

Atul

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 1293 OF 2018
IN
SUIT NO. 606 OF 2018

Sunil Dilip Kakod ...Plaintiff
Versus
Ratan Dilip Kakod & Ors ...Defendants

Mr Tejas Vora, *with DR Mishra, i/b GK Vora, for the Plaintiff.*
Mr Vishal Kanade, *with Rohaan Sawant, i/b Sanjay Shivram Gawde,*
for Defendants Nos. 1 to 3.
Mr Rajesh M Yadav, *for Defendant No. 4.*
Ms Sonali Salaskar, *for Defendant No. 5.*

CORAM: G.S. PATEL, J
DATED: 1st August 2018

PC:-

1. Heard. This is an application by the 1st Defendant to vary my order dated 3rd May 2018. Some background is necessary. The Plaintiff is the 1st Defendant's son. Defendants Nos. 2 and 3 are the Plaintiff's sisters. They live abroad, in Dubai. Defendant No. 4 is a housing society. Defendant No. 5 is a firm of developers.
2. The suit seeks administration of the estate of the Plaintiff's father, the 1st Defendant's husband, Dilip Malharrao Kakod, in

terms of his Will dated 3rd March 2016. The Plaintiff, Sunil, has filed a separate Testamentary Petition No. 1699 of 2017 for probate of this Will. Defendants Nos. 1, 2 and 3 have entered Caveats. That Testamentary Petition is now renumbered as Testamentary Suit No. 2 of 2018. It is pending. Dilip Kakod died on 10th December 2016 in Mumbai. The Will that the Plaintiff propounds is at Exhibit “B” to the present Suit and is dated 3rd March 2016. Another proceeding, Testamentary Petition No. 68 of 2017, sought probate of an earlier Will said to have been made by Dilip Kakod on 7th April 2007. It transpired that the same two persons were attesting witnesses to the Will of 7th April 2007 as also the later Will of 3rd March 2016 (the one Sunil now propounds). Evidently, neither of those witnesses could in any circumstances whatsoever depose truthfully to the 7th April 2007 Will as being Dilip Kakod’s “*last* Will and Testament”. Consequently, on Sunil Kakod’s application in Notice of Motion no. 228 of 2017, I dismissed Testamentary Petition No. 68 of 2017 saying that it could not possibly survive.

3. This is the background to the present application.

4. The matter was first moved before me on 27th April 2018 when I allowed some amendments and listed the matter on 3rd May 2018. On the next date, I found that there were Affidavits in Reply by Defendants Nos. 2 and 3, Sunil Kakod’s sisters. At the time, I was given to understand this: First, that despite notice, the 1st Defendant had not replied. Second, that the 1st Defendant had chosen to move permanently to Dubai to live with Defendants Nos. 2 and 3. Third, that Sunil, the Plaintiff, was then living in a flat in Goregaon ‘which was not his’. I have said that this was what I was

given to understand, for perhaps I ought to have enquired further on the last of these, asking whose flat it was in which Sunil was residing. The reason is that the Will that the Plaintiff propounds mentions two flats. One of these is a flat at Goregaon of about 630 sq ft on the 6th Floor of Lupin Building, Mantri Park, Film City Road, Dindoshi, Goregaon (East), Mumbai 400 065 (“**the Goregaon flat**”). It is in the joint names of the deceased and the 1st Defendant. Technically, therefore, Sunil was correct in saying that he was residing in a flat that was “*not his*”, but that statement was perhaps a little too economical with the facts. The Goregaon flat was not the property of a person outside the family, nor did — or does — Sunil face an imminent threat of eviction. The other flat mentioned in the Will is of about the same area of 650 sq ft at B-65/617 MIG Colony, Gandhi Nagar, Bandra (West), Mumbai 400 051 (“**the Bandra flat**”). That flat was surrendered during a redevelopment/reconstruction proposal. This reconstruction was being done by the 5th Defendant. A new flat was to be allotted in the new project known as Rustomjee Seasons. The question was whether Sunil ought to be put in possession of the Rustomjee Seasons at Bandra once the occupation certificate was received.

5. Having regard to the submissions on behalf of Sunil on that day, I held that in order to balance the competing equities and to preserve the parties to the extent possible in *status quo*, an order will need to be made in the following terms:

“5. Thus balance of convenience is in favour of the Plaintiff who has also made out a sufficient *prima facie* case. Justice and equity also demand that the following order should be made.

(a) The 5th Defendant will deliver possession of the Rustomjee Seasons flat once the occupation certificate is in hand to the Court Receiver, High Court, Bombay.

(b) The Court Receiver will then call upon the Plaintiff to execute a standard-form agency agreement but without payment of any royalty or security. It shall however, be specifically provided that all routine outgoings and maintenance will be to the account of the Plaintiff. He will not claim any equities on that ground.

(c) On execution of that agency agreement in these terms, the Plaintiff will be put in possession of the Rustomjee Seasons flat.

(d) The undertaking of the Plaintiff is accepted that should his mother, the 1st Defendant ever wish to visit or stay in Mumbai he will make adequate provision for her in the Rustomjee Seasons flat and will not deny her entry into or use of any part of that flat."

6. On 12th June 2018, I declined the 1st Defendant ad interim reliefs in her present Motion. That cannot have a bearing on the final disposal of the Motion.

7. The 1st Defendant, Sunil's mother, is present in Court today. She was in Court yesterday too when the hearing began. She is of advanced years and in failing health, but is firm in her views and clear in her speech. She says three distinct things. First, that her health did not permit to be personally present in Court on 3rd May 2018 or to properly instruct her Advocate. Second, that the Bandra flat is one in which she lived with her late husband. It was they who delivered possession to the society and the builder. She desires to

reside there. It is most convenient to her. It is proximate to her doctors and hospital, Lilavati Hospital. She agrees not to induct any third party, not to create any third party rights, not to part with possession, and not to create any encumbrance on that flat. She is willing to have this statement noted as an undertaking to the Court. Third, she says she is unwilling to share any flat whatever with the Plaintiff, her son. His statement that she is welcome to live with him is meaningless; she is unprepared to do that.

8. I do not propose to go into the reasons why relations in the family are at this low an ebb. No purpose will be served by that enquiry, regrettable though it is. I understand Mr Vora's anxiety that neither his administration Suit nor the Testamentary Suit should be utterly compromised by any observations or findings at this stage. With his usual fairness, he agrees that an order that balances the equities of all parties and leaves contentions open is appropriate. It is, however, his submission that the 1st Defendant should be allowed to occupy the Rustomjee Seasons flat only as an agent of the Receiver. There seems to be now no cogent reason why Sunil should get to use both the Goregaon flat and the Bandra flat.

9. If an order of Receivership is to continue for Rustomjee Seasons flat then a corresponding order must necessarily be made for the Goregaon flat as well. Even according to Sunil Kakod that too is part of the estate. I do not see any justification now for a Receiver of either flat. The statement of the 1st Defendant for the Bandra flat will suffice, and there need only be a corresponding statement by Sunil for the Goregaon flat he occupies.

10. A word about Clause 10 of the Will in question, which runs like this:

"10. In the circumstances, I hereby declare that all my immovable properties, viz. (i) Flat admeasuring 650 sq ft situate at B-65/617, MIG Colony, Gandhi Nagar, Bandra (East), Mumbai 400 051 (which is under redevelopment); (ii) Flat admeasuring 630 sq ft at 605, 6th Floor, Lupin Building, Mantri Park, Film City Road, Dindoshi, Goregaon (East), Mumbai 400 065 with joint name of Smt Ratan Dilip Kakod i.e. 50% each; and (iii) Landed property situated at Site No. 418 and 419 formed by the Improvement Board of Belgaum in Scheme No. 11 in the Kudachi Extension in Survey No. 1A/1A site admeasuring East to West 70ft North to South 70 ft in all measuring 4,900 square feet are given, devised and bequeathed to my son Mr Sunil Dilip Kakod absolutely and for ever as the absolute owners thereof. However, I wish to clarify that my wife Smt Ratan Dilip Kakod shall be entitled to live at any of the said 2 (two) flats as she may deem fit, proper and convenient till her death. Thus, she will have only life interest in both the said two properties i.e. flats at Bandra and Goregaon."

11. This gives the 1st Defendant, Dilip Kakod's widow, only a life interest in the flats at Bandra and Goregaon. *Prima facie* it seems difficult to accept the validity of a bequest of only a life interest in view of the provisions of Section 14 of the Hindu Succession Act 1956 and the settled law on the subject. The Supreme Court has categorically held that Section 14(2) constitutes a proviso to Section 14(1) and its explanation. Section 14(2) applies only to cases where a new title is created in favour of a female Hindu by a Will, gift etc, for the first time, without any prior or pre-existing right. Section 14(2) has no application to any property or estate in which a female Hindu

already has a title or an interest, and this has been held to include any inherent pre-existing rights such as a right to residence or maintenance. Where any instrument, therefore, purports to create only a life interest in respect of any property over which or in which a female Hindu can be shown to have an inherent right, she will take the estate as an absolute owner and will not be restricted only to a life interest.¹

12. I am not deciding this question at this stage. I am only noting that this is an issue that is bound to arise at some point in the interpretation of the Will. What this does, however, tell us is that Sunil's claim to exclusive rights to either or both these flats is far from concluded in his favour.

13. Consequently, there is a need now to maintain both the Plaintiff *and* the 1st Defendant on parity in *status quo* in some reasonable measure. The rights of Defendants Nos. 2 and 3, Plaintiff's sisters will be sufficiently protected by keeping their contentions open at this stage; for neither of them have ever expressed any need or requirement to come and live in India. Even the 1st Defendant does not say that her daughters need a flat of their own in India.

14. I will, therefore, modify the 3rd May 2018 order in the following manner:

1 *V Tulsamma v Sessa Reddy*, (1977) 3 SCC 99; *Thota Sesharathamma v Thota Manikyamma*, (1991) 4 SCC 312; *Nazar Singh v Jagjit Kaur*, (1996) 1 SCC 35; *Jupudy Pardha Sarathy v Pentapati Rama Krishna*, (2016) 2 SCC 56; *Ranvir Dewan v Rashmi Khanna*, (2018) 12 SCC 1.

- (a) The order of receivership will stand vacated forthwith.
- (b) The 5th Defendant and the 4th Defendant will put the 1st Defendant into possession of the Rustomjee Seasons flat at Bandra. This is specifically without prejudice to the rights and contentions of both sides.
- (c) The statement made by the 1st Defendant, who is personally present in Court, that she will not part with possession, encumber, alienate or create any third party rights in respect of the Rustomjee Seasons flat at Bandra is accepted as an undertaking to the Court.
- (d) There will be an identical statement that will bind the Plaintiff in regard to the Goregaon flat.
- (e) The Plaintiff will be responsible for payment of all outgoings only in respect of Goregaon flat. The 1st Defendant will make payment from her own resources of all outgoings and charges in respect of the Rustomjee Seasons flat at Bandra. These payments will also be without prejudice and will not be used to claim any equities in respect of either of these flats.
- (f) The Plaintiff is relieved of his undertaking in sub-clause (d) of paragraph 5 of the 3rd May 2018 order.

15. This order will also be in substitution of the 12th June 2018 ad interim order.

16. Since Caveats have already been filed in the Testamentary Petition, list Testamentary Suit No. 2 of 2018 for framing issues on 3rd August 2018.

17. Mr Kanade has instructions to say that the 1st Defendant's cousin's daughter attends to her (the 1st Defendant) on account of her health issues. He has instructions to volunteer that an Affidavit will be filed by this person making it clear that she is not claiming any rights to the flat. That is to be filed and served in two weeks. In any case, it is abundantly clear to me that both the flats at Goregaon and at Bandra were the properties in respect of which the deceased had a share; whether this share was 100% or jointly with others is another matter. There was no title to either of these properties that vested in any other person and the deceased's title can only devolve within his family either on intestacy or according to the Will that is being propounded.

18. The Notice of Motion is disposed of in these terms. There will be no order as to costs.

(G. S. PATEL, J)