

IN THE HIGH COURT OF JUDICATURE AT PATNA
Miscellaneous Appeal No.279 of 2018

1. In The Goods Of Late Mahanth Hanuman Das Chela of Mahanth Laxman Das of Mohalla-Manpur, Gopalganj Road, Gaya, P.S.-Mofassil, District-Gaya.
2. Ramjee Das Son of Late Sudama Das Resident of Mohalla-Manpur, P.S.-Buniyadganj, District-Gaya.
3. Udai Das Son of Late Sudama Das, Resident of Mohalla-Manpur, P.S.-Buniyadganj, District-Gaya.
4. Jai Ram Das Son of Late Sudama Das, Resident of Mohalla-Manpur, P.S.-Buniyadganj, District-Gaya.

... .. Appellant/s

Versus

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Mrigendra Kumar, Adv.
	:	Ms. Kusum Kumari, Adv.
	:	Mr. Mayank Bilochan, Adv.
For the Respondent/s	:	Mr.

CORAM: HONOURABLE MR. JUSTICE S. KUMAR

ORAL JUDGMENT

Date : 06-08-2019

Heard the parties.

2. This miscellaneous appeal has been filed for setting aside the order dated 16.06.2017 passed by learned Additional District Judge-1st, Gaya in Probate Case No. 07 of 1988 (DJ)/02/16 by which he has dismissed the application for grant of probate by the appellant/applicant.

3. Briefly stated, the facts of the case is that original applicant Sudama Das had filed a probate case bearing Probate Case No. 07/1988 in the court of District Judge, Gaya for grant



of probate of the last will and testament of Mahanth Hanuman Das, Chela of Mahanth Luxman Das of Mohalla- Manpur, Gopalganj Road, Thana- Moffasil, District- Gaya.

4. Testator Mahanth Hanuman Das was aged about 60 years in the year 1968 and was unmarried. Original applicant was his cousin grandson and being pleased with his service Mahanth Hanuman Das executed a deed of will on 08.10.1968 and same was registered on 09.10.1968. The executor Hanuman Das died on 06.03.1986 leaving behind petitioner as his legal heirs.

5. It has been contended in the application that will dated 08.10.1968 was the last will executed by Hanuman Das who had no relative except the original applicant being his grandson. The will is a valid and genuine and duly executed by the Executor, as such, applicant is entitled for grant of probate.

6. The application for grant of probate was filed in the court of District Judge on 29.04.1988 and was registered as probate case No. 07 of 1988. Original applicant Sudama Das died during pendency of probate case and was substituted by the present petitioner/appellant.

7. In support of probate case five witnesses were examined. P.W. 1 is the Advocate Clerk who in his deposition



has stated that he received Dasti Summon against Bhagwan Das, Bodhan Sao and Bageshwar Pandey and he proceeded for service of summons but on enquiry found that all have died and service report has been marked as Exhibit- 1, 1A and 1B.

8. P.W. 2 Jai Ram Das has stated in his deposition that Late Hanuman Das was Chachera grandfather of his father. His father Sudama Das was pupil of Hanuman Das and he resided with him and served him and also used to look after the RAG-BHOG of deities and property of Hanuman Das who executed registered deed of will in favour of Sudama Das on 08.10.1968. The deed was scribed by Nand Kishore Prasad which was read over and explained to Mahanth Hanuman Das and thereafter Mahanth Hanuman put his L.T.I. which was identified and attested by Bageshwar Pandey. On instruction of Mahanth Hanuman Das witness Bhagwan Das put his signature on the deed of will as attesting witness. On instruction of Mahanth Hanuman Das witness Bodhan Das put his signature on will as attesting witness. Bodhan Das also died and petitioners are sons of original applicant Late Sudama Das. The deed of will was handed over to Sudama Das by Late Hanuman Das during his life time.

9. P.W. 3 Supported the evidence of P.W. 2 who



supported the claim of applicant.

10. P.W. 4 is Gopal Pandey who in his evidence has stated that his father Bageshwar Pandey died on 04.06.1998 who was advocate clerk in civil court. His father used to come in Thakurbari and had good relation with Hanuman Das. He was fully aware with the handwriting/signature of his father. His father Bageshwar Pandey put his signature as identifier/attesting witness on deed of will.

11. P.W. 5 is Bhesraj Ram who has also supported the probate case of applicant and has stated in his deposition that he knows Mahanth Hanuman Das and Sudama Das who were pupil of Mahanth Hanuman Das and both are dead. Mahanth Hanuman Das executed a deed of will in favour of Sudama Das on 09.10.1968, which was scribed by Nand Kishore Prasad. After preparation of deed of will, it was read over and explained to Hanuman Das and thereafter Hanuman Das put his L.T.I. on the deed of will and Bageshwar Pandey identified the L.T.I. of Hanuman Das and two witnesses Bhagwan Sao and Bodhan Sao put their signature on deed of will on 08.10.1968 as attesting witnesses and same was produced before the Registrar on 09.10.1968 for registration. The deed of will has been marked as Exhibit-2.



12. The trial court has rejected the application of grant of probate on the ground that testator of deed of will Mahanth Hanuman Das died on 06.03.1986 but nothing has been produced in support of his death. All the attesting witnesses of the deed of will namely, Bageshwar Pandey, Bhagwan Das and Bodhan Sao died and when they died have not been clearly stated nor any death certificate have been produced.

13. The trial court has further doubted about the authenticity and genuinity of the will as deed of will was executed on 08.10.1968 but same was produced before the Registrar on 09.10.1968 but no explanation has been given as to why it was produced after one day of execution.

14. The application for grant of probate was rejected as no attesting witnesses of deed of will was produced as a witness by the applicant whereas according to Evidence Act a deed of will must be proved by one of the attesting witnesses and there being no death certificate of attesting witnesses of the deed of will.

15. It has been further held that applicants have not produced any document regarding title of Mahanth Hanuman Das the testator of the will with respect to schedule 1 and schedule 2 property to show that property belongs to testator



Mahanth Hanuman Das and accordingly, rejected the application for grant of probate of the applicant/appellant.

16. It has been submitted on behalf of learned counsel for the appellant that Section 276 of the Indian Succession Act mandates the application for probate of the will and Section 68 of the Evidence Act postulates with respect to proof of execution of documents required by law to be attested and same shall not be used as evidence unless one of the attesting witnesses has been called for the purpose of proving his execution, if there is an attesting witness alive.

17. It has been submitted that since both attesting witnesses were dead, therefore under provision of Section 69 of the Evidence Act where no such attesting witnesses found then it must be proved that attesting witness is in his handwriting and that the signature of the person executing the document is in the handwriting of that person. It has been submitted that Gopal Pandey, son of one of the attesting witnesses Bageshwar Pandey has been examined by the court who has proved the signature of his father on the deed of will as such the requirement of due attestation of will has been proved and on that ground the application of appellant could not have been rejected.

18. It has been further submitted that in a case for grant



of probate of will the only issue before probate court is to give a finding with regard to genuinity and validity of will and its due execution in accordance with Indian Succession Act and title of the testator is not a subject matter for the probate court and it cannot delve into issue of title of testator, as such the finding of the trial court dismissing the probate case of appellant on the ground that there is no document on record that the testator Mahanth Hanuman Das had title and interest in the will property is beyond the scope and ambit of probate court. In the application for grant of probate no names of near relative has been given on the ground that propounder of the will was unmarried and had no surviving near relations, as such, they were not made party and original applicant was his disciple on account of service rendered by him, he was pleased with his services and executed the will in his favour.

19. Learned counsel has placed reliance upon a decision of this Court in Vikas Singh Vs. Devesh Prakash Singh since reported in 2001(2)PLJR 184. Paragraph no. 6 of the aforesaid decision is quoted below:-

“ 6. Whether a person was incapable of executing a will by reason of any physical and/or mental incapacity is certainly a relevant point and, in fact, the most relevant point which is to be decided in Probate/Letters of Administration proceeding and in this case also I would deal with this aspect later in this judgment. As regards the use of the words his property’, it is clear and, if I may say so,



implicit that a person can execute a will, like any transfer deed, only with respect of his own property and not someone else's property and, therefore, nothing much turns on use of those words in section 59 as to confer jurisdiction on the probate Court to decide any dispute relating to title, ownership etc. of the testator/testatrix in the property which is the subject matter of the will. It is settled legal position that it is not the duty of the probate Court to consider any issue as to title of the testator to the property with which the will propounded purports to deal or to the disposing power the testator may have possessed over such property or as to the validity of the bequeaths made. See, for example, the case of Kashi Nath vs. Dulhin, AIR 1941 Patna 475. Proceeding for grant of probate or letters of administration is not suit in the real sense, it only takes the a "form" of a regular suit according to the provisions of the Code of Civil Procedure, "as early as may be"-vide section 295 of the Act. Reference may be made to a Division Bench decision of this Court in Sidhnath Bharti vs. Jai Narayan Bharti, 1994 (1) PLJR 644, a Full Bench decision of the Allahabad High Court in Parizy Ferondes vs. M. F. Queoros, AIR 1963 Allahabad 153, and a Division Bench decision of the Calcutta High Court in Batal Lall Banerjee vs. Debaki Kumar Ganguly, AIR 1984 Calcutta 16. The grant of probate or letters of administration is decisive only of the will propounded and not of the title etc. of the testator to the property. As the issues relating to title, ownership etc. are not to be gone into in such proceeding, it follows that even a favourable decision in favour of the petitioner/plaintiff granting probate or letters of administration in his favour does not operate as res judicata in any future suit which the Objector is at liberty to bring seeking declaration of his right, title, interest etc. in the property. In the above premises the objection of the Objector as to disposing capacity i.e. ownership of the testatrix is rejected."

20. In case of grant of probate or letter of administration the requirement under Section 276 has been fulfilled by the appellant. He has given the date and time of testator's death and also statement that same is last will and testament of the executor and the amount of assets which are likely to come to



applicant's hand and applicant is the executor named in the will and all such conditions have been satisfied by the original applicant and the due execution of the will by the son of one of the attesting witnesses when both the witnesses were found to be dead, as such, there was no occasion for the probate court to refuse the application of the appellant for grant of probate.

21. For the reasons stated above, the Appeal is allowed and the judgment and order of the trial court is set aside and the application for grant of probate is allowed. The trial court is directed to grant the probate of will in favour of appellant.

22. Let LCR be returned to the court concerned forthwith.

(S. Kumar, J)

veena/-

AFR/NAFR	NAFR
CAV DATE	N.A.
Uploading Date	03.12.2019
Transmission Date	N.A.

