

IN THE HIGH COURT OF JUDICATURE AT PATNA

Letters Patent Appeal No.1370 of 2014

Arising out of

Test Suit No. 1 of 2010

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Rakesh Bihari Sharan S/o Late Sita bar Sharan, resident of Flat No. 204, B. Block,
S.B. Residency Sheikhpura, P.S.- Hawi Adda, District- Patna

.... Appellant - Defendant

Versus

1. Alka Sharan wife of Sri Ashok Kumar Sinha, Resident of Flat No. 101, Maa Vindhvashini Apartment, Sheikhpura More, P.S.- Shastrinagar, District- Patna
2. Ashok Bihari Sharan, son of Late Sita Bar Sharan, Resident of Flat No. 302, 303, S.B. Residency Sheikhpura, Patna- 14
3. Madan Mohan Sharan, S/o Late Sita Bar Sharan, Resident of Flat No. 102, Block- A, S.B. Residency Sheikhpura, P.S.- Hawi Adda, Patna- 14
4. Dinesh Bihari Sharan S/o Late Sita Bar Sharan, Resident of Flat No. 204, Block- A, S.B. Residency Sheikhpura, P.S.- Hawi Adda, Patna- 14
5. Kunti Devi W/o Sri Surendra Prasad, Resident of Dundi Bazar, Mangal Talab, P.S.- Chawk, Patna City, District- Patna **(Since dead, substituted by following heirs and legal representatives vide order dated 16.05.2017 passed on IA No. 3709/2017)**
- 5(i) Sudhish Verma,
- (ii) Ravish Verma,
- (iii) Harish Verma,
- (iv) Girish Verma,
- All sons of late Surendra Prasad, resident of Dundi Bazar, Mangal Talab, P.O. -Chak Shikarpur, Patna – 8000008,
- (v) Punam Kumar, W/o Prit Ranjan Sinha, R/o Kund Mohalla, Hanuman Oil Mil Road, Daltenganj – 822101, Jharkhand,
- (vi) Ranjan Sinha, W/o Shashi Sinha, Regal 'A' Wing, Flat No. 604, Punam Sagar Complex, Meera Road, East Thane – 401107.
6. Sumitra Sharan, W/o Late Sharda Nandan Prasad resident of village- Chhoti Badalpura, P.S.- Khagaul, District- Patna
7. Pratibha Sharan W/o Sri Manoj Kumar Sinha, Resident of Azad Path, Saristabad, P.S.- Gardanibag, District- Patna

.... Defendants / Respondents

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Appearance:

For the Appellant/s : Sri Ganpati Trivedi, Sr. Advocate and
Sri Praveen Kumar, Advocate.

For the Respondent No. 1: Sri L.N. Das, Advocate.

For the Respondent No. 2: Sri Ranajee Arwind
Sri D.N. Mallik, Advocates.

For the Respondent No. 3: Sri Manoj Kumar Amhastha, Advocate.

For the Respondent No. 4: Sri Sudhir Kumar Singh, Advocate.

For the Respondents 5,6&7: Sri Udai Pratap Singh, Advocate.

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**CORAM: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD**

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE AJAY KUMAR TRIPATHI)

Date: 10-07-2017

A very short question of law has been raised in the present appeal arising out of Testamentary Suit No. 1/2010. Since the learned Single Judge refused relief for substitution or transposition to the present appellant Rakesh Bihari Sharan in place of the executor, therefore, the appeal has been filed against the order dated 27.03.2014.

The learned Single Judge while dealing with the matter came to a considered opinion keeping in mind the law which has been laid down by the Patna High Court as early as AIR 1917 Patna 209 (DB) as well as the statutory provisions as it stands in The Indian Succession Act, 1925 and declared that after the death of the executor and before the will could be proved no beneficiary or claimant can be permitted to get himself or herself substituted in place of the executor. The probate proceedings comes to an end with the death of the executor.

The learned senior counsel representing the appellant on the basis of certain decision of Madras High Court reported in AIR 1963 Madras 456 as well as an analogy sought to be drawn on some



observations made by a Division Bench of the Bombay High Court reported in AIR 2011 Bombay 76 and the decision of the Hon'ble Supreme Court reported in (2016) 13 SCC 253 tried to prevail upon this Court that in the interest of cutting down on litigation time and keeping in mind that the appellant is supposed to be one of the beneficiaries of the will, he should have been allowed to be substituted and then the proceedings converted into a proceedings for grant of letter of administration.

This Court has serious difficulty in accepting the submission of the learned counsel for the appellant or disagreeing with the findings given by the learned Single Judge. There is no ambiguity in the two proceedings, i.e., probate and letter of administration since the Indian Succession Act, 1925 has envisaged proceeding for probate under Section 276 and the petition for letter of administration separately under Section 278.

In addition to above it is of significance that the legislatures have specifically provided Section 222 laying down as to who can be given probate in cases of execution of a will. Since all these sections have relevance, therefore, they are reproduced here-in-below:

“222. Probate only to appointed executor.- (1) Probate shall be granted only to an executor appointed by the Will. (2) The appointment may be expressed or by necessary implication.”



“276. Petition for probate.- (1) Application for probate or for letters of administration, with the Will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the Will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating-

- (a) the time of the testator's death,
- (b) that the writing annexed in his last Will and testament,
- (c) that it was duly executed,
- (d) the amount of assets which are likely to come to the petitioner's hands, and
- (e) when the application is for probate, that the petitioner is the executor named in the Will.

(2) In addition to these particulars, the petition shall further state,-

- (a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and
- (b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.”

“278. Petition for letters of administration.- (1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating-

- (a) the time and place of the deceased's death;
- (b) the family or other relatives of the deceased, and their respective residences;
- (c) the right in which the petitioner claims;
- (d) the amount of assets which are likely to come to the petitioner's hands;
- (e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction



of the Judge; and

(f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judge within whose jurisdiction such assets are situate."

There has been a distinction between probate and letter of administration and that distinction has always been maintained and has been aptly dealt with by the Patna High Court in a Division Bench judgment of **Mt. Phekni v. Mt. Manki**, reported in AIR 1930 Patna 618. Hon'ble Justice Fazl Ali, J. (as he then was) has distinguished the two provisions in his words:

".... On looking into the matter carefully however I find that the case of Sarat Chandra v. Nani Mohan (2), on which Greaves, J., principally relied, is easily distinguishable from the facts of the present case. In that case, as I have already said, the executor named in the will of which probate was sought had died before obtaining a grant and an application was made by the heirs of the executor to be substituted in his place. The case thus came directly within the mischief of S. 222, Succession Act, which provides that probate shall be granted only to an executor appointed by the will. Now the words of this section show that the right to obtain a probate is confined to the executor and can by no means devolve upon the heir of the executor."

The law is unambiguous. The statutory provisions and the interpretation thereof cannot be allowed to be diluted to suit the convenience of a litigant on the premise that if a substitution is



allowed it will only facilitate early resolution of the dispute. A reading of the provisions, which have been quoted in earlier part of the order, and have been clearly distinguished by a Division Bench of the Patna High Court, which has been quoted as above in the case of **Mt. Phekni v. Mt. Manki** (supra), the Court comes to a considered opinion that no other decision of any High Court is of any relevance to the issue raised herein. The learned Single Judge was absolutely correct in dismissing the application or the prayer for substitution in the testamentary suit after the death of the executor. The dismissal of such application, however, will not come in the way of the present appellant to take recourse to Section 276 of The Indian Succession Act.

The stand of the respondents in support of the impugned order is correct and is in conformity with the law as it stands today. The appeal has no merit. It is dismissed.

(Ajay Kumar Tripathi, J)

(Rajeev Ranjan Prasad, J)

Dilip, AR

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