

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.495 of 2010

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1. Hare Ram Singh, S/O Late Dharamdeo Singh, R/O Vollage & P.O., Kandap, P.S. Gaurichak, Distt. Patna.
2. Gauri Shankar Singh, S/O Late Dharamdeo Singh, R/O Vollage & P.O., Kandap, P.S. Gaurichak, Distt. Patna.
3. Prem Ranjan Singh @ Prem Ranjan, S/O Late Dharmbeer Singh R/O Village & P.O., Kandap, P.S. Gaurichak, Distt. Patna.
4. Abhimanyu Singh @ Ranjan Kumar, S/O Late Hari Krishna Singh R/O Village & P.O., Kandap, P.S. Gaurichak, Distt. Patna. Appellants.

Versus

1. Estate of Late Baliram Singh @ Bali Singh of Village and P.O- Kandap Police Station- Gaurichak, Distt- Patna.
2. Smt. Deepa Devi, W/o Shri Baikunth Singh and D/O Late Baliram Singh Resident of Village and P.O- Bishunpura, Police Station- Bihta, District- Patna.
3. Smt. Dharam Shila Devi W/O Sri Jairam Singh and D/O Late Baliram Singh resident of Village and P.O- Bishunpura, Police Station- Bihta, District- Patna.
4. Most. Ramjhari Devi Widow of Late Khelari Singh Resident of Village and P.O- Kandap, P.S- Gaurichak, Distt- Patna
5. Smt. Geeta Devi W/O Gauri Shankar Singh Resident of Village and P.O- Kandap, P.S- Gaurichak, Distt- Patna. ... Respondents.

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Appearance :

For the Appellants : Mr. Satyendra Narayan Singh, Adv.
For the Respondent No.4 : Mr. Shrekant Sharan Singh, Adv.
For the Respondent No.5 : Mr. Manoj Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE PRAKASH CHANDRA JAISWAL

ORAL JUDGMENT

Date: 18-07-2018

Heard learned counsel for the appellants and learned counsel for the respondent nos.4 and 5. Respondent nos.2 & 3 did not put their appearance in the case despite valid service of notice.

Re.: I.A. No.5155 of 2018

This interlocutory application has been filed by the appellants under Order 41 Rule 27 of the Civil Procedure Code for admission of the original Will dated 15.03.1989, executed by Baliram Singh alias Bali Singh in favour of Hare Krishna Singh and others, certified copy



of the death certificate of Dasrath Prasad Singh and Ram Naresh Singh as additional evidence with the case that the aforesaid original Will was not in possession of the appellants rather of the testator and it was misplaced and was not available to the appellant at the time of filing of the probate case. Which could only be traced out in a neglected, old damaged wooden box in March, 2018 and as date of death of Dasrath Prasad Singh and Ram Naresh Singh, who happen to be scribe and one of the attesting witness respectively of the Will was not known to the appellants, they could not procure certified copy of the death certificates of the aforesaid two persons for want of date of death of the aforesaid two persons and after making hectic effort, which took quite some time, appellants came to know the date of death of the aforesaid deceased and then they obtained certified copy of the death certificate of the aforesaid persons in the month of October, 2016 and filed the aforesaid documents in this Court as additional evidence. The aforesaid documents could not be procured by the appellants despite their best effort and due diligence and there was no deliberate laches on the part of the appellants in not filing the aforesaid documents in the learned court below. As the probate case has been filed on the basis of the aforesaid Will and the Dasrath Prasad Singh happens to be scribe while Ram Naresh Singh happens to be one of the attesting witness of the said Will, hence filing of the



aforesaid documents by the appellant is necessary for just decision of the case.

In the facts and circumstances of the case and in the interest of justice, the aforesaid I.A. is hereby allowed and the said documents filed by the appellants are hereby admitted as additional evidence.

M.A. No.495 of 2010

This miscellaneous appeal has been preferred against the judgment dated 26.02.2010 passed by the learned Additional District Judge, Fast Track Court-III, Patna in Probate Case No.191 of 1999/5 of 2005, whereby the learned court below dismissed the aforesaid probate case.

The factual matrix of the case is that Hare Ram Singh and Gauri Shankar Singh filed the aforesaid probate case for granting probate of the Will dated 15.03.1989 executed by Baliram Singh alias Bali Singh in favour of Hare Ram Singh, Gauri Shankar Singh, Prem Ranjan Singh @ Prem Ranjan and Hare Krishna Singh with the case that the said Baliram Singh alias Bali Singh had executed a Will of his entire property in favour of the aforesaid persons out of his sweet will and in sound health of mind in presence of attesting witnesses, namely, Dharmdeo Singh and Ram Naresh Singh. The aforesaid Will was scribed by Dasrath Prasad Singh. The said Baliram Singh alias Bali Singh after executing the said Will got the same attested by the



aforesaid two attesting witnesses and got it registered by presenting before the Sub-Registrar, Patna after fully understanding its contents and admitting the execution of the Will before the Sub-Registrar. The aforesaid Will has been duly attended by the aforesaid two attestating witnesses, namely, Ram naresh Singh and Dharamdeo Singh. Ram Naresh Singh had expired preceding to filing the aforesaid case, likewise scribe, namely, Dasrath Prasad Singh had also expired preceding to the aforesaid period. Hence, the aforesaid attestating witness and scribe could not be examined by the appellant and one of the attestating witness, namely, Dharamdeo Singh has brought the aforesaid fact in to the knowledge of the Court by his deposition given before the court. Moreover, the attestation of the said Will has been duly proved by one of the attestating witness, namely, Dharamdeo Singh. But the learned lower court considering the factum of non-examination of one of the attestating witness and scribe, not filing of the original Will in the learned court below and not appearing of the daughter-in-law and daughters of the deceased Baliram Singh @ Bali Singh and not filing of no objection by them in the said probate case, allegedly creating a doubt about the genuineness of the said Will dismissed the aforesaid probate case.

Being aggrieved and dissatisfied with the aforesaid dismissal order the appellants have preferred the present miscellaneous appeal.



Respondent no.4 by filing I. A. No. 5250 of 2018 and respondent no. 5 by filing I.A. No. 5249 of 2018 have given their no-objection in allowing the aforesaid appeal in favour of the appellants. Respondent nos. 2 and 3 who happens to be daughters of late Baliram Singh @ Bali Singh did not put their appearance in the case despite valid service of notice upon them.

It is submitted by learned counsel for the appellants that the said Baliram Singh @ Bali Singh had executed the aforesaid Will in favour of appellant nos. 1,2 and 3 and in favour of father of appellant no. 4, namely, Hare Krishna Singh out of his sweet will and in sound health of mind. The aforesaid Will was duly attested by Dharamdeo Singh and Ram Naresh Singh and it was scribed by Dasrath Prasad Singh. Out of the aforesaid attestating witnesses Ram Naresh Singh had expired on 22.01.1993 and scribe Dasrath Prasad Singh had also expired on 05.12.2000 i.e. preceding to the impugned judgment and another attestating witness, namely, Dharamdeo Singh had brought the factum of the death of the aforesaid attesting witness and scribe in the knowledge of the learned Lower Court by deposing before the court. Moreover, one of the attesting witnesses, namely, Dharamdeo Singh has sufficiently and satisfactorily proved the attestation of the Will. He has further submitted that the aforesaid Will was not available to the appellants and could not be traced out, despite their



best efforts as it was with the testator and was misplaced and later on was traced out in a neglected, old damaged wooden box in March, 2018. Hence, the original Will could not be filed before the learned court below rather the certified copy of the same was filed which is on record. The appellants have taken the case before the learned Court below that the original Will was in custody of Baliram Singh @ Bali Singh which was lost after his death. As per Section 237 of the Indian Succession Act, 1925 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 but the learned lower court ignoring the aforesaid aspect of the case has wrongly and illegally dismissed the case.

It is further submitted by the learned counsel for the appellants that the daughters and daughter-in-law of the testator were opposite party nos.6 &7 and opposite party no. 2 respectively in the probate case and they did not put their appearance and filed any rejoinder or no-objection in the case despite service of notice over which appellants have no control. Mere not filing of no-objection by the aforesaid opposite parties by no stretch of imagination creates any doubt regarding the genuineness of the Will but the learned lower



court has wrongly and illegally held otherwise.

From perusal of the record, it appears that Baliram Singh @ Bali Singh had executed a Will on 15.03.1989 in favour of Hareram Singh and others. The aforesaid Will was duly registered by the Sub-Registrar, Patna. The said Will has been attested by the two attesting witnesses, namely, Ram Naresh Singh and Dhramdeo Singh. The said Will was scribed by scribe Dasrath Prasad Singh. The appellants have filed certified copies of the said Will in the learned court below and have taken the case that the aforesaid original Will was kept by its testator with him. After his demise, it was lost and could not be traced out despite their best efforts. As per Section 237 of the Indian Succession Act, 1925 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 but the learned lower court below appears to have dismissed the aforesaid probate case, inter alia, due to not filing of the original Will by the appellants in the case. The appellants have filed the aforesaid original Will before this court as the additional evidence.

The record further indicates that the aforesaid Will was attested by two attesting witnesses namely, Ram Naresh Singh and



Dharamdeo Singh. It is settled principle of law that attestation of the Will may be sufficiently proved by one of the attesting witnesses and both the attesting witnesses are not necessarily required to prove the attestation of the Will. Moreover, the appellants have taken the case that one of the attesting witness, namely, Ram Naresh Singh has expired preceding to the judgment and they have also given evidence by examining one of the attesting witness, namely, Dharamdeo Singh to the aforesaid effect. They have also taken the case that scribe of the Will namely, Dasrath Prasad Singh has also expired preceding to the judgment and has also taken the case in this regard and adduced evidence of said Dharamdeo Singh to the said effect. The attestation of the aforesaid Will appears to have been duly proved by one of the attesting witnesses and non-examination of the other attesting witness or scribe, in my considered opinion, does not affect the merit of the case. The appellants have filed death certificate of aforesaid Ram Naresh Singh and Dasrath Prasad Singh as additional evidence in the appeal.

Opposite party nos. 6 & 7 of the aforesaid probate case happens to be daughters and opposite party no. 2 daughter-in-law of Baliram Singh @ Bali Singh. They were duly served with notice in the probate case but despite service of notice they did not file any rejoinder or no-objection in the case. It is not the duty of the



appellants to force and ensure their presence and get filed their no-objection in the case. Non-appearance and non-filing of no-objection by the aforesaid persons in favour of petitioners/appellants, by no stretch of imagination, creates any doubt about the genuineness of the Will.

In the aforesaid facts and circumstances of the case, the impugned judgment passed by the learned lower court appears to be wrong, illegal and bad in law and is set aside. This case is remitted back to the learned court below to decide the probate case afresh in view of the observations made by me hereinabove. Accordingly, this miscellaneous appeal stands allowed.

(Prakash Chandra Jaiswal, J.)

Trivedi/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	25.07.2018
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