

(2012) 06 BOM CK 0111

In the Bombay High Court

Case No : Miscellaneous Petition No. 13 of 2011 in Suit (L) No 1161 of 2011

Chetan Haridas Parekh and Another

APPELLANT

Vs

Navnit Haridas Parekh and Others

RESPONDENT

Date of Decision : 25-06-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 32 Rule 15

Citation : (2013) 2 ALLMR 296 : (2012) 5 BomCR 879

Hon'ble Judges : Dalvi Roshan, J

Bench : Single Bench

Advocate : Rajani Iyer, sisted with N.C. Parekh instructed by Mansukhlal and Hirala and Co, for the Appellant; N.N. Vaishnawa a/w. Anil Chauhan instructed by . N.N. Vaishnawa, for Defendant Nos. 2 and 5, for the Respondent

Judgement

Dalvi Roshan (Mrs.), J.—The dispute is between siblings. This petition is filed for appointment of a guardian or next friend of respondent No. 1 to prosecute the suit and for not permitting him to withdraw the suit. There have been several litigations between the parties. One Harish Parekh, the father of the parties, died leaving behind essentially one flat in Matru Chhaya, Marine Drive, Mumbai 20. Respondent No. 1 lives there. His brother and three other sisters have been married and have settled elsewhere in India and abroad. His son is serving in Abudhabi, UAE. His daughter is married. He is 75 years of age. At the time of the death of the father all sibilings were minors except himself. The father died leaving behind his widow and five children including respondent No. 1. The mother of the parties got the tenancy rights of the suit flat transferred to the name of the respondent No. 1 after the death of the father. He continued as tenant. He has been made an owner of the suit flat along with other tenants in the building. The defendants accept his possession through decades.

2. The initial dispute started in 2010. Respondent No. 1 gifted the suit flat to his son on 1st December, 2010. Soon thereafter he sued his sibilings restraining them from entering into the flat. It was contended by the sibilings that the gift

deed was got fabricated by the son and the litigation was instigated by the son. Another suit came to be filed by them, initially in the City Civil Court and later in the High Court challenging the gift deed for its cancellation and for partition amongst the siblings as the co-owners of the suit flat.

3. The above suit has been shown to be filed by respondent No. 1 in the petition against his son and the siblings. The suit is also for declaration that the gift in favour of the son is void and that the other defendants are co-owners with the plaintiff. This suit is similar to the suit filed by the siblings.

4. The plaintiff (respondent No. 1 herein) has applied for withdrawal of the suit. Defendant Nos. 2 to 5 in the suit have opposed the withdrawal and have thereafter taken out the above miscellaneous petition for appointment of the next friend on the ground that he has been unable to manage his affairs and is mentally not in a position to conduct his affairs himself.

In the meantime the objections have not been removed. The suit stood dismissed. Nevertheless the application is prosecuted.

5. It is argued on behalf of the respondent No. 1 that the application lacks bona fides in view of the aforesaid litigations. It is contended that certain signatures of respondent No. 1 have been obtained by his siblings on certain written notes and documents. One such document is a writing in the handwriting of petitioner No. 1 herein shown to be signed by respondent No. 1. Respondent No. 1 upon having realised that he was made to sign certain documents and upon having been informed about the plaint has sought to withdraw the plaint. It is contended by the petitioner that the withdrawal has been instigated and is not of his own violation.

6. Counsel on behalf of the both parties have requested the Court to interview respondent No. 1. He was also interviewed by Justice S.J. Vazifdar at the time of application of withdrawal of the suit made by the plaintiff and opposed by the defendants therein.

7. The Court has interviewed respondent No. 1. He has been an Advocate of this Court. His father was a Solicitor of this Court He has attended the chamber of the Court and has answered several questions of the Court. He has affirmed his decision to withdraw this suit on the ground that it was not filed upon his violation. He has answered the questions of the Court relating to his children and the siblings. He has not been seen as a person of such feeble mind as not to be able to decide for himself. He is not shown to be incapable by reason of any mental infirmity to protect his interest requiring his next friend or guardian to be appointed under the provisions of Order 32, Rule 15 of the Civil Procedure Code. The suit itself is not clearly seen to have been filed bona fide.

8. In the case of Smt. Surinder Kaur and Others Vs. S. Rajdev Singh and Others, , a question of lack of bona fides for appointing the next friend of a litigant was considered. In that case such litigant had suffered from meningitis

long before the plea of mental infirmity was raised. Even thereafter a letter was sent showing full confidence of the other party in such litigant. The plea of infirmity was raised only after refusal by the party to renew the terms of a partnership and a lease. The assertion of mental infirmity and incapacity was held not to have been made bona fide but for ulterior purpose of embarrassing the respondents. The party failed to show a prima facie case that he was not capable of protecting his interest or had lost his cognitive power to be able to comprehend due to any mental infirmity and thereby protecting his interest. The Court observed the facts of the case that only after refusal to renew the partnership and the lease the application was taken out. The Court also considered the letters of reposing confidence in that same person despite the attack of meningitis. The Court founds no infirmity but that the application lack bona fides and dismissed it.

9. This is one such case. Respondent No. 1 had alone continued to live in the house tenanted by his father and lived with his mother and with minor siblings at the time of his death. He has become the owner of the flat since. It is only from 2010 that the disputes began. Of course, the initial dispute resulted in the litigation 10 days after he executed a deed of gift. It is open to his siblings to challenge the deed of gift and the title acquired by his son to the exclusion of the others if they so deem fit in their own litigation which respondent No. 1 as well as his son would be able to defend. It does not call for a suit to be filed by respondent No. 1 against his own volition if he states so. It also does not call for appointment of any other person as his next friend or guardian being officer of the Court or otherwise. It also does not behave the petitioner and his siblings to challenge the withdrawal of the suit by respondent No. 1. The case of the respondent would be considered in their own suit on its own merits including the aspect of limitation, if any, raised since the suit is filed decades after the existence of the tenancy, as also the ownership rights, consequent thereupon, of respondent No. 1. The Miscellaneous petition for appointment of the guardian deserves to be dismissed. The suit itself is dismissed. Both the suit and petition are disposed of accordingly.