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**(1917) 04 PAT CK 0007**  
**In the Patna High Court**

Jugeshwar Nath Sahai and Another

APPELLANT

Vs

Jagatdhari Prasad and Others

RESPONDENT

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**Date of Decision :** 26-04-1917

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 23 Rule 1  
Probate and Administration Act, 1881 — Section 55

**Citation :** AIR 1917 Patna 41 : 40 Ind. Cas. 345

**Hon'ble Judges :** Chapman, J;Atkinson, J

**Bench :** Division Bench

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**Judgement**

Chapman, J.—This appeal arises out of a proceeding for the Probate of the Will of a person who died leaving three sons by a wife who predeceased him, and a widow with a son by her. The Will purported to leave the bulk of his property to the widow and her son. The application for Probate was made by two of the executors on the 2nd of February 1914. On the 13th July a petition of compromise was filed under which the widow on behalf of herself and her son agreed to divide the properties with the three sons by the first wife. On the same date the two executors who had applied for Probate withdrew their application. On the 11th of February 1915 a fresh application for Probate of this Will was made. In this application one of the executors who had applied before joined; the other applicant was another executor. An objection was taken on behalf of the sons of the first wife that the previous application for Probate having been withdrawn the executors were precluded by the provisions of Order XXIII, Rule 1, of the CPC from again applying for Probate. It is well settled by authority that an application for Probate cannot legally be disposed of by a compromise. The law imposes on the Court itself the duty of determining whether the Will is genuine or not. It is quite clear, therefore, that the Court acted improperly in permitting the executors to withdraw the application for Probate merely by reason of the compromise which was filed. So far as the question of the application of Order XXIII, Rule 1, of the CPC is concerned, that question has to be determined by reference to Section 55 of the Probate and Administration Act, 1881. That section

says that the proceeding of the Court in relation to the granting of Probate shall be regulated, so far as the circumstances of the case will admit, by the Code of Civil Procedure. Now the circumstances of a Probate case do not properly admit of the withdrawal of an application for Probate by an executor. Order XXIII, Rule 1, of the Code of Civil Procedure, which says that a plaintiff may withdraw his suit or abandon a part of his claim-, therefore, does not, in my opinion, apply to an application for Probate. It is the duty of an applicant for Probate to obtain the opinion of the Court upon the genuineness or otherwise of the Will. He fails in his duty if he does not obtain the finding of the Court on the Will; that being so, it is clear that the farther provision in Order XXIII, Rule 1, to the effect that if a plaintiff withdraws from a suit, he shall be precluded from instituting any fresh suit in respect of the same subject-matter, also does not apply. It is clearly undesirable that if any executor does improperly withdraw an application for Probate, he should be precluded from again undertaking the discharge of his duty in obtaining the finding of the Court on the genuineness of the Will. I would accordingly allow this appeal, set aside the judgment and order of the learned Judicial Commissioner and remand the case to him for a fresh-decision. I am not prepared to express any opinion as to whether the parties will or will not be bound inter se by the petition of compromise which they filed, in so far as the disposal of the assets is concerned: but that has nothing to do with the question whether the Will is genuine or not, and upon that question the learned Judicial Commissioner must express an opinion.

2. The matter has been greatly delayed and we trust that it will be expedited as much as possible.

3. The appellants are entitled to their costs.

Atkinson, J.

4. I agree.