

IN THE HIGH COURT OF JUDICATURE AT PATNA

First Appeal No.6 of 2011

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Dr. Rai Chandi Nath Sahay son of laet Rai Krishna Bahadur residing at 294/C Road
no. 1/A Ashok Nagar P.S. Argora PO Hinoo District Ranchi

.... Appellant/s

Versus

Animesh Ranjan & Ors

.... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Amit Prakash Mr. Jitendra Kishore Verma
For the Respondents	:	Mr. Keshav Shrivastava Mr. Manoj Kumar Sinha
For respondent no.3	:	Mr. Raj Kishore Prasad

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
CAV JUDGMENT

Date: 24-07-2018

1. Plaintiff-appellant (hereinafter referred to as ‘the plaintiff’) has filed this appeal against the judgment and decree dated 6.10.2010 and 25.10.2010 respectively passed by learned Subordinate Judge II, Patna in Title suit no. 138 of 2007 by which and whereunder he dismissed the above stated Title suit no. 138 of 2007 on contest.

2. Plaintiff-appellant filed the above stated Title suit no. 138 of 2007 against the defendants-respondents (hereinafter referred to as ‘the defendants’) and sought declaration that defendant nos. 1 and 2 by their act of violation, disobedience and disregard of the Will as a whole and, particularly, by violating its condition,



restriction, intention and desire appearing from letter and spirit of the said Will have given a go-bye to the Will dated 3.1.1983 of late Rai Bageshwari Nath Sahay and thereby have deprived themselves from taking the beneficiary and legatee of the said Will and from getting any benefit there from including their claim of devaluation of Schedule I property on them by virtue of the said Will and hence, consequently, development agreement dated 11.1.2007 executed by defendant nos. 1 and 2 in favour of defendant no.3 and all other acts done by them on the basis of that Will are illegal unlawful, without jurisdiction, void and nullity in the eye of law. The plaintiff-appellant further sought declaration that on the death of late Rai Bageshwari Nath Sahay it be treated that he died intestate and the plaintiff as well as perma defendant no.5 being the sole successor inherited property detailed in Schedule I of the plaint. Plaintiff also sought relief for issuance of temporary injunction restraining the defendants from alienating and encumbering the property in suit and from making any construction and changing physical feature thereof in any manner whatsoever and they be directed to maintain status quo.



3. The case of the plaintiff-appellant is that late Rai Bageshwari Nath Sahay was owner of double storied building standing on survey plot no. 861 (municipal survey plot no. 168) situated at mauza Moharrampur Safiapur Ahara P.S. Gandhi Maidan District Patna. The plaintiff happens to be full brother of late Rai Bageshwari Nath Sahay whereas defendant nos. 1 and 2 namely, Animesh Ranjan and Sri Anupam Ranjan respectively are step nephews of late Rai Bageshwari Nath Sahay. Defendant nos. 1 and 2 filed a petition under section 276 of the Indian Succession Act for grant of letter of administration which was numbered as L.A. Case no. 55/1985. The aforesaid application under section 276 of the Indian Succession Act was filed by the above stated defendants on the basis of registered Will said to be executed by late Rai Bageshwari Nath Sahay in favour of defendant nos. 1 and 2 described in Schedule I of the plaint. The above stated Will dated 3.1.1983 got registered on 23.2.1983. The plaintiff filed objection in L.A. Case no. 55/1985 as a result whereof the aforesaid L.A. Case no. 55/1985 was converted into Title suit no. 05/1987. The above stated Title suit no. 05/1987 was



decreed in favour of defendant nos. 1 and 2 and certificate of letter of administration in respect of the above stated Will was granted on 23.4.1994 in favour of defendant nos. 1 and 2. The plaintiff preferred Misc. Appeal no. 32/1995 against the judgment dated 23.4.1994 passed in Title suit no. 05/1987 but the same was dismissed vide order dated 5.3.2002. The plaintiff preferred LPA no. 464/2002 but the same was also dismissed on 29.2.2003. The plaintiff preferred Special Leave Petition before the Hon'ble Supreme Court of India but the Special Leave Petition of the plaintiff was, too, dismissed. Further case of plaintiff is that the above stated Will dated 3.1.1983 contained restriction that legatee will not alienate Will property within 40 years of the death of the testator but the plaintiff in the last week of 2007 came to know that defendant nos. 1 and 2 entered into a development agreement with defendant no.3 on 11.1.2007 in total disregard and violation of the specific provision contained in the Will and after execution of the aforesaid development agreement, the double storied building has completely been demolished and the materials including doors, windows and other fixed up etc



were sold away. Further case of the plaintiff is that in terms of the above stated development agreement, parties thereto have entered into an arrangement for construction of multi storied building with right of transfer/ alienation contrary to in an expressed violation of specific condition and prohibition contained in the said will. Defendant nos. 1 and 2 violated terms and conditions of the Will as they have no right to alienate the disputed property or any part thereof for 40 years from the death of the testator who died on 23.3.1985. Plaintiff sent a legal notice but the defendants continued their illegal act contrary to the terms of the Will and accordingly, they had given a complete go-bye to the Will and had deprived themselves from inheritance of estate of late Rai Bageshwari Nath Sahay by virtue of the said Will. Further case of the plaintiff is that plaintiff being full brother of late Rai Bageshwari Nath Sahay and similarly, performa defendant no. 5 being own sister's son of late Rai Bageshwari Nath Sahay are legal heirs and inherited the property in question under the provision of the Indian Succession Act.

4. Defendant nos. 1 and 2 contested the above



stated Title suit no. 05/1987 by filing their written statement. They raised ornamental objections and also averred in their written statement that late Rai Bageshwari Nath Sahay executed registered Will dated 3.1.1983 in their favour and on the basis of the aforesaid registered Will dated 3.1.1983, probate was granted to them in Title suit no. 05/1987 which was challenged by the plaintiff upto the Hon'ble Apex Court but the plaintiff lost the case on each and every step and accordingly, granted probate in favour of defendant nos. 1 and 2 became final. Defendant nos. 1 and 2 further averred that the Will contained wish of the testator regarding succession of his property in their favour and there was no condition or restriction on vesting of the property and it is wrong to say that succession to defendant nos. 1 and 2 was subject to certain conditions and, as a matter of fact, property in question was completely vested in them from the time of death of the testator. Defendant nos. 1 and 2 further averred that after death of the testator, they became absolute owners of the property and the plaintiff has got no right to raise question of vesting of the property when the property has already been vested in



them. Defendant nos. 1 and 2 further averred that wish of the testator is that they should not execute any document and it can not be said to be a true condition of the disputed property and wish of the testator is that the property would be enjoyed by them. Further case of the defendant nos. 1 and 2 is that no doubt, defendant nos. 1 and 2 entered into development agreement with defendant no. 3 but, as a matter of fact, circumstances compelled them to enter into development agreement as level of the ground floor of the house became very low from surrounding land whose level became higher level due to filling up by the owner with the result that even rain water entered the house and the house became dump and dirty water always coming out from it and the said house became inhabitable and, therefore, there was no option except to demolish the aforesaid house and, as a matter of fact, development agreement is not transfer but a scheme of development of the property with best advantage of the owner and hence, there is no violation of any specific provision of the Will. Defendant nos. 1 and 2 denied the allegation of alienation of the suit property and pleaded that the plaintiff has no right to interfere with enjoyment



of the property by defendant nos. 1 and 2.

5. Separate written statement was filed by defendant nos. 3 and 4 stating therein that they had entered into a development agreement dated 11.1.2007 with defendant nos. 1 and 2 containing terms and conditions enumerated therein and under the said agreement, they had to develop the property in question by constructing thereon multi storied building. As a matter of fact, they have taken vacant land from defendant nos. 1 and 2 which has clearly been mentioned in development agreement and after taking possession of the land in question, they got sanction plan by the concerned authority and have invested huge amount of money over the construction work. It has further been pleaded by them in their written statement that under the development agreement they have to construct building and give possession of ownership area to defendant nos. 1 and 2 within the period of two years six months from the date of handing over vacant possession of the said land and on failure to pay compensation of Rs 5,000/- per month till handing over possession of the land. They further pleaded that the aforesaid development agreement



was well within the knowledge of the plaintiff since the date of the execution of the development agreement but the plaintiff had intentionally filed the suit with a view to create hindrance during construction of the building.

6. Performa defendant no. 5 also filed separate written statement supporting the case of the plaintiff. Defendant no. 5 pleaded that defendant nos. 1 and 2 had violated the terms and conditions of the Will and they had acted against the wish and desire of the testator and, therefore, they are not entitled to inherit the disputed property and as a matter of fact, he along with plaintiff inherited the disputed property under the provision of Indian Succession Act.

7. On the basis of the pleadings of the parties, learned court below framed following issues:-

- 1) Is the suit, as framed, maintainable?
- 2) Has the plaintiff valid cause of action for the suit?
- 3) Is the suit barred under section 34 of the Specific Relief Act?
- 4) Is the plaintiff liable to pay advoluerum court fee on the market value of the suit property?
5. Is the suit barred by the principle of estoppel, waiver and acquiescence?



6. Whether the defendants have violated the conditions, restriction, intentions and desire of the Will dated 3.1.1983 of Late Rai Bageshwari Nath Sahay and by such violation defendants have deprived themselves from being the beneficiary and legatee of the said Will and their claim of devaluation of schedule I property on them in view of section 307 of the Indian Succession Act?

7. Whether by violation of the conditions, restrictions, intentions and desire of the Will dated 3.1.1983 of Late Rai Bageshwari Nath Sahay the property has been reverted back to the plaintiff?

8. Whether the development agreement dated 11.1.2007 executed by the defendant nos.1 and 2 in favour of defendant no.3 on the basis of the said Will dated 3.1.1983 is illegal, unlawful without jurisdiction void and nullity being in violation of the conditions of the Will?

9. Has the title vested in the defendant by virtue of probated Will dated 3.1.1983?

10. Is the plaintiff entitled to object right of development of property under the Will by defendant nos.1 and 2 ?.

11. To what other relief or reliefs the plaintiff is entitled to?.

8. Plaintiff, in support his case, examined, altogether, 3 witnesses and also got exhibited notice dated 31.1.2007 as exhibit 1, development agreement executed



by defendant nos. 1 and 2 in favour of defendant no.3 as exhibit 2, death certificate of late Rai Bageshwari Nath Sahay as exhibit 3, photostate copy of Will dated 3.1.1983 as exhibit 4, order of Hon'ble Supreme Court as exhibit 5, order of High Court as exhibit 6 and apart from this four photographs which have been marked in Roman as exhibits I to IV.

9. Defendant nos. 1 and 2 examined two witnesses and also got exhibited report dated 10.3.2005 given by the Executive Engineer as exhibit A.

10. Remaining defendants neither examined any witness nor produced any document.

11. The learned court below, after considering the evidences available on record, decided the above stated issues against the plaintiff and accordingly, dismissed the suit on contest. The learned court below came to the conclusion that the disputed property vested in defendant nos. 1 and 2 and they got absolute right and interest in the property bequeathed to them and the restriction as mentioned in the Will was only a dying expectation of testator which was hit by section 11 of the Transfer of Property Act. The learned court below also



came to the conclusion that defendant nos. 1 and 2 legally executed development agreement in favour of defendant no.3.

12. Learned counsel appearing for the plaintiff challenged the impugned judgment and decree arguing that the Will in question contained specific restriction that the legatee would not alienate the property within 40 years of the death of the testator and admittedly, defendant nos. 1 and 2 entered into a development agreement dated 11.1.2007 with defendant no. 3 within 40 years of death of the testator and according to the aforesaid development agreement, part of the property in question was alienated in favour of defendant no.3 and, therefore, the aforesaid fact clearly goes to show that defendant nos. 1 and 2 have violated the terms and conditions of the Will in question. Learned counsel for the plaintiff further pleaded that the contents of the Will go to show that the testator wanted to protect the interest of some persons and that was the reason, he put the clause in the Will that the legatee would not alienate the property within 40 years of his death. He, further, submitted that no doubt, probate was granted in favour of



defendant nos. 1 and 2 but defendant nos. 1 and 2 were bound to accept the whole Will as provided in section 122 of the Indian Succession Act, 1925 which says that where a bequest imposes an obligation on the legatee, he can take nothing by it unless he accepts it fully. He, further, submitted that in view of section 122 of the Indian Succession Act, 1925, defendant nos. 1 and 2 were bound to accept the Will in question fully but admittedly, they have violated the condition of the Will and, therefore, they have no right to inherit the property of the testator on the basis of Will dated 3.1.1983 rather inheritance of the testator shall be decided under the provision of the Hindu Succession Act as the testator shall be deemed to have died intestate and admittedly, plaintiff and defendant no. 5 are legal heirs of the testator and, therefore, they have inherited the property of the testator.

13. He, further, submitted that according to section 88 of the Indian Succession Act, 1925, where two clauses of gifts in a Will are irreconcilable so that they can not possibly stand together, the last shall prevail. He, further, submitted that the testator in Will dated 3.1.1983 made a provision that legatee will not alienate the



property within 40 years of his death and the aforesaid restriction was last desire of the testator and, therefore, the aforesaid last desire of the testator shall prevail over previous clause of the Will as per section 88 of the Indian Succession Act, 1925. He, further, submitted that for proper construction of a Will, intention of the testator is paramount and in the present case, intention of the testator was that the property should not be transferred within 40 years of his death. Learned counsel for the plaintiff relied upon decision of **Purnendu Nath Tagore vs Administrator General of West Bengal & others reported in AIR 1954 SC 41**. He, further, submitted that the learned court below wrongly, applied section 11 of the Transfer of Property Act in the present case because provisions of the Indian Succession Act, 1925 are applicable in the present case and the present case shall govern by section 88 of the Indian Succession Act, 1925. He, further, submitted that the learned trial court made out a third case which is not permissible in the eye of law.

14. On the contrary, learned counsel for defendant nos. 1 and 2 supported the impugned judgment and decree arguing that the suit of the plaintiff was hit by



section 34 of the Specific Relief Act as there was no relief for recovery of possession. He, further, submitted that admittedly, after getting order of probate, defendant nos. 1 and 2 came in possession of the suit property and it is also an admitted position that the plaintiff has not prayed for recovery of possession and, therefore, the suit is hit by section 34 of the Specific Relief Act. He, further, submitted that no doubt, plaintiff filed petition under Order 6 rule 17 of the CPC seeking relief of recovery of possession but his prayer was rejected upto this court and, therefore, it is obvious that there is no relief for recovery of possession and the suit of the plaintiff is hit by section 34 of the Specific Relief Act. In support of his contention, he referred decision reported in (1996) I Supreme Court Cases 90. He also referred decision reported in 2014 Supreme court cases (14) 502.

15. He, further, submitted that so called restriction in Will dated 3.1.1983 was not a pre-condition for vesting of the property rather the intention of the testator was to bequeath his property absolutely to defendant nos. 1 and 2 and there was no restriction of vesting of the property into defendant nos. 1 and 2. He,



further, submitted that defendant nos. 1 and 2 became absolute owner after vesting of the property and they had every right to alienate the aforesaid property though there was a clause of non-alienation of the property in the Will. He, further, submitted that the aforesaid restriction in the Will has no force in view of section 11 of the Transfer of Property Act as well as section 138 of the Indian Succession Act, 1925. He, further, submitted that condition of restraining alienation of the property was repugnant to the interest created in such property and, therefore, restriction on alienation of the property was ignorable. In support of his contention, he referred decision reported in AIR 2010 Madras 34, AIR 1992 Delhi page 134. He also referred AIR 1952 Delhi 134 in which it has been held by the Hon'ble Apex Court that in construing a Will court has to read and keep in mind the whole of the document and then determine as to what was the dominate intention of the testator and give effect to the same accordingly. In the aforesaid decision, it has further been held by the Hon'ble Delhi High Court that once the court is satisfied that the testator wanted to give his entire property to named legatee, then also,



subsequent restriction would be void as being repugnant to pre-dominate intention of passing entire estate to the heir.

16. Learned counsel for defendant nos. 1 and 2 further, submitted that in construing the document fundamental rule is to ascertain the intention from the word used as well as surrounding circumstances. He, further, submitted that in the present case, admittedly, plaintiff is full brother of the testator whereas defendant nos. 1 and 2 are step nephews of the testator but even then the testator did not bequeath his estate to the plaintiff and bequeathed his entire estate to defendant nos. 1 and 2 and, therefore, the aforesaid circumstance clearly goes to show that the testator never wanted to give his estate to the plaintiff. Learned counsel relied upon decision reported in AIR (88) 1951 SC 139. He also relied upon decisions reported in AIR 1958 Andhra Pradesh 447, AIR 1929 (Privy council) 283, (2007) 7 Supreme court cases 183, AIR 1954 SC 41, AIR 1940 PC 70, AIR 1986 Punjab and Haryana 350 as well as AIR 2016 SC 5242.

17. Learned counsel for defendant no.3 adopted the arguments advanced on behalf of the defendant nos. 1



and 2 whereas defendant no.5 adopted the arguments advanced on behalf of the plaintiff.

18. Having heard the rival contentions of the parties, I went through the record along with lower court record.

19. It is admitted position that the testator late Rai Bageshwari Nath Sahay executed Will dated 3.1.1983 in favour of defendant nos. 1 and 2 in respect of disputed property. It is further admitted position that probate was granted in favour of defendant nos. 1 and 2. Furthermore, it is admitted position that defendant nos. 1 and 2 are step nephews of the testator whereas plaintiff is full brother of the testator. It is further admitted position that defendant nos. 1 and 2 entered into a development agreement with defendant no.3 in respect of disputed property.

20. The main controversy between the parties is in respect of nature of Will dated 3.1.1983. According to the plaintiff Will dated 3.1.1983 is a conditional and defendant nos. 1 and 2 violated the condition of the Will and, therefore, suit property reversed to the legal heirs of the testator.

21. On the other hand, defendant nos. 1 and 2



claimed that Will dated 3.1.1983 is not a conditional Will and, as a matter of fact, recital of the Will dated 3.1.1983 goes to show that property in Will was vested in defendant nos. 1 and 2 and so far as subsequent condition mentioned in the Will is concerned, the same is only expectation of the testator.

22. First of all, I would like to refer relevant portion of Will dated 3.1.1983 (exhibit 4) which runs as follows:-

“UPROKT JAIDAD KHANA SANKHIYA PANCH BASIKA HAJA ME MUNDARJE HAI UN SABKA PURA HAKDAR AUR MALIK MUSTAKAMA LEKHADHARI KE SWARGBASH KARNE KE BAD LEKHADHARIGAN JO POTEKAN LEKHADHARI KO HAI HOGA WO RAHE GA”

Further the recital of Will says as follows:-

“WO WAJE RAHE KI JAB TAK LEKHADHARI JINDA RAHEGA TAB TAK LEKHADHARI SABIT DASTUR SATH JUMLEY ISKTAHKAH MALIK MUTABLIK BAKABAJ WO DAKHAL LEKHADHARI KA RAHEGA WO JAB LEKHADHARI SWARGBASH KAR JAYEGA TO



LEKHADHARIGAN MAUSFIN LEKHADHARI SJ
DAH SANSKAR WO KA SARADH YATHA SHAKTI
KARAYANGE”.

23. In the last but one paragraph of the aforesaid
Will it has been mentioned as follows:-

“WO WAJE RAHE KI LEKHADHARIGAN
UPROKT MAKAN WO JAMIN MUNDARJE KHANA
SANKHYA 5 WASIK HAJA KO LEKHADHARI KE
SWARGWASH KI TITHI SE CHALIS BARSH KE
ANDER KISI PARAKAR KA KOI WASIKA
LEKHADHARIGAN KO TAHRIR WO TAMIL
KARNEY KA HAK NAHI HOGA”.

24. From perusal of the recital of the Will, it is
apparent that the intention of the testator was to give his
entire estate to defendant nos. 1 and 2 and he did not
impose any condition in vesting his estate into defendant
nos. 1 and 2. It is also apparent from the aforesaid Will
that the testator had no intention to give his estate to the
plaintiff and that is the reason he had mentioned in his
Will that after his death, his estate shall be absolutely
vested in defendant nos. 1 and 2 and no one will have
right to interfere into title and possession of defendant



nos. 1 and 2. It is pertinent to note here that plaintiff is full brother whereas defendant nos. 1 and 2 are step nephews of the testator but even then the testator had no intention to give his property to the plaintiff and, therefore, the aforesaid circumstance clearly speaks that the testator never wanted to give his property to his full brother as well as his sister.

25. No doubt, testator mentioned in the Will that defendant nos. 1 and 2 shall not execute any deed in respect of gifted property within 40 years of his death but, in my view, the learned court below rightly held that the aforesaid restriction was repugnant to the earlier intention of the testator and the aforesaid restriction was not pre-condition of vesting of the estate in defendant nos. 1 and 2 and, therefore, even if defendant nos. 1 and 2 executed development agreement in favour of defendant no.3, then also, it can not be said that they got debarred themselves from inheriting the property of the testator because property of the testator had already been vested in defendant nos. 1 and 2 and the said restriction was repugnant to the main intention.

26. Moreover, section 138 of the Indian



Succession Act, 1925 says that where a fund is bequeathed absolutely to or for the benefit of any person, but the Will contains a direction that it shall be applied or enjoyed in a particular manner, the legatee shall be entitled to receive the fund as if the Will had contained no such direction. Now, it has already been set at rest in several decisions of the Hon'ble Apex Court that the word "fund" used in section 138 of the Indian Succession Act is not denote only moveable property but also immovable property and apart from this, section 11 of the Transfer of the Property Act also prohibits imposition of any restriction in respect of enjoyment of the property, if absolute interest is created in the aforesaid property. Moreover, after perusing the recital of the Will (exhibit 4), I find that the property of the testator was absolutely vested in defendant nos. 1 and 2 after death of the testator and the restriction mentioned in the Will is repugnant to the intention of the testator.

27. It has been argued on behalf of the plaintiff that sections 88 and 122 of the Indian Succession Act, 1925 are applicable in this case and according to section 88 of the Indian Succession Act, 1925, if two



clauses of a Will are irreconcilable, last shall prevail but in my view, section 88 of the aforesaid Act is not applicable in the present case because in the present case, there are no irreconcilable clause and the Will (exhibit 4) is very clear and there is no ambiguity in the Will.

28. So far as section 122 of the Indian Succession Act is concerned, the same is also not applicable in the present case because in the preset case, there was no restriction regarding vesting of the property and section 122 of the Indian Succession Act applies in the case in which an obligation is imposed before vesting of the property. Therefore, I do not find any substance in the above stated contentions of learned counsel of the plaintiff.

29. It is admitted position that the plaintiff did not seek relief of recovery of disputed property and during the pendency of the suit, he prayed for amendment for adding relief for recovery of the suit property but his prayer was rejected upto this court and, therefore, it is obvious that presently, there is no relief for recovery of possession of the suit property.

30. No doubt, appellate court may take notice of



any error, defect, irregularity in any order affecting the decision of the case but in the present case, neither there is any error nor defect or irregularity in rejecting the amendment petition of the plaintiff and, therefore, in my view, plaintiff can not take help of section 105 of the CPC.

31. On the basis of above discussions, I do not find any irregularity or illegality into the impugned judgment and there is no need to interfere into the impugned judgment. Accordingly, this appeal stands dismissed and the impugned judgment is, hereby, confirmed.

Shahid

(Hemant Kumar Srivastava, J)

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