

(2013) 03 BOM CK 0259

Bombay High Court

Case No: Writ Petition No. 7867 of 2012

Chandrashekhhar Kashinath
Patange

APPELLANT

Vs

Ramesh Kashinath Patange and
Others

RESPONDENT

Date of Decision: March 19, 2013

Citation: (2013) 5 ABR 27 : (2013) 3 ALLMR 547 : (2013) 5 BomCR 340 : (2013) 3 MhLj 669

Hon'ble Judges: R.M. Savant, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

@JUDGMENTTAG-ORDER

R.M. Savant, J.

Rule with the consent of the learned counsel for the parties made returnable forthwith and heard. The above Petition takes exception to the order dated 6/7/2012 passed by the learned Judge, City Civil Court, Greater Bombay by which order the Notice of Motion No. 1305 of 2011 in SC Suit No. 2123 of 2008 came to be rejected.

2. By the said Notice of Motion No. 1305 of 2011, the Petitioner herein had sought the stay of the suit filed by the Respondent No. 1 herein being SC Suit No. 2123 of 2008 till the probate proceeding being Testamentary Suit No. 33 of 2010 filed by the Petitioner herein is decided.

3. The suit in question has been filed by the Respondent No. 1 for an injunction restraining the Defendant No. 1 from objecting, obstructing, or interfering with the Plaintiff from managing the affairs of the suit property i.e. plot of land admeasuring 555.18 sq.meters bearing CS No. 101/74 of Suparibaug Estage, Plot No. 131 of Parel Sewree Division along with a building known as Shanti Niketan thereon at Parmar Guruji Cross Road (Opposite Nare Park), Parel Mumbai - 4000 012. An injunction is also sought to the effect that the Defendant be restrained by a permanent order of

injunction from disturbing, obstructing and/or interfering with the Plaintiff's possession in respect of the suit premises i.e. Flat No. B-2, measuring about 672 sq. feet carpet area, situate on the ground floor of the suit building Shanti Niketan at Parmar Gururji Cross Road (Opposite Nare Park) Parel, Mumbai. In the suit in Paragraph 5 it has been averred that vide Indenture dated 26/09/1963 entered into between Mr. Charandas Meghji Mathuradas, Mr. Dwarkadas Meghji Mathuradas, Mrs. Javerbai Madhavji, Mr. Karsandas Madhavji, Mr. Dwarkadas Mulji and Mr. Dinesh Meghji Mathurdas on the one side, and the Plaintiff's father Mr. Kashinath D. Patange and the Plaintiff's mother Mrs. Shantabai K. Patange on the other side, the said Charandas Meghji Mathurdas and ors sold, transferred and assigned the suit property in favour of the Plaintiff's father and mother for consideration and upon the terms and conditions as mentioned in the deed of assignment. The said averments in Paragraph 5 of the plaint have not been denied by the Petitioner but in Paragraph 6 of his written statement he has stated that the said statement is substantially true.

4. The father of the Plaintiffs i.e. Kashinath Patange expired on 25/2/1986. The Petitioner herein who is the Defendant to the suit in question applied for probate of the Will which has been allegedly executed by the father in favour of the Defendant No. 1 and his sister thereby bequeathing the suit property to the Petitioner and his sister. To the said probate proceedings, it appears that the Respondent No. 1 and his mother have given their consent. However, the Respondent No. 2 herein who is the step brother of the Petitioner and the Respondent No. 1 filed a caveat in the said probate proceedings as a consequence of which the probate proceedings were converted into the Testamentary Suit No. 33 of 2010. The instant suit being SC Suit No. 2123 of 2009 has been filed prior to filing of the caveat by the Respondent No. 2 herein.

5. The Petitioner i.e. the Defendant No. 1 to the suit in question, in view of the probate proceedings being pending, filed the instant Notice of Motion No. 1305 of 2011 for stay of the suit filed by the Respondent No. 1. The said Notice of Motion was founded on the fact that since in the probate proceedings the rights of the Plaintiff as also the Defendant No. 1 in respect of the suit property would be adjudicated, that the hearing of the suit being SC Suit No. 2123 of 2009 be stayed till the hearing of the Probate Petition No. 472 of 1989.

6. In the said Notice of Motion the Respondent No. 1 herein filed his reply and in the said reply it has been contended that since the suit property, admittedly, belonged jointly to the Plaintiff's father Mr. Kashinath Patange and the Plaintiff's mother Smt. Shantabai Patange, they were each entitled to 50% share therein and since the Plaintiff's mother died in-testate and as such the Plaintiff is entitled to his share in the suit property being the heir and legal representative of his mother.

7. The said Notice of Motion was heard by the learned Judge of the City Civil Court who has by the impugned order dated 6/7/2012 has rejected the same. The

rejection of the said Notice of Motion, as can be seen from the impugned order, is on the ground that the scope of the probate proceedings is as regards the genuineness and validity of the Will and the question of title which the Plaintiff is raising in the said suit as regards his claim in the 50% share of his mother cannot be gone into. The Trial Court has further gone on to state that merely because the Plaintiff has given consent to the Defendant No. 1 for grant of probate in the year 1989, the same would not preclude the Plaintiff to pursue the legal remedy in respect of his right to the property of his parents. The Trial Court therefore did not deem it fit to stay the suit in question and resultantly dismissed the Notice of Motion by the impugned order dated 6/7/2012.

8. Heard the learned counsel for the parties. The learned counsel appearing for the Petitioner/Defendant No. 1 Shri Jaywant would reiterate the case of the Petitioner before the Trial Court viz. that it would be in the said probate proceedings that the rights of the parties would be crystallized. The learned counsel would contend that since the Plaintiff is claiming an injunction in the suit, and if the suit is allowed to be proceeded with during the currency of the probate proceedings, the possibility of conflicting orders being passed by the two different Courts cannot be ruled out, and therefore the suit which is filed later in point of time should be stayed.

9. Per contra, the learned counsel appearing for the Respondent No. 1/original Plaintiff Shri Pawar would contend that the scope of the two proceedings viz the Petition for probate and the suit in question being different, there is no warrant to stay the suit in question. The learned counsel for the Respondent No. 1 by drawing my attention to Paragraph 5 of the reply filed to the Notice of Motion would contend that it is the Plaintiff's case that he would be entitled to 50% share in the share of his mother as the suit property was jointly purchased by his father and mother. The learned counsel would contend that the issue of title which the Plaintiff claims in the 50% share of his mother cannot be gone into by the probate court as the jurisdiction of the probate court is restricted to the legality and validity of the Will.

10. Having heard the learned counsel for the parties I have bestowed my anxious consideration to the rival contentions. The relief in the Notice of Motion is referable to Section 10 of the Code of Civil Procedure. Under the said provision the Court is ceased with the power to stay the trial of any suit in which the matter in issue is also directly and substantially in issue in previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title. It is in the said context that the reliefs sought vide the Notice of Motion would have to be considered.

11. The suit in question as can be seen has been filed by the Plaintiff for seeking injunction against the Defendant No. 1 i.e. the Petitioner herein from interfering with his rights in respect of the suit property and also for the injunction restraining the Defendant No. 1 from interfering with his possession. In so far as the first relief is concerned, the Plaintiff is seeking the said relief undoubtedly on the basis of he

being the heir of the original owners i.e. his parents. In the teeth of the averments made in the plaint and the reply in the written statement filed by the Petitioner herein i.e. the Defendant No. 1 the fact that the suit property was jointly purchased by the mother and father of the Plaintiff cannot be disputed. Therefore, the right which the Plaintiff claims in the suit property as now referred to in Paragraph 5 of the affidavit in reply filed to the Notice of Motion can be said to be a right in respect of the share which he claims in the 50% share of his mother in the suit property.

12. Now coming to the proceedings for probate, the Petitioner i.e. the Defendant No. 1 in the suit claims that by the Will executed by his father, the suit property has been bequeathed to him and his sister. Therefore in so far as the said probate proceedings are concerned, the issue would be as regards the legality and validity of the Will in question. The extent of the bequeath that could have been made by the father of the Petitioner also cannot be gone into the probate proceedings. The Plaintiff in the suit claims the relief on the basis of his right which he claims in the 50% share of his mother in the suit property. The Plaintiff therefore virtually claims title to the property to the extent of 50% of the share of his mother. Obviously in the probate proceedings the said aspect cannot be gone into. The question therefore would be whether the scope of the two proceedings are running parallel or are different. The answer is obviously in the negative as in the suit the issue is about the Plaintiff's right to claim a share in the 50% share of his mother. In the suit therefore that right would have to be adjudicated. The scope of the suit is therefore distinct from the scope of the probate proceedings. The probate proceedings would be the entitlement of the Petitioner to the probate of the Will of his father where the issue would be as regards the legality and validity of the Will. In view thereof the conditions which are mentioned in Section 10 of the CPC cannot be said to have been satisfied. In my view, therefore, the Trial Court has rightly come to a conclusion that the suit need not be stayed as the scope of the two proceedings are distinct and different. Undoubtedly the Petitioner herein i.e. the Defendant would be entitled to raise such defences as are available to him in the suit and it is for the Trial Court to consider whether the reliefs which have been sought by the Plaintiff in the suit can be granted. However, the suit cannot be stayed on the ground that the probate proceedings filed by the Petitioner herein are pending. In my view, therefore, the order passed by the Trial Court cannot be faulted with. There is no failure on the part of the Trial Court to exercise jurisdiction. No interference is therefore called for in the writ jurisdiction of this Court. The above Writ Petition is accordingly dismissed. Rule discharged with no order as to costs. All interim orders stand vacated.