baidyanath Sah had scribed who read over the same to Sushila Devi and after finding it correct, Sushila Devi put her LTI. Satya Narain Poddar had identified Sushila Devi. He along with Baidyanath Sah and Satya Narain Poddar put their signatures.

23. Evidence of PW-1, Kailash Poddar should also be taken note of in the present context who had stated that Sushila Devi wife of Ram Raksh Poddar had executed last 'Will' in his favour on 30.04.1977. Baidyanath was scribe who read over the same and Sushila Devi put her LTI after finding it correct. Satya Narain Poddar had signed in presence of Sushila Dev. Baidyanath Sah and Dinesh Mahto also put their signatures. Satya Narain Poddar and Bidayanath Sah are dead.

24. So from perusal of the evidence of PW-1 as well as

PW-3 inconsonance with the averments whatever made under para-3 of the petition, it is evident that there happens to be inconsistency with regard to status of PW-3 as a witness over the alleged Will'.

25. Before coming to the evidence of other PWs, it has to be borne in mind that original 'Will' is not available on the record. When original 'Will' is not available then what kind of procedure is to be taken up by the court concerned as well as what kind of order is expected and for better appreciation, the relevant provisions of Indian Succession Act are being quoted hereinbelow:-

**237. Probate of copy or draft of lost will.**-When a will has been lost or mislaid since the testator's death, or has been destroyed by wrong or accident and not by any act of the testator, and a copy or the draft of the will has been preserved, probate may be granted of such copy or draft, limited until the original or a properly authenticated copy of it is produced.

**238. Probate of contents of lost or destroyed will.**-When a will has been lost or destroyed and no copy has been made nor the draft preserved, probate may be granted of its contents if they can be established by evidence.

**239. Probate of copy where original exists.**-When the will is in the possession of a person residing out of the State in which application for probate is made, who has refused or neglected to deliver it up, but a copy has been transmitted to the executor, and it is necessary for the interests of the estate that probate should be granted without waiting for the arrival of the original, probate may be granted of the copy so transmitted, limited until the will or an authenticated copy of it is produced.

**240. Administration until will produced.**-Where no will of the deceased is forthcoming, but there is reason to believe that there is

a will in existence, letters of administration may be granted, limited until the will or an authenticated copy of it is produced.



26. The original 'Will' as is evident from the order-sheets was filed along with the petition on 01.10.1977 but a copy thereof, was not at all annexed therewith. In similar way, Ext-1 (with objection) purported to be the true copy of the 'Will' is not an authenticated copy. Then in that event, there would be applicability of Section 237 of the Indian Succession Act whereunder, Probate is to be granted for limited period until the original or a properly authenticated copy of the 'Will' is produced. The order impugned, as is evident, has ignored all the relevant provisions as indicated above. Moreover, where it was to be granted for limited period and if not, then proper reason should have been assigned. At this juncture, from the successive order-sheets, it is evident that learned lower court had not cared to do proper exercise as, just after filing of the petition, the same was before the learned Sub-Judge and from order no.16 dated 20.07.1978, it is evident that on account of nature of the litigation being contentious, the record was transmitted to the learned District Judge for institution of proper title suit. The order is silent over the activity whether original 'Will' which was directed to be kept in safe custody on the first day itself was ever transmitted with the record to



the court of District Judge and further, the concerned ministerial staff were directed to search out and procure the same nay there happens to be any kind of report on the record that original 'Will' is lost. Because of the fact that original 'Will' was not traceable before the Court where it was pending, on account thereof, the respondent filed petition for replacement of the 'Will' by a copy of the same and the same was allowed with certain conditions vide order dated 10.09.1993 as indicated above.

27. In the background of aforesaid incident coming from the lower court record, now Ext-1 copy of the 'Will' is to be seen whether it satisfies the ingredients of secondary evidence.

28. Secondary evidence has been dealt with under Section 63 of the Evidence Act and its clarification are as follows:-,

1. Certified copies given under the provisions hereinafter contained;
2. Copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies;
3. Copies made from or compared with the original;
4. Counterparts of documents as against the parties who did not execute them;
5. Oral accounts of the contents of a document given by some person who has himself seen it.

29. Ext-1 happens to be typed copy, that means to say, it has been prepared by means of mechanical process. That being so,

more particularly, it is being covered by sub-clause 2 and if its scope is expanded then under sub-clause 3. While preparing the document either under sub Clause 2 or Sub Clause 3, one has to ensure the accuracy of the copy and further it has been made from as well as compared with the original 'Will' Ext-1 is silent.

30. PW-4 Kaushal Kishore Singh, an Advocate's Clerk has come up to exhibit the same. After going through his evidence, it is apparent that he has not stated that after having been prepared the copy through mechanical process (typed), it was compared and found to be accurate one. That being so, the requirement of Sub Clause 2 as well as Sub Clause 3 of Section 63 of the Evidence Act for identifying a document to be the secondary document of the original is found not at all satisfied and proved. That being so, Ext-1 on its face could not be accepted in lieu of secondary evidence. In same sequence, contention of learned counsel for respondent that under Sub Clause 5 of the Section 63 of the Evidence Act, oral evidence of the witnesses is to be accepted and that being so, the same should be treated to be in compliance of Section 63(5) of the Evidence Act is found completely misconceived in the facts and circumstances of the case that neither PW-2 nor PW-3 have spoken a single word with regard to contents of the document over which they allegedly put their signatures. Had there been specific deposition at their end that testatrix, Sushila Devi

had executed 'Will' containing following contents then in that event, the aforesaid oral evidence would have been treated in lieu of secondary evidence.

31. At the present juncture, Section 65 of the Evidence Act is also to be looked into. Section 65 (C) deals with conditions that in case, the original has been destroyed or lost not on account of his own default or neglect, then in that event, the same is permissible by way of secondary evidence relating to contents of the document. As stated above, none of the witnesses have stated the contents of the document. PW-4 as stated above had not stated that after preparation of the copy from the original 'Will', it was compared with and further was an accurate one. And being so, is found deficient one whereupon that authenticity of the typed copy became inadmissible in the eye of law.

32. In *H. Siddiqui (dead) by LRs. V. Ramalingam* reported in **AIR 2011 SC 1492** it has been held :-

10. Provisions of Section 65 of the Act 1872 provide for permitting the parties to adduce secondary evidence. However, such a course is subject to a large number of limitations. In a case where original documents are not produced at any time, nor, any factual foundation has been led for giving secondary evidence, it is not permissible for the court to allow a party to adduce secondary evidence. Thus, secondary evidence relating to the contents of a document is inadmissible, until the non production of the original is accounted for, so as to bring it within one or other of the cases provided for in the section. The secondary evidence must be authenticated by foundational evidence that the alleged copy is in fact a true copy of the

original. Mere admission of a document in evidence does not amount to its proof. Therefore, the documentary evidence is required to be proved in accordance with law. The court has an obligation to decide the question of admissibility of a document in secondary evidence before making endorsement thereon. (Vide: The Roman Catholic Mission & Anr. v. The State of Madras & Anr., AIR 1966 SC 1457; State of Rajasthan & Ors. v. Khemraj & Ors., AIR 2000 SC 1759; Life Insurance Corporation of India & Anr. v. Ram Pal Singh Bisen, (2010) 4 SCC 491; and M. Chandra v. M. Thangamuthu & Anr., (2010) 9 SCC 712).

33. After proper scrutiny of the material available on the record, as indicated above, it has become crystal clear that learned lower court while allowing the petition failed to perceive the deficiency persisting on the record, more particularly, with regard to identification of Ext-1 to be the true copy of the alleged ‘Will’. That being so, the petition would not have been allowed. Thus, the judgment and decree impugned do not justify its prevalence whereupon the same are set aside. The appeal is allowed.

34. However, in the fact and circumstances of the case, parties will bear their own costs.

**(Aditya Kumar Trivedi, J)**

Patna High Court  
The 12<sup>th</sup> of August 2016.  
Perwez/AFR

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