

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.206 of 2014**

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1. Jaibir Prasad Gupta
2. Ram Babu Prasad Gupta  
Both 1 & 2 Sons Of Late Hira Lal Sah
3. Mona Devi
4. Sona Devi  
Both 3 & 4 Daughter Of Late Hira Lal Sah  
All 1 to 4 Resident Of Mohalla- Mishriganj, Patel Chowk, P.S- Lalit Narayan Mishra University Campus, Darbhanga., At Present Resident of Village Paigambarpur, P.S- Keoti, District- Darbhanga.
5. Jagriti Devi Widow Of Late Hira Lal Sah Resident Of Mohalla Mishriganj, Patel Chowk, P.S- Lalit Narayan Mishra University Campus, Darbhanga, District- Darbhanga. ... .. Appellant/s

Versus

1. Mahesh Prasad Gupta, Son of Late Mahavir Prasad Gupta.
  2. Rani Devi D/o Mahavir Prasad Gupta
  3. Mamta Devi D/o Late Mahavir Prasad Gupta.
  4. Anita Devi D/o Late Mahavir Prasad Gupta.  
All Resident Of Mohalla- Mishriganj, Patel Chowk, P.S- Lalit Narayan Mishra University Campus, Darbhanga, District- Darbhanga.... Respondent/s
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**Appearance :**

|                      |   |                           |
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| For the Appellant/s  | : | Mr.Arbind Kumar Singh,Adv |
|                      | : | Mrs. Prativa Kumari, Adv  |
| For the Respondent/s | : | Mr.None                   |

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**CORAM: HONOURABLE MR. JUSTICE BIRENDRA KUMAR**  
**ORAL JUDGMENT**

**Date : 25-02-2019**

Heard learned counsel for the appellants.

2. In spite of valid service of notice and appearance of some of the respondents through vakalatnama, no one appears to oppose the prayer.

3. One Hira Lal Sah brought Probate Case No.33 of 1997 in the court of learned District Judge, Darbhanga for grant of probate in respect of the will dated 25.05.1995 executed by one Radha Devi @ Radhika Devi.



4. During pendency of the probate proceeding, Hira Lal Sah died and his sons and daughters were substituted and they prayed that in changed circumstances, letters of administration be issued in their favour.

5. The learned court below by the order dated 2<sup>nd</sup> March, 2012 found that since the nature of the claim has changed, therefore, letters of administration would be granted to the applicants. Thereafter, the learned court below incidentally examined title of Radha Devi and found that the property was purchased by Radha Devi through registered sale deed. Therefore, she was competent to execute a will in respect of those properties. The learned court below on appreciation of evidence came to the conclusion that the will was executed by Radha Devi.

6. While examining the requirement of attestation of the will, the learned court below found that for attestation of the will, two attesting witnesses are required as per Section 63 of the Indian Succession Act and since in the present case, only one attesting witness was examined. The petitioners failed to prove due attestation of the will. Accordingly, prayer for grant of letter of administration was refused.



7. Learned counsel for the appellants submits that the appellants challenged the said order dated 2<sup>nd</sup> March, 2012 in Misc. Appeal No.226 of 2012 before this Court and by order dated 24.04.2013, the matter was remitted back to the learned court below to decide the matter afresh. Thereafter, the second attesting witness was also examined before the learned court below as A.W.8-Mahavir Prasad. A.W.8-Mahavir Prasad did not fully support the case of the applicants. Hence, this time also, the prayer was refused by the impugned order dated 28.02.2014.

8. Section 68 of the Indian Evidence Act provides for proof of execution of document required by law to be attested. The same reads as follows:

**“68. Proof of execution of document required by law to be attested.-If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process**



*of the Court and capable of giving evidence:*

*Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a Will, which has been registered in accordance with law the provisions of the Indian Registration Act, 1908 (16 of 1908), unless its execution by the person by whom it purports to have been executed is specifically denied.”*

9. A will is required to be attested by two witnesses.

The due attestation of the will has been well proved by the evidence of attesting witness-Gudari Thakur, who has been examined as P.W.1. There is clear finding of the learned court below that the testator was in a sound disposing state of mind. She has right to dispose of the property. She duly executed the will and the aforesaid requirement of Section 68 of the Indian Evidence Act proves that the due attestation of the will was also proved. Therefore, only for the reason that another attesting witness turned hostile the learned court below should not have refused the prayer of the appellant.



10. Accordingly, the impugned order is hereby set aside and this appeal is allowed.

11. Let a letters of administration be issued in favour of the appellants within two months.

**(Birendra Kumar, J)**

Nitesh/-

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| AFR/NAFR          | AFR         |
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