

(2008) 05 BOM CK 0027

In the Bombay High Court

Case No : Appeal No. 876 of 2005 in Notice of Motion No. 2878 of 2003 in Miscellaneous Petition (Lodg.) No. 162 of 2003 in Testamentary Petition No. 1849 of 1983

Mangala R. Awad

APPELLANT

Vs

Shashikala Kisan Awad and Another

RESPONDENT

Date of Decision : 06-05-2008

Acts Referred:

Citation : (2008) 6 ALLMR 273 : (2009) 1 BomCR 377 : (2008) 5 MhLj 112

Hon'ble Judges : R.M.S. Khandeparkar, J;P.B. Majmudar, J

Bench : Division Bench

Advocate : A.K. Tripathi, instructed by D.R. Mishra, for the Appellant; Asha Mehta and Manoj Chatage, instructed by T.J. Pandian, for the Respondent

Final Decision : Dismissed

Judgement

R.M.S. Khandeparkar, J.—Heard.

2. In terms of the order dated 18th November, 2005, the appeal has been heard only in relation to the point of dismissal of Revocation Petition (lodging) No. 162 of 2003.

3. The facts in brief, relevant for the decision in the matter, are that one Kisan Awad employed with Central Railway, Mumbai, expired on 29th December, 1999. The respondent No. 1 herein, the widow of Kisan Awad, applied for Succession Certificate on 3rd July, 2000 which came to be granted by Order dated 29th June, 2001. The appellant herein took out the Revocation Petition (Lodging) No. 162 of 2003 on 4th March, 2003. Consequent to the grant of Succession Certificate, the respondent No. 1 herein also took out Notice of Motion No. 2178 of 2003 seeking direction that the respondent No. 2 should accept the said Succession Certificate and consequently pay the dues of the deceased husband to her as his widow.

4. The Miscellaneous Petition (Lodging) No. 162 of 2003 taken out by the

appellant herein was to seek the relief in the nature of cancellation and/or revocation of the said Succession Certificate issued in favour of the respondent No. 1. Consequent to the filing of such petition, the respondent No. 2 informed the respondent No. 1 that the Railway authorities were not in a position to release the payment in favour of the respondent No. 1.

5. By an interim order dated 5th February, 2005 passed in Notice of Motion No. 2878 of 2003, the learned Single Judge directed the respondent No. 2 to deposit the amount due and payable to the deceased-husband of the respondent No. 1 in the Court and consequently the respondent No. 2 deposited sum of Rs. 1,71,000/- in the Court.

6. When the matter came up for hearing on 2nd August, 2005 before the learned Single Judge, it was found that the Railway authorities taking shelter of the Miscellaneous Petition (Lodging) No. 162 of 2003 were denying to release the amount in favour of the respondent No. 1 even though she was armed with the Succession Certificate. It was also noticed by the learned Single Judge that the Miscellaneous Petition (Lodging) No. 162 of 2003 was kept under objections for more than two years without even taking any step either for removal of office objections or dismissal thereof by Prothonotary and Senior Master of this Court.

7. When the matter came up for hearing before the learned Single Judge on 2nd August, 2005, learned Advocate appearing on behalf of the appellant had requested for adjournment of the matter and for further time for removal of office objections. The learned Single Judge declined to give any further time or to grant adjournment, and passed the impugned order.

8. The impugned order is sought to be challenged on the ground that the learned Single Judge erred in passing the impugned order ignoring the request made on behalf of the appellant for extension of time for removal of office objections and thereby also erred in not following the procedure as laid down under High Court Rules relating to rights of the parties for removal of office objections.

9. Learned Advocate appearing on behalf of the appellant taking us through para 10 of the impugned judgment submitted that the fact that the Miscellaneous Petition (Lodging) No. 162 of 2003 was not even appearing on the board of the Prothonotary and Senior Master for removal of the office objection has not been disputed by the respondent and in those circumstances, there was no justification for the learned Single Judge to refuse to grant further time for removal of office objections. He further submitted that the procedure for removal of office objections has been duly prescribed under the Rules and accordingly, if the office objections are not removed within the stipulated time, the matter has to appear on the board of Prothonotary and Senior Master specifying the time within which the office objection should be removed and thereafter the matter can be dismissed for failure of party to comply with those directions. However, this procedure has not been followed in the matter in hand. Therefore, there was no occasion for learned Single Judge to dismiss the Miscellaneous Petition

(Lodging) No. 162 of 2003. He further submitted that the respondents have not disputed the facts stated by the appellant in this regard and considering the law laid down by the Supreme Court that in the absence of dispute being raised, the fact stated shall be deemed to have been established. The impugned order should not be sustained and be set aside giving opportunity to the appellant to prove her case. He further submitted that assuming that there was some failure on the part of the advocate for the appellant to remove office objections, for the mistake of Advocate, the appellant should not be penalised and considering the same also, the impugned order needs to be set aside and the matter remanded to learned Single Judge.

10. The learned Advocate appearing for respondent No. 1 submitted that the appellant was duly represented before the learned Single Judge on the relevant day and no sufficient cause was shown for extension of time and therefore no fault can be found with the impugned order refusing to extend the time. She further submitted that the respondent No. 2 is in collusion with the appellant and has denied her rights solely at the instance of the appellant. If the appellant was really interested in the matter, the appellant would not have failed to take necessary steps to remove office objections for a period of two years. She further submitted that in the circumstances of the case, the appeal should be dismissed with heavy costs. She further submitted that the respondent No. 2 has failed to pay costs which were directed to be paid under the impugned order.

11. The learned Advocate for respondent No. 2 submitted that the respondent has already deposited the amount in terms of the interim order passed on 5th February, 2005. As regards the cost of Rs. 10,000/-, he submitted that he has no instructions in that regard.

12. The point for determination is restricted to the issue in relation to the Miscellaneous Petition (Lodging) No. 162 of 2003 in terms of order dated 18th November, 2005. In this regard, before considering the rival contentions, it would be worthwhile to reproduce the contents of para No. 10 of the impugned order, which reads thus:

10. Insofar as the revocation petition Lodging No. 162 of 2003 is concerned, it is very significant to note that even though the petitioner has filed the same two years back, it has not been prosecuted at all. It is also surprising that the office of the Prothonotary and Senior Master, High Court, Bombay, did not take action for dismissal of the petition for non removal of office objections under the provisions of High Court Rules for almost two years. This in-action on the part of the office has resulted in the said petition continued to remain on record and never came up for hearing before the Court since it was not numbered. This Petition (Lodging) No. 162 of 2003 is still pending on a lodging number. This motion was heard on earlier four occasions. None appeared for the Petitioner in the said petition Lodging No. 162 of 2003. However, today the learned Advocate appearing for the petitioner sought time to remove the office objection in the said Misc. Petition No. 162 of 2003. I have declined to give time because the

process of the Court cannot be operated upon in such a manner that it defeats substantial justice in favour of the party who is holding the succession certificate. If the said petitioner Smt. Mangala Awad was really genuine in prosecuting her claim she would have pressed that petition but she did not prosecute the same for the entire period of two years. I am dealing with a case where balance dues of the deceased which are payable to the widow are withheld for a long time. I therefore declined to grant time in the aforesaid circumstances and I dismiss the same for non-prosecution and non-removal of office objections.

13. On plain reading of the impugned order and records relating to the matter in hand discloses that Miscellaneous Petition (Lodging) No. 162 of 2003 which was revocation petition filed by the appellant appeared before the learned Single Judge along with Notice of Motion No. 2878 of 2003 which was taken out by the respondent No. 1 herein for release of the dues in terms of succession certificate granted by the Court on 29th June, 2001. Undisputedly the Miscellaneous Petition (Lodging) No. 162 of 2003 was filed in March, 2003 by the appellant. No steps were taken to complete the said petition for the purpose of consideration by the Court and the office objections were allowed to remain for a period of more than two years. It is to be noted that the appellant was fully aware in March, 2003 that the respondent No. 1 was armed with the succession certificate issued dated 29th June, 2001 and she would be entitled to collect the amount on the strength of the said order. With the full knowledge of the said facts, the petition for revocation of the order dated 29th June, 2001 was filed by the appellant in the form of Miscellaneous Petition (Lodging) No. 162 of 2003. It is undisputed fact that Railways respondent No. 2 hesitated to release the dues in favour of respondent No. 1 only on account of Miscellaneous Petition (Lodging) No. 162 of 2003 taken out by the appellant and yet no steps were taken for two years to make the said Miscellaneous petition complete in every respect for the purpose of consideration thereof by the Court. On the one hand the respondent No. 1 was armed with necessary succession certificate to collect the dues of her husband, but on the other hand, she was unable to collect the same solely on account of pendency of Miscellaneous Petition (Lodging) No. 162 of 2003 for no fault on her part, nor on account of any adjournments or delay on the part of the Court in hearing the matter, but solely on account of inaction on the part of the appellant to remove the office objections in relation to the said petition. In other words, the said Miscellaneous Petition (Lodging) No. 162 of 2003 was the sole obstruction for the respondent No. 1 to get dues as per the order dated 29-6-2001.

14. It was sought to be contended on behalf of the appellant that there was failure on the part of the office of Prothonotary and Senior Master to follow the procedure regarding the opportunity to be given to the parties to remove the office objections. In this regard, it is pertinent to note that there was no categorical assertion in respect thereof before the learned Single Judge nor there is categorical assertion in that regard in the Memo of Appeal. In fact there is no statement of fact made in that regard in the Memo of Appeal. What has been

stated in the Memo of Appeal in that regard reads thus:

a) That the judgment and Order dated 2nd day of August, 2005 passed by single Hon"ble Judge is illegal and bad in law as it suffers from serious legal infirmity as learned Judge before dismissing the petition did not verify the fact that the said matter though it was club together with the Notice of Motion 2878 of 2003 in Petition No. 887 of 2000 her advocate's name never appeared on either before the Prothonotary and Senior Master or even on the board of learned Judge. Hence the said matter is dismissed without following the proper procedure as laid down by High Court Rule and Law.

15. The statement of fact is that the name of the Advocate for the appellant never appeared either before the Prothonotary and Senior Master or on the board of learned Single Judge. The statement is not regarding failure on the part of the Prothonotary and Senior Master to afford opportunity to the party to remove office objections. The Advocate repeatedly argued about failure of the Prothonotary and Senior Master to follow the prescribed procedure and to give fair opportunity to the party to remove office objection. Before canvassing any such argument, the party has to lay factual foundation in the pleadings. The arguments cannot be made without necessary factual matrix being made available in the pleadings. It is one thing to say that there was failure on the part of Prothonotary and Senior Master to give opportunity to remove office objection and another thing to say that the name of the Advocate did not appear on the board.

16. As regards the absence of the name of the Advocate on the board of the learned Single Judge, undisputably the Advocate for the appellant did appear before the learned Single Judge on 2nd August, 2005. In other words, the Advocate had full knowledge about the date of hearing and therefore Advocate appeared on that day. In fact mere allegation that the name of the Advocate did not appear on the cause list would not be sufficient to arrive at the conclusion about the contentions advanced in the matter. In case the party wants to make out a case regarding failure on the part of Court to disclose the name of the Advocate, it is necessary for the party to place on record necessary documents material in that regard. No such efforts have been made by the appellant in this case.

17. It is true that when the opposite party does not dispute the statement of fact, the Court need not necessarily require the proof regarding such statement of fact. However, when the party lacks bona fide, nothing prevents the Court from expecting such party to establish even such statement of fact by the necessary proof. In spite of knowing well that the respondent No. 1 would be entitled to collect the dues pursuant to the order passed in 2001, the appellant took out the objection as late as in 2003 and did not pursue the matter even for removal of office objection for two years and only when ultimately the respondent No. 1 took out Notice of Motion for necessary direction for release of the money, tried to seek time for removal of office objection, which apparently

disclose lack of bona fide on the part of appellant. In these circumstances it would clearly warrant the appellant to establish every statement of fact which the appellant wants the Court to believe.

18. It is then sought to be contended that negligence on the part of the Advocate should not penalise the party. As a proposition of law, no fault can be found with it. However, in the facts and circumstances of the case, we find no application thereof. It was nobody's case before the learned Single Judge that there was any mistake on the part of the Advocate in removing the office objection in relation to Miscellaneous Petition (Lodging) No. 162 of 2003. This argument is advanced in an attempt to get sympathy of the Court. However, in the facts and circumstances of the case, it warrants no such sympathy to the appellant.

19. It is also surprising that the respondent No. 2 has not paid the costs which were directed to be paid by the impugned order. In this regard, the respondent No. 2 is directed to pay the said cost of Rs. 10,000/- within four weeks to the respondent No. 1.

20. For the reasons stated above, therefore the appeal needs to be dismissed. Appeal is accordingly dismissed with cost of Rs. 2,000/-. Learned Advocate for the appellant prayed for stay of the judgment delivered. For the reasons recorded in the Judgment, we find no justification for grant of stay of the order. Request is rejected.