

IN THE HIGH COURT OF JUDICATURE AT PATNA

CIVIL MISCELLANEOUS JURISDICTION No.738 of 2022

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1. Anil Kumar Pandey S/o Ram Bachan, R/o Village-Sonwarsha Madaini, P.S.-Shivsagar, District-Rohtas.
2. Arvind Kumar Pandey, S/o-Gauri Shankar Pandey, R/o Village-Sonwarsha Madaini, P.S.-Shivsagar, District-Rohtas.

... .. Petitioners

Versus

1. Dhananjay Pandey S/o Late Jwala Pandey, R/o Village-Narayanpur, P.S.-Sonhan, District-Kaimur at Bhabua, at present R/o Village-Sonbarsa Madaini, P.S.-Sheosagar, District-Rohtas.
2. Chandrabhushan Pandey, Son of Late Jwala Pandey, R/o Village-Narayanpur, P.S.-Sonhan, District-Kaimur at Bhabua, at present R/o Village- Sonbarsa Madaini, P.S.-Sheosagar, District-Rohtas.
3. Ravishankar Pandey, Son of Late Jwala Pandey, R/o Village-Narayanpur, P.S.-Sonhan, District-Kaimur at Bhabua, at present R/o Village-Sonbarsa Madaini, P.S.-Sheosagar, District-Rohtas.
4. Arbind Kumar Pandey, S/o Late Jwala Pandey, R/o Village-Narayanpur, P.S.-Sonhan, District-Kaimur at Bhabua, at present R/o Village-Sonbarsa Madaini, P.S.-Sheosagar, District-Rohtas.

... .. Respondents

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Acts/Sections/Rules:

- *Order 22 of the Code of Civil Procedure*
- *Sections 222, 276, 278 of the Indian Succession Act*

Cases referred:

- *Musammat Phekni v. Musammat Manki, reported in AIR 1930 Pat 618*
- *Bihari Lal Mahton Tetak Gayawal vs. Ganga Dai Tatkain & Ors. , reported in AIR 1917 Patna 209*
- *Rakesh Bihari Sharan vs. Alka Sharan, reported in 2017 (3) PLJR 951*
- *Sanjay Tribedi @ Munna Tribedi Vs. Kanti Devi & Ors., reported in 2024 SCC OnLine Pat 8327*

Petition - filed for quashing the order whereunder the Additional District Judge allowed the substitution petition.

A person filed a probate case on the basis of unregistered will for grant of probate/letters of administration of the estate of the deceased. The petitioners appeared and filed their objections and the trial court converted the probate case into Title Suit. During pendency of the probate case the original probate petitioner died issue-less and thereafter, respondents filed a substitution petition, which was allowed.

Held - Probate shall be granted only to an executor appointed by the will. As such, the right to obtain a probate is confined to the executor and it can by no means devolve upon the heir of the executor appointed by the will. (Para 9)

An application with prayer for substitution in the testamentary suit after the death of the executor is not maintainable and the probate proceeding comes to an end with the death of the executor. (Para 10)

The trial court, before allowing the substitution, allowed the respondents to amend the probate petition to seek relief for issuance of letters of administration. Amendment at this stage could not be allowed at the instance of the court, for the simple reason that unless substitution is allowed, there remains no petitioner to effect the amendment to seek relief for issuance of letters of administration. The respondents could have amended the probate petition and sought relief of issuance of letters of administration if they were already on record. (Para 13)

The impugned order is set aside and the application filed by the respondents for their substitution in place of the original probate petitioner is dismissed. However, the dismissal of such application shall not preclude the respondents from resorting to Section 276 of the Indian Succession Act, 1925 for redressal of their grievance (para 14).

Petition is allowed. (Para 15)

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... .. Respondents

Appearance :

For the Petitioner/s : Mr. Ashutosh Tripathy, Advocate
For the Respondent/s : Mr. Ravi Shankar Sahay, Advocate
Mr. Rakesh Kumar Mishra, Advocate

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

Date :03-04-2025

The instant petition has been filed by the petitioners for quashing the order dated 18.07.2022 passed by the learned Additional District Judge-IV, Rohtas at Sasaram in Probate Case No. 88 of 1999 (Title Suit No. 02 of 2002), whereby and whereunder the learned Additional District Judge allowed the substitution petition filed on behalf of the respondents.

02. The brief facts of the case are that one Vishwanath



Pandey filed a probate case on the basis of unregistered will vide Case No. 88 of 1999 for grant of probate/letters of administration of the estate of late Deorati Devi. The petitioners appeared and filed their objections and the learned trial court converted the probate case into Title Suit No. 02 of 2002. It appears that during pendency of the probate case the original probate petitioner died issue-less on 12.09.2020 and thereafter, respondents filed a substitution petition dated 03.11.2020 for substituting their names in place of original probate petitioner-Vishwanath Pandey. The petitioners filed their rejoinder and opposed the substitution of respondents. The learned trial court, vide order dated 18.07.2022, directed the respondents to seek relief for issuance of letters of administration and accordingly amended the probate petition and in this manner, allowed the respondents to be substituted in place of deceased-Vishwanath Pandey.

03. Learned counsel appearing on behalf of the petitioners submits that the impugned order is illegal and could not be sustained. Learned counsel further submitted that one Jagarnath Pandey had a daughter, namely Deorati Devi, who inherited his property after his death as the wife of Jagarnath Pandey predeceased him. The petitioners and respondents



claimed the property of Deorati Devi on the basis of two separate wills dated 21.06.1999 and 24.08.1999, respectively. The Will dated 21.06.1999 was an unregistered will executed in favour of late Vishwanath Pandey and the petitioners claimed that Deorati Devi never executed any unregistered Will in favour of Vishwanath Pandey. However, the petitioners claimed that Deorati Devi executed a registered Will dated 24.08.1999. After death of Vishwanath Pandey, the respondents filed the substitution petition claiming themselves to be nephew of probate petitioner-Vishwanath Pandey and making averment that there was no Class-I legal heir of deceased Vishwanath Pandey. The learned Additional District Judge without looking into the material, allowed substitution petition and permitted the respondents to amend the petition seeking letters of administration without there being any prayer on their part in the substitution petition. Learned counsel further submitted that the learned trial court did not consider for the moment that there is no applicability of Order 22 of the Code of Civil Procedure in the probate case and there could be no substitution of a legatee, if the legatee is the executor appointed by the Will and he dies. Learned counsel further submitted that no probate can be granted in favour of the legal heirs of original probate



petitioner-Vishwanath Pandey, who was the sole executor under the Will. Learned counsel further submitted that there is no provision for substitution of the executor or the legatee in a probate proceeding. Therefore, the impugned order suffers from illegality and the same be set aside.

04. Learned counsel appearing on behalf of respondents vehemently contended that there is no infirmity in the impugned order and the same is just and proper. Learned counsel admitted the facts about there being two Wills and two probate proceedings being initiated on the basis of these two Wills, Title Suit No. 02 of 2002 and Title Suit No. 01 of 2003. Learned counsel further submitted that in probate proceeding of the respondents, the prayer was already there to issue a certificate either of probate or letters of administration and if the prayer was already there for issuance of letters of administration, after death of original legatee, namely Vishwanath Pandey who had no issues and the present respondents are sons of his full brother and they are within their right to file the petition for their substitution in place of original probate petitioner. Therefore, there is nothing wrong in the impugned order 18.07.2022 and the same needs to be sustained.

05. I have given my thoughtful consideration to the



rival submission of the parties and perused the record.

06. The only issue involved in the present case is whether the respondents should be allowed to be substituted in place of deceased-probate petitioner-Vishwanath Pandey or not?

07. Sections 222 of the Indian Succession Act provides as under:

“222. Probate only to appointed executor.—(1) Probate shall be granted only to an executor appointed by the will. (2) The appointment may be expressed or by necessary implication.”

08. The facts could be further analyzed taking recourse to Section 276 and Section 278 of the Indian Succession Act. These two provisions read as under:

“276. Petition for probate.—(1) Application for probate or for letters of administration, with the will annexed, shall be made by a petition distinctly written in English or in the language in ordinary use in proceedings before the Court in which the application is made, with the will or, in the cases mentioned in sections 237, 238 and 239, a copy, draft, or statement of the contents thereof, annexed, and stating—

- (a) the time of the testator’s death,*
- (b) that the writing annexed is his last will and testament,*
- (c) that it was duly executed,*
- (d) the amount of assets which are likely to come to the petitioner’s hands, and*
- (e) when the application is for probate, that the petitioner is the executor named*



in the will.

(2) In addition to these particulars, the petition shall further state—

(a) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(b) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.

(3) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate.

278. Petition for letters of administration.—*(1) Application for letters of administration shall be made by petition distinctly written as aforesaid and stating—*

(a) the time and place of the deceased's death;

(b) the family or other relatives of the deceased, and their respective residences;

(c) the right in which the petitioner claims;

(d) the amount of assets which are likely to come to the petitioner's hands;

(e) when the application is to the District Judge, that the deceased at the time of his death had a fixed place of abode, or had some property, situate within the jurisdiction of the Judge; and

(f) when the application is to a District Delegate, that the deceased at the time of his death had a fixed place of abode within the jurisdiction of such Delegate.



(2) Where the application is to the District Judge and any portion of the assets likely to come to the petitioner's hands is situate in another State, the petition shall further state the amount of such assets in each State and the District Judges within whose jurisdiction such assets are situate."

09. Thus, it is very much clear that probate shall be granted only to an executor appointed by the will. As such, the right to obtain a probate is confined to the executor and it can by no means devolve upon the heir of the executor appointed by the will. In this regard, decision of the Division Bench of this Court in the case of ***Musammat Phekni v. Musammat Manki***, reported in ***AIR 1930 Pat 618*** can be referred. On the same proposition, reference could also be made on another decision of Hon'ble Division Bench of this Court in the case of ***Bihari Lal Mahton Tetak Gayawal vs. Ganga Dai Tatkain & Ors.***, reported in ***AIR 1917 Patna 209***.

10. Further, reliance could be placed on another decision of Division Bench of this in the case of ***Rakesh Bihari Sharan vs. Alka Sharan***, reported in ***2017 (3) PLJR 951*** wherein the issue before the Court was whether after the death of the executor and before the Will could be proved can a beneficiary or claimant be permitted to get substituted in place of the executor? The Court answered the question in negative



and held that an application with prayer for substitution in the testamentary suit after the death of the executor is not maintainable and the probate proceeding comes to an end with the death of the executor.

11. This Court, in the case of *Sanjay Tribedi @ Munna Tribedi Vs. Kanti Devi & Ors.*, reported in *2024 SCC OnLine Pat 8327* held that there could be no substitution of the respondents in a probate case in place of the original probate petitioner.

12. Right to obtain a probate is confined to the executor and it can by no means devolve upon the heir of the executor appointed by the will. Therefore, after the death of the executor and before the will could be proved no beneficiary or claimant can be permitted to get himself or herself substituted in place of the executor. The probate proceedings come to an end with the death of the executor. Moreover, the substitution of heirs/legal representatives of an executor is not permissible in a probate proceeding though such heirs/legal representatives could maintain a petition under Section 276 of the Act for grant of letters of administration.

13. It is also relevant to take note of the fact that the learned trial court, before allowing the substitution, allowed the



petitioners-applicants/respondents herein to amend the probate petition to seek relief for issuance of letters of administration. I am of the view that amendment at the stage could not be allowed at the instance of the court, for the simple reason that unless substitution is allowed, there remains no petitioner to effect the amendment to seek relief for issuance of letters of administration. The respondents could have amended the probate petition and sought relief of issuance of letters of administration if they were already on record. But, allowing them to seek relief of issuance of letters of administration and accordingly amend the probate petition, appears to be putting the cart before horse and the same is not permissible under the law.

14. Taking into consideration the aforesaid facts and circumstances and the discussion made here-in-before, I am of the considered opinion that the learned trial court exceeded its jurisdiction and passed the order 18.07.2022, which appears *prima facie* illegal and the same cannot be sustained. Therefore, the impugned order dated 18.07.2022 passed by the learned Additional District Judge-IV, Rohtas at Sasaram in Probate Case No. 88 of 1999 (Title Suit No. 02 of 2002) is set aside and the application dated 03.11.2020 filed by the respondents for their



substitution in place of original probate petitioner is dismissed.
However, the dismissal of such application will not come in the way of the respondents to take recourse of Section 276 of the Indian Succession Act, 1925 for redressal of their grievance(s).

15. As a result, the present petition stands allowed.

16. Pending applications, if any, stands disposed of.

(Arun Kumar Jha, J)

Ashish/-

AFR/NAFR	AFR
CAV DATE	27.01.2025
Uploading Date	04.04.2025
Transmission Date	NA

