

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

MISC. CIVIL APPLICATION NO. 273 OF 2018

Devan S. Ghatalia, Age : 59 yrs)
Mumbai, Indian Inhabitant, residing)
At Flat no.21, 6th Floor, Iris Apts,)
G.D. Somani Road, Cuffe Parade)
Mumbai-400 005.

....Applicant
(Orig. Defendant no.1)

V/s.

1. Mr. Nanak S. Ghatalia,)
Mumbai, Indian Inhabitant, residing)
At Flat no.21 and 22, 6th Floor,)
Iris Apts, G.D. Somani Road, Cuffe)
Parade, Mumbai-400 005.) ...Original Plaintiff

2. Ms. Swati S. Ghatalia,)
Mumbai, Indian Inhabitant, residing)
at Flat no.21 and 22, 6th Floor,)
Iris Apts, G.D. Somani Road, Cuffe)
Parade, Mumbai-400 005.)...Orig. Defendant
no.2./Respondents

Ms. Gargi Bhagwat a/w. Ms. Kritika Joshi i/by. M/s.
Divekar Bhagwat & Co., Advocate for the applicant.

Ms. Sheetal Shah i/by. Mehta & Girdharlal, Advocate for respondent no.1.

Ms. Swati S. Ghatalia, respondent no.2 present in person.

CORAM : SANDEEP K. SHINDE, J.

Reserved Order on : 20th March, 2019.

Pronounced Order on : 29th March, 2019.

ORDER :

1. *It is an application under Section 24(1)(a) of the Civil Procedure Code, 1908 preferred by the defendant no.1 seeking transfer of the Suit No. 2222 of 2017 pending in the City Civil Court, Bombay to the High Court, Bombay.*

2. *Before adverting to the grounds on which the transfer of suit is sought, let me place on record, the facts of the case in context of which, this application is preferred;*

(i) *Shatishchandra V. Ghatalia, father of the*

applicant and respondents, made his last Will on 2nd July, 2002 whereunder all his heirs and the legal representatives were named as beneficiaries.

(ii). The beneficiaries named in the Will are (i) Urmila S. Ghatalia, (now deceased) wife of the testator, (ii) Dilip Sheth-the eldest son of the testator who predeceased the testator, (iii)the applicant-(son), (iv) respondent no.1, (Son) herein and (v) respondent no.2-(daughter), of the testator.

(iii). The probate of the Will of the testator was obtained on 2nd July, 2010. The applicant, respondent no.1 and Mr. Harshad F. Sheth were confirmed as executors. The testator owned Flat no.22 in Iris Apartments, Cuffe Parade, Mumbai-400 005. The testator had 20% share in Flat No.21 which is owned by Mr. Shatishchandra V. Ghatalia

(HUF) which he willed. Both the aforesaid flats are adjacent and were purchased in 1972.

(iv). The Will of the testator in Clause-4 of the Will states that Flat no.22 in Iris Apartments wholly owned by the testator is to be sold after the demise of Urmila Ghatalia at the best available price and the proceeds are to be distributed to surviving children beneficiaries, subject to Clause-10 of the Will.

(v). Clause-10 of the Will states that, if any of the beneficiaries disputes or challenges the Will or challenges the authority or power of the testator to dispose of the estate and/or objects to legacies and/or takes any action adverse to estate or the Will, then such person will be precluded and debarred from taking any benefit whatsoever out of

the estate of the testator and all rights or benefits of such a person under the Will, will lapse.

(vi). *Urmila S. Ghatalia passed away on 19th August, 2011 and in accordance with Clause-4 of the Will of the testator, Flat no.22 was to be sold immediately thereafter.*

(vii). *The plaintiff alleged that, in August, 2011 Ms. Swati Ghatalia threatened, introducing third parties in Flats no.22 and 21, however, Devan and Harshad Sheth refrained themselves from taking any action to protect the estate. Thus, refusal to protect the property or take any action to safeguard the property was an act adverse to the estate. Thus, in order to protect the property, the plaintiff in his capacity as executor and beneficiary filed Suit in the Bombay City Civil Court (Suit No.*

1980 of 2011) to restrain the defendants i.e. Swati Ghatalia and Devan Ghatalia from introducing third party or creating third party rights in the suit residential premises. It is the plaintiff's case that, Harshad Sheth refused to support him in the said suit filed to protect the property. Equally, brother Devan, refused to support him and as such refusal was an action adverse to the estate of the testator.

(viii). The First Suit No. 1980 of 2011 filed by the plaintiff was disposed of by consent decree dated 26th February, 2012 and all the parties agreed to the following under the consent terms :

(i) Not to induct third party,

(ii) not to create third party rights.

(iii) to allow unconditional sale of Flats

no.22 and 21.

(ix) On 20th July, 2017, respondent no.1 herein

had filed Suit No.2222 of 2017 in the Bombay City Civil Court for the following relief :

(a)that this Hon'ble Court be pleased to declare that Devan Shatishchandra Ghatalia (applicant herein), and Swati Satishchandra Ghatalia (respondent no.2 herein) have acted adverse to the interest of the Late, Shatishchandra V. Ghatalia and therefore are dis-entitled and debarred from taking any benefits under the Will of Late, Shatischandra V. Ghatalia in accordance with Clause-10 of the Will of the testator due to acts adverse to the estate, committed by him.

(x). The respondent no.1 (hereinafter called, the plaintiff), alleged that applicant (Devan Ghatalia) and Harshad Sheth colluded with

respondent no.2, not to allow sale of the Flats which forms 75% of the remaining estate. It is the plaintiff's case that, Devan Ghatalia and Swati Ghatalia being parties to the consent terms, Swati Ghatalia did not permit sale of the Flats by one way or another and thus acted contrary to the wishes of the testator. The plaintiff in Suit No.2222 of 2017 brought on record, circumstances which in terms, according to him indicates that Devan and Swati who are defendants no.1 and 2 in the said suit acted adverse to the estate and therefore he sought a declaration that, they are dis-entitled to any benefits under the Will of the testator as per Clause-10 of the Will.

(xi). It may be stated that, before instituting subject Suit No.2222 of 2017, Nanak Ghatalia-respondent no.1 herein filed Miscellaneous Petition

No. 70 of 2015 in Probate Petition No. 815 of 2009 for removal of applicant and Harshad F. Sheth as executors of the Will and for other reliefs. He alleged that, Devan Ghatalia, Swati Ghatalia and Harshad Sheth are conniving to ensure that the plaintiff's legacy in the Flat is delayed and defeated which constrained him to file Miscellaneous Petition No. 70 of 2015 in Probate Petition No. 815 of 2009 to remove Devan and Harshad Sheth as Executors, make them liable and pay towards the loss caused to the estate of the testator. The said application is pending.

(xii) *On 16th December, 2016 applicant herein and Harshad Sheth filed Miscellaneous Application No. 26 of 2017 in Testamentary Petition No. 815 of 2009 seeking removal of Nanak as executor of the Will. This application is also pending.*

3). *The applicant is seeking transfer of Suit No.2222 of 2017 filed against him by respondent no.2 debarring him from taking any benefits under the Will of Shatishchandra Ghatalia in accordance with Clause-10 of the Will, on the following grounds :*

i) that the reliefs in Suit No.2222 of 2017 relate to the estate of the deceased and issues arising for decision in the Suit and Misc. Petition No. 70 of 2015 and Misc. Petition No. 26 of 2017 which are pending before this Court are substantially common.

ii) that the disputes and issues in Suit No.2222 of 2017 are connected with the issues in Misc. Petitions No.70 of 2015 and 26 of 2017.

iii) that the issues in the said suit cannot be

determined unless and until the Misc. Petitions No.70 of 2015 and 26 of 2017 are heard and disposed of.

4). *Thus, in short, the applicants are seeking transfer on the ground that the facts in issue in the subject suit and in the Misc. Petitions No.70 of 2015 and 26 of 2017 are similar and over lapping and therefore to avoid inconsistent findings and conflicting orders/decrees, the subject suit may be transferred to this Court and be heard together.*

5). *I have perused Misc. Petition No.70 of 2015 filed by respondent no.1 wherein it is contended that Harshad Sheth and Devan Ghatalia being Executors, are not doing administrative work and entire burden has fallen on the shoulder of Nanak Ghatalia. It is contended that, Harshad and Devan Ghatalia do not perform even the smallest of task given to them and do not advance him any funds for*

administration expenses. It is said that, these two Executors are wasting time of Nanak Ghatalia and not allowing him to perform the administrative activities. It is alleged that, the intention of these two Executors is to paralyse the administration of estate and let it remain in stagnant state so that Devan Ghatalia and his sister, Swati Ghatalia can enjoy the property to the exclusion of Nanak Ghatalia.

6). *I have perused Clause-27 (prayer clause) of Misc. Petition No.70 of 2015. Vide prayer clause (g), a declaration is sought, that Swati Ghatalia is dis-entitled under Clause-10 of the Will from taking any benefit as a beneficiary of the deceased. Thus perusal of this petition reveals that, Nanak Ghatalia not only sought an order removing and discharging Harshad F. Sheth and Devan Ghatalia as Executors and Trustees appointed under the Will of the deceased, but also a declaration that, Swati Ghatalia is dis-*

entitled under Clause-10 of the Will as beneficiary. In the said Misc. Petition No.70 of 2015, Chamber Summons No. 21 of 2017 was filed and after hearing the parties, the learned Judge of this Court held that Misc. Petition should proceed only as regards prayer clauses (a), (b), (d), (d1), (d2), (d3), (d4), (d5), (m) and (n), meaning thereby, such other prayers including prayer clause (g) which relates to order to dis-entitle the respondent no.2 (respondent no.3 in the suit) from taking any benefits under the Will as a Beneficiary was directed to be deleted. However, liberty was given to file such proceedings for such reliefs. This order was passed on 20th April, 2017 and only thereafter respondent-Nanak has filed a suit on 20th July, 2017.

7). *Thus, it is to be held at the first instance, when respondent no.1 sought a relief to declare Swati Ghatalia as dis-entitled from taking any benefits under the Will of the beneficiary in Misc. Petition No. 70 of 2015, the learned*

Judge of this Court declined to entertain this prayer (prayer clause-(g) therein), may be for the reasons that scope of enquiry for removal and discharging Harshad Sheth and Devan Ghatalia as Executors under the Will is different than one excluding the beneficiary from taking the benefits under the Will in terms of Clause-10 of the subject Will.

8). *It may be stated that, before precluding Devan and Swati Ghatalia from taking any benefit out of the estate of the testator, a formal decision has to be made by the Civil Court of competent jurisdiction on fact-in issue and that too after permitting the parties to lead evidence and not in the summary manner. That Misc. Petitions No.70 of 2015 and 26 of 2017 preferred by the Trustees and Executors against each other are pending in Probate Court which exercises limited jurisdiction. The issues in the suit relating to disqualification of defendants therein in terms of Clause-10 of the Will pending in the City Civil Court are*

to be answered by the Civil Court in the trial, subject to the provisions of the Code of Civil Procedure. Besides, removal of a person as an Executor for not administering the estate may not have civil consequences but if beneficiary is precluded and debarred from taking any benefit out of the estate of the testator would entail in civil consequences. Admittedly, in the probate jurisdiction, even if the parties are permitted to lead the evidence, such proceedings before the Probate Court are in the “form of the suit” and not the “suit” itself. That even otherwise, the scope of enquiry for removal of executors and trustees is completely different than the proceedings wherein the beneficiary is debarred and precluded from taking the benefit out of the estate of the testator. Thus, in my considered view, though the grounds in Misc. Petition No. 70 of 2015 and Misc. Petition No. 26 of 2017 filed by the Executors against each other and assertion of facts in the suit may be overlapping, but the scope of enquiry in these two proceedings is distinct and

would culminate into different orders with distinct consequences.

9. *In the case of Jerbanoo Rustomji Garda V/s. Pootlamai Manecksha Mehta, reported in AIR 1955 Bombay 447, it is held, that :*

“ In a civil suit the Court is only concerned with deciding the rights between the parties. In a Probate Court the position is entirely different.

The Probate Court is a Court of conscience and it does not decide rights between parties but it has to deliver a judgment which would become a judgment 'in rem' and this judgment will bind not only the parties before it but the whole world. Therefore, the approach of a Probate Court to the question before it is different from the approach of a civil Court adjudicating upon the rights between the parties, and this position is made clear by the provisions of Section 41, Evidence Act.”

10. *The learned Counsel for the applicant, has relied on the judgment of the Apex Court in the case of M/s. Chitivalasa Jute Mills v. M/s. Jaypee Rewa Cement,*

reported in AIR 2004 Supreme Court 1687. In this case, two suits were filed by the petitioner and the respondent against each other wherein it appears that the cause of action alleged by one party as foundation for the relief prayed for and the decree sought for in one case is the ground of defence in the other case. In view of this, the Apex Court has held, the issues arising for decision would be substantially common. Almost the same set of oral and documentary evidence would be needed to be adduced for the purpose of determining the issues of facts and law arising for decision in the two suits before two different Courts. Thus, to avoid the duplication of recording of evidence and possibility of inconsistent finding and conflicting decrees, the suit filed by the respondent was transferred.

. However, in this case, the nature and character of the proceedings in the suit and Miscellaneous Petitions are different, which are to be decided under different

jurisdiction and would culminate in distinct orders. Therefore, the ratio laid down in the cited judgment is not applicable to the facts of this case.

11). *The learned Counsel has relied on the judgment on the case of **Rosamma Joseph v. P.C. Sebastian**, reported in AIR 1996 Kerala 113, wherein it is held that “When the Court feels that facts intertwined with the different causes of action are separated and suits tried independently would result in conflicting decisions, it can allow the transfer and joint trial. In this case, the cause of action in both the proceedings is different and would not result into conflicting decisions because the scope of pending Miscellaneous Petitions in the testamentary jurisdiction is different than the scope of the suit pending in the Bombay City Civil Court.*

12) *Yet another judgment relied upon by the*

*appellant is in the case of **Purna Chandra Mahanty and Others v. Samanta Radhaprasana Das**, reported in 1953 Orissa 46 wherein it is held that where there are two suits which has certain common questions of fact and law, having a substantial bearing on the decision of each of the cases, it is obviously desirable that, they should be tried at some place and by the same Judge.*

. In the case in hand, proceeding of which the transfer is sought is the suit itself. The other proceedings are in the form of Miscellaneous Applications wherein the trustees against each other are seeking removal and discharge as the trustees of the Will of the testator. No doubt, the High Court on its the Original Side can try the suit between the parties which is pending in the City Civil Court, however, it may be stated that the said suit cannot be tried in the probate jurisdiction where these two Miscellaneous Petitions are pending, except with the leave of the Hon'ble, the Chief Justice. However, the transferee Court

is not of competent jurisdiction.

13) *That even otherwise, parties to the suit and their witnesses are living in Mumbai, no inconvenience would be caused to either of them if transfer of the suit is not ordered.*

14) *Thus, taking into consideration facts of the case and for the reasons stated hereinabove, Miscellaneous Civil Application No.273 of 2018 is hereby rejected with no order as to costs.*

(SANDEEP K. SHINDE, J)