

IN THE HIGH COURT OF JHARKHAND AT RANCHI
F.A. No.204 of 2016

Balmukund Sharma @ Mukund Sharma, Son of Late Badri Prasad Sharma, Resident of Plot No.353, Co-operative Housing Construction Society, B.S. City, P.O. & P.S.- B.S. City, District-Bokaro
 Appellant

Versus

1. Kanchan Sharma, Wife of Deepak Kumar Bhargava, Daughter of Late Badri Prasad Sharma, Resident of Shivpuri Colony, Chas, P.O. & P.S. Chas, District- Bokaro.
2. Kamini Sharma, Wife of Sri Bipin Singh, Daughter of Late Badri Prasad Sharma, Resident of Qr. No.69, Sector-3/D, B.S. City, P.O. & P.S.- B.S. City, District-Bokaro
3. Kumud Sharma, Wife of Sri M.M. Sharma, Daughter of Late Badri Prasad Sharma, Resident of Ganpati Apartment, Saraidhela, P.O. & P.S. Saraidhela, District-Dhanbad
 Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KUMAR CHOUDHARY

For the Appellant : Mr. Praveen Akhouri, Advocate
 For the Respondents : Mr. Pandey Neeraj Rai, Advocate

Order No.10 Dated- 25.06.2020
I.A. No.10297 of 2019

1. Heard the parties through video conferencing.
2. It is submitted by the learned counsel for the appellant-petitioner that this interlocutory application has been filed to stay the further proceedings of the instant appeal till the final decision is made by the Principal District Judge, Bokaro in Letters of Administration Suit No.9 of 2019.
3. It is submitted by the learned counsel for the appellant-petitioner that in the preliminary decree passed in Title (Partition) Suit No.69 of 2010 of the Court of Civil Judge (Senior Division-I), Bokaro, the plaintiff-respondent no.1 has been held to be entitled to get 1/4 th share of the schedule property of the suit. It is further submitted by the learned counsel for the appellant-petitioner, that it is the case of the appellant-petitioner who was the defendant no.1 in the court below that he has

acquired the suit property on the basis of the Will executed by his father. It is then submitted that petitioner-appellant is the brother of the respondent no.1 and their father, undisputedly is the common ancestor of both of them as well as two of their sisters being the respondent no. 2 and 3. It is next submitted by the learned counsel for the appellant-petitioner that the appellant-petitioner has filed an application under Section 276 of the Indian Succession Act in the court of Principal District Judge, Bokaro for grant of Letters of Administration with respect to the said Will dated 19.06.2010, executed by his father, being the legatee of the said Will and the outcome of the decision of the said Letters of Administration case shall have direct bearing on the instant appeal and shall materially affect the judgment and decree. Mr. Praveen Akhouri, learned counsel for the appellant-petitioner relied upon the judgment of Hon'ble Supreme Court of India in the case of **Binapani Kar Chowdhury vs. Sri Satyabrata Basu & Anr.** reported in **AIR 2006 SC 2263** paragraph no.8 of which reads as under:-

"8. Therefore, with a view to do complete justice between the parties, it is appropriate to direct the trial court (Civil Judge, Senior Division, Alipore), where T.S. No. 10/1995 is pending, to proceed to hear arguments and deliver judgment in the suit. Nothing further will be required, if the suit is to be dismissed. But if the suit is to be decreed, the trial court should make it clear that the judgment and decree will come into effect only on the first respondent obtaining and producing the probate of the will, and till then the decree should be considered only as provisional and not to be given effect. We dispose of this appeal accordingly making it clear that nothing stated above is an expression of any opinion on merits of the case."

Mr. Praveen Akhouri, learned counsel for the appellant-petitioner also relied upon the judgment of Hon'ble Supreme Court of India in the case of **Crystal Developers vs. Smt. Asha Lata Ghosh (Dead) (Through L.Rs.) and allied cases** reported in **AIR 2004 SC 4980**, paragraph no.17 of which reads as under:-

“17. Mr. Mukul Rohtagi, learned senior counsel for plaintiffs Nos. 1 and 4 and defendant No. 4; Mr. Dhruv Mehta, learned counsel for plaintiffs No. 5 and 6; and Mr. R.K. Shukla, learned senior counsel appearing on behalf of the heir of plaintiff No. 2 submitted that defendants Nos. 14 to 20 were not entitled to rely upon the probate or the Will in support of their case in view of the concession made by their counsel before the Division Bench of the High Court. In this connection, it may be mentioned that when the appeal came for final hearing before the High Court, the learned Judges enquired whether defendants Nos. 14 to 20 would like to await the decision on the validity of the Will from the Probate Court to which the defendants Nos. 14 to 20 responded by stating that they would like to proceed with the matter as they were in possession having title to the suit premises. Learned counsel for the plaintiffs, therefore, submitted that defendants No. 14 to 20 cannot rely on the probate or the Will under the aforesaid circumstances.”

Mr. Praveen Akhouri, learned counsel for the appellant-petitioner also relied upon the judgment of Hon'ble Supreme Court of India in the case of **Nirmala Devi vs. Arun Kumar Gupta And Others** reported in **(2005) 12 SCC 505**, paragraph no.4 of which reads as under:-

“4. It has been brought to our notice that settlement is not possible at this stage. Therefore, now remains the question whether the probate proceedings could be clubbed with the suit. Learned counsel for the Respondent 1 submitted that the civil suit is of the year 1987 and that despite various orders of the High Court, it has remained pending and the probate proceedings are initiated by the appellant in 1997 regarding the Will of 1984. Be that as it may, the decision in the probate proceedings on the question of proof of the Will will have a direct impact on the suit. Only on this short ground and without expressing any opinion on the merits of the controversy between the parties, we request the learned

District Judge, Gopalganj to make it convenient to dispose of the probate proceedings being Probate Case No. 11 of 1997 along with civil suit being TS No. 27 of 1987 filed by Respondent 1 at his earliest convenience and preferably within a period of six months from the date of receipt of a copy of this order at its end. The aforesaid TS No. 27 of 1987 pending in the court of eight Sub-Judge, Gopalganj shall therefore, stand transferred to the Court of District Judge, Gopalganj and be clubbed with Probate Case No. 11 of 1997 which is pending in the Court of District Judge, Gopalganj for being tried together. The appeal is accordingly disposed of. No costs."

and submitted that it being a settled principle of law that the decision in the probate proceeding on the question of the proof of the Will will have direct impact on the suit hence, it is submitted that the further proceeding of the instant appeal be stayed.

4. Mr. Pandey Neeraj Rai, learned counsel for the respondents on the other hand vehemently opposes the prayer for staying the further proceeding of this appeal. It is further submitted by the learned counsel for the respondents that the Judgment of Hon'ble Supreme Court in the case of **Binapani Kar Chowdhury vs. Satyabrata Basu & Anr. (supra)** was passed by the Hon'ble Supreme Court of India to do complete justice in exercise of its jurisdiction under Article 142 of the Constitution of India and the said power cannot be placed as a precedent before this court in exercise of its jurisdiction, in this interlocutory application. It is next submitted by Mr. Pandey Neeraj Rai, learned counsel for the respondents that the appellant-petitioner is not diligent, which is evident from the fact that though he filed an interlocutory application being I.A. No.11316 of 2018 in this appeal, for staying the further proceeding in execution of the impugned judgment and decree pending before the learned Civil Court (Senior Division-I), Bokaro but sensing that there is no merit in the said petition, he sought permission for withdrawal of the said Interlocutory Application No.11316 of 2018 with a liberty to file fresh and appropriate application and accordingly, vide order dated 28.08.2019, the said

interlocutory application stood dismissed as withdrawn. It is next submitted by Mr. Pandey Neeraj Rai, learned counsel for the respondents that though undisputedly the father of the appellant died on 10.09.2010 and the appellant claims that the said Will was executed by his father on 19.06.2010 and this appeal was filed on 09.11.2016 yet the said application for grant of Letters of Administration was not filed by the appellant-petitioner any date prior to 13.09.2019 and the appellant also did not file any copy of the alleged 'Will' executed by his father on 19.06.2010, during the trial of the suit. It is next submitted by Mr. Pandey Neeraj Rai, learned counsel for the respondents that the real intention of the appellant-petitioner is to get relief of stay of execution of the decree by backdoor which they cannot get by front door, as they were left with no option but to withdraw the Interlocutory Application No.11316 of 2018 and to deprive the respondents the fruits of the decree by hook or crook. Hence, it is submitted that this petition being without any merit be dismissed and the appeal be heard on its merit.

5. Having heard the submissions made at the Bar and after perusal of the record, it is crystal clear that there is no material in the record to suggest that the final decree has been prepared as yet, after the preliminary decree which is being impugned in this appeal, was passed by the court below. Mr. Praveen Akhouri, learned counsel for the appellant-petitioner during the course of hearing submitted that the final decree is yet to be drawn up. As far as the judgment of the Supreme Court in the case of **Binapani Kar Chowdhury vs. Satyabrata Basu & Anr.** (*supra*) is concerned, in that case the Hon'ble Supreme Court did not stay the proceeding of the suit but made an observation, to do the complete justice between the parties, that a decree if passed will not be given effect to till disposal of the probate proceeding. In this case, as admitted by the learned counsel for the appellant-petitioner, that the final decree is yet to be prepared, so under such circumstances, as the learned counsel for the respondents is vehemently opposing to the prayer for stay of this appeal and only the judgment and decree passed in the preliminary decree is under challenged in this appeal, hence, this Court is of the considered

view that there is no justification for staying the further proceedings of this instant appeal indefinitely. Accordingly, this petition being without any merit is dismissed.

(Anil Kumar Choudhary, J.)

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List this first appeal under the heading 'For Hearing' one week after the lockdown period is over.

(Anil Kumar Choudhary, J.)

Sonu-Gunjan/- A.F.R.