

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

MISC. CIVIL APPLICATION NO. 13 OF 2019

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) read with Section 3 Clause (b) of the Civil Procedure Code, 1908 seeking transfer of proceedings in Execution Application No. 297 of 2014 preferred by the defendant no.2 in Suit No. 1980 of 2014 pending before the City Civil Court, Bombay to the High Court, Bombay.*

2. *Before adverting to the grounds on which the transfer 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 said Urmila Ghatalia ("Urmila" for short) had also left behind her last Will and Testament dated 16th November, 2002.*

(viii). *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, in*

order to protect the property, the respondent no.1-plaintiff in his capacity as executor and beneficiary filed Suit in the Bombay City Civil Court (Suit No. 1980 of 2011-First Suit for short) 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 this 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.

(ix). 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 sale of Flats no.22 and 21.

(x) On 8th October 2013, respondent no.1 had filed Testamentary Petition No. 457 of 2014 for grant of probate of last Will and Testament dated 16th November, 2002 of Smt. Urmila.

(xi) On 20th July, 2017, respondent no.1 herein filed Suit No.2222 of 2017 ("second suit" for short) 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 Shatishchandra 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.

(xii). *The respondent no.1 (hereinafter called, the plaintiff), alleged that applicant (Devan Ghatalia) and Harshad Sheth colluded with respondent no.2, in order to not 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 indicate 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.

(xiii). *It may be stated that, before instituting 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.

(xiv) *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.*

(xv) *In 2015, applicant herein and said Harshad Sheth (being Executors under the Will dated 16th November, 2002 of Smt. Urmila) had filed Misc. Petition No.119 of 2015 in Testamentary Petition No. 457 of 2014 for removing the respondent no.1 herein as executor and permitting them to administer the estate of Smt. Urmila. This petition*

is also pending.

3). *The applicant is seeking transfer of the execution proceedings in consent decree passed in Suit No. 1980 of 2011 being Execution Application No. 297 of 2014 from the Bombay City Civil Court to this Court on the following grounds :-*

(i) that the reliefs prayed for in Execution Application No. 297 of 2014 relates to the estate of the deceased which is also subject matter of Misc. Petition no. 70 of 2015 and 26 of 2017.

(ii) That the contentions raised by the parties in Execution Application No.297 of 2014 are identical and/or similar to their respective contentions in Misc. Petitions N.70 of 2015 and 26 of 2017.

(iii)that the subject Execution Application No. 297

of 2014 is beyond the scope of the decree and jurisdiction of the Bombay City Civil Court at Bombay since respondent no.1 has filed an application for removing respondent no.1 as an Execution of the Will and therefore no further dealings of the Flats being estate of the deceased is permissible without the permission of the High Court.

(iv) That the dispute between the parties can be effectively determined by this Hon'ble Court if the said Execution Application was heard alongwith Misc. Petition No. 70 of 2015.

(v) that the issues in the said Execution Application No. 297 of 2014 cannot be determined unless and until Misc. Petition No. 70 of 2015 and 26 of 2017 are heard and disposed of.

4). *Besides the aforesaid grounds, it is pleaded that, serious disputes arose between the applicant and the respondent as regards the sale of two Flats (estate) as contemplated under Clause-4 of the Will dated 2nd July, 2002 and with regard to the further course of action to be taken by the executors. It is pleaded that, the respondent no.1 was not in favour of filing an application before this Court under the provisions of the Indian Succession Act and was adamant about pursuing an Execution Application for execution of consent decree. It is pleaded that, respondent no.1 filed execution application in the consent decree without the consent of the applicants and Mr. Harshad Sheth to which applicant has filed affidavit-in-reply.*

5). *It may be stated that in Misc. Petition No. 70 of 2015, the learned Judge of this Court vide order dated 28th October, 2015 held, all other litigations in respect of estate*

of deceased in abeyance till the consideration of Misc. Petition No. 70 of 2015 apprehending that effective orders would only add to the confusion and uncertainty in the family disputes. However, on 30th October, 2018 the learned Judge of this Court vacated the order dated 28th October, 2015 and kept open all contentions of the parties in the proceedings pending in the City Civil Court.

6). *It is to be noted that, after the order dated 30th October, 2018 the applicant herein has filed this application within a month i.e. on 19th November, 2018 seeking transfer of the pending execution proceedings in the City Civil Court to this Court.*

7). *Before I deal with the grounds raised by the applicant, it may be stated that the applicants have filed Misc. Application No. 273 of 2018 before this Court under Section 24(1)(a) of the Civil Procedure Code and sought*

transfer of Suit No.2222 of 2017 from the City Civil Court, Bombay to High Court, Bombay.

8). *This Court has declined to transfer the said application vide order dated 29th March, 2019.*

9). *The grounds urged for transfer of the Suit No.2222 of 2017 are the grounds with some modification and raised even in this application.*

10). *It may be stated that, parties to the Suit No.2222 of 2017 have filed Undertaking and agreed thus;*

“(i) that they will not create third party interest in any manner whatsoever in the suit residential premises comprising of Flats No. 21 and 22 which is the estate of the deceased, they will not induct any third party in the suit premises;

(ii) not create any third party rights or other rights of forcible nature till the sale of the residential premises which all the parties unconditionally agree to sell. (emphasis supplied)."

11). *The aforesaid Undertaking was filed by the parties to the Suit on 18th May, 2012, however, proceedings for removal of the executors were filed by respondent no.1 and applicant against each other in the year 2015 and 2017. The scope and the nature of enquiry in these Miscellaneous Petitions pending in the Probate Court and execution of the decree is distinct. Therefore, the proceedings pending before this Court being subsequent proceedings would not affect the proceedings of which transfer is sought.*

12). *It is settled position of law that, the Probate court*

does not decide the rights between the parties and its jurisdiction is a limited jurisdiction wherein the execution proceedings cannot be tried. That, Rules 445 and 451 of the Bombay High Court (Original Sides) Rules and Rule 245(1) of the Bombay City Civil Court and Sessions Court Rules, specifically provide for execution of the decree or process by the City Civil Court and High Court to the Sheriff. In view of this, applicants are obviously aware of these provisions but inspite of it, this application is filed.

13). *Thus, after taking survey of the pending proceedings and its nature, in my view, this application is not a bonafide application. The applicant and respondent no.1 who are the beneficiaries have successfully prolonged the sale of Flats no.21 and 22 on one pretext or another for the obvious reason that, respondent no.2 is occupying the said Flats. Though the applicant and respondent no.2 have filed an Undertaking in Suit No.1980 of 2011, they are*

resiling from it, which is evident from this application and other proceedings filed by them from time to time. The applicant could not point out as to how this Court can proceed with the execution of the consent decree and as to how the proceedings pending before this Court would have a bearing on the execution proceedings of which transfer is sought.

14). *The applicant could not point out, nor it is urged that the orders in the pending proceedings before the Probate Court would result into conflicting orders if the execution proceedings are not transferred to this Court. As a matter of fact, in terms of the consent decree, the estate is required to be sold and the amount realised therefrom is to be apportioned amongst the beneficiaries as per the Will of the deceased. It is settled law that, unless and until, cogent and convincing ground is made out, transfer ought not to be allowed as a matter of course and while deciding an application for*

transfer, the paramount consideration would be the ends of justice and in case the Court is of the view that ends of justice would be met only by transfer, the matter has to be transferred. Thus, in the given circumstances, the present application is nothing but abuse of process of law.

15). *That in the application, the applicants have also referred to Testamentary Petition No. 457 of 2014 and Misc. Application No.119 of 2015 filed therein by respondent no.1. Infact, this Testamentary Petition relates to the Will of Urmila S. Ghatalia. In my view, Testamentary Petition No. 457 of 2014 has no bearing on the issue in this transfer application. I fail to understand why the reference is made to this Testamentary Petition. The onus of establishing sufficient grounds for the transfer lies heavily upon the applicant. The applicant could not justify as to how the subject Execution Application No. 297 of 2014 is beyond the scope and jurisdiction of the Bombay City Civil Court. In*

Ground No.(d), it is urged that, since respondent no.1 has filed for revocation of grant in this Court, no further dealings of Flats being the estate of the deceased is permissible without the permission of the Bombay High Court. Admittedly, respondent no.1 has not filed the petition for revocation of grant.

16). Thus, ground no.(d) is incorrect ground and shows casual approach of the applicant. The transfer of a case is a serious matter and it cannot be granted for any fancy notions of the litigant. It could only be granted if it is required in the interest of justice. The other grounds on which the transfer is sought are general in nature. One of the grounds that, the subject execution proceedings cannot be decided till the decision in Misc. Petition No.70 of 2015 and 26 of 2017 filed by the applicant against the respondent no.1 and vice-a-versa is not a valid ground. The scope and nature of these proceedings is neither similar nor evidence to be lead

therein would be overlapping.

17). *Thus, taking into consideration the facts of the case, and for the reasons stated, the Misc. Civil Application is rejected with no order as to costs.*

(SANDEEP K. SHINDE, J)