

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION**

**CIVIL APPLICATION NO.1962 OF 2014
IN
FIRST APPEAL NO.742 OF 2014**

Mohd. Ali Khan S/o.Hazrat Sufi Bismillah .. Applicant

vs.

Shaukat Ali Khan S/o. Hazrat Sufi Bismillah .. Respondent

Mr.Ashish Mehta a/w Mr.Prakash Mishra i/b Mr.Ashish Mehta for the applicant

Mr.J.S.Sapra for the respondent

**CORAM : K.K.TATED, J.
DATED : 12/08/2015**

PC:

1 Heard the learned counsel for the parties.

2 This application is preferred by defendant for stay of the operation and implementation of the impugned judgment and decree dated 3.2.2014 passed by Bombay City Civil Court, Mumbai in Suit No.3951 of 2004 (H.C.3951 of 2004) holding that the respondent plaintiff is entitled ½ share in the suit property. That suit was decreed by the Trial Court in terms of prayer clause (a), (b) and (e) which reads thus:

“(a) That the “suit property” i.e. estate of the said deceased

father Hazrat Sufi Bismillah Shah i.e. premises admeasuring 85 sq.meters and the structures standing thereupon known as Khanqah Janhagiri Aswi, situate lying and being at plot of land bearing C.T.S. No.857, Hissa No.48 (part) of Village Mohili, Taluka-Kurla M.S.D. being assessed for the purpose of assessment tax in the name of the deceased Hazrat Sufi Bismillah Shah as a occupier bearing Municipal Ward No.L-3921 (187BB) 187 BB those mentioned in Schedule (Exh.B of the plaint) be administered by appointment of an administrator, by and under the orders, supervision and direction of this Hon'ble Court.

b) That it be declared that upon the death of deceased father Hazrat Sufi Bismillah Shah as on his intestacy, the estate i.e. 'suit property' left by the said deceased devolved upon the plaintiff and the defendant and the plaintiff is entitled $\frac{1}{2}$ share right, title and interest therein; those mentioned in Schedule (Exh-B of the plaint)

c) That upon such disclosure being made accounts rendered and the amount deposited in this Hon'ble Court aforesaid, the plaintiff's share in the net estate of the said deceased be ascertained and/or delivered and/or paid over to the plaintiff.”

3 The learned counsel for the defendant submits that properties stands in the name of Public Trust known as Hazrat Khwaja Makhdoom Sufi Mohd.Bismillah Shah Asvi Welfare Trust. He submits that the said trust was registered on 31.7.2004 bearing Registration No.E-21911(Mumbai) pg 144. He further submits that Schedule III vide

Rule 13(1) of the Public Trust Act, 1950 shows the suit property as Trust property. In support of this contention the learned counsel for the applicant defendant relies on the Schedule III issued by the office of the Charity Commissioner (page 146 of the compilation of documents). On the basis of these facts, the learned counsel for the applicant submits that in the interest of justice this Hon'ble Court be pleased to stay the operation and implementation of the impugned judgment and decree dated 3.2.2014 passed by Trial Court. He submits that as on today neither the applicant nor the respondent are in possession of the suit property.

4 On the other hand, the learned counsel for the respondent plaintiff vehemently opposed the present Civil Application. He submits that the applicant defendant without their consent formed the said trust. He further submits that without obtaining any probate of will executed by their predecessors, applicant formed the said trust and transferred all the properties in that trust. Hence, that is not binding on him. On the basis of these facts, the learned counsel for the respondent plaintiff submits that there is no question of staying the operation and implementation of the impugned judgment and decree passed by Trial Court.

5 I have heard both the sides. Admittedly, in the present proceeding as on today on the basis of Schedule III issued by office of the Charity Commissioner, Mumbai the property stands in the name of the said Trust. Not only that respondent plaintiff initially preferred Chamber Summons No.430 of 2005 in Trial Court for joining the said trust as a defendant. That Chamber Summons was withdrawn by the

respondent plaintiff which was recorded in the order dated 24.10.2005 passed by Trial Court (page 169 of the compilation). This itself shows that the plaintiff had knowledge that the suit property was transferred in the name of the said trust. Considering these facts as on today neither the suit property is in the name of plaintiff or defendant but stands in the name of the third party i.e. trust.

6 On the basis of above submissions, I am of the opinion that applicant defendant has made out a case for allowing this Civil Application. Hence, Civil Application is allowed in terms of prayer clause (b) which reads thus:

“(b) That pending the hearing and final disposal of the above Appeal, this Hon'ble Court may be pleased to stay the effect, operation and implementation of the Order and Judgment dated 3rd February, 2014 (“the Impugned Order”), passed by the Hon'ble City Civil Judge, Mumbai, Hon'ble Judge Shri Sanjay Patil, Presiding in Court Room No.2 (“the Trial Court”) thereby partially decreeing Suit No.3951 of 2004 (“the Suit”)”

7 Civil application stands disposed off accordingly.

(K.K.TATED, J.)