

(2013) 02 BOM CK 0197

In the Bombay High Court

Case No : Notice of Motion No. 25 of 2011 in Suit No. 402 of 2007

Roger Rodrigues and Others

APPELLANT

Vs

Russel Pereira and Others

RESPONDENT

Date of Decision : 04-02-2013

Acts Referred:

Citation : (2013) 7 BomCR 247

Hon'ble Judges : R.S. Dalvi, J

Bench : Single Bench

Final Decision : Disposed Off

Judgement

Dalvi Roshan J.

1. The plaintiffs have applied for judgment on admission essentially in respect of one of the properties of their deceased parents. The plaintiffs together have one share. Defendant No. 1 has another share. The defendant Nos. 1 to 5 have one share each. The shares of the plaintiffs are specifically admitted. Consequently a judgment on admission in respect of Flat No. 22 in Sandelle Apartments of Perry Road, Bandra (W) Mumbai is required to be passed. Defendant No. 1 claims that though the shares are admitted, the property be not sold but be given on license because it would fetch a decent amount each year. The suit is for determination and division of the respective shares. The shares having been admitted, a final judgment is required to be passed. In the final judgment no property can be ordered to be given on license. A license is essentially a temporary measure. A sale of the property can alone be ordered upon partition.

2. Defendant No. 2, who is the real contesting defendant accepts that the property be sold and the sale proceeds be distributed between the parties as per their share, the plaintiffs together having one share as the heirs of the deceased son of their parents.

3. The parties shall put up the suit flat for sale. The key of the flat in Sandelle Apartments is with the Court Receiver. Upon the written undertaking of the

parties that they shall only use the suit flat in Sandelle Apartments for the purpose of showing the prospective purchasers and not for any other purpose whatsoever, the Court Receiver shall make one duplicate key each for the plaintiffs, defendant No. 1 and defendant No. 2. All parties shall be entitled to obtain offers for sale. The flat shall be sold to the highest offerer. The amount received upon the sale shall be deposited in the Court.

4. The distribution shall then have to be made. There are various other properties of the deceased parents also.

5. Defendant No. 2 is residing in one of the properties of the parents. He has claimed tenancy rights. His father was a tenant. The father shifted from tenanted premises prior to his death. Defendant No. 2 came into the tenanted premises prior to the death of the father. Whether or not defendant No. 2 would be taken to be the tenant to the exclusion of all other siblings would have to be decided by the rent Court. The declaratory suit has been filed in the Bombay Small Causes Court for that purpose. The defendant No. 2 has been served. The defendant No. 2 has filed his W.S. That suit shall determine whether or not that property would belong solely to defendant No. 2 or to the defendants and plaintiffs.

6. The plaintiff contended that since defendant No. 2 has surrendered the tenancy and taken the entire surrendered value, his share upon valuation be not paid to him. Defendant No. 2 is settled in Australia. He does not live in any of the premises. Defendant No. 2 claims an equal share along with plaintiffs in the property at Sandelle Apartments, which would be sold.

7. Defendant No. 2 claims that since there are other properties of the deceased, those properties may be kept for adjustment of the sale value even if the Small Causes Courts suit remains undecided or is decided ultimately against defendant No. 2. That would be a reasonable proposition.

8. The partition decree is not for punishment of any of the parties. It is also not for rewarding one of the parties. It is for rewarding all the parties. It would be that parties may be entitled, one by one to the sale of the properties of their parents. Once an admission is made, the admission must result in a judgment at least in part of the plaintiffs claim. If the plaintiff gets his share there is no reason why defendant No. 2 must be deprived of his share subject of course, to the adjustment since he has not shared the tenancy value with the other siblings.

9. Once the sale is effected and the amount is deposited in the Court, the adjustment and/or division shall be decided by this Court based upon the above observations and upon seeing how far the declaratory suit has proceeded and how the other properties of the parents are sought to be divided and/or adjusted.

10. It may be observed that once there is an admission with regard to the extent of the shares upon intestacy it would apply to all the properties and it would also apply in respect of all the parties who are the heirs of the parents.

11. Notice of Motion is disposed off accordingly. Suit is adjourned to 8th April,

2013.