

(2017) 09 BOM CK 0135

In the Bombay High Court

Case No : 61 of 2016, 62 of 2016 & 13 of 2017

Mr. Inacinho Celestino do Pinto e Sa @ Ignatius de Sa, & Ors. APPELLANT
Vs

Ms. Idalina Preciosa D'Souza, & Ors. RESPONDENT

Date of Decision : 13-09-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 43 Rule 1](#) -
[Transfer of Property Act, 1882](#), [Section 52](#) -
Transfer of property pending suit relating thereto

Citation : (2017) 09 BOM CK 0135

Hon'ble Judges : Prithviraj K. Chavan

Bench : SINGLE BENCH

Advocate : A.D.Bhobe, Shradha Bhobe, Rohit Bras DE Sa, G.Salkar, Y. Mandrekar

Final Decision : Dismissed

Judgement

1. These three appeals can be disposed of by a common judgment and order since the parties and subject matters involve in all three suits are intrinsically interconnected. The appellants in Appeal Nos.61/2016 and 13/2017 are the husband and wife. Respondent Idalina has filed three different suits against the appellants for declaration, possession, recovery of money, permanent injunction and other consequential reliefs based on registered last Will dated 22.7.2010 of her aunt deceased Ana Ditosa Eufemia De Souza alias Ditosa De Souza (for short "Ana") who admittedly died on 16.4.2011.
2. The parties shall be referred to as "plaintiff" and "defendants" as per their original status in the trial Court for the sake of convenience.
3. The facts in brief are as follows:- The plaintiff's case in Appeal No.61/2016 is that deceased Idalina was the sole and exclusive owner of a house property known as "Casa Ditosa" of plot bearing Chalta No.68 of P.T.Sheet No.119 of City Survey Panaji. Defendant no.1, who is admittedly not related with deceased Ana, got the suit property transferred in his name by executing Sale Deed for a very

meager price wherein, as a matter of fact, the said suit property actually worth crores of rupees. According to the plaintiff, defendant no.1 took disadvantage of the plaintiff's absence from Goa as well as the ill-health and old-age of deceased Ana and thereby got the suit property transferred in his name which, in fact, has been bequeathed by deceased Ana in favour of the plaintiff Idalina by virtue of Will dated 22.7.2010. By the said registered Sale Deed, defendant no.1 had purchased the first floor of the suit property. The plaintiff apprehends that defendant no.1 might create third party interest in the suit property to which he is not legally entitled to and the plaintiff being the legatee of deceased Ana is, in fact, the owner of the first floor premises of the suit property along with undivided proportionate right, title and interest therein. The alleged registered Sale Deed between the deceased Ana and the defendant no.1 is dated 27.6.2008.

4. On the other hand, the defendants have come up with a case that the Will dated 22.7.2010 does not confer any right upon the plaintiff nor she could claim of having any right over the suit property as on the date of executing Sale Deed dated 27.6.2008 the Will of the deceased Ana did not exist. Deceased Ana being the sole owner of the suit property was entitled to deal and dispose of the same which she did by virtue of Sale Deed dated 27.6.2008. The defendants further contend that they have, therefore, disputed the Will dated 22.7.2010 by contending that deceased Ana had rightly transferred the suit property in favour of the defendant and his brother by way of registered Sale Deed. Thus, it is the contention of the defendants that even if it is presumed that any right has been accrued in the property left by the deceased Ana in favour of the plaintiff, it came into existence only after her death by virtue of Will dated 22.7.2010, which was not in existence when the property was sold by deceased Ana to the defendants on 27.6.2008.

5. In Appeal No.62/2016 the contentions of the respective parties are similar wherein the subject matter of the suit is a ground floor premises of the said "Casa Ditosa" wherein deceased Ana appears to have transferred her undivided proportionate right, title and interest in favour of the defendant Baldwin Maria Pinto de Sa by registered Sale deed dated 30.10.2007. Here is also the contention of the plaintiff that the suit property is actually worth crores rupees which the defendant by taking disadvantage of the plaintiff's absence from Goa managed to get Sale Deed executed in his favour by taking disadvantage of the old age of deceased Ana. In fact, the plaintiff by virtue of Will dated 22.7.2010 has been bequeathed with the suit property and all the moveable and immoveable of deceased Ana. The defendants' case in all the three suits, apart from the right of the deceased Ana to dispose of her exclusive property, is that during her old-age they took care and looked after her day to day needs including medical requirement and medial care of the deceased Ana. The plaintiff and other relatives of deceased Ana were aware of this fact. The defendants contend that the medical reports of deceased Ana would show that she was hospitalized on 23.7.2010. As per the advice of the doctor she was admitted in the hospital by defendants and rendered all assistance required by the ailing old

lady.

6. In Appeal No.13/2017, the plaintiff Idalina sought temporary injunction in respect of an amount of Rs.15,70,000/- which was allegedly withdrawn by defendant no.1 without any legal right in connivance with other defendants from the Saving Account No.6012500112024701 and F.D.R. It is the contention of the plaintiff that defendant no.1 has withdrawn the amount in connivance and with illegal assistance of Senior Manager, Karnataka Bank, Panaji Branch and placed the amount in his Saving Account in Karnataka Bank, Panaji Branch in the joint name of himself.

7. The contention of the defendants is that there was no joint account in the name of deceased Ana and defendant no.1, as alleged by the plaintiff. According to the defendants, deceased Ana, on her own free will, issued a cheque in favour of defendant no.1 dated 15.4.2011, which was encashed by defendant no.1. The defendants contend that there was no question of bequeathing the FDR in the name of plaintiff when the deceased Ana herself had issued cheque in favour of defendant no.1 and allowed defendant no.1 to withdraw the amount prior to her death.

8. The learned trial Court, after hearing the respective parties, by the impugned order directed defendants no.3 and 4 to withhold the amount lying in the account of defendant no.1, till the dispute is finally adjudicated between the parties. Similarly, in Appeal Nos.61/2016 and 62/2016, the learned trial Court by the impugned order restrained the defendants from creating any third party interest in respect of the suit property, till the final decision of the suit.

9. The learned counsel appearing for the appellants, Shri Bhobe, assailed the impugned orders by submitting that the learned trial Court has not discussed the principles required for granting relief of temporary injunction such as prima facie case, balance of convenience and irreparable loss. The trial Court has also lost sight of the fact that the appellants are in possession and have title on the basis of Sale Deed with respect to the suit property and, therefore, there was no necessity to grant temporary injunction against the appellants. He drew the attention of the Court to a Will dated 22.7.2010 vis-a-vis medical certificate dated 17.7.2010 of Dr. Oscar Rebellow, who has specifically certified about the fracture of the spine of Ms. Ditosa, who was prone to bouts of depression and her physical and mental condition was frail. The learned counsel, therefore, questioned the genuineness of the Will dated 22.7.2010 within such a short span of five days.

10. Per contra, learned counsel for the respondents has supported the impugned orders by stating at the bar that the defendants including the Branch Manager of the bank have orchestrated to thwart the legitimate right of the plaintiff by unlawfully and illegally attempting to grab the suit property of the deceased Ana by taking undue advantage of her illness and oldness.

11. There is no dispute that deceased Ana, by her last Will dated 22.7.2010

registered in the office of Notary Ex-officio, Panaji, Ilhas, Goa at pages 81 onwards of Book No.172, bequeathed all her assets moveables as well non-moveables including fixed deposits in various banks, all the money lying in her accounts in various banks, gold ornaments, Units of UTI, shares, National Savings Certificates, savings in Indian Posts and Telegraph departments, a sum of Rs. 24,00,000/- along with all future interest accrued thereon held by Fixed Deposit bearing no.964470 and 964471, property ad-measuring 507 square metres i.e. suit property in favour of plaintiff. There is also no dispute that the plaintiff Idalina is the niece of Ana residing abroad. But, on the other hand, the defendants by virtue of two Sale Deeds referred hereinabove dated 30.10.2007 and 27.6.2008 contend that deceased Ana had transferred the said properties in their favour. Under such circumstances, without going into the merits as regards the genuineness and authenticity of sale as well as the transaction of Will of the suit property, it would be just and proper that the matter should be allowed to be adjudicated on a full-fledged trial before the Civil Judge. The argument of the learned counsel appearing for the appellant that the plaintiff accrued right to the estate left by deceased Ana by virtue of the Will was not in existence as deceased Ana had already sold the suit property to defendant no.1 though appears to be prima facie correct, yet it cannot be conclusively held at this prima facie stage as to genuineness of the Will and the registered Sale Deed without adjudicating the said facts when there are disputed questions of facts and law involved in the matters.

12. There appears some substance in the contention of the learned counsel for the plaintiff that there is nothing on record to show that, in fact, the defendants had paid the consideration in the name of deceased Ana and, therefore, the possibility of coercing or inducing deceased Ana, in view of her illhealth, cannot be said to be without substance. Of course, these are prima facie observations and not on merits.

13. Merely because, there is existence of two registered Sale Deeds in favour of the defendants would not conclusively mean that they have derived right, title or interest in the suit properties when there is a registered Will Deed of Ana produced by the plaintiff on record. This aspect can be said to be prima facie case in favour of the plaintiff. There is no doubt that the defendants are in possession of the suit property, and, therefore, it can be said that the balance of convenience tilts in their favour. However, it cannot be said that the plaintiff would not suffer irreparable loss, if injunction is refused. Since there is involvement of immovable properties, it would be just and proper in the circumstances of the case that the defendants are required to be restrained, for, if the preventive relief is not granted, the plaintiff would indeed suffer irreparable loss, which cannot be compensated in terms of damages. It is equally important to ensure that there should not be multiplicity of litigation. The trial Court has, therefore, correctly exercised its judicial discretion while passing the impugned orders.

14. The learned counsel for the appellants relied upon a case law reported in 2010 (5) ALL MR 366 (M/s Kachhi Properties Vs. Ganpatrao Shankarrao Kadam and Ors.). The ratio laid down by the learned Single Judge of this Court is on the point of Rule of lis pendens. It is held that there could always be cases where rule of lis pendens may be inadequate to prevent the mischief and a temporary injunction to prevent such mischief would be warranted. It is held that it would imply that a person claiming injunction in such a situation would have to show that protection under Section 52 of the T.P. Act is not adequate. It is also held that while considering balance of convenience and irreparable loss, Civil Courts would have to see as to what is the preventive relief sought or what mischief is sought to be prevented. In the case at hand, since the defendants are in possession of the suit properties by virtue of two Sale Deeds dated 30.10.2007 and 27.6.2008, the Rule of lis pendens can be said to be inadequate to prevent the mischief of creating third party interest and, therefore, the relief of temporary injunction to prevent such mischief is warranted. It would probably lead to multiplicity of proceedings by requiring the plaintiff to chase the parties who may claim to be bonafide purchasers without notice.

15. As per Order XLIII Rule 1 R of the Code of Civil Procedure, the Appellate Court is required to see as to whether the exercise of discretion by the trial Court is required to be interfered with. The interference of the Appellate Court is warranted only if the discretion by the trial Court is palpably incorrect or untenable. If the view taken by the trial Court is a possible view, the same is not liable to be interfered with by the Appellate Court.

16. The learned trial Court has properly and correctly exercised the discretion in passing the impugned orders, which cannot be said to be incorrect or untenable. I, therefore, do not deem it necessary to interfere with the impugned orders. Consequently, the appeals stand dismissed with costs.