
(2000) 12 BOM CK 0026

In the Bombay High Court

Case No : Appeal Lodging No. 704 of 2000 in Notice of Motion No. 989 of 1997
in Suit No. 980 of 1997

Ramniklal Amritlal Shah

APPELLANT

Vs

Bhupendra Impex Pvt. Ltd. and Others

RESPONDENT

Date of Decision : 13-12-2000

Acts Referred:

Partition Act, 1893 — Section 4(1)
Straits Settlements Limitation Ordinance Act, 1896 — Section 17
Succession Act, 1925 — Section 111, 112, 113, 114, 21(1)
Transfer of Property Act, 1882 — Section 4, 44

Citation : AIR 2001 Bom 224 : (2001) 2 ALLMR 592 : (2001) 2 BomCR 479 :
(2001) 1 BOMLR 670 : (2001) 2 MhLj 536

Hon'ble Judges : S.D. Gundewar, J;B.N. Srikrishna, J

Bench : Division Bench

Advocate : Mr. I.M. Chagla, Mr. Aspi Chinoy, Mr. S.J. Vazifdar, S.K. Sen and
Uttam Hati, instructed by R.A.K. Najam-Us-Sani, for the Appellant; Mr. S.H.
Doctor, Mr. Virag Tulzapurkar, Ms. Vileena Mirasee and Mr. Prakash Shah,
instructed by Shah and Sanghavi, for the Respondent

Judgement

B. N. Srikrishna, J.—Appeal admitted. By consent, notice made returnable forthwith. Respondents waive service through counsel Mr. Doctor.

2. By consent, appeal is called out for final hearing and heard.

3. This appeal is directed against an order of the learned Single Judge dated 11th February, 2000 dismissing the notice of motion. Since this is an appeal against an interlocutory order, we indicate the bare essential facts requisite to dispose of the appeal. Those facts are :-

The appellant is the brother of one Madhuben @ Mridulaben Amritlal Shah who had filed the suit before this Court. The suit was filed invoking Section 44 of the Transfer of Property Act and Section 4 of the Partition Act, 1893. The case was that the suit property was a dwelling house in the occupation of an undivided

family, that the original defendant Nos. 1 to 7, outsiders to the family, had purchased the undivided share of one Mrs. Sadguna Shah, a member of the family, and on the strength of the said fact they had entered into occupation of the second floor of the suit property. This, according to the original plaintiff, was illegal as the purchaser not being a member of the undivided family could get no right of joint occupation by virtue of the second paragraph of Section 44 of the Transfer of Property Act, unless he sues for partition and obtains a partition by metes and bounds. Pending the suit, the notice of motion was taken out by the original-plaintiff in which certain preventive reliefs were sought against the original defendants (present respondents). While this notice of motion was pending, the original plaintiff died and the appellant brought himself on the record claiming to be the legal representative of the deceased-original plaintiff. The appellant claims that he represents the estate of the deceased plaintiff as the named executor under a Will left by the deceased plaintiff. He has also filed a petition, being Probate Petition No. 313 of 1998, in this Court for grant of probate of the Will dated 4th May, 1997 said to have been made by the deceased-original plaintiff. This notice of motion was heard and the learned Single Judge dismissed the notice of motion by taking the view that the plaintiff could not be said to have a prima facie case in his favour in view of Section 213 of the Indian Succession Act. He also took the view that the plaintiff being brother of the original plaintiff, who was unmarried, the question whether he was a member of the family of the unmarried sister could only be decided on the basis of documentary and oral evidence; consequently, at the interlocutory stage it could not be said that the appellant had a prima facie case in his favour. In this view of the matter, the learned Judge was pleased to dismiss the notice of motion. Being aggrieved, the appellant is before this Court.

4. Turning to the first question revolving around Section 213 of the Indian Succession Act, it appears to us that the effect of section 213 on existing or impending litigation has been misconstrued. All that section 213 provides is that no executor or legatee can establish his right qua executor or legatee in any Court of Justice, unless he obtains a probate of the Will under which such right is claimed. It is strenuously contended by the learned counsel for the respondents that this means that no interlocutory proceedings can also be adopted nor relief granted in interlocutory proceedings unless probate is obtained. We are inclined to disagree. According to Mr. Doctor, learned counsel for the respondents, in the instant case, the present appellant, not having obtained probate of the Will, could not have established his right to represent the estate of the deceased-original plaintiff. The logical result should have been, abatement of the suit. It is contended that if a suit is brought in the capacity of an executor or legatee without production of a probate certificate of the Will under which such character is claimed, then, the suit itself would not be maintainable.

5. In our judgment, the contention is unsound. Way back, in the Year 1916. Their Lordships of the Privy Council had occasion to consider the position in law, though somewhat obliquely, in *Meyappa Chetty v. Supramanian Chetty*,. Here,

the Privy Council took the view that the words "capable of instituting an action" used in section 17 of the Straits Settlements Limitation Ordinance of 1896 merely mean capable of institution an action in which a degree might be obtained. In other words. Their Lordships were of the view that the Will under which the executor claims must be capable of probate; otherwise the action must fail. This judgment was followed by a learned Single Judge of our Courts in *Raichand Dhanji v. Jivraj Bhavanji and others*. The learned Single Judge of this Court following the judgment of the Privy Council in *Meyappa Chetty v. Supramanian Chetty*,; *Chandra Kishore Roy v. Prasanna Kumari*, and the judgment of this Court in *Jamsetji Nassarwanji v. Hirjibhai Naoroji*, took the view that the personal property of the testator including all rights of action vests in the executors after the testator's death and that he could institute a suit without obtaining probate, but that he could not obtain a decree in the suit before the grant of probate.

6. Mr. Doctor was quick to point out that these Judgments were rendered prior to coming into force of the Indian Succession Act, 1925, and that the language used in sections 111 to 114 of the 1925 Act made a qualitative difference to the legal situation. He particularly drew our attention to the difference in phraseology used in section 212 which deals with representation of the estate by an administrator and section 213 which deals with representation of the estate by a legatee or executor. In his submission, the grant of an administration certificate was a condition precedent u/s 212 of the Indian Succession Act, 1925. He also drew our attention to section 214 which talks of a decree not being granted unless the probate certificate is obtained. In our view, it is unnecessary to go into these niceties for the Judgment of the Supreme Court in *Mrs. Hem Nolini Judah* (since deceased) and after her legal representative *Mrs. Marlean Wilkinson v. Mrs. Isolyne Sarojbashini Base and others*, is rendered under the Indian Succession Act, 1925 and considers in terms section 213. Explaining the meaning of Section 213, the Supreme Court says, (vide paragraph 7) :-

The words of Section 213 are not restricted only to those cases where the claim is made by a person directly claiming as a legatee. The section does not say that no person can claim as a legatee or as an executor unless he obtains probate or letters of administration of the Will under which he claims. What it says is that no right as an executor or legatee can be established in any Court of Justice, unless probate or letters of administration have been obtained of the Will under which the right is claimed and therefore it is immaterial who wishes to establish the right as a legatee or an executor."

In our view, the Supreme Court in this judgment has distinguished laying claim as an executor or a legatee from establishing the right as a legatee or an executor. A reading of the judgment does not even remotely suggest that a suit brought in the capacity of legatee or executor would fail unless the probate certificate is filed with it. Nor does it suggest, as Mr. Doctor does, that where a person is brought on record as an executor to represent the estate of a deceased

plaintiff, unless he produces a probate certificate, the suit must be held to have abated. We are, therefore, of the view that section 213 is merely a bar to a person "establishing" his right as an executor or legatee in an action. This does not suggest that the said person cannot claim the capacity of executor or legatee so long as he is able to produce the probate certificate before the actual decree is passed. In other words, the bar is really one against the passing of a decree without a probate certificate and not the entertainment of the suit itself.

7. The next contention of Mr. Doctor is that, even presuming that the suit is maintainable without production of the probate certificate, the appellant in his capacity as executor could not have sought any interlocutory relief. This is the argument which seem to have appealed to the learned Single Judge. The contention is that to claim interim relief the appellant had to establish, apart from the merits of the case, his character as the executor; this he could not do without production of a probate certificate by reason of section 213, even *prima facie*. Consequently, no interim relief could have been granted. In our considered view, this argument is fallacious. A party seeking interim relief in a suit is not required to "establish" his rights. Question of establishment of rights is relevant only for the purpose of the final decree in the suit and not at an Interlocutory stage. In order to seek or get interlocutory relief, all that a party has to show is that the suit is not frivolous, that there is a probability of his succeeding in the suit, apart from balance of convenience, with which we are not concerned here. As far as the argument of Mr. Doctor goes, we focus our attention on the "establishment" of the appellant's character as an executor. In our view, it was not necessary for the appellant to "establish" his character as executor at this stage. It was necessary to show, *prima facie*, that he was the executor. This could have been done by the production of the Will of the deceased-original plaintiff and, unless upon a perusal thereof the Court came to the conclusion that there was no way the appellant could claim to be an executor under the Will, that would *prima facie* show the character of the appellant as an executor under the Will. The stage for the appellant to establish his right as an executor under the Will is yet to come in the trial if the suit goes on and under the law as laid down by the Supreme Court, the appellant would fail unless he produces the probate certificate at the time when the Court finally decides the suit. At all intermittent stages, therefore, the insistence upon establishing the appellant's right as an executor, was neither necessary nor required. It was sufficient that he showed that he had a *prima facie* right to that character.

8. Mr. Doctor, however, referred to the judgments of the Supreme Court in Chiranjilal Shrilal Goenka (deceased through L.Rs. v. Jasjit Singh and others, and the judgment of the Supreme Court in Satish Kumar Grover and others v. Surinder Kumar Grover and others, to contend that these judgments support his contention that section 213 would bar even interlocutory relief to the appellant. On a perusal of these judgments, we are unable to agree. A careful reading of these judgments does not suggest, even remotely, that in a situation as before us the suit should fail unless the probate certificate is produced by the appellant

to establish his capacity as executor. In fact, in Chtranjilal's case (supra) the Supreme Court says in paragraph 14 that by operation of section 21(1) of the Indian Succession Act, the executor of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. The judgment in Satish Kumar's case (supra) does not even suggest what is being contended for the respondents.

9. We are, therefore, of the considered view that the learned Single Judge erred in holding that, because the final decree could not be passed in favour of the appellant without production of a probate certificate, no interlocutory order could also be passed.

10. As to the second issue as to whether the appellant is a member of the undivided family, we are of the view that there was ample material on record which showed, prima facie, that he was the member of the undivided family. In fact, it was nowhere disputed, nor is it disputed before us. by the respondents that the appellant is the real brother of the deceased-original plaintiff and that he was staying with her. Our attention has been drawn to the judgment of the Division Bench of the Calcutta High Court in Satyendu Kundu v. Amar Nath Ghosh and Ors.. wherein the Calcutta High Court after careful consideration of law has summarized the law asunder:-

"(1) The provisions contained in Section 4(1) of the Partition Act have been introduced in order to maintain customary privacy and to prevent the intrusion of strangers into the dwelling house belonging to an undivided family.

(2) A liberal interpretation is to be put upon the provisions contained in Section 4 of the Partition Act, as would promote and fulfil its object, which is to preserve the integrity of the family dwelling house and to enable the members of the family to keep it for themselves as far as possible.

(3) The expression, "share of a dwelling house belonging to an undivided family" occurring in Section 4 of the Partition Act is to be construed in the same way as the expression is construed in Section 4 of the Transfer of Property Act. Section of the said Act carries forward the law laid down in Section 44 of the Transfer of Property Act.

(4) In order to attract the provisions of Section 4 of the Partition Act, there should be "a family" who must own a "dwelling house".

(5) As long as there is a "dwelling house" which has not been divided "qua" the family, it might be said to be a dwelling house belonging to an "undivided family" for the purposes of Section 4(1).

(6) The provisions of Section 4 are of general application and are not confined to a Hindu Joint Family.

(7) The word "family" as used in Section 4 was not intended to be used in a narrow and restricted sense, namely a body of persons who can trace their

descent from a common ancestor. It certainly includes such persons, but it is sufficient if there is a collective body of persons living together within the same cartilage, subsisting in common, and directing their attention to a common object and to the promotion of their mutual interests and social happiness.

(8) It is not necessary that all the members of such a family should continuously reside together. It is sufficient if some of them so reside, and others reside there temporarily or have not abandoned the intention of residing there, altogether.

(9) It does not matter if a part of the such dwelling house is let out to tenants or even the whole, provided that it can be shown that the owners have not given up their intention of residing therein. Whether they have such an intention or not is a question of fact, to be decided upon the circumstances prevailing in each case. For example, if the parties have given a permanent lease, it may be said to militate against their having an intention of resuming residence.

(10) That some of the members of the family have transferred their interest to strangers will not by itself take the case out of the operation of Section 4. Until the dwelling house is completely alienated to a stranger, it is still an undivided dwelling house within the meaning of Section 4.

(11) The fact that some of the members of the family possess other immovable properties or even dwelling houses will not necessarily take the matter out of the operation of Section 4."

We respectfully agree with the view of the Calcutta High Court. We are of the view that the appellant has been able to show, *prima facie*, that he was a member of the undivided family. Mr. Doctor contended that even if he is a member of the undivided family, he was not entitled to get relief u/s 4 of the Transfer of Property Act. We decline to go into this question as that is not the basis on which the notice of motion has been dismissed.

11. In the result, the appeal is allowed and the following order is made -

(i) The order of the learned Single Judge dated 11th February, 2000 is set aside.

(ii) Notice of Motion No. 989 of 1997 is restored to file.

(iii) It is held that the appellant has *prima facie* shown that he is the executor of the Will of the deceased-original plaintiff and, therefore, entitled to move for interlocutory reliefs.

(iv) It is held that the appellant has *prima facie* shown that he is a member of the undivided family of the deceased-original plaintiff.

12. We make it clear that the above findings are *prima facie* and intended only for disposal of the notice of motion and it is open to the respondents to show to the contrary at the trial of the suit.

13. Mr. Doctor, the learned counsel for the respondents makes a statement that pending hearing and disposal of the notice of motion, the respondents shall not

create any third party rights in or induct any third parties on the suit premises. In view of this statement, we do not think it necessary to revive the original ad Interim orders at this stage, though the appellants are at liberty to move the learned Single Judge for appropriate ad-interim and/or interim reliefs, if necessary

14. Appeal accordingly allowed and disposed of.

15. The parties to act on ordinary copy of this order duly authenticated by Court Associate.

16. Certified copy expedited.