

IN THE HIGH COURT OF JUDICATURE AT PATNA
FIRST APPEAL No.531 of 1981

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1. Chandra Shekhar Prasad son of Shri Ram Baran Rai deceased, resident of village-Manoharpur, Kachhuara, Police Station Phulwari, Dist.-Patna (Dead)
- 1(I). Mostt. Shanti Dei, w/o Late Chandra Shekhar Prasad
- 1(II). Shri Chandra Bhanu Prasad (Dead)
- 1(II)(i). Rekha Devi, w/o Late Chandra Bhanu Kumar
- 1(II)(ii). Gautam Kumar, s/o Late Chandra Bhanu Kumar
- 1(II)(iii). Himanshu Kumar, aged 15 years, minor son under guardianship of his natural guardian, the mother Rekha Devi
- 1(III). Ranjit Kumar, s/o Late Chandra Shekhar Prasad
- 1(IV). Brajesh Kumar (Dead)
- 1(IV)(i). Vaishnavi Kumari, w/o Late Brajesh Kumar
- Appellant nos. 1(II)(i), 1(II)(ii), 1(II)(iii) and 1(IV)(i) are residents of village and P.O. Manoharpur Kachhuara, P.S. Gopalpur, Dist.-Patna
- Appellant nos. 1(I) and 1(III) are residents of village-Manoharpur, Kachhuara, P.S.- Phulwarisharif, Dist.-Patna

... .. Appellant/s

Versus

1. Smt. Mungia Devi, widow of Shri Ajodheya Mahton (Dead)
2. Shri. Nageshwar Prasad, s/o Late Shri Ram Baran Prasad
- Shri Naresh Prasad, s/o Late Shri Ram Baran Prasad, both sons of Shri Ram Baran Prasad deceased, under the guardianship of Smt.
3. Raj Kumari Devi mother and next friend
4. Shri Bishundhari Rai son of Shri Ram Prasad Rai (Expunged)
- 5(a). Manoj Kumar, s/o Bisundhari Rai
- All are resident of Village and P.O.- Manoharpur, Kachhuara, P.S.- Phulwarisharif, Dist.-Patna

... .. Respondent/s

Appearance :

For the Appellant/s : Mr. Jitendra Kishore Verma, Advocate
 Mr. Shivdayal Singh, Advocate

For the Respondent/s : Mr. Shashi Bhushan Pd.Sinha, Advocate

CORAM: HONOURABLE MR. JUSTICE KHATIM REZA
ORAL JUDGMENT

Date : 26-09-2023



Heard learned counsel for the appellants and learned counsel for the respondents.

2. This appeal has been filed against the judgment and order dated 28.09.1977 passed by the Additional District Judge-Vth, Patna in Title Suit No. 17 of 1976/01 of 1976 arising out of Probate Case No. 160 of 1972 whereby the learned lower court has dismissed the probate as not maintainable.

3. The appellant has filed an application for grant of probate of Will executed in favour of the appellant. The case of the appellant, is that, Ajodhya Rai executed a Will in favour of the original appellant-(plaintiff) and his two brothers on 18.06.1967. It is further contended that at the time of executing a Will he was in state of sound mind and he possessed of full disposing capacity. The contents of the Will were read over and explained to him and he fully understood the same and thereafter, voluntarily with his free consent executed the Will. It is further contended that it was duly attested. The applicant-appellant filed Probate Case No. 160 of 1972 for grant of probate of Will. After objection being filed by opposite party-respondent nos. 1 to 4, the said probate case was converted into Title Suit No. 17 of 1976/01 of 1976. The other two brothers, who are beneficiaries under the Will was made opposite party/defendant nos. 2 and 3 in the probate case. It is submitted



that at the time when the said Will was executed, the appellant was minor and so under the Will Shri Ram Baran Rai, the father of the appellant and defendant nos. 2 and 3 was authorized to manage the property of the testator after his death during the minority of the appellant and other beneficiaries. The properties under the Will has been described in Schedule annexed with the application.

4. Most. Mungia Devi wife of Late Ajodhya Rai and Bishundhari Prasad (defendant no. 4) filed objection alleging that the Will, in question, is not genuine and is forged, fabricated and without the knowledge of the alleged testator. It is further contended that the testator was not of sound mind at the time of execution of Will. He was suffering from myltities since 1965 and had become both physically and mentally incapable of understanding the questions put to him few days before his death and also stated that no probate can be granted.

5. During the pendency of aforesaid title suit (proabate case), Most. Mungia Devi and Bishundhari Prasad-objectors defendant nos. 1 and 4 filed a joint petition and raised a preliminary objection with regard to maintainability of probate suit on the ground that the Will has been executed with respect to the *Raiyati* land (agricultural land). The Will is unregistered and under the provision of Section 16 (2) (iii) of the Bihar Land Reforms



(Fixation of Ceiling Area and Acquisition of Surplus Lands) Act 1961, the Will in respect of agricultural lands must be a registered document. In such circumstances, the said probate suit is not maintainable and is liable to be dismissed on the ground of maintainability as a preliminary issue and prayed to decide the same first.

6. The learned lower court below after hearing the parties on the point of preliminary issue, framed the preliminary issue i.e., whether the petition filed by the applicant is maintainable?

7. After hearing the parties, the learned lower court on 28.09.1977 dismissed the probate suit on the ground of maintainability holding that the said Will is unregistered and is in teeth of Section 16 (2) (iii) of Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Lands) Act, 1961 in view of the decision of this Court reported in case of *Shrimati Dil Kuer alias Akali Devi and Ors* reported in *AIR 1976 Patna 193*. The Hon'ble Court has held that the registration of Will is necessary for grant of probate when it relates to the *raiyati* land according to the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Lands) Act, 1961. Thereafter, application filed by the applicant for grant of probate of Will was held as not maintainable



and the probate suit was dismissed on the ground of maintainability.

8. The appellant filed present appeal against the said judgment and order dated 28.09.1977 passed by the Additional District Judge, Patna in Title Suit No. 17 of 1976/01 of 1976 arising out of Probate Case No. 160 of 1972.

9. Learned counsel for the appellants submits that the said probate suit has been dismissed only on the ground that the registration of Will is necessary for grant of probate and relied upon a decision of this Court reported in case of *Shrimati Dil Kuer alias Akali Devi and Ors* reported in *AIR 1976 Patna 193*.

10. The said decision was subsequently over ruled by a Division Bench of this Court in case of *Koshila Devi Vs Parvati Devi* reported in *AIR 1979 Patna 65 (DB)* holding that no such registration is necessary even with respect to *Raiyati* lands.

11. Learned counsel for the appellants further relied upon a decision in the case of *V. Prabhakara Vs Basavaraj K. and another* reported in *2022 (1) SCC 115*, in which the Hon'ble Supreme Court has held at paragraph no. 19 as hereunder:-

“19. Section 17 of the Registration Act deals with documents of which registration is compulsory. A will being a testamentary document does not find a place under Section



17 which factum is reiterated under Section 18, making such a document to be registered at the option of a party. A will which is originally not registered may be presented for registration or deposited at any time under Section 27. Therefore, the registration of a will is only an additional or attending circumstance in proving it with the rebuttable presumption available under Section 114 Illustration (e) of the Evidence Act.”

12. After analyzing the pleadings and perusing the impugned judgment and order as well as submissions of the parties, this Court is of the view that the learned trial court has wrongly rejected the probate case on the point of maintainability of the probate case on the ground that the Will is an unregistered one. The decision which the lower court relied upon has been overruled by a Division Bench of this Court and also the principle of non-registration of a Will has been settled by the Hon'ble Supreme Court as discussed above.

13. In view of the law applicable in the present case, the Will, in question, is not required to be registered and non-registration of Will is not fatal to the probate of Will. The learned lower court at the threshold of the probate case without any trial only on a preliminary issue has dismissed the suit which does not lay down a correct position in law.



14. Accordingly, the appeal is allowed and the judgment and order dated 28.09.1977 passed by Additional District Judge-Vth, Patna in Title Suit No. 17 of 1976/01 of 1976 arising out of Probate Case No. 160 of 1972 is set aside and the Title Suit No. 17 of 1976/01 of 1976 is remanded to the lower court to decide afresh on merit after giving due notice and opportunity of hearing to the parties.

(Khatim Reza, J)

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AFR/NAFR	AFR
CAV DATE	NA
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