

IN THE HIGH COURT OF JUDICATURE AT PATNA
First Appeal No.208 of 1997

- =====
- 1(a). Radha Piyari Devi wife of Late Kanhaiya Prasad Singh
(b). Narbeshwar Prasad Singh son of Late Kanhaiya Prasad Singh
(c). Maheshwar Prasad Singh son of Late Kanhaiya Prasad Singh
(d). Ajay Shankar Singh son of Late Kanhaiya Prasad Singh
(e). Smt. Sandhya Tiwary D/o Late Kanhaiya Prasad Singh
(f). Prabha Singh D/o Late Kanhaiya Prasad Singh
All R/o village narwan, P.O.- Narwan, P.S.- Manjhi, District- Saran
- 2 (a). Nain Kumari Devi wife of Late Parshuram Prasad Singh
(b). Sanjay Kumar Singh son of Late Parshuram Prasad Singh
(c). Pushpa Kumari @ Pushpa Kumar Daughter-in-law of Late Parshuram Prasad Singh
(d). Ujjwal Kumar Singh grand son of late Parshuram Prasad Singh
All R/o village and P.O.- Narwan, P.S.- Manjhi, District- Saran
3. (i) Shambhu Kumar son of late Raghav Singh
(ii)(a) Anurag son of Late Bhuneshwar Kumar
(b) Anuraj son of Late Bhuneshwar Kumar
(c) Most. Rekha Kumari @ Rekha Singh wife of Late Bhuneshwar Kumar
All R/o village- Narwan, P.O.- Ekma, district- Saran, at present- R/o Bihar State Housing Colony, Behind Bhoot Nath Mandir, P.S.- Agamkuan, District- Patna
(iii) Smt. Manju Singh, D/o Late Raghav Singh and wife of Sri Pramod Singh
(iv) Smt. Renu Kumari D/o late Raghav Singh, wife of Sri Krishna Prakash
(v) Most. Deojhari Devi wife of Late Raghav Singh
All R/o Housing Colony, Kankarbagh, P.S.- Agamkuan, District- Patna
4. (a) Maniden Prasad Singh son of late Sukhdeo Singh
(b) Most. Kalawati Devi wife of late Dharamanath Singh
(c) Satish Kumar Singh son of Late Dharamnath Singh
(d) Binod Kumar Singh son of Late Dharamnath Singh
(e) Giteshwar Prasad Singh son of Late Dharamnath Singh
(c) to (e) are the grandsons of Late Sukhdeo Singh
All R/o village Narwan, P.O.- Manjhi, District- Sarwan
5. Gautam Prasad Singh son of Late Shrikant Singh
6. Pashupati Singh son of Parmeshwar Singh
7. Bhrigunath Singh son of Parmeshwar Singh
8. Anand Kumar Singh son of Yamuna Singh
9. (a) Dev Mukta Kuer wife of Late Kedarnath Singh
(b) Shashi Devi daughter of Late Kedarnath Singh
(c) Sachidanand Singh son of Late kedarnath Singh
10. Birendra Prasad Singh son of Kapildeo Singh
All R/o Narwan, P.O.- Narwan, P.S. Manjhi, Dist- Saran
.....Appellants



Versus

1. Suman Singh son of Brijnath Singh, R/o village & P.O.- Narwan, P.S.- Manjhi, District- Saran
2. Gulabi Kuer wife of Sri Sudama Singh, R/o village & P.O.- Siswa Patna, District- East Champaran
3. Smt. Sabitri Kuer wife of Late Sarda Singh, R/o village- Dhani Patti, P.O.- Kurwa Dalip nagar, District- Dewaria
4. Bhagmati Devi wife of Sri Anirudh Roy, R/o village- Sisotar, p.O.- Sisotar, District- Ballia U.P.
5. Smt. Shanti Devi wife of Sri Shyam Bihari Kuer, R/o village- Shah Ke Dumari, P.O.- Shah Ke Dumari, District- Bhojpur

At present- narwan Pargana Bal, P.S.- Manjhi, District- Saran
.... Respondents

=====

Appearance :

For the Appellants : Mr. S.S. Dwivedi, Sr. Advocate
Mr. Ranjan Kumar Dubey, Advocate
Mrs. Sangeeta Sharma, Advocate
For the Respondents: Mr. K. N. Choubey, Sr. Advocate
Mr. S.K. Singh, Advocate
Mr. Animesh Kumar, Advocate
Mr. Prashant Kumar, Advocate
Mr. Ambuj Nayan Choubey,
Advocate

=====

CORAM: HONOURABLE MR. JUSTICE JITENDRA MOHAN SHARMA

C.A.V. JUDGMENT

Date: 09-08-2017

This appeal has been preferred against the judgment and order dated 03.03.1997 passed by Sri Bihari Pandey, the then Ist Additional District Judge, Chapra in Probate Case No. 20 of 1986 whereby and whereunder the Probate Case was held to be premature and not maintainable and accordingly, the probate case was dismissed without cost.

2. Probate Case No. 20 of 1986 was filed by the Petitioners Sri Gulabi Kuer and others for granting Probate or Letters of Administration in respect of Will dated 11.06.40 executed by Ganesh Singh deceased in favour of his daughter-in-



law Kishunpari O. P. No. 1 and the ancestors of the petitioners. At the foot of the petition genealogical table has been given from which it reveals that Barahmdatt Singh common ancestor of both the parties had 3 sons Bisheshwar Singh, Ramashankar Singh and Sheo Shankar Singh. Sheo Shankar Singh had a son namely, Ganesh Singh the Testator. Ganesh Singh had two sons namely, Hardeo singh and Bashishtha Singh. Both of them pre-deceased their father issueless. O. P. No. 1 Kishunpari was the widow of Bashishtha Singh and daughter-in-law of Ganesh Singh the Testator. The petitioners and O. P. No. 2 to 4 are the descendants of other branch of Bisheshwar Singh and Ramashankar Singh. Ganesh Singh executed registered Will dated 11.06.40 in respect of his entire properties in favour of Mostt. Kishunpari O. P. No. 1 and Babu Srikant Singh, Kapildeo Singh, Parmeshwar Singh, Madho Singh, Bageshwar Singh, Jagannath Singh, Ramkant Singh, Basdeo Singh and in the Will Ganesh Singh had given limited right to Kishunpari to utilize the usufruct of the property till her life time. The certified copy of Will was filed with the petition. It is said that the original Will remained in custody of Kishunpari who now says that the same is misplaced or lost. Ganesh Singh died in the year 1942 in the life time of all the legatees. When the probate case was filed only the petitioner legatees Basdeo Singh and Nand Lal Singh were alive, later on both also died and have been represented by their legal heirs. Other petitioners are also legal



heirs of original legatees. The petitioners have given the details of the properties under Will in annexure-A of the petition. Prayer has been made for granting Probate or Letters of Administration.

3. The Opposite parties have resisted the claim of the petitioner by filing the Caveat contending that the probate case is not legally maintainable. The petitioners have no right to file the probate case during the life time of legatee Mostt. Kishunpari O. P. No. 1 who is still alive. The petitioners have got no cause of action for filing the petition for probate and they have got no locus standi to institute the case. The Testator Ganesh Singh was absolute owner of his properties. Ganesh Singh executed a registered deed of gift dated 08.06.40 in favour of Smt. Kishunpari in respect of the properties mentioned in Schedule A to this caveat and he put Kishunpari in possession of the same and she had been coming in possession after having accepted the gift and after three days of deed of gift the testator again executed a registered Will on 11.06.40. In the Will it is provided that O. P. No. 1 Kishunpari would at the first instance get the entire properties existing at the time of testator's death as limited owner under the then Mitakshara System of Hindu Law. Further it has been provided that the Legatees Srikant Singh and others or their heirs were given an estate which could only come in existence after the death of Mostt. Kishunpari, prior to that they have no locus standi to prefer any claim as Kishunpari is still alive, so filing of this case by the remote



legattes does not arise. As per terms of the Will, Kishunpari was in possession of the properties under Will as limited owner and she became absolute owner after passing of the Hindu Succession Act, 1956 and as such she executed the registered deed of gift in favour of O. P. No. 2 and 3 on 12.06.83 and put in possession and accordingly, mutation was done hence, the probate case is fit to be rejected.

4. The learned Trial Judge on the basis of pleadings of both the parties framed the following issues:

- (i) Is the probate case maintainable in the law ?
- (ii) Have the applicants got cause of action to institute the case and pursue the same as such ?
- (iii) Have the applicants got locus standi to get the Will probated in the case and are entitled to a Probate or to Letters of Administration as prayed for ?
- (iv) Is the Will in question genuine and valid ?

5. The learned Trial Judge decided the issue No. (iv) at first and on the basis of admission of the parties held that the Will in question is genuine and valid. Issue Nos. (i) (ii) and (iii) were decided thereafter and came to the conclusion that the probate case is not maintainable in the life time of Kishunpari. The applicants have got no cause of action to institute the case and



pursue the same and further they have got no locus standi to get the Will probated in the case and they are not entitled to a Probate or Letters of Administration as prayed for and accordingly, dismissed the probate case without cost.

6. The petitioners being aggrieved and dissatisfied with the said judgment and order preferred this appeal challenging the legality, correctness and propriety of the same on the grounds that the right of Kishunpari and of the petitioners emerged from the same Will, which is still unprobated. The right of Kishunpari Kuer and the petitioners is depending on the Will in question being probated and it is only after the probate and Will that even Kishunpari Devi can acquire a life estate, thus, the prayer for grant of probate could not have been refused by the court below. Learned Senior Counsel for the appellants arguing in this appeal has submitted that under Section 119 of Indian Succession Act the right become vested in the legatee on the testator's death, and shall pass to the legatee's representatives if he dies before that time and without having received the legacy, and in such cases the legacy is from the testator's death said to be vested in interest. The learned counsel has cited illustration (iii). Further it has been argued that a Testamentary Court is only concerned with finding out whether or not the testator executed the testamentary instrument out of his free will. It is settled law that the grant of a Probate or Letters of Administration does not confer title to



property. They merely enable Administration of the estate of the deceased. Thus, it is always to a person to dispute title even though Probate or Letters of Administration has been granted. Here the Will in question has not been doubted by anyone and it has been held to be genuine, so, the learned court below erred in law that in the life time of Kishunpari, the petitioners have got no right to file the probate case and to continue the same. Learned counsel has relied upon a judgment reported in **(2003) 7 SCC page 301** (Para 8) in the matter of **Delhi Development Authority .appellant vs. Vijaya C. Gurshaney (Mrs.) and another....respondent**. Learned counsel has further argued that during the pendency of this appeal Kishunpari also died and as such now the appellants are entitled for Probate or Letters of Administration. The learned court below has erred in holding otherwise. The court of Probate is only concerned with the question as to whether the document put forward is the last Will and testaments of a deceased person was duly executed and tested in accordance with law and whether at the time of such execution the testator had sound disposing mind and for that reliance has been placed upon a judgment reported in **AIR 1954 S.C. 280 (Vol. 41 C.N. 67) (para 2)** in the matter of **Ishwardeo Narain Singh...Appellant v. Smt. Kamta Devi and others...Respondents**. Learned counsel has further argued that in the same Will Kishunpari was given limited right till her life after



the death of Testetar and other legatees were given right after the death of Kishunpari. So, after the death of Testator all will acquire right simultaneously so in the life time of Kishunpari also the petitioners were entitled for probate. Reliance has also been placed upon a judgment reported in **AIR 1996 Supreme Court page 2260 (Para 16 to 18)** in the matter of **Usha Subbarao.. Appellant V. B. E. Vishveshariah and others..Respondents.**

7. Learned court below by virtue of being of a court of limited jurisdiction had no right to decide the right, title and interest of the appellants *vis a vis* kishunpari or her donees. The learned court below had no jurisdiction to refuse to grant of probate on the ground of pre maturity. The learned court below has failed to appreciate that a limited right of widow doest not perfect into an absolute if the said right has accrued to her by virtue of a Will or a gift and Kishunpari Kuer still held a limited estate and she has no right to execute the deed of gift nor donee acquire a right within it.

8. Learned Senior counsel for the respondents, on the other hand, submits that in this case in the life time of Kishunpari Kuer, the petitioners have got no right and locus standi to file the probate case and as such the learned court below has rightly dismissed the case. The judgment and order of the learned court below is quite legal and valid. From bare perusal of the registered deed of Will it is evident that after the death of testator,



Kishunpari was given right to administer the estate till her life so in her life time no probate can be granted in favour of other petitioners. Death of Kishunpari during pendency of this appeal has not changed the locus standi of the petitioners because here the judgment and order of learned court below is to be tested. After the death of Kishunpari the appellant ought to have filed another probate case and for challenging the legality and correctness of the deed of gift executed by Kishun kuer they ought to have been filed a separate title suit. Probate court has got limited jurisdiction and there title cannot be decided. The arguments advanced by learned counsel for the appellants are academic. Here, limited question is as to whether in the life time of kishunpari the petitioners were entitled for probate or Letters of Administration and the learned court below has rightly held that in the life time of Kishunpari Kuer the petitioners have got no right and locus standi to file case for grant of probate.

9. The only point for consideration is as to whether in the life time of Kishunpari the applicants have got any right or locus standi to get the Will probated in the case and whether were entitled to a Probate or Letters of Administration.

FINDINGS:-

10. The petitioners have examined two witnesses, AW 1 Ragho Singh, one of the petitioners, has supported his case and proved the certified copy of Will which has already been marked as



Ext. 1 on admission. AW 2 Parsuram Prasad Singh is petitioner no. 7. He has proved several rent receipts which have been marked as Ext. 2 series.

11. Opposite parties have examined 5 witnesses. OW 1 is Kishunpari examined on commission. She has supported her case. OW 2 is Ram Ayodhya Mishra, a formal witness, and has proved several rent receipts marked as Ext. A to A/36. OW 3 Parshuram Singh is also a formal witness. He has proved rent receipts marked as Ext. A/37 to A/39. OW 4 Suman Prasad Singh is opposite party no. 3. He has supported his case. OW 5 is Sheoji Singh. He has proved the gift deed executed by Kishunpari in favour of Suman Prasad and Damayanti O. P. No. 3 and 4. This gift deed has been marked as Ext. B. Ext. A/40 to A/43 are 3 rent receipts. Ext. B/1 is the gift deed dated 08.06.1940 executed by Ganesh Singh. Ext. C is the notice of C.O. in favour of Kishunpari for payment of loan. Ext. C/1 is the notice of Kishunpari from co-operative bank to pay the loan. Ext. C/2 is the notice to Kishunpari issued by District magistrate, Chapra for payment of loan. Ext. C/3 is the notice of Land Development Bank for payment of loan. Ext. D series are receipt of co-operative bank in the name of Kishunpari. Ext. E series are chaukidari receipts. Ext. F is the certified copy of judgment dated 24.01.47 in L.A.R. No. 173/A, 302/B, 303/B, 306/B of 1944-45. Ext. F/1 is the certified copy of judgment in Rent Suit No. 71/53 dated 27.02.45. Ext. F/2 is the



certified copy of judgment in Suit no. 108 of 22/1945 dated 28.06.46. Ext. G is the order of C.O., Manjhi dated 21.02.19874 and Ext. H series are challan. Ext. I is Neelami Isthehar. Ext. 1 is the certified copy of deed of Will which has been marked on admission.

12. From plain reading of Will in question it is clear that the terms of Will is that so long as the Testator will remain alive, he will remain in possession of the property as owner and after his death Most. Kishunpari will possess the property as a limited owner and after her death the other legatees, the ancestors of the petitioners, will come in possession of the property. At the time of judgment of Probate Case No. 20/86 Kishunpari was alive, hence, the petitioners are remote legatees having no locus standi to file the Probate Case and their petition was premature. As per the terms of the Will, Most. Kishunpari was the limited owner and as such she came in possession of her property after death of Testator Ganesh Singh and as such in her life time Probate Case filed by the petitioners was not maintainable. The argument advanced by learned counsel for the petitioners are not maintainable in the present case. Admittedly, Kishunpari had got life estate in the proprieties of Testator Ganesh Singh. In the life time of kishunpari the petitioners have no locus standi to file the petition for grant of Probate or Letters of Administration, as according to the terms of Will, other legatees will come in



possession of the property after the death of Kishunpari. The petitioners have pleaded that Kishunpari has admitted herself as absolute owner and executed gift in favour of O. P. NO. 2 and 3 hence, they have filed their probate case seeking Probate or Letters of Administration. The learned court below has found that this cannot be a ground for seeking grant of Probate or Letters of Administration . The remedies are available to the petitioners, they can file separate suit for setting aside the gift deed executed by kishunpari in favour of O. P. No. 2 and 3 claiming their vested interest in the property. I am also of the opinion that the remedy lies in filing separate suit for setting aside the gift deed executed by kishunpari in favour of o. P. No. 2 and 3 and in probate case all these things cannot be adjudged.

13. Considering these facts, I also hold that the petition filed by the petitioners seeking grant of probate is premature. Hence, it is not tenable and the point is decided accordingly. In the result, the finding of the learned court below is hereby affirmed and finding no merit in this appeal, the same is hereby dismissed on contest but under the circumstances without cost.

(Jitendra Mohan Sharma, J)

avin/-

AFR/NAFR	NAFR
CAV DATE	31/07/2017
Uploading Date	09/08/2017
Transmission Date	09/08/2017

