

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.1095 of 2017

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1. Manoj Kumar @ Manoj Golchha Son of Lunkaran Golchha
2. Lunkaran Golchha Son of late Ramlal Golchha Both Resident of Banmankhi, Post Office & Police Station- Banmankhi, District- Purnea, At Present residing at 54/1, Canning Street, 4th Floor, Room No. 3, Kolkata, Both Permanent Resident of Indira Chowk, New Lane, Post office - Ganga Shahr, District- Bikaner, Rajasthan.

.... Petitioner/s

Versus

1. Om Prakash Agrawal Son of late Ram Swarup Agrawal
2. Smt. Santosh Devi Daughter of late Bilas Rai Kedia, Wife of Om Prakash Agrawal Both Resident of Banmankhi, Post Office & Police Station- Banmankhi, District- Purnea.
3. Jaskaran Golchha Son of late Ramlal Golchha Permanent resident of Indira Chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan at Present residing at Naveen Polymers & Chemicals, 219B, Old China Bazar Street, Ist Floor, Kolkata-1
4. Hanuman Mal Golchha Son of late Ramlal Golchha Permanent resident of Indira chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan.
5. Ratan Lal Golchha Son of late Ramlal Golchha Permanent resident of Indira chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan.
6. Shikhar Chand Golchha Son of late Ramlal Golchha Permanent resident of Indira chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan at Present residing at Buchha Mohalla- P.O.- Lunkarandar, District Bikaner- 334 603.
7. Tolaram Golchha Son of late Ramlal Golchha Permanent resident of Indira Chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan at Present residing at S.B.M. Computer, B-6/3 Modi tower, Neharu Place, New Delhi 19
8. Shanti Devi Daughter of late Ramlal Golchha Permanent resident of Indira Chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan at Present residing at Old Lane, Behind Mahabir Chowk, Gangasahr, District- Bikaner, Rajasthan.
9. Kamla Devi Daughter of late Ramlal Golchha Permanent resident of Indira Chowk, New Lane, P.O.- Ganga Shahr, District- Bikaner, Rajasthan at Present residing at Bilashipara, District- Gwalpara, Assam.

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Manoj Kumar
For the Respondent/s : Mr.

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CORAM: HONOURABLE MR. JUSTICE PRABHAT KUMAR
JHA
ORAL ORDER



3 10-09-2018 Heard Mr. J.S.Arora, learned senior counsel for the petitioners and Mr. Sudhir Kumar Thakur, learned counsel for the respondent Nos.1 and 2-defendants 1st set.

The petitioners have filed this civil miscellaneous petition under Article 227 of the Constitution of India for quashing the order dated 11.05.2017 passed by Sub Judge, Banmankhi, Purnea in Title Suit No.110 of 2013 by which learned Sub Judge held that the plaintiff cannot claim title on the basis of unprobated Will and, therefore, the plaint is liable to be rejected under Order VII Rule 11 C.P.C., accordingly, rejected the plaint.

The plaintiff filed the suit claiming title over the land mentioned in Schedule A of the plaint on the basis of a Will executed by Ramlal Golcha on 17.07.1996 and for declaration that the sale deed executed by defendants 2nd set in favour of defendants 1st set on 11.05.2010 is illegal and the same is not binding on the plaintiff. The defendants 1st set who are the purchasers from defendants 2nd set filed petition under Order VII Rule 11 C.P.C. raising objections about the maintainability of the suit on the ground that Ramlal Golcha is said to have executed the Will on 17.07.1996 but till the institution of the suit, the Will has not been probated and even the probate case has not been filed either for the probate of the Will or for issuance of letters of



administration. The plaintiff cannot claim any title by virtue of unprobated Will and accordingly, learned Sub Judge rejected the plaint of the plaintiff.

Mr. J.S.Arora, learned senior counsel for the petitioners submits that this issue whether plaintiff can lay claim and institute suit on the basis of an unprobated Will came up for consideration before Division Bench of this Court and the Division Bench of this Court in the case of Suresh Singh and Anr. v. Rajaram Singh and ors., 1992(2) PLJR 129 held in para 12 as follows:

“12. In view of the foregoing discussions, I hold that a legatee or executor of an unprobated Will making a claim on the basis of the same can institute a suit or take a defence in a suit on the basis of such a Will, but his claim cannot be established in a Court of law unless and until a probate or letters of administration is granted meaning thereby that neither any decree can be passed in favour of a Plaintiff nor defence can be accepted in such a suit unless probate or letters of administration is obtained before its disposal. I also hold that if such a legatee or executor can institute a suit or set up a claim by way of defence, he can be allowed to be substituted in place of the testator or added as a party if he makes a claim on the basis of an unprobated Will. Therefore, it is held that the Court below has committed error of jurisdiction in refusing the prayer made on behalf of the Petitioners, and thereby refusing to exercise jurisdiction vested in it under law. I am of the view that if the impugned order is allowed to stand, there will be failure of justice and irreparable injury would be caused to the Petitioners if they are not permitted to be impleaded as party, the suit is allowed to be



disposed of in terms of the compromise and they would be required to challenge the decree by filing Anr. suit leading to multiplicity of the suit.”

It is submitted that the legatee and executor of the Will can lay claim on the basis of the unprobated Will but the suit cannot be decreed unless and until the Will is probated.

As per contra, Mr. Sudhir Kumar Thakur, learned counsel for the respondents 1st set also placed reliance on the judgment reported in (2006) 10 Supreme Court Cases 442 and submits that the suit cannot be decreed and the title cannot be declared on the basis of unprobated Will. Executor or legatee under a Will can establish any right but in the aforesaid judgment also, it has been held that there is no bar of institution of a suit and possession of property by the executor or legatee claiming under a Will but the suit shall not be decreed or final order shall not be passed till the legatee or executor obtain probate or letter of administration.

Having considered the facts aforesaid and submission of both sides and on perusal of the judgment, I find that a legatee or executor of a Will can institute suit for declaring of title and possession on the basis of an unprobated Will but suit cannot be decreed in absence of probate of Will or issuance of letter of administration in favour of legatee or executor but in the present case, the learned Sub Judge has committed jurisdictional error in



dismissing the suit itself holding that the legatee or executor cannot even institute suit on the basis of unprobated Will. Therefore, in my view the order is not sustainable. Accordingly, the order dated 11.05.2017 passed in Title Suit No.110 of 2013 is set aside.

This civil miscellaneous petition is accordingly allowed.

(Prabhat Kumar Jha, J)

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