

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION (L) NO.706 OF 2016
IN
APPEAL (L) NO.100 OF 2016
IN
NOTICE OF MOTION NO.107 OF 2015
IN
TESTAMENTARY SUIT NO.577 OF 2008

Dinesh Vallabhdas Kapadia. .. Applicant/Appellant/
(Orig. Plaintiff)

IN THE MATTER BETWEEN

Dinesh Vallabhdas Kapadia. .. Appellant
Vs
Ramesh Vallabhdas Kapadia & Ors. .. Respondents
—
Shri Swapan Samdhani for the Applicant/Appellant.
Shri A.R. Shaikh i/b Mrs. Swati S. Margi for the Respondents.
Shri S.S. Deshpande, Court Receiver, is present.
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CORAM : A.S. OKA & G.S.KULKARNI, JJ
DATED : 15TH MARCH 2016

PC.

1. Heard the learned counsel appearing for the Applicant (Appellant) and the learned counsel appearing for the first to third Respondents (Respondents in the Appeal). Prima facie, it appears to us that the learned Single Judge while passing the impugned order has purportedly exercised the powers under Sub-section (1) of Section 269

of the Indian Succession Act, 1925 (for short “the said Act of 1925”).

Admittedly, the parties are Hindus.

2. Our attention is invited to the judgment and order dated 29th March 2011 in Appeal No.797 of 2010 (*Ramchandra Ganpatrao Hande alias Handege v. Vithalrao Hande and Others*). The view taken by this Court is that in view of Sub-section (2) of Section 269 of the said Act of 1925, when the parties to the Probate Petition are Hindus, the power under Sub-section (1) of Section 269 cannot be exercised by the Testamentary Court.

3. The learned counsel appearing for the Respondents states that though the Appeal is pending against the said judgment and order dated 29th March 2011 before the Apex Court, as of today, the said decision continues to bind this Court. However, he relied upon the Rule 403 of the Bombay High Court (Original Side) Rules, 1980. He submitted that once a Testamentary Petition is treated as a suit, the Application under Rule 1 of Order XL as well as Rules 1 and 2 of Order XXXIX of the Code of Civil Procedure, 1908 is maintainable.

4. Perhaps, the Rule 403 of the said Bombay High Court (Original Side) Rules, 1980 is founded on Section 254 of the said Act of 1925 which provides that in a Petition for grant of Probate or Letters of

Administration when there is a contest, the Petition shall be treated as a suit. Nevertheless, it continues to be a proceeding for grant of probate and, therefore, the powers to protect the property under Sub-section (1) of Section 269 of the said Act of 1925 cannot be invoked. In the present case, the parties being Hindus, Sub-section (2) of Section 269 of the said Act of 1925 comes into picture. Therefore, this Court cannot exercise the powers under Sub-section (1) of Section 269 of the said Act of 1925.

5. Therefore, prima facie, the order passed by the learned Single Judge appears to be erroneous. Therefore, a case is made out for grant of stay. We make it clear that notwithstanding the grant of stay, it will be always open for the first to third Respondents to file appropriate proceedings in accordance with law for seeking the reliefs which were sought in the Notice of Motion No.107 of 2015.

6. It is an admitted position that the Court Receiver has not taken charge of the flat subject matter of this Appeal.

7. Hence, we dispose of the Notice of Motion by passing the following order.

ORDER :

- (a) Notice of Motion is made absolute in terms of prayer clause (a);
- (b) On the Application being made by the first to third Respondents, the Court Receiver will refund the amount deposited by the said Respondents.
- (c) After the amount is refunded, the Court Receiver shall stand discharged without passing any accounts;
- (d) This order will not preclude the first to third Respondents from taking out appropriate proceedings in accordance with law for seeking the reliefs claimed in the Notice of Motion No.107 of 2015;
- (e) We make it clear that the proceedings of the Testamentary Suit No.577 of 2008 are not stayed and notwithstanding the pendency of the Appeal, the proceedings will continue;

- (f) To enable the first to third Respondents to take appropriate proceedings in accordance with law, we direct that the Respondent No.5 shall not part with possession of the flat in question for a period of six weeks from today;

(G.S.KULKARNI, J)

(A.S. OKA, J)