

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.2421 OF 2011

Arun Ganesh Dighe ... Petitioner
Vs.
Kumudini Krishnaji Salkade and others ... Respondents
WITH

WRIT PETITION NO.2422 OF 2011

Arun Ganesh Dighe ... Petitioner
Vs.
Saroj Krishnaji Salkade and others ... Respondents

Mr. Surel S. Shah for Petitioner.

Mr. Vaibhav Mehta for Respondent No.10 in Writ Petition No.2421 of 2011
and for Respondent No.3 in Writ Petition No.2422 of 2011.

CORAM : R. G. KETKAR, J.

Reserved on : OCTOBER 7, 2016

Pronounced on: NOVEMBER 17, 2016

ORDER :

Heard Mr. Shah, learned Counsel for the petitioner and Mr. Mehta, learned Counsel for respondent No.10 in Writ Petition No.2421 of 2011 and for respondent No.3 in Writ Petition No.2422 of 2011 at length.

2. Writ Petition No.2421 of 2011 is directed against the - (i) judgment and order dated 29.10.2007 in Interim Notice No.67 of 2007 in R.A.D. Suit No.2078 of 1996; (ii) judgment and order dated 29.10.2007 in Interim Notice No.68 of 2007 passed by the learned Judge presiding over Court Room No.14 of the Court of Small Causes at Mumbai; (iii) judgment and order dated 21.02.2011 in Revision Petition No.88 of 2008 in Interim Notice No.67 of 2007; and (iv) judgment and order dated 21.02.2011 in Revision Petition No.89 of 2008 in Interim Notice No.68 of 2007 passed by the Appellate Bench of the Small Causes Court.

3. By order dated 29.10.2007 in Interim Notice No.67 of 2007, the learned trial Judge allowed the Notice taken out by Radheshyam Chhotelal Shah, hereinafter referred to as applicant. The applicant is ordered to be brought on record in the place of deceased defendant No.2 Ms Saroj Krishnaji Salkade as defendant No.2. Petitioner-plaintiff is directed to amend the plaint. By order dated 29.10.2007 in Interim Notice No.68 of 2007, the learned trial Judge has allowed the notice taken out by the applicant for condoning the delay for bringing him in place of deceased defendant No.2 Saroj Salkade. Aggrieved by these orders, petitioner-plaintiff instituted Revision Petition No.88 of 2008 challenging the order passed in Interim Notice No.67 of 2007. Petitioner-plaintiff also instituted Revision Petition No.89 of 2008 challenging the order passed in Interim Notice No.68 of 2007. Appellate Court dismissed the Revision Petitions. It is against these orders, original plaintiff has instituted Writ Petition No.2421 of 2011.

4. Writ Petition No.2422 of 2011 is directed against the - (i) judgment and order dated 29.10.2007 in Interim Notice No.69 of 2007 in R.A.E. Suit No.907/1726 of 1997; (ii) judgment and order dated 29.10.2007 in Interim Notice No.70 of 2007 passed by the learned Judge presiding over Court Room No.14 of the Court of Small Causes at Mumbai; (iii) judgment and order dated 21.02.2011 in Revision Petition No.87 of 2008 in Interim Notice No.69 of 2007; and (iv) judgment and order dated 21.02.2011 in Revision Petition No.85 of 2008 in Interim Notice No.70 of 2007 passed by the Appellate Bench of the Small Causes Court.

5. By order dated 29.10.2007 in Interim Notice No.69 of 2007, the learned trial Judge allowed the Notice taken out by applicant - Radheshyam Chhotelal Shah. The applicant is ordered to be brought on record in the place of deceased plaintiff Ms Saroj Krishnaji Salkade as

plaintiff. Plaintiff is directed to amend the plaint. By order dated 29.10.2007 in Interim Notice No.70 of 2007, the learned trial Judge has allowed the notice taken out by the applicant for condoning the delay for bringing him in place of deceased plaintiff - Saroj Salkade. Aggrieved by these orders, petitioner-defendant No.2 instituted Revision Petition No.85 of 2008 challenging the order passed in Interim Notice No.70 of 2007. Petitioner-defendant No.2 also instituted Revision Petition No.87 of 2008 challenging the order passed in Interim Notice No.69 of 2007. Appellate Court dismissed the Revision Petitions. It is against these orders, original defendant No.2 has instituted Writ Petition No.2422 of 2011.

6. Since the common questions of law and fact are raised in these Petitions, the same can conveniently be disposed of by the common order. For appreciating the controversy raised in these Petitions, facts from Writ Petition No.2421 of 2011 are taken into consideration.

7. Petitioner Arun G. Dighe has instituted declaratory suit claiming that he is a tenant in respect of flat situate at 6/123, Hindu Colony, Laxmi Sadan, Dadar, Mumbai - 400 014 (for short 'suit premises'). Ms Saroj K. Salkade was impleaded as defendant No.2. During the pendency of the Suit, defendant No.2 Saroj Salkade expired on 08.08.2006. Applicant took out Interim Notice No.67 of 2008 for bringing him as defendant No.2 in the place of Ms Saroj Salkade, since deceased. Petitioner-plaintiff resisted the notice by filing reply. Applicant also filed Interim Notice No.68 of 2007 for condoning the delay in filing the Interim Notice. Plaintiff resisted that Notice. On 29.10.2007, the learned trial Judge allowed both the Interim Notices. Aggrieved by these orders, plaintiff preferred Revision Petitions, which were dismissed by the appellate Court. It is against these orders, plaintiff instituted Writ Petition No.2421 of 2011.

8. In support of this Petition, Mr. Shah strenuously contended that the Courts below committed serious error in allowing the Interim Notices taken out by the applicant. He submitted that the applicant had filed interim notice inter alia contending that defendant No.2 - Saroj had executed Will, which is registered on 28.03.2006 bequeathing her share in his favour. As of today, applicant has not obtained probate of that Will. He submitted that in view of Section 213 of the Indian Succession Act, 1925 (for short 'Succession Act'), applicant cannot establish any right as executor or legatee in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of the authenticated copy of the Will annexed. He, therefore, submitted that impugned orders are liable to be set aside.

9. On the other hand, Mr. Mehta supported the impugned orders. He submitted that in view of Section 211 of the Succession Act, the executor or administrator of a deceased person is his legal representative for all purposes and all the property of the deceased person vests in him as such. He invited my attention to the definition of the expression "legal representative" in Section 2(11) of the Code of Civil Procedure, 1908 (for short 'C.P.C.'). He relied upon the decision of the Apex Court in the case of **FGP Limited Vs. Saleh Hooseini Doctor, (2009) 10 SCC 223**, and in particular paragraphs 46 to 53 thereof. He further submitted that in fact, applicant has already instituted probate proceedings on the Original Side of this Court and the same is pending.

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. Sections 211 and 213 of the Succession Act read thus,

"211. Character and property of executor or administrator as such.
- (1) The executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all

the property of the deceased person vests in him as such.

(2) When the deceased was a Hindu, Muhammadan, Buddhist, Sikh, Jaina or Parsi or an exempted person, nothing herein contained shall vest in an executor or administrator any property of the deceased person which would otherwise have passed by survivorship to some other person.

213. Right as executor or legatee when established.- (1) No right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

(2) This section shall not apply in the case of Wills made by Muhammadans or Indian Christians, and shall only apply-

(i) in the case of Wills made by any Hindu, Buddhist, Sikh or Jaina where such Wills are of the classes specified in clauses (a) and (b) of Section 57; and

(ii) in the case of Wills made by any Parsi dying, after the commencement of the Indian Succession (Amendment) Act, 1962 (16 of 1962), where such Wills are made within the local limits of the ordinary original civil jurisdiction of the High Courts at Calcutta, Madras and Bombay, and where such Wills are made outside those limits, in so far as they relate to immovable property situated within those limits.”

11. Section 211 lays down that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Section 213 lays down that no right as executor or legatee can be established in any Court of Justice, unless a Court of competent jurisdiction in India has granted probate of the Will under which the right is claimed, or has granted letters of administration with the Will or with a copy of an authenticated copy of the Will annexed.

12. In **FGP Limited** (*supra*), the Apex Court has observed in paragraphs 46 to 53 thus:

“46. In this connection, we must see the distinction between Sections 211 and 213 of the Indian Succession Act. Under Section

211 of the said Act, the executor or administrator, as the case may be, of a deceased person is his legal representative for all purposes, and all the property of the deceased person vests in him as such. Here the legal representatives will have the same meaning as has been given in Section 2(11) of the Code of Civil Procedure.

“Section 2(11) of the Code of Civil Procedure provides as under: "legal representative" means a person who in law represents the estate of a deceased person, and includes any person who intermeddles with the estate of the deceased and where a party sues or is sued in a representative character the person on whom the estate devolves on the death of the party so suing or sued.”

47. Therefore, it is Section 211 and not Section 213 that deals with the vesting of property. This vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain.

48. Under Section 213, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the will. This vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding.

49. It has been held in *Kulwanta Bewa Vs. Karam Chand Soni* - reported in AIR 1938 Calcutta 714 that the whole scheme of the Act is to provide for the representation of the deceased's estate for the purpose of administration. That vesting is not only for the beneficial interest in the property but is also for the purposes of representation.

50. Similarly, it has been held in *Meyappa Chetty Vs. Supramanian Chetty* - (1916) 43 IA 113, that an executor derives his title from the Will and not from the probate and the right of action in respect of personal property of the testator vests in the executor on the death of the testator.

51. But Section 213 operates in a different field. Section 213 enjoins that rights under the Will by executor or a legatee cannot be established unless probate or letters of administration are obtained. Therefore, Section 211 and Section 213 of the said Act have different areas of operation.

52. Even if the Will is not probated that does not prevent the vesting of the property of the deceased on the executor/administrator and consequently any right of action to represent the estate of the executor can be initiated even before the grant of the probate.

53. Similar opinion has been expressed by this Court in Commissioner, Jalandhar Division and Ors. Vs. Mohan Krishan Abrol and Anr. - (2004) 7 SCC 505 (See para 10 at page 513). So the suit filed by the respondents as executors is also maintainable.”

13. In paragraph 46, the Apex Court referred to Section 211 and observed that the legal representatives will have the same meaning as has been given in Section 2(11) of C.P.C.

14. In paragraph 47, it is observed that Section 211 and not Section 213 deals with the vesting of property. Vesting does not take place as a result of probate. On the executor's accepting his office, the property vests on him and executor derives his title from the Will and becomes the representative of the deceased even without obtaining probate. The grant of probate does not give title to the executor. It just makes his title certain. In paragraph 48, the Apex Court observed that under Section 213, the grant of probate is not a condition precedent to the filing of a suit in order to claim a right as an executor under the will. This vesting of right is enough for the executor or administrator to represent the estate in a legal proceeding. In paragraph 51, the Apex Court observed that Section 213 operates in a different field. Section 213 enjoins that rights under the Will by executor or a legatee cannot be established unless probate or letters of administration is obtained. Section 211 and Section 213 of the said Act have different areas of operation. Thus, in view of Section 211 of C.P.C., I do not find any merit in the submission of Mr. Shah.

15. In the present case, it is not in dispute that Saroj Salkade has expired on 08.08.2006. Applicant came with the case that she was residing with him in the suit premises of which he is a tenant. He holds the rent receipts and other relevant documents. Applicant has also made

reference to his forcible dispossession from the suit premises on 02.09.2006 and his filing of Suit No.4835 of 2006 under Section 6 of the Specific Relief Act, 1963 in the Bombay City Civil Court. Applicant further came with the case that Saroj Salkade has given 3/6 share in his favour by executing a Will, which is registered on 28.03.2006. It is not in dispute that applicant has also filed probate proceedings on the Original Side of this Court, and which is pending. In view of Section 211 of the Succession Act read with Section 2(11) of C.P.C., I do not find that the Courts below committed any error in allowing the interim notice taken out by the applicant. Hence, no case is made out for invocation of powers under Article 227 of the Constitution of India. Petitions fail and the same are dismissed.

(R. G. KETKAR, J.)

Minal Parab