Mahmadbhai Peerbhai Vs Bai Havabai

Court: Bombay High Court

Date of Decision: Nov. 20, 1923

Citation: AIR 1924 Bom 507 : (1924) 26 BOMLR 145

Hon'ble Judges: Norman Macleod, J; Crump, J

Bench: Division Bench

Judgement

Norman Macleod, C.J.
The original applicants in this case were the widow and three daughters of One Haji Nabi, who died in or about

the month of October 1922 at his residence, within the jurisdiction of the District Court of Broach. The application purported to be made under

Act XIX of 1841. It stated that deceased had died leaving a considerable amount of property, that opponent No. 1, who was the nephew of the

deceased, together with two daughters by a previous wife of the deceased residing with him, had taken into possession all the property of the

deceased with the intention of appropriating it to himself, and prayed that an inventory of the estate and effects of the deceased Haji Nabi Miyaji

should be made and some officer of the Court appointed as curator of the property belonging to the deceased. It is true that the applicants prayed

for any other relief that might be deemed fit and proper to be granted. But that prayer can only be read in conjunction with the main prayer for the

relief which was for the appointment of a curator and the taking of an inventory.

2. On that application an order for inventory was made after hearing opponent No. 1 on December 18, 1922. On September 6, 1923, an order

was made by the District Judge at the applicants" request which runs as follows:--

Whereas on the application of Bai Havabai widow of Nabi Miyaji danger is apprehended that before the summary suit can be determined there is

danger of waste or misappropriation of the property by the opponent No. 1, Mahomed-bhai Pirbhai, who is alleged to have taken all the property,

and though his pleader has made various promises which he has never carried out, I order that the said Mahomedbhai do furnish security to the

extent of two lakhs within three days or a Curator will be appointed. This embodies the oral order issued by the Court on Thursday 30th August

1923.

3. Against this order the original opponent No. 1 has applied to us in revision. It has been contended that the District Judge hart no jurisdiction

under the Act to make the order, on the ground that the opponent No. 1 was an heir of the deceased, and was entitled to be in possession of the

whole, until the question had been decided how the estate should be distributed. There might have been some weight in that argument had it not

been that the first opponent had claimed a half share of the property as belonging to himself during the lifetime of the deceased. He was, therefore,

setting up a claim to at least half the property against the heirs.

4. But the real objection to the order of the District Judge is that no summary suit has been filed as contemplated by the Act. The Act is really out

of date, and there is no necessity whatever for parties claiming the estate of a deceased person to have recourse to it. The relief which is properly

open to them is to file an administration suit, and apply for the appointment of a receiver, in which case the question will be, who should be given

possession until the dispute between the parties has been decided in the suit. Then the Court can by an interlocutory order either appoint a receiver

and so take the property into its own possession, or it can allow any of the disputing parties to have possession on such terms as it may think fit.

5. Now the scheme of Act XIX of 1841 seems to us to be as follows. First a person must have died possesssed of moveable and Immovable

property, and the same must have been taken or alleged to have been taken upon some pretended claim of right by gift or succession. Then the

Act contemplates that it shall be open to any persons claiming a right by succession to the property of the deceased, to make application to the

Judge of the Court of the district where any part of the property is found or situate for relief, and that application for relief must clearly take the

nature of a plaint in a summary suit.

6. Then Section 3 states what should be done after a party has applied to a Court for relief. The Judge to whom such application shall be made

shall, in the first place, enquire by the solemn declaration of the complainant, and by witnesses and document at his discretion, whether there be

strong reasons for believing that the party in possession or taking forcible means for seizing possession has no lawful title, and that the applicant, or

the person on whose behalf he applies, is really entitled and is likely to be materially prejudiced if left to the ordinary remedy of a regular suit, and

that the application is made bona fide.

7. u/s 4, the Judge if he is satisfied of the existence of such strong ground for belief, but not otherwise, shall cite the party complained of, and give

notice of vacant or disturbed possession by publication, and after the expiration of a reasonable time shall determine summarily the right to

possession (subject to a regular suit as thereinafter mentioned), and shall deliver possession accordingly. Then the section goes on to give the Judge

interlocutory powers pending the summary determination of the right to possession, to appoint an officer who shall take an inventory of the effects,

whether he shall have concluded the enquiry necessary for citing a party complained of or not.

8. u/s 5 the Judge can appoint one or more curators whoso authority shall in no case continue beyond the determination of the summary suit, and

u/s 6 the Judge can authorize the curator to take possession of the property generally, or until security be given by the party in possession, or until

inventories of the property shall have been made, or for any other purpose necessary for securing the property from misappropriation or waste by

the party in possession, provided always that it shall be entirely discretionary with the Judge whether he shall allow the party in possession to

continue in such possession on giving security or not.

9. So that the whole of these proceedings are interlocutory depending upon the filing of an application for relief asking the Court to determine who

has the right to possession pending the final determination of the rights of the parties in a regular suit.

10. There has been in this case no application to the Court for the primary relief which it was intended by the Act the Court should give to a person

claiming a right to the estate of a deceased person. The whole of this proceeding, which is of an interlocutory nature, is misconceived, because

assuming that this order made by the District Judge directing opponent No. 1 to give security were confirmed, there is nothing further for the Court

to do.

11. There is no application or pleading on which a further order could be made. It is perfectly clear that interlocutory proceedings cannot be filed

until the plaint or proceeding on which they depend has first been placed on record. So that, therefore, in our opinion the learned Judge has

misconceived the nature of these proceedings, and had no jurisdiction to make the order in the case. We think, considering the wide powers that

are now given to the Courts to make interlocutory orders in regular suits, that an application for relief under the Act should not be entertained,

because u/s 3 the Judge has to be satisfied that the applicant is really entitled to the property, and is likely to be materially prejudiced if left to the

ordinary remedy of a regular suit. Now it cannot be said that any person in such a position is likely to be materially prejudiced if he is told to tile a

regular suit, because if he proceeds with ordinary diligence, he can ask for relief of an interlocutory nature in that suit.

12. The rule is made absolute and the order of the lower Court set aside. There will be no order as to costs.