

(2006) 02 PAT CK 0023
In the Patna High Court
Case No : M. A. No. 497 of 2004

Most. Lalmati Kuer and Another

APPELLANT

Vs

Rajbahadur Singh and Another

RESPONDENT

Date of Decision : 07-02-2006

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, Order 41 Rule 11
Succession Act, 1925 — Section 213

Citation : (2006) 2 PLJR 109

Hon'ble Judges : M.L. Visa, J

Bench : Single Bench

Advocate : Praveen Prakash, for the Appellant; Atul Kumar Pandey, Nityanand Mishra, for the Respondent

Judgement

M.L. Visa, J.—This case was listed under the heading "For Hearing under Order 41 Rule 11 of CPC (In short "CPC")" and with the consent of both the parties, the matter was heard for final disposal of the case alongwith I.A. No. 1908 of 2005 and it is, therefore, finally being disposed of by this order. Brief facts of the matter are that the appellants have filed Title Suit No. 49 of 2004 in the Court of Subordinate Judge I, Gopalganj for a declaration that late Manager Rai was adopted son of Kashi Rai and appellants are legal heirs of late Manager Rai and respondents be restrained by injunction from interfering with the possession of the appellants over the suit properties. Case of appellants is that one Kashi Rai had no issue and he, in the year, 1962, adopted Manager Rai, the youngest son of Jwala Rai who was relative and friend of Kashi Rai. Jwala Rai had four sons. Raj Bahadur Singh, respondent No. 1, Gulab Rai, Babuna Rai and Manager Rai, Kumari Neelam, appellant No. 2 is daughter of Manager Rai. Further case of appellant is that Manager Rai died on 30.4.1987 during the lifetime of Kashi Rai who, on account of death of Manager Rai, lost his mental balance and called respondent No. 1 to look after his cultivation and taking advantage of mental condition of Kashi Rai, respondent No. 1, on the pretext of his treatment, brought Kashi Rai to Gopalganj and got a forged deed of Will executed in the

name of his wife Kiran Devi, respondent No. 2, without the knowledge of appellants and on the basis of the forged Will, he and his wife threatened appellants to dispossess them from the suit properties over which appellants are in possession. The appellants made prayer for injunction restraining respondents from interfering their possession of suit properties and the Court, by its order dated 6.10.2004, rejected prayer of appellants against which appellants have preferred the present appeal. Case of appellants is that the alleged Will said to have been executed by Kashi Rai in favour of respondents has neither been probated nor any letters of administration have been granted by a Court of competent jurisdiction, therefore, right of legatee is not established. The appellants filed I. A. No. 1908 of 2005 under Order 39 Rule 1 of CPC for grant of ad interim injunction restraining respondents from making constructions of rice and flour mill over the suit land because according to them, respondents had brought bricks over the suit land and have engaged labourers to lay foundations and construction of brick wall for erecting a rice and flour mill on the suit land.

2. The respondents, by filing counter-affidavit, have opposed the prayer of appellants. The case of respondents is that Kashi Rai never adopted Manager Rai and in fact Kashi Rai was living with the respondents who were looking after him till his death and due to this fact, Kashi Rai executed a deed of will in favour of respondents. According to respondents, the Will executed by Kashi Rai is a genuine Will and it has been duly registered and a Probate Case No. 7 of 1999 is pending in the Court of learned Additional District Judge IV, Gopalganj. Their further case is that they are in possession of suit property which is evident from rent receipt issued in favour of Kashi Rai and after his death, Marfati rent receipts have been issued in favour of respondents. They have made prayer for rejecting prayer of appellants for issuing ad interim injunction.

3. Learned counsel appearing on behalf of appellants has argued that in the impugned order, the Court below, after observing that the appellants have filed the suit for a declaration that Manager Rai was adopted son of Kashi Rai and allowing the prayer of appellants for injunction, during the pendency of the suit, Will amount predeciding the issue that Manager Rai was adopted son of Kashi Rai and for this reason, no prima facie case is made out in favour of appellants. According to him, this interpretation of law is not correct in view of decision reported in AIR (37) 1950 Pat 537 by which it has been held that "the mere fact, therefore, that the points which will ultimately have to be decided as issue in the suit does not exclude them from the consideration of the Court at the stage of an application for a temporary injunction." On this point, he has relied on an another decision of this Court reported in AIR (38) 1951 Pat 469 by which it has been held that while deciding the question of grant of temporary injunction, the Court is not right to anticipate the decision of the question in the suit itself. It has been argued that this is not the correct interpretation of law. From the perusal of impugned order, I find that no doubt aforesaid observation has been made by Court below but that is not the only ground on which prayer of injunction has been refused. The Court below has also taken into consideration

the fact that balance of convenience is not in favour of appellants and nothing has been brought on record to show that in case prayer of appellants for injunction is not granted, they will suffer irreparable loss. On all the aforesaid grounds, prayer for injunction has been refused.

4. Suit properties belonged to Kashi Rai is an admitted fact. Appellants are claiming suit properties on the ground that they are legal heirs of Manager Rai who was adopted by Kashi Rai. On the other hand, respondents are claiming the suit properties on the ground that Kashi Rai had executed a Will in their favour. If the appellants are armed with matriculation certificate of Manager Rai, family book and death certificate in which Manager Rai has been shown as son of Kashi Rai, the respondents are also in possession of rent receipts, ration cards etc. showing that Kashi Rai was living with the respondents. On the point of Will said to have been executed by Kashi Rai in favour of respondents, as claimed by respondents, the learned counsel of appellants has argued that Section 213 of Indian Succession Act creates a bar to the establishment of any right under Will by an executer or a legatee unless probate or letters of administration of the Will have been obtained. In support of this argument, he has relied on two decisions reported in AIR 1962 Supreme Court 1471 and Suresh Singh and Another Vs. Raja Ram Singh and Others . The fact that probate case in respect of Will said to have been executed by Kashi Rai in favour of respondents is still pending has not been disputed. In this order, that question is not being decided. Therefore, the decisions which have been cited by learned counsel of appellants have got no application for the present in this order.

5. On the point of possession, both the parties are claiming possession over the suit properties. It is the case of the appellants that respondents had collected bricks and have engaged labourers on suit land for constructing a rice and flour mill. It has been argued on behalf of appellants that during the pendency of litigation, allowing changes of status quo of property is not justified except in exceptional circumstances. A decision reported in AIR 2005 Supreme Court 104 has been relied upon. It is the own case of appellants that respondent No. 1 is the eldest son of Jwala Rai who was friend and relative of Kashi Rai. It is their further case that Manager Rai died during the lifetime of Kashi Rai and on account of death of Manager Rai, Kashi Rai lost his mental balance and called respondent Na.1 to look after his cultivations and respondent No. 1 started looking after his cultivation. The appellants have further stated that taking advantage of mental condition of Kashi Rai, respondent No. 1 brought him to Gopalganj on the pretext of his treatment and got a forged Will executed in his favour without the knowledge of plaintiffs. These facts show that respondent No. 1 was called by Kashi Rai for looking after his cultivation because Kashi Rai was not in such a mental condition to look after his own properties. When the appellants came in possession of the suit properties has not been made clear by the appellants.

6. Considering the entire materials on record, I find no merit in this appeal which

stands dismissed.

7. I.A. No. 1908 of 2005 also stands disposed of. Here, I may make it clear that this order is in respect of miscellaneous appeal preferred by the appellants against the order of Court below rejecting their prayer for injunction and no observation on any fact given in this order will be used against appellants while deciding the main issues in the suit which will be decided on the basis of evidence of parties adduced by them.