

IN THE HIGH COURT OF JUDICATURE AT PATNA
CIVIL MISCELLANEOUS JURISDICTION No.9 of 2020

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Shankar Prasad Son of Vishnu Prasad, R/o Mohalla- Chabhachcha chowk, Ward No.
4, P.S. Town, District- Madhubani.

... .. Petitioner/s

Versus

1. Smt. Prameela Devi W/o Lalan Prasad, R/o Mohalla- Chabhachcha Chowk, Ward No.
4, P.S. Town, District- Madhubani.
2. Vishnu Prasad, Son of late Chulhai Sahu, R/o Village- Parihar, P.S. Parihar, District-
Sitamarhi.

... .. Respondent/s

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Constitution of India - Article 227 of the Constitution of India- Indian Evidence Act, 1872 - Sections 68 and 69 - - Proviso to Section 68 clarifies that calling an attesting witness is unnecessary for documents other than wills if their execution is not specifically denied and the document is registered under the Indian Registration Act, 1908 - The trial court misinterpreted Section 68, which requires calling at least one attesting witness to prove execution if alive - - Misapplied Sections 47 and 73 of the Indian Evidence Act by requiring proof of handwriting or signature when execution was not denied. (cases referred: - Rosammal Issetheenammal Fernandez vs. Joosa Mariyan Fernandez (AIR 2000 SC 2857) - Execution of a registered document not specifically denied waives the necessity of attesting witness testimony - - Reiterated that proving execution via attesting witnesses is unnecessary if execution is not denied (cases referred: - Govindbhai Chhotabhai Patel vs. Patel Ramanbhai Mathurbhai (AIR 2019 SC 4822). Held, The impugned order by the trial court was set aside, and the petition to mark the gift deed as an exhibit was allowed.

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Ward No. 4, P.S. Town, District- Madhubani.
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District- Sitamarhi.

... .. Respondent/s

Appearance :

For the Petitioner/s : Mr. Baidya Nath Thakur, Advocate
For the Respondent/s : Mr.

**CORAM: HONOURABLE MR. JUSTICE ARUN KUMAR JHA
ORAL JUDGMENT**

Date : 25-06-2024

Heard learned counsel for the petitioner. However,
despite service of notice no one appears for the respondents.

2. The present petition has been filed under Article
227 of the Constitution of India for setting aside the order dated
18.10.2019 passed by learned 6th Sub Judge, Madhubani in
Partition Suit No. 17 of 2005, whereby and whereunder the
prayer made by the plaintiff/petitioner for marking exhibit a gift
deed dated 13.12.1979, executed by maternal grandmother of
the petitioner in favour of mother of the petitioner and
respondent no. 1, was rejected.

3. Learned counsel for the petitioner submits that the



impugned order has been passed on erroneous interpretation of Section 68 of the Indian Evidence Act. The learned trial court rejected the petition on the ground that one attesting witness was necessary to prove the documents in terms of Section 68 of the Indian Evidence Act. But it has been specifically pleaded before the learned trial court that attesting witness was not alive and the application filed earlier when the attesting witness was alive was disposed of as not pressed. Learned counsel further submits that proviso to Section 68 is clear on the point that if the execution of the document is not in question, it would not be necessary to call an attesting witness in proof of execution of the such document, not being a will, and the document being registered under the Indian Registration Act, 1908. Further, the learned trial court proceeded in the matter recording the finding that it was incumbent upon the plaintiff/petitioner to produce a person to identify handwriting and signature of attesting witness again on wrong assumption by mentioning Sections 47 and 73 of the Indian Evidence Act. This interpretation of law is against the principle of law settled by the Hon'ble Supreme Court. The learned trial court has not considered the fact that the defendants have admitted the execution of the gift deed which was being sought to be exhibited. The Hon'ble Supreme Court in the case



of *Rosammal Issetheenammal Fernandez (Dead) By LRS & Others Vs. Joosa Mariyan Fernandez and Others* reported in *AIR 2000 SC 2857* has held in paragraph 10 that under the proviso to Section 68 the obligation to produce at least one attesting witness stands waived if the execution of any such document, not being a will, which is registered is not specifically denied. Thus, the learned counsel submits that the learned trial court committed error when it rejected the petition to allow the gift deed of 1979 to be marked as exhibit.

4. The law regarding proof of execution of document is provided under Section 68 of the Indian Evidence Act. Section 68 of the Indian Evidence Act 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 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.”

Thereafter, everything hinges on the recording of this denial of execution of the document in question. If there is denial, the same could not be used as evidence unless one attesting witness has been called for the purpose of proving its admission, of course, if the attesting witness is alive and subject to process of court he is capable of tendering his evidence. In case when no attesting witness could be found, then, Section 69 of the Indian Evidence Act would come into play. Section 69 of the Indian Evidence Act provides that in such a case the witness the document must be proved in manner that attestation of one attesting witness is at least in his handwriting and that the signature of the person executing the document being in the handwriting of that person and for the same purpose Sections 47 and 73 of the Indian Evidence Act would be relevant. However, proviso to Section 68 do away with the necessity of calling an attesting witness if there is no denial of execution by the person by whom it purports to have been executed. The case of ***Rosammal Issetheenammal Fernandez (Dead) By LRS & Others Vs. Joosa Mariyan Fernandez and Others***



(*supra*) can be referred in this regard. Further, reference to the decision of Hon’ble Supreme Court in the case of ***Govindbhai Chhotabhai Patel and Others Vs. Patel Ramanbhai Mathurbhai*** reported in the case of ***AIR 2019 SC 4822*** could be made on the same proposition of law, wherein it has held that donee does not need to examine one of the attesting witnesses in terms of proviso to Section 68, in conditions when the execution of the gift deed was not specifically denied. Since there is no denial of execution of the gift deed, the same could be admitted in evidence without seeking formal proof of the attesting witness.

5. For the aforesaid reasons, I do not find the impugned order could be sustained and hence, the same is set aside and the application is allowed.

6. Accordingly, the present petition stands allowed.

(Arun Kumar Jha, J)

DKS/-

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