

ssp

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO.169 OF 2018

Abdul Ziz Alimohammed Chotani ...Appellant
vs.
The Official Assignee of Bombay ...Respondent

Mr.Asif Y. Menon I/b Anam Fatima for the appellant
Mr.E.B.Sivakumar, Dy.O.A is present
Mr.Vishal Kanade a/w Mr.Saket Mone, Mr.Vishesh
Kalra, Mr.Prakash Kadam and Mr.Makrand Savant I/b
Vidhi Partners for the respondent No.2

CORAM : A.S.OKA, &
 M.S.SONAK,JJ.
DATE : AUGUST 28, 2018

Digitally
signed by
Shubhashri
Shirurkar
Pathak
Date:
2018.10.04
10:55:36
+0530

P.C.:

1 Heard the learned counsel for the appellant. The appellant is the original plaintiff No.3. The challenge in this Letters Patent Appeal is to the order dated 23rd February 2018 passed by the learned Single Judge on Chamber Summons taken out by a third party (second respondent). The first prayer in the Chamber Summons was for directing impleadment of the second respondent as a party defendant. The second prayer was permitting the second respondent to file a written statement. Both the prayers have been granted by the learned Single Judge.

2 The suit in which the Chamber Summons was taken out is a suit for partition in which a preliminary decree has been passed. The second respondent is

claiming on the basis of the agreement executed by Madiwale Family. It is the case made out in the plaint that the suit property was owned by Mia Mahomed Chotani. The original plaintiff filed the said suit against one Usman in his capacity as the legal representative of the said Mia Mahomed Chotani. It appears that the said Usman was declared insolvent and that is how the Official Assignee was brought on record of the suit. It is claimed that the said Mia Mahomed Chotani during his lifetime has entrusted his property to one Krishnadas Gordhandas Madiwale for managing the same. The legal representatives of Krishnadas claimed that there were certain debts due and payable by late Mia Mahomed Chotani. There is a reference to the suit filed by the Court Receiver appointed in the suit. The said suit was for possession against Madiwale Family. One fourth share in the suit property was awarded to Madiwale Family in the said suit. It is claimed that in response to consent decree in the suit, there was a partition by metes and bounds.

3 As stated earlier, the second respondent claimed to be a transferor from the members of the Madiwale Family on the basis of the various documents.

4 The opposition of the original plaintiffs was on various grounds such as documents on which reliance was placed by the second respondent were insufficiently stamped. Secondly, the second

respondent was claiming only on the basis of an agreement of sale which does not create any interest in the property. Thirdly, it was contended that the right of the second respondent at highest is to seek the specific performance of the agreement for sale and that also against the members of the Madiwale Family. The interest pleaded by the second respondent at highest can be treated as a commercial interest. One of the findings recorded by the learned Single Judge in the impugned order is that the right of the Madiwale Family to sue for partition of the property has been transferred to the second respondent and that the second respondent was entitled to represent Madiwale Family.

5 The submission of the learned counsel for the appellant is that that second respondent has no interest in the property subject matter of the suit. Moreover, there is already a preliminary decree in the suit. His submission is that the members of the Madiwala Family are very much parties to the suit and therefore, only on the basis of the agreements pleaded by the applicants, no right can be claimed by the second respondent.

6 We have considered the submissions. In paragraph 10 of the impugned order, the learned Single Judge has observed thus:

"10 One more important aspect which bears a mention here, is that when the Court allows

an applicant to represent the interest of a party, on an application under Order 22 Rule 10, it is not as if the contest on the entitlement of the party to do so is fully and finally decided. All contentions on merits concerning such entitlement are still a matter of trial. It is just that on a prima facie assessment of the applicant's locus to do so, the Court permits him to defend or prosecute the suit. The merit of his defence or prosecution itself is open to debate in the trial and that includes the assessment of his right on the basis of which he claims to defend or prosecute the suit. This Court in the case of Mah-Hill Properties Pvt. Ltd - Applicant in the matter of Behram Nawrosji Gamadia Vs. Babli Samarthlal Seth has laid down that the Court has only to be prima facie satisfied for exercising its discretion in granting leave for continuing or defending the suit by the applicant under Order 22 Rule 10 on assignment or devolution and the validity of the assignment or devolution can be considered at the trial of the suit on merits. In the present suit, the questions such as whether the documents executed by Madiwale family are documents of transfer or they do or do not invest the Applicant with the right to claim the transferor's interest in the division of the suit property whether

these documents can be relied on due to insufficiency of stamp, etc are all matters of trial. This Court may not decide them finally at this stage."

7 In paragraph 6, the learned Single Judge observed on the basis of the documents relied upon by the second respondent that the said respondent can be said to be interested in the subject matter of the suit by virtue of creation of rights in his favour during the pendency of the suit. The findings recorded by the learned Single Judge in paragraph 10 make it very clear that there is no adjudication made finally on the rights as claimed by the second respondent. In fact, the right of the parties to contest rights claimed by the second respondent has been expressly kept open. Even the issue whether the documents relied upon by the second respondent amounts to transfer of interest of Madiwale Family is also kept open. In fact, the rights and liabilities of the parties have not been adjudicated upon by the impugned order. On being prima facie satisfied regarding the existence of interest claimed by the second respondent, the learned Single Judge has exercised power under Rule 10 of Order XXII of the Code of Civil Procedure, 1908.

8 Apart from the fact that there is no adjudication made by the impugned order on the rights of the parties, we find nothing

wrong in exercise power under Rule 10 of Order XXII of the said Code.

9 Subject to what is observed above, there is no merit in the appeal and the same is dismissed. Pending Notice of Motion does not survive and the same is also disposed of.

(M.S.SONAK,J.)

(A.S.OKA,J.)