

IN THE HIGH COURT OF JUDICATURE AT PATNA

Miscellaneous Appeal No.645 of 2013

=====

1. Smt. Sarita Sinha W/O Sri Atma Nand And D/O Late Kamleshwar Prasad Sinha
Resident Of 190a-Boring Road, P.S. Sri Krishnapuri, District Patna.

.... Appellant/s

Versus

1. Sanjay Sinha S/O Late Kamleshwar Prasad Sinha And Late Usha Sinha Resident
Of 190a-Boring Road, P.S. Sri Krishnapuri, District Patna.
2. Samir Sinha S/O Late Kamleshwar Prasad Sinha And Late Usha Sinha Resident
Of 190a-Boring Road, P.S. Sri Krishnapuri, District Patna.
3. M/S Classicon Builders (P) Ltd. Represented Through Its Managing Director
Deepak Kr Sinha Having Its Regd. Office At 2nd Floor J.J. Complex, East Boring
Canal Road, P.O. Boring Road, P.S. Buddha Coloy, District Patna.
4. Sri Deepak Kr. Sinha S/O Sri Shiv Shankar Sinha Managing Director M/S
Classicon Builders (P) Ltd. R/O Keshari Ngar, P.S. Patliputra Colony, P.O. Keshari
Nagar, District Patna.

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. ABINASH KUMAR

For the Respondent/s : Mr. Navin Kumar

=====

CORAM: HONOURABLE MR. JUSTICE SHIVAJI PANDEY

ORAL JUDGMENT

Date: 18.01.2016

Heard learned counsel for the appellant and learned
counsel for the respondent.

2. In the present appeal, the appellant is challenging the
order dated 2.7.2013 passed by Sub Judge IIIrd, Patna in
T.P.S. No.593 of 2012 by which the court below has refused to
grant injunction in favour of the appellant.

3. Brief facts of the case is that the appellant and
respondent I set are sons and daughter of late Usha Sinha and
she was absolute owner of the said property. As per the case of



appellant, she is employed at Gurgaon in the state of Haryana and after the demise of her mother respondent Ist set have entered into an agreement with the builder i.e. respondent IInd set for the construction of building. Claim has been made that she has 1/3rd share in the property without taking her in confidence both brothers of the appellant have wrongly entered into an agreement wrongly mentioning that they are absolute owner of the said property whereas fact is that she has 1/3rd share in the said property.

4. The present appellant has filed a partition suit claiming 1/3rd share in the said property and also filed an injunction petition restraining respondent Ist set to prohibit him to alienate as well as any manner alter the feature of the land, at the same time, respondent IInd set be also restrained to change any feature of the land and also prohibit him to make any construction over the same.

5. Respondents have appeared. Respondent Ist set has taken a plea earlier partition has taken place between two brothers and mother bears signature of brothers. It has been claimed that mother has executed a Will dated 17.2.1975 in their favour, testamentary the disputed property in favour of them and as such the present appellant does not have any right title and claim over



the said property. In such view of the matter, no prima facie case, balance of convenience and irreparable loss is caused to the plaintiff. The trial court has dismissed the petition on the ground that having not made out a prima facie case. So much so respondent Ist set has filed an application before the court below for grant of probate in his favour which is still pending for consideration. In the said case appellant has lodged caveat there by the appellant has challenged the Will itself claiming to be forged and fabricated. It has been submitted, un-probated Will does not confer any right placed reliance on the judgment in the case of Hem Nolini Judah v. Isolyne Sarojbhashini Bose reported in AIR 1962 SC 1471 Paragraph 7 where the Hon'ble Supreme Court has interpreted Section 213 of the Succession Act and held that unless Will is probated it does confer any semblance of right in favour of the person who is claiming right through the Will. He has further submitted, if the nature of the suit properly is allowed to be changed it will be caused irreparable injury as at end of suit nothing will survive for adjudication, it will in the ends of justice, the property in question should be remain protected so that at the end of the trial she will get usufruct of the litigation, placed reliance on the judgment in the case Maharwal Khewaji Trustt (Regd) V.



Baldev Dass, reported in (2004) 8 SCC 488=AIR 2005 SC 105 paragraph 10, N Srinivasa vs. Kuttukaran Machine Tools Ltd. (2009 (5) SCC 182) paragraph 29 where Hon'ble Supreme Court has held that it will be proper to keep the property protected prohibiting any change in the status of the land and also prohibit alienation or transfer of property in any manner to avoid multiplicity of the proceeding.

6. In the present case, probate case has been filed by respondent Ist set claiming absolute right and tile claiming that the disputed property has been bequeathed to them. The right of appellant over the disputed property is dependent on the outcome of probate, if the testamentary suit is decided in favour of present appellant only then suit of partition will have some bearing. This itself shaken the plea of prima facie case as claimed by the appellant.

7. During the argument, the appellant shown inclination that 1/3rd in landlord share remained protected subject to the production of map of building, but later withdrew the offer, on the plea that builder map has not been sanctioned and submitted that respondents may make construction leaving 1/3rd share in the land and if they would succeed, they would make rest construction but respondents Ist set are not agreeable to such

suggestion.

8. Probate case and title suit will consume considerable time, by that time construction cost of building will go high. Aforesaid two judgments are not applicable to the present case as rightly held that plaintiff could not make out prima facie case and as such this Court does not find favour with the appellant. It goes without saying principle of lis-pendency will apply.

9. Accordingly appeal is dismissed. However, respondents are directed to keep 1/3rd share in fair manner in the share of landlord in the building remain protected in favour of the appellant, will be subject to the result of suit.

(Shivaji Pandey, J)

Vinay/-

U			
---	--	--	--