
(2015) 02 PAT CK 0092

In the Patna High Court

Case No : Miscellaneous Appeal No. 75 of 2011 in Title Suit No. 3 of 2007

Bhorik Pasi

APPELLANT

Vs

Bhagan Pasi

RESPONDENT

Date of Decision : 12-02-2015

Acts Referred:

Succession Act, 1925 — Section 280, 281

Citation : AIR 2015 Patna 137

Hon'ble Judges : Akhilesh Chandra, J

Bench : Single Bench

Advocate : Binod Kumar Singh and Vagisha Pragya Vacak Navi, for the Appellant; Bachchan Jee Ojha, Advocates for the Respondent

Final Decision : Allowed

Judgement

Akhilesh Chandra, J.—Heard learned counsel for the parties. Delay in filing the present application is condoned. Accordingly, Interlocutory Application No. 814/2011 stands allowed.

2. This appeal has been filed on behalf of the sole appellant against order/judgment dated 14th September, 2010 of Additional District and Sessions Judge, Fast Track Court-II, Buxar, in Probate Case No. 10/2006/Title Suit No. 3/2007 allowing the prayer and granting probate of the registered Will dated 30th June, 1999 said to be executed by one Sadan Pasi in favour of the plaintiff respondent.

3. Admittedly, the testator Sadan Pasi was a widower having no issue and parties present are his nephews through two full brothers.

4. In view of the legal objections apparently substantiated by judicial pronouncement, there appears no need to go into the details of the case, which appears already mentioned in the judgment of the Court below.

5. Learned counsel for the appellant submits that on the Will in question there are two attesting witnesses, but one of them, Ram Bali Singh, has also acted as

identifier of the testator before the registering authority. Hence, in view of the decisions of the Apex Court in cases of Bhagat Ram and Another Vs. Suresh and Others, AIR 2004 SC 436 : (2004) 98 CLT 114 : (2003) 10 SCALE 13 : (2003) 12 SCC 35 : (2003) 6 SCR 216 Supp and M. L. Abdul Jabbar Sahib Vs. M. V. Venkata Sastri and Sons and Others, AIR 1969 SC 1147 : (1969) 1 SCC 573 : (1969) 3 SCR 513 ; his status now is diluted and cannot be said as the attesting witness. In that view of the matter, the mandatory requirement to establish a Will whereon two persons must appear as attesting witnesses since not fulfilled makes the Will invalid.

6. Another submission by learned counsel for the appellant is that in view of Sections 280 and 281 of the Indian Succession Act, 1925, which reads as such:

"280. Petition for probate, etc. to be signed and verified -- The petition for probate or, letters of administration shall in all cases be, subscribed by the petitioner and his pleader, if any, and shall be verified by the petitioner in the following manner, namely:--

"I (A.B.), the petitioner in the above petition, declare that what is stated therein is true to the best of my information and belief."

281. Verification of petition for probate, by one witness to Will.-- Where the application is for probate, the petition shall also be verified by at least one of the witnesses to the will (when procurable) in the manner or to the effect following, namely:--

"I (CD.), one of the witnesses to the last Will and testament of the testator mentioned in the above petition, declare that I was present and saw the said testator affix his signature (or mark) thereto (or that the said testator acknowledged the writing annexed to the above petition to be his last Will and testament in my presence)."

7. It is mandatory to present the application for probate that the application should be verified by the applicant and at least one of the two attesting witnesses, but in the present case, neither the application is verified by the plaintiff applicant nor by the attesting witness.

8. Thus, in view of the decision in a case in the matter of: In Re: Madhav Prasad Birla (D), AIR 2005 Cal 1 , also, the application cannot be held maintainable.

9. Learned counsel representing plaintiff respondent has left with no option but to concede the legal position as stated above. Having regard to the facts and circumstances, the impugned order appears not sustainable, consequently, it is set aside and appeal is hereby allowed.