

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition No. 1735 OF 2017

Kulbhushan Ramnath Khanna HUF

...Petitioner

Versus

Asha Baldev R. Khanna

And Ors.

...Respondents

....

Mr. Dipesh U. Siroya, Advocate for the Petitioner.

Ms. Mamta Sadh a/w. Mr. Prathamesh Seth i/b. Joseph Fernandes,
Advocate for the Respondents.

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CORAM : R. G. KETKAR, J.

RESERVED ON : 19th APRIL, 2018

PRONOUNCED ON : 24th APRIL, 2018

ORDER :

1. Heard Mr. Dipesh Siroya, learned Counsel for the petitioner and Ms. Mamta Sadh, learned Counsel for the respondents, at length.
2. By this Petition under Article 227 of the Constitution of India, the petitioner, hereinafter referred to as the 'plaintiff' has challenged the judgment and order dated 19.11.2016 passed by the Appellate Bench of the Small Causes Court at Bombay in (iii)Revision Petition No.253/2015. By that order, the Appellate Court allowed the Revision Application preferred by the respondents, hereinafter referred to as the

'defendants', and quashed and set aside the judgment and order dated 3.7.2015 passed by the learned Judge, Court Room No.9 of the Court of Small Causes Court at Bombay below Exhibit-34 in L.E. Suit No.152/190 of 2011. The Appellate Court allowed the application Exhibit-34 made by the defendants for staying the further proceedings of L.E. Suit No.152/190 of 2011 pending before Court Room No.9, till disposal of the Administration Suit No.823/2011 pending before this Court.

3. The defendants have instituted Suit No.823/2011 on the Original Side of this Court on 15.10.2010 against the plaintiff herein and four others *inter alia* praying for administration of the estate of Ramnath Khanna, since deceased, as mentioned in Exhibit-W to the plaint; for declaration that they are entitled to 1/4th share in the estate of the deceased Ramnath Khanna and for distribution thereof, amongst other reliefs.

4. The plaintiff herein has instituted L.E. Suit No.152/190 of 2011 in the Small Causes Court on 19.9.2011 against the defendants under Section 41 of the Presidency Small Cause Courts Act, 1882 *inter alia* contending that the defendants are the gratuitous licensees in respect of portion of terrace flat No.20, admeasuring 1800 sq. ft., situate on the 4th floor of the Sunshine Building, Sunshine Building Co-

operative Housing Society Ltd., 78-B, Dr. Annie Besant Road, Worli, Mumbai – 400 018 (for short, 'suit premises'). The plaintiff contended that the defendants are the gratuitous licensees in respect of portion of the suit premises consisting of two rooms of North-West corner admeasuring 400 sq. ft. During pendency of the suit, defendant No.2 took out application Exhibit-34 for staying the further proceedings of L.E. Suit in view of pendency of the suit instituted on the Original Side of this Court for administration of the estate of the deceased Ramnath Khanna. Defendant No.2 contended that the controversy raised in the Administration Suit in the High Court has bearing on the suit in the Small Causes Court.

5. The plaintiff resisted the application. By order dated 3.7.2015, the learned trial Judge rejected the application principally on the ground that the defendants did not produce the certified copies of the orders. Aggrieved by that order, the defendants preferred Revision Application. By the impugned order, the Appellate Court allowed the Revision Application. It is against this order, the plaintiff has instituted the present Petition.

6. In support of this Petition, Mr. Siroya reiterated the submissions that were advanced before the Courts below. He submitted that basically the Revision instituted by the defendants itself is not

maintainable as no substantive rights of the defendants are affected. He relied upon the decision of Full Bench of this Court in **Bhartiben Shah and another v. Gracy Thomas and others**, 2013(2) Bom.C.R. 1. He further submitted that Section 10 of Code of Civil Procedure, 1908 (for short, 'C.P.C.') is not applicable in the present case. The defendants cannot take recourse to Section 151 of C.P.C. In support of his submissions, he relied upon following decisions :

- [i] **Abdul Rahim B. Attar and others vs. Atul Ambalal Barot and another**, AIR 2005 BOMBAY 120;
- [ii] **Arvind Kumar vs. Smt. Umapati Devi**, 1997 (1) BLJ 1042 [Bihar High Court];
- [iii] **Ram Narain Gupta (since deceased) and others vs. Hari Om Agarwal and another**, [Allahabad High Court] decided on 31.1.2012 in Civil Misc. Writ Petition No.2147/2012;
- [iv] **M/s. Sadguru Constructions and another vs. Smt. Jaimeet Kaur Nirmansingh Sial and others**, decided by this Court (Coram: S.U. Kamdar, J.) on 23.12.2005 in Writ Petition No.8110/2005.
- [v] **National Instituted of Mental Health & Neuro Sciences vs. C. Parameshwara**, 2005 (2) SCC 256;
- [vi] **Aspi Jal and another vs. Khushroo Rustom Dadyburjor**, 2013(4) SCC 333;
- [vii] **Ramji Gupta and another vs. Gopi Krishan Agrawal and others**, (2013) 11 SCC 296; and
- [viii] **Prakash Chand Soni vs. Anita Jain**, [Madhya Pradesh High Court], 2002(2) MPHT 424;

7. On the other hand, Ms. Sadh supported the impugned order. She submitted that the plaintiff claims that Ramnath Khanna had executed a registered Will dated 25.8.1995. The plaintiff obtained Probate on 6.8.2007. The defendants filed Misc. Petition No.83/2007 for revocation of the Probate. By order dated 10.10.2008, the learned Single Judge of this Court dismissed the Misc. Petition. Aggrieved by that decision, the defendants preferred Appeal No.330/2009 before the Division Bench of this Court.

8. It is case of the defendants that Ramnath Khanna had executed subsequent Will on 10.3.1997. They have instituted Misc. Petition No.59/2008 for obtaining Probate of that Will and said proceedings are pending. After hearing both sides, by order dated 31.8.2009, the Division Bench of this Court admitted the Appeal and gave liberty to move the Court after Misc. Petition No.59/2008 is decided. Ms. Sadh also invited my attention to the correspondence exchanged between the parties and also with the Society.

9. Ms. Sadh submitted that in the Administration Suit, the suit premises is one of the properties left by Ramnath Khanna. The defendants are claiming 1/4th share in the estate of Ramnath Khanna which also includes the suit premises. The controversy raised in the suit for administration of the estate of Ramnath Khanna has bearing on the

suit instituted by the plaintiff before the Small Causes Court. If it is ultimately held the defendants have share in the suit premises amongst other properties of Ramnath Khanna, the plaintiff's suit on the ground that the defendants are gratuitous licensees in respect of part of the suit premises must fail. She therefore, submitted that the Appellate Court rightly allowed the Revision Application. In support of these submissions, she relied upon following decisions :

- [i] **Subho Ram Kalita vs. Dharmeswar Das Koch and others, AIR 1987 Gau 73 [Gauhati High Court];**
- [ii] **Shiv Shakti Coop. Housing Society, Nagpur vs. M/s. Swaraj Developers and others, (2003) 6 SCC 659; and**
- [iii] **Bhartiben Shah (supra).**

10. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. It is not in dispute that the suit premises originally belonged to deceased Ramnath Khanna. It is not in dispute that the defendants have instituted Suit on the Original Side of this Court on 15.10.2010 and the same is pending. It is also not in dispute that the plaintiff has instituted Suit in the Small Causes Court on 19.9.2011. Defendant No.2 filed application Exhibit-34 for staying the further proceedings of the suit instituted in the Small Causes Court pending disposal of the Suit for administration of the estate of Ramnath Khanna.

11. Section 10 of C.P.C. reads thus :

“10. Stay of suit.-- No Court shall proceed with the trial of any suit in which the matter in issue is also directly and substantially in issue in a previously instituted suit between the same parties, or between parties under whom they or any of them claim litigating under the same title where such suit is pending in the same or any other Court in [India] having jurisdiction to grant the relief claimed, or in any Court beyond the limits of [India] established or continued by [the Central Government] and having like jurisdiction, or before [the Supreme Court].

Explanation.-The pendency of a suit in a foreign Court does not preclude the Courts in [India] from trying a suit founded on the same cause of action.”

12. In the case of **Ram Bahadur Thakur and Co. vs. Devidayal (Sales) Ltd., A.I.R. 1954 Bombay 176**, the Division Bench of this Court observed in paragraph-6 that Section 10 for its application requires a previously instituted suit in which the matter in issue is also directly and substantially in issue in the subsequent suit. It requires that the parties should be the same and it further requires that the Court in which the suit is previously instituted should have jurisdiction to grant the relief claimed in the subsequent suit.

13. In paragraph-7, the Division Bench observed that the question is whether in every case and in every circumstance when Section 10 applies the Court is bound to give effect to that section. The further question is whether the Court has any power under Section 151 not to give effect to Section 10 under certain circumstances and in certain

cases. When C.P.C. deals with a particular subject matter and gives specific directions to the Court to do certain things or to follow a certain procedure, it is not open to the Court not to do those acts or not to follow that procedure. If the conditions laid down in Section 10 are complied with, the Court has power to stay the subsequently filed Suit. It is well settled that under Section 151, a Court cannot act contrary to the specific provisions of the statute. Section 151 is intended to deal with cases which have not been dealt with by C.P.C. It is clear that C.P.C. cannot deal with every conceivable case that may arise in Courts of law. Section 151 is enacted in order to save the inherent powers of the Court to do justice in proper cases. In paragraph-8, it was observed that a situation might arise which could not have been contemplated by the Legislature when it enacted Section 10.

14. In the present case, the defendants have instituted suit prior in point of time for Administration of the estate of deceased Ramnath Khanna. While deciding the suit, this Court obviously will have no jurisdiction to decide as to whether there is a relationship of licensor and licensee between the parties. Equally the Small Causes Court will have no jurisdiction to decide as to whether the defendants are the co-sharers in respect of the suit premises and it will have the jurisdiction to decide whether the defendants are gratuitous licensees as claimed by the

plaintiff or not.

15. In view of the decision of this Court in **Ram Bahadur Thakur** (supra), strictly speaking Section 10 of C.P.C. will not be applicable. Section 151 of C.P.C. reads thus :

“151. Saving of inherent powers of Court.-- Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders as may be necessary for the ends of justice, or to prevent abuse of the process of the Court.”

16. In concurrent judgment in **Ram Bahadur Thakur** (supra), Hon'ble Mr. Justice Shah observed in paragraph-14 thus :

“14. Section 151 of the Civil Procedure Code, which enunciates the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court, enables the Court to pass such orders as may be necessary for preventing injustice being done, or, in other words, to pass orders 'ex debito justitiae' for the effective administration of justice for doing which alone the Court exists. It is possible that a party may by making untrue averments file a suit in a Court and induce that Court to entertain his suit, and thereby may be able to hold up proceedings in another suit instituted bona fide in respect of the same matter in dispute in another Court by the opposite party, and may compel that opposite party to defend the previously instituted suit, and thereby involve him in expense and cause him harassment.

.....
In my view, the provisions of Section 10 and Section 151 of the Civil Procedure Code must be read together, and if the Court which is asked to stay a suit comes to the conclusion that by staying the suit before it, it would perpetrate an abuse of the process of Court,

or would enable the other party to obtain a benefit to which in view of his conduct he is not legitimately entitled, then, notwithstanding the provision of Section 10, the Court would be justified in refusing to stay the suit before it, even though that suit is a subsequently instituted suit.”

17. Applying the tests laid down by the Division Bench of this Court in **Ram Bahadur Thakur** (supra) to the facts of the present case, in my opinion, application filed by defendant No.2 has to be treated as one under Section 151 and not under Section 10 of C.P.C. In paragraph-19 of the impugned order, the Appellate Court has considered the reliefs claimed by the defendants in Administration Suit and the jurisdiction of the High Court as also the nature of relief claimed by the plaintiff and jurisdiction of the Small Causes Court. The Appellate Court rightly held that though different issues can be decided by different competent Court, still the effect of finding by the High Court would have bearing on the issues raised before the Small Causes Court in the subsequent suit. Though the issue before one Court is not directly in issue before another Court in subsequent suit, still that aspect is substantially in issue before both the Courts.

18. In paragraph-20, the Appellate Court dealt with the submission of the defendant that Section 10 of C.P.C. cannot be applied. The Appellate Court, however, observed that Section 10 applies and

Section 151 is not applicable. In view of paragraph-6 of the decision of Division Bench of this Court in **Ram Bahadur Thakur** (supra), I find that the said finding recorded by the Appellate Court to this extent cannot be sustained.

19. However, for the reasons recorded hereinabove, I do not find that the Appellate Court committed error in allowing Revision Application.

20. Mr.Siroya relied upon the decision of Full Bench of this Court in **Bhartiben Shah** (supra). The Appellate Court rightly came to the conclusion that the substantive rights of the defendants will be affected and, therefore, the Revision is maintainable. Even otherwise the Revision instituted under Section 42(4) of Presidency Small Cause Courts Act, 1882 is maintainable. In view thereof, the reliance placed by Mr. Siroya on the decisions, referred hereinabove, does not advance the case of the plaintiff. No case is made out for invocation of powers under Article 227 of the Constitution of India. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)