

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**Miscellaneous Appeal No.182 of 2012**

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1. MOST. GENA DEVI W/O Late Harihar Sah R/O Vill. Jura, P.O. and P.S. Bhairoganj, District - West Champaran
2. Mina Devi D/O Late Harihar Sah, W/O Sri Omprakash Sah R/O Vill. Jura, P.O. and P.S. Bhairoganj, District - West Champaran

... .. Appellant/s

Versus

1. NATHUNI SAH S/O Sri Thagi Sah R/O Vill. Jura, P.O. and P.S. Bhairoganj, District - West Champaran
2. Most. Laxminia Devi W/O Late Thagi Sah R/O Vill. Jura, P.O. and P.S. Bhairoganj, District - West Champaran
3. Shambhu Sah S/O Late Thagi Sah R/O Vill. Jura, P.O. and P.S. Bhairoganj, District - West Champaran
4. Lalbabu Sah S/O Late Thagi Sah R/O Vill. Jura, P.O. and P.S. Bhairoganj, District - West Champaran
5. Sarda Devi W/O Prabhu Prasad Gupta, D/O Late Thagi Sah R/O Vill. - Sirsiya, P.S. Bhairoganj, District - West Champaran
6. Rita Devi W/O Binod Prasad, D/O Late Thagi Sah R/O Lauriya Mishratoli, P.O. and P.S. Lauriya, District - West Champaran

... .. Respondent/s

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**Appearance :**

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| For the Appellant/s  | : | Mr. Ranjan Kumar Dubey, Adv                                                       |
| For the Respondent/s | : | Mr. Jitendra Prasad Singh, Adv, Mr. Prabhat Kumar Deepak, Adv & Mr. Abhishek, Adv |

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

**Date : 09-05-2019**

Heard learned counsel for the parties.

2. This miscellaneous appeal has been filed for setting aside the order dated 03.02.2012 passed by 1<sup>st</sup> Additional District Judge, West Champaran at Bettiah, whereby and whereunder, he has allowed the Probate Case No. 16 of 1995 in



favour of Respondent No. 1.

3. Briefly stated, the facts of the case is that Harihar Sah and Thagi Sah were two brothers and both the brothers had separated and were not concerned with the family of each other although there was no partition by metes and bounds.

4. Nathuni Sah, s/o Thagi Sah filed a probate case No. 16 of 1995, in the Court of Additional District Judge, West Champaran, Bettiah for grant of probate in respect of Will executed by his uncle Harihar Sah on 17.08.1983, who died in a state of separation from his brother Thagi Sah and he was possessed of the property as detailed in Schedule of the Will. Harihar Sah had no male issue while he died on 01.05.1984 leaving behind his daughter and widow who were opposite parties in the court below. Nathuni Sah served him very well and he executed a Will in his favour. Attesting witnesses of the Will were Thagi Sah his own father and his Brother-in-Law Prabhu Prasad Gupta. He filed an application for grant of probate of the Will in 1995.

5. Appellant was made party in the probate case and in his written statement opposed the grant of Will being forged, fabricated and manufactured document and has been brought in existence after death of Harihar Sah by way of conspiracy in



connivance with his own father. Harihar Sah did not die on 07.01.1983 and date of his death was 01.05.1984. Attesting witnesses Thagi Sah is father of respondent no. 1 and other attesting witness Prabhu Prasad Gupta is his Brother-in-Law.

6. On pleading of the parties, probate Court framed five issues for adjudication. Altogether nine witnesses were examined on behalf of respondent no. 1 and documentary evidences adduced on behalf of respondent no. 1 were Exhibit-1 Will dated 17.08.1983, Exhibit-2 deed of Baiwapsi dated 17.08.1983, Exhibit-2/A signature of Behari Prasad over Baiwapsi deed dated 17.08.1983, Exhibit-3 to 3/D are negatives and Exhibit-4 to 4/D are positive photos, Exhibit-5 is expert report, Exhibit-6 certified copy of plaint of miscellaneous case no. 46/1986, Exhibit-7 certified copy of ordersheet dated 19.11.1986 passed in Miscellaneous Appeal No. 46 of 1986, Exhibit-8 certified copy of compromise petition, Exhibit-9 to 9/5 certified copy of Hazri of Harihar Sah in Money Suit NO. 58 of 1979, Exhibit-10 to 10/2 certified copy of powers filed by Harihar Sah in Miscellaneous Case No. 2 of 1985, Exhibit-11 certified copy of judgment of Miscellaneous Case No. 2 of 1985, Exhibit-12 certified copy of order under Section 144 of Cr.P.C passed by SDM, Bagha, and Exhibit-13 certified copy of



order dated 05.04.2000 passed by High Court, Patna, in Case No. 1766 of 2000.

7. Opposite Party/Appellants had examined altogether 10 witnesses in opposition for grant of probate to applicant-respondent no. 1 and in documentary evidences Exhibit-A is expert report, Exhibit-B to B/3 are negatives, Exhibit-C to C/3 enlarged photographs, Exhibit-D Rehan Deed executed by Harihar Sah and Thagi Sah dated 20.07.1974 and Exhibit-D/1 Rehan Deed dated 22.05.1971 executed by Harihar Sah and Thagi Sah and Exhibit-E death certificate of Harihar Sah dated 07.01.1983.

8. After hearing both the parties and considering and appreciating the evidence and materials available on record, the court below has held that Will dated 17.08.1983 (Exhibit-1) is a genuine and valid Will executed by Harihar Sah in favour of both the parties bequeathing his all the properties to the appellants as well as respondents in the Schedule of the Will. The court below has also found on the basis of evidences produced before it that executant Harihar Sah was alive on the date of execution of Will and disbelieved the case of Appellant/Opposite Party that Harihar Sah died on 07.01.1983 and further held probate case to be maintainable and applicants



had valid cause of action and allowed the probate case of respondent no. 1.

9. Learned counsel for the Appellants has submitted that admittedly even according to respondents, Will was executed by the propounder of Will Harihar Sah on 17.08.1983, and he died on 01.05.1986, in which he had bequeathed his entire landed property in favour of respondents vide Schedule-1 of the Will and in favour of Opposite Party No. 1 and 2 as Schedule-2 of the Will but same was presented for grant of probate in the year 1995, and since the cause of action to file the application for grant of probate had accrued on the date of death of testator- Harihar Sah on 01.05.1986, as such the probate case was barred by limitation and it has been held that the residuary Article-137 of the Limitation Act is also applicable for filing of application for grant of probate or succession certificate.

10. It is true that now it is well settled proposition of law that residuary Article 137 of Limitation Act is applicable to the application filed for grant of probate or succession certificate but cause of action does not accrue on the date of death of testator but it has to be filed within three years when the right to apply accrues and the limitation shall run from the date of right to apply and not from the date of death of testator.



However, delay of more than three years from the date of death of testator has to be properly explained by the applicant and the limitation shall run from the date when the cause of action accrues.

11. After hearing learned counsel for the parties, and going through the LCR, it appears that the court below had not framed any issue in respect of whether the probate case was barred by limitation or not and same is dependant upon the facts and circumstances of each case and what will be the starting point of limitation and when the right to sue accrued for the first time is dependant upon the facts and circumstances of each case, which is essentially to be decided by the probate court on the basis of evidence led by the parties on such issue, and as such the matter is remanded back to the trial court to consider the issue of limitation, whether the probate case was barred by law of limitation when the application for grant of probate/letter of administration was filed on behalf of applicant-respondent. However, this Court does not find any error or infirmity in the finding arrived by the trial court on other issues as framed by it and as such this Court is not inclined to interfere with the finding of the trial court on other issues as decided by it.

12. The appeal is partly allowed and the matter is



remanded to the court below for its determination on the issue  
of limitation.

**(S. Kumar, J)**

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| AFR/NAFR          | NAFR       |
| CAV DATE          | NA         |
| Uploading Date    | 25.06.2019 |
| Transmission Date | NA         |

