

(2009) 09 BOM CK 0124

In the Bombay High Court

Case No : Appeal No. 256 of 2008 in Notice of Motion No. 131 of 2007 in T. and I.J. Suit No. 29 of 2005 in T. and I.J. Petition No. 454 of 2004

Kamlesh Singh Harnamsingh Chowhan APPELLANT

Vs

Kishorsingh Gangasingh Chowhan and Another RESPONDENT

Date of Decision : 22-09-2009

Acts Referred:

Citation : (2010) 3 ALLMR 313 : (2010) 5 BomCR 361 : (2010) 1 MhLj 238

Hon'ble Judges : R.P. Sondurbaldota, J; J.N. Patel, J

Bench : Division Bench

Advocate : Vivek Kantawala, for the Appellant; Zubin Behram Kamdin and Karl F. Tamboly, instructed by y Wadia Ghandy and Co., for the Respondent

Final Decision : Dismissed

Judgement

J.N. Patel, J.—Heard learned Counsel for the parties.

2. This appeal is preferred by the original defendant in T. & I.J. Petition No. 454 of 2004 being aggrieved by the order passed by the learned Single Judge in Notice of Motion taken out by the petitioner therein for dismissal of his caveat dated 2nd May 2005.

3. By the impugned order dated 29th February 2008, the learned Single Judge of this Court allowed the motion and made it absolute in terms of prayer Clause (a), which reads as under:

that this Hon''ble Court be pleased to dismissed the caveat dated May 2005 filed by the defendant in T.&. I.J. Petition No. 454 of 2004.

The petitioner has sought a probate in respect of the Will dated 7th March 1992 and the Codicil dated 1st July 2003 executed by Gangasingh who died on 4th July 2003 leaving behind his wife Indumati and children.

4. The petition for probate came to be filed in this Court by Kishoresingh Gangasingh Chowhan and Padma Singh. The appellant2nd defendant filed the

caveat on May 2005, wherein he has opposed the grant of probate of the Will dated 7th March 1992 and Codicil dated 1st July 2003 mainly contending that there is a building namely Lalsingh Mansingh, Lohar Chawl, Mumbai 400 002, in which under the family agreement dated 29th April 1970, the testator had two annas (2/16) share along with other co owners including the father of the appellant-caveator i.e. late Shri Harnamsingh who had according to the appellant the largest six annas share. It is specifically contended that one of the co-owner Pushpendra Singh Kama filed the suit for partition in respect of properties including said Lalsingh Mansingh Building in the Court of Additional District Judge, Mainpuri, Uttar Pradesh being Original Suit No. 68 of 1972 wherein the testator and the caveator were sued as defendants. Under a final decree passed by the Court on 23rd April 1982, the late father of the petitioner, Harnamsingh got a particular share in respect of properties including the said Lalsingh Mansingh Building which stood partitioned under the above decree. According to him, under the above decree, the share which came in favour of his late father consisted of 11 shops, 4 godowns, 31 rooms, 15 Wcs, 10 bathrooms and 1 staircase in the said building and this is within the knowledge of the parties. First Appeal No. 407 of 1982 is presently pending before the Allahabad High Court for final hearing, wherein certain interim orders have been passed. Particular reference was made to interim order dated 23rd March 1983 which is in the nature of permitting the parties to manage the properties in dispute including Lalsingh Mansingh building situated at Mumbai. It is the case of the appellants that under the said Will, the testator has bequeathed rooms 1st 2nd described as and rooms facing Seikh Memon Street on fourth floor i.e. room Nos. B-58 and B-57, which are in use and occupation of the appellant, to original plaintiff No. 2 and wife of deceased respectively. So also the rooms described as 7th and 8th rooms in the said Will facing Kitchen Garden Lane on fourth floor are Rooms Nos. C-17 and C-18 which have been assigned for use and occupation of his family members as prayer room and kitchen and fridge room respectively by the testator under his Will. Room described as one room on third floor in the said Will is room No. C-16 assigned for common use for himself and his family members by the deceased and all these above properties are the subject matter of the appeal pending in the Allahabad High Court, wherein the suit for partition under the family agreement is under challenge. Therefore, it is the contention of the appellant that assuming the said Will is probated by this Court, the same Will become authenticated even in respect of use and occupation of the said properties as directed by the deceased in his said Will. In case the First Appeal pending before the Allahabad High Court, too, confirms the decree of partition the appellant will become entitled to the five rooms described above which have been bequeathed under the will. He apprehends that the respondents as executors of the Will, would resist the execution of the decree in respect of those five rooms on the strength of Probate granted by this Court. Therefore, in order to avoid volatile consequences which could arise therefrom, the probate of the Will sought for should not be granted. In addition to the Will, the appellant-caveator has also challenged the Codicil of the deceased.

5. The learned Single Judge found that the caveator is not a beneficiary under the Will and even taking into consideration whether the caveator could have a share, in the event the deceased testator has died intestate. The learned Single Judge found that caveator who has no chance of succession in the properties of the deceased, as he is the son of the brother of the deceased and cannot maintain a caveat. Therefore, considering that the property admittedly is owned by several family members, the caveator also has an interest therein and which is subjudice. Neither the Will nor the Probate thereof, if granted, will affect caveator's right either in the said partition suit or otherwise assuming that the caveator has an interest.

6. The learned Counsel for the appellant has placed reliance on the following three decisions in order to substantiate his contentions primarily to challenge the grant of probate on the ground that his interest in the property would stand compromised and therefore he has right to challenge grant of Probate in favour of respondents-plaintiffs.

1. Jamni Hanmantha Rao v. Aratala Latchamma, reported in AIR 1926 Mad 1193;
2. Nabin Chandra Guha Vs. Nibaran Chandra Biswas and Others, ;
3. Mutukdhari Singh Vs. Smt. Prem Debi and Others, .

The ratio in the aforesaid authorities do not assist the appellant caveator in establishing his locus standi in contesting the probate.

7. On the other hand, the learned Counsel appearing for the respondents placed reliance on the latest decision rendered by Hon"ble Supreme Court in the case of Krishna Kumar Birla Vs. Rajendra Singh Lodha and Others, , wherein the Supreme Court has defined as to what is "caveatable interest".

8. In our opinion, the view taken by the learned Single Judge is a correct view in law. As the probate does not confer any title of the properties bequeathed in favour of the plaintiffs and even accepting that the Will bequeathes certain properties to the plaintiff, out of the joint family properties being subject matter of the partition suit and appeal pending before the Allahabad High Court, which would ultimately determine the title and share in the property. Probate Court only decides the question of genuineness and validity of the Will and does not enter into the question of title. The subject matter in respect of the title of the property is already subjudice before Allahabad High Court in the First Appeal filed by the parties. Therefore, we do not find any error or illegality committed by the learned Single Judge and dismiss the appeal.

9. After we dismissed the appeal, the learned Counsel appearing for the appellant submitted that the interim protection granted by the learned Single Judge on 4th September 2009 may be continued for a further period of six weeks, which is strongly opposed by the respondents. The request does not find favour with this Court and therefore, the same is rejected.

10. In view of disposal of the Appeal, the Notice of Motion No. 3627 of 2008 does not survive and the same is disposed of accordingly.