

(2010) 04 JH CK 0043
In the Jharkhand High Court

Smt. Kalpana Samanta and Another

APPELLANT

Vs

Rabindra Nath Samanta

RESPONDENT

Date of Decision : 13-04-2010

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 151

Citation : (2010) 04 JH CK 0043

Hon'ble Judges : Ramesh Kumar Merathia, J

Bench : Single Bench

Judgement

Ramesh Kumar Merathia, J.

I.A. No. 3466 of 2007;

1. This interlocutory application has been filed under Order XXXIX Rules 1 and 2 read with Section 151 of the CPC for restraining the respondent from alienating the suit property in any manner during the pendency of this miscellaneous appeal.

2. Mr. V.P. Singh, learned senior counsel appearing for the appellants petitioners submitted as follows. That after the partition suit was filed by the petitioners, their brother-respondent filed Probate Case No. 3 of 1990 for grant of probate with respect to the purported Will dated 26.2.1965 executed by the father of the parties, who died on 28.12.1976. Another probate case being Probate Case No. 2 of 1990 was filed for probating the purported will dated 26.12.1988 executed by the mother of the parties. That the said cases were filed only with a view to frustrate the right, title and interest of the appellants. That the said wills are forged and fabricated and they have been obtained by practicing fraud. That the prayer for probating the will was time barred. That even the joint family properties, in which petitioners also have share, are the subject matter of the wills. That after filing this appeal, the respondent has sold one of the suit properties and has executed power of attorney for sale of other properties. That there are strong chances of success of the appellants in this appeal. That if third

party's rights are created, it will create unnecessary complications and it would be very difficult for the appellants, both being ladies, to indulge in litigations. He relied on Krishna Kumar Sharma Vs. Rajesh Kumar Sharma, .

3. On the other hand, Mr. P.K. Prasad, learned senior counsel appearing for the respondent, submitted as follows. The wills in question could also be granted for joint family properties which will naturally be relatable only to the extent of share of executor. That neither the petitioners have alleged nor the respondent intends to alienate the residential house in any manner. That the probate cases were not time barred. That the properties vested in the respondent on the death of the executors of the wills. That probate cases were filed only when cause of action arose. That as the respondent has got the judgment under appeal in his favour and, therefore, he should be allowed to enjoy the properties covered under the will, during the pendency of this appeal. That any transaction made by the respondent with regard to the suit properties will naturally be governed by the principles of *lis pendens*. That this injunction petition was filed on 14.12.2007 and, therefore, there is no occasion for grant of injunction at this belated stage. He relied on *Mandali Ranganna and Others etc. Vs. T. Ramachandra and Others, , Kanhaiyaji Sahay and Ors. v. Kamla Prasad and Anr.* 1990 (1) PLIR 661 and *Bali Ram Dhote Vs. Bhupendra Nath Banerjee and Others,*

4. In reply, Mr. Singh submitted that when the appellants sought to press the stay matter, this Court ordered for hearing the stay matter at the stage of hearing under Order XLI Rule 11 of the Code of Civil Procedure. Thereafter lower court records were called for and ultimately the case was admitted for hearing on 1.9.2009 and the stay matter was adjourned from time to time. Therefore, he submitted that there is no delay on the part of the appellants in moving for injunction. He also controverted the other submissions made by Mr. Prasad.

5. Admittedly, after filing this appeal, the respondent has sold one of the properties and has also executed the power of attorney for sale of other properties.

6. After hearing the parties, I am satisfied that a *prima facie* case is made out in favour of the appellants and the balance of convenience also lies in their favour and if the third party rights are created during the pendency of this appeal, the appellants will suffer serious loss and injury.

7. Accordingly, the respondent is restrained from alienating the suit properties in any manner during the pendency of this appeal.

However, this order will not prejudice the parties at the time of final hearing of the appeal.

I.A. No. 3466 of 2007 stands disposed of.