

Sequeira

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

WRIT PETITION NO. 3139 OF 2016

Nathmal Rekhchand Sancheti

... Petitioner

Vs.

Sushilabai Chimanlal Shah & ors.

... Respondents

Mr.Sanjay Jain a/w Mr.Prathamesh Kamat i/b M/s.K.K.Associate, for the Petitioner.

Mr.K.S.Dewal i/b Mr.Jayesh M.Joshi, for Respondents.

***CORAM : N.M.Jamdar, J.
Tuesday, 30 August 2016.***

Oral Order :

Rule. Rule made returnable forthwith. The learned counsel for the Respondents waives service. Taken up for disposal forthwith.

2. The Petitioner challenges the order passed by the learned Civil Judge, Senior Division, Thane dated 13 September 2010 and 10 February 2016 in Special Civil Suit No.665 of 2010.

3. Heard the learned counsel for the parties.

4. By order dated 13 September 2010 below Exhibit 12 in Miscellaneous Application No.182 of 2010, the learned Civil Judge has stated that the Miscellaneous Application now stands converted

into a suit. The Petitioner has assailed this order on various grounds. One of the grounds that has been stated is that there is no question of converting the application into a suit as various jurisdictional issues will then arise. It was submitted that all that the law contemplates is that when there is opposition for grant of heirship certificate, the proceedings have to be tried as if it is a suit, but that does not mean that the proceedings get converted into a civil suit. The learned counsel for the Respondents on the other hand submitted that the order is passed in the year 2010 and thereafter the Petitioner has participated in the proceedings.

5. In my opinion, it is not necessary to go into the question whether the order should be quashed at this stage as the order will have to be interpreted to mean that the application will be treated as if it is a suit. The learned counsel for the Petitioner is right in contending that it cannot be converted into a civil suit but only treated as a suit. Proceeding on this basis the challenge to the order dated 10 February 2016 will have to be now considered.

6. By this application, the Petitioner has prayed that pending the outcome of the proceedings in Special Civil Suit No.117 of 2011 filed by the Respondent-Plaintiff, the Special Civil Suit No.665 of 2010 (Earlier Miscellaneous Application No. 182 of 2010) be stayed. By the impugned order the learned Civil Judge has rejected the application. The learned counsel for the Petitioner submitted that order impugned is wrong on two counts. Firstly, that the Court has

power to defer and suspend the proceedings till the question is tried by a regular civil suit instituted by parties which is pending and inspite of the fact that suit is already filed by the Respondent-plaintiff the learned Judge has not exercised his powers. He submitted that whether issue is complicated or difficult in nature can be considered by perusal of the application and it is not necessary that this decision should await till the conclusion of the evidence. He also submitted that the learned Judge is in error in holding that since the proceedings are now a civil suit, the application filed by the Petitioner cannot be entertained. The learned counsel for the Respondent submitted that the evidence of the Plaintiff is not yet complete and the Plaintiff is now 92 years old and the application is filed by the Plaintiff only to delay the proceedings.

7. The application is moved by the Petitioner under Bombay Regulation VIII of 1827 more particularly, Rule 4 thereof. Rule 4 reads as under -

'4. First – If, before the expiration of the time, any objection is made to the right of the person claiming as heir, executor or administrator, the Judge, on a day to be fixed (of which at least eight days' previous notice shall be given to the parties), shall summarily investigate the grounds of the objections on the one hand, and of the right claimed on the other, examining such witnesses or other evidence as may be adduced by the parties, and either grant or refuse a certificate, as the circumstances of the case may require.

Second. - But if from the evidence adduced, it appears that the question at issue between the parties is of

a complicated or difficult nature, the Judge may suspend proceedings in the application for a certificate until the question has been tried by a regular suit instituted by one of the parties.'

8. The bare perusal of the Rule would indicate that it is open to the learned Judge, if from the evidence adduced it appears that question at issue between the parties is of complicated nature, to suspend the proceedings. At this stage, it is informed cross-examination of the Plaintiff is going on. It is also informed that on the last date the Respondent-Plaintiff fainted while under cross-examination.

9. There was a debate at the bar as to what is the stage at which such application needs to be maintained. According to the learned counsel for the Petitioner, the learned Judge can decide whether to suspend the proceedings based on the perusal of the application alone, while it is the contention of the learned counsel for the Respondents that such decision will have to be taken after the entire evidence is adduced and more particularly, in this case, since the order of treating the application as a suit is passed in the year 2010.

10. What is primary is the opinion to be formed by the learned Judge as to whether the questions are of complicated or difficult nature so as to suspend the proceedings till the question is tried in a regular civil suit. The learned Judge may form an opinion at an earlier stage or may defer the opinion till the evidence is adduced, if

the learned Judge does not find that the issue is of complicated nature on mere by perusal of the application or on the evidence of the witness of the Plaintiff.

11. Considering the fact that the learned Civil Judge, while deciding the application has not recorded his satisfaction as to whether the proceedings need to be suspended on the ground that issue is complicated or difficult in nature, it will be appropriate that an application is made by Petitioner after the completion of the evidence of the Plaintiff's witness invoking the provision under Rule 4. Once such application is moved it will be open to the learned Judge to consider the same within the parameters of Rule 4. The learned Judge may decide the issue after the completion of Plaintiff's evidence or defer the decision till the entire evidence is completed. Since that primary decision has to be taken by the learned Civil Judge, this decision has to be left to the learned Civil Judge. It is not possible to take this original decision in the power of superintendence of this Court. The learned counsel for the Respondents states that in view of the fact that the proceedings are now to be treated as a suit, Rule 4 itself will not apply. Even this submission can be left open to be considered when the Petitioner files an application. Accordingly, the Writ Petition is disposed of by following order -

(a) As regards challenge to order dated 13 September 2010 is concerned, it is clarified that this order directs that the application be treated as a suit and it is not to be construed as if the application has

now become a regular civil suit.

(b) The order dated 10 February 2016 below Exhibit 103 is quashed and set aside.

(c) It is open to the Petitioner to file an application invoking the provisions of Section 4 of the Bombay Regulation VIII of 1987, after the completion of evidence of Plaintiff's evidence and the learned Judge will decide the application or defer the same in light of what is stated above in this order.

12. All contentions of the parties are kept open as indicated above.

(N.M.Jamdar, J.)