
(2005) 06 BOM CK 0092

In the Bombay High Court

Case No : Notice of Motion No. 3298 of 2003 in Testamentary Petition No. 598 of 1990

Bhaktawar Lentin and Others

APPELLANT

Vs

Mrs. Lyla Darius Jehangir and Others

RESPONDENT

Date of Decision : 24-06-2005

Acts Referred:

Citation : (2005) 6 BomCR 822

Hon'ble Judges : S.U. Kamdar, J

Bench : Single Bench

Advocate : P.L. Bachani, instructed by I.R. Joshi, for the Appellant; Rekha Tawade, instructed by M.V. Kini and Co. for Respondent No. 3 and V.J. Shah, for the Respondent

Judgement

S.U. Kamdar, J.—The present Notice of Motion has been taken out by the applicant who is the legatee under the Last Will and Testament dt. 21.04.1989 of one Mr. Pilloo Ghaswalla. The petitioners in the present petition are the executors of the said will. The respondent No. 1 is the mother of the applicant. Respondent No. 2 is the aunt of the applicant and respondent No. 3 and 4 are joined as proper party namely the respective banks against whom certain directions are sought by the applicant.

2. By the present motion applicant is seeking direction from this court against respondent No. 3 to pay over to the applicant a sum of Rs.1,27,00,923.63 forming part of two Fixed Deposits lying with them and belonging to the deceased. The applicant is also seeking direction for sum of Rs. 15,50,000/- kept in Fixed Deposit with the said Bank of Baroda be paid over to her with accrued interest. Thus, by prayer (a) of the motion, aforesaid two sums are claimed by the applicant to be paid over to her with interest accrued thereon. It is an admitted position before me that out of the aforesaid 2 sums, an amount of Rs. 1,27,00,923.63 is already been encashed and the amount thereto is lying with the Court Receiver, High Court, Bombay who has intern invested the same and

thus, the direction against the bank is not necessary but the direction is sought for against Court Receiver in substitution of Bank of Baroda. In so far as prayer (b) of the motion is concerned, the learned Advocate for the applicant has not pressed the same. In so far as prayer (c) is concerned, directions are sought against Hongkong Bank to pay over to the applicant an amount lying in the credit of the Savings Bank A/c No. 002-1523346006. Prayer (d) of the motion is also not pressed as the same has been worked out. In so far as prayer (e) of the motion is concerned, same is pressed by the applicant and claimed that the jewellery and other articles of ornaments lying with the Court Receiver and belonging to estate of the deceased Piloo Ghaswala be handed over to the applicant as she is entitled to the same. Some of the material facts are briefly set out as under:

3. The deceased Piloo Ghaswalla left behind her Last Will and Testament dated 21.04.1989. Under the Last Will and Testament there were certain bequeaths which were given to the applicant who was minor at the relevant time and thus, till her attaining the age of majority respondent No. 1 was given the said bequeath to be held by her in trust till the time the applicant attains the age of majority. To the said last will and testament petitioners were the executors and trustees. There were serious disputes by and between the applicant and respondents herein and large number of proceedings are initiated between the parties. Even the petitioners executors has resigned and thereafter this court appointed Justice M.L. Dudhat (Retired Judge of this Court) as an Administrator of the estate. However, the said Justice M.L. Dudhat has already resigned and has addressed a letter to the applicant that he is not concerned with the estate of the said deceased. Of course, on the other hand respondent No. 1 has contended that Justice M.L. Dudhat continues to be the Administrator and without him being added as party to the present proceeding no relief should be granted to the applicant herein.

4. There were also disputes by and between the parties about the actual nature of bequeath and about true and correct interpretation of the various clauses of the will. In pursuance thereof, the respondent No. 1 preferred an Originating Summons being O.S. No. 309 of 2000 in Suit No. 686 of 2000 and O.S. No. 447 of 2003 in suit No. 738 of 2003. By the said Originating Summons, the issues as to the interpretation of the various clauses of the will were raised. The present Notice of Motion came up for hearing before the learned single Judge of this court but he by his order dt.29.4.04 dismissed the said Notice of Motion inter alia on the ground that the said motion cannot be decided because of the pendency of the said Originating Summons before this Court. An appeal was preferred against the said order dt. 29.4.04 passed in the present Notice of Motion being Appeal No. 82 of 2005. By an order and judgment dt.22.3.05 the Division Bench allowed the appeal and remanded the matter back for hearing afresh.

5. In the meantime both Originating Summons has been disposed of by my order and Judgment dt. 19.1.05. In view of my Judgment in O.S., the Division Bench

remanded the matter back to the Single Judge and directed hearing afresh. In pursuance of the said order of Division Bench dt.22.3.05 the present motion has been placed before me for hearing. The learned counsel for the applicant has submitted that in view of the interpretation of the will as held by this court by the judgment dt.19.1.05 in Originating Summons, the applicant has been held to be the beneficiary of the various assets of the said deceased which includes inter alia the assets in respect of which relief is sought by the applicant herein in the present Notice of Motion. It has been further contended that in the light thereof, the present Notice of Motion should be made absolute in so far as prayer (a) (c) and (e) are concerned. In so far as prayer (b) and (d) are concerned, the applicant does not press the same at this stage. The learned counsel for respondent No. 1 has inter alia contended that the present Notice of Motion is not maintainable. It has been contended that for the reliefs which are sought in the present Notice of Motion cannot be sought by way of Notice of Motion but substantive suit should be filed. Secondly, it has been contended that in any event the motion deserves to be dismissed because the Administrator appointed by this court Justice M.L. Dudhat (Retired Judge of this Court) has not been impleaded as party to the motion when in fact he is holding the estate of the said deceased as an administrator.

6. The third and the last contention advanced by the learned counsel for the respondent is that the present motion should not be heard till and until the appeal preferred against my order and judgment dt. 19.01.05 passed in Originating Summons No. 309 of 2000 and 447 of 2003 which has been admitted by the Division Bench is finally heard and disposed of.

7. Taking the last contention first, , I am of the opinion that the said contention cannot be accepted for two reasons. Firstly, it is true that an appeal is admitted and pending against my order dt. 19.01.05 passed in the aforesaid two Originating Summons. However, no stay has been granted by the Division Bench either of the hearing of the present Notice of Motion and / or stay of the operation of the Judgment delivered in the said aforesaid two Originating Summons. In absence of any stay, it cannot be contended that I should not hear the present Notice of Motion.

8. Secondly, in the present case apart from the fact that there is no stay on the contrary the Division Bench of this court has by its order dt. 22.03.2005 specifically directed that motion must be heard afresh because of the judgment being delivered in the aforesaid two Originating Summons. Obviously, therefore, the Division Bench was conscious of the fact that Motion will have to be heard in the light of the Judgment delivered by me in the aforesaid two originating summons. Thus, the contention of the learned counsel for the respondent that till the appeal is finally disposed of against my judgment in the aforesaid two Originating Summons, the present Notice of Motion should not be heard cannot be accepted and I reject the same.

9. Now turning to the remaining two contentions advanced by the learned

counsel for the respondent. I am of the opinion that both the aforesaid contentions has no merits. Firstly, the contention that the applicant should file suit and not the motion for the relief cannot be accepted because Fixed Deposits which were lying with the Bank of Baroda has already been encashed and the amount has already been deposited with the Court Receiver, High Court, Mumbai pursuant to earlier interim orders. In view of the fact that I have already held in my judgment in the aforesaid two Originating Summons that the applicant is entitled to the benefits of the said estate as a legatee and / or beneficiary under the last will and testament of the deceased which is already been probated, it is not possible for me to reject the relief sought for by the applicant and relegate the applicant to filing of the suit. In view thereof, I reject the aforesaid contention raised by the learned counsel for the respondent No. 1 herein.

10. In so far as the next contention raised by the learned counsel for the respondent No. 1 that Justice M.L. Dudhat, ought to be impleaded as party to the present Notice of Motion because he is appointed as Administrator of the estate of the deceased and in absence of he being impleaded as party to the present Notice of Motion, no relief can be granted in the motion in my opinion cannot be accepted. It is because Justice M.L. Dudhat has himself in his letter dt.8.3.99 have stated that he has resigned as Administrator and is no more in charge of the estate of the said deceased and thus, the question of impleading him as party to the present motion does not arise. Even otherwise, I am of the opinion that since no relief is sought against the Administrator in the present Notice of Motion, the said Administrator is not required to be impleaded as a party respondent to the present motion. It is because the Administrator has no interest in the estate of the deceased and has merely to follow the direction of the will. In an event if the directions are issued by the court for distribution of the estate in particular manner he is bound to follow the same. In view thereof, I am of the opinion that merely not impleading Justice Dudhat (Retired, Judge of this Court) who was appointed as an Administrator cannot result in dismissal of the present Notice of Motion. Thus, I do not find any substance in any of the contentions raised by the learned counsel for respondent No. 2 herein and I reject the same. In the aforesaid circumstances, I pass the following order:

a. Court Receiver is directed to hand over to the applicant an amount of Rs. 1,27,00,923.63 and Rs. 15,50,000/- by encashing the Fixed Deposits with the Bank of Baroda along with accrued interest thereon.

b. Court Receiver is also directed to hand over to the applicant, the Jewellery and other articles of ornaments lying with the Court Receiver, High Court, Bombay and belonging to the estate of the said deceased, Piloo Ghaswalla.

c. The Hongkong and Shanghai Banking Corporation Ltd. M.G. Road, Mumbai is directed to pay over to the Applicant the total amount lying credit to the savings bank account No. 002-1523346-006.

d. Respondent is directed to comply with the order within a period of 4 weeks

from today.

e. Motion is made absolute in terms aforestated. However, there shall be no order as to costs.

f. The learned counsel for the respondent No. 1 seeks stay of the Judgment. Stay rejected.