

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL (L) NO.261 OF 2013
IN
NOTICE OF MOTION NO.2607 OF 2012
IN
SUIT NO.2561 OF 2012
WITH
NOTICE OF MOTION (L) NO.3123 OF 2016**

Mumtazhusain Mohammedhusain Kagalwala
and Anr.

... Appellants

versus

Zulkarnain Mohammedhusain Kagalwala
and Anr.

... Respondents

Mr. Uday Warunjikar i/by Mr. S.A.Pilankar, for Appellants.

Mr. Prashant Pandey with Mr. A. Memon, Mr. Ifran Unwala, for Respondent No.1.

Mr. M.D.Jaywant, for Respondent No.2.

Mr. Panandikar, Asstt. Section Officer, Court Receiver's office, present.

**CORAM: AKIL KURESHI &
S.J. KATHAWALLA, JJ.**

DATE: 26th SEPTEMBER, 2019

P.C.:

1. This appeal remained at the admission stage on account of efforts made by the parties to resolve the disputes amicably *interse*. Finally under an order dated 25th September, 2018 the Court noted that all such efforts have failed. The appeal was therefore, ordered to be placed for fresh admission hearing on an appointed date. Sometime thereafter, this appeal has been placed before us for the same purpose. Considering the nature of the disputes involved in the appeal, the parties agreed that

the same may be admitted, taken up forthwith for final hearing and be disposed of on an broad lines that we have discussed with the learned Advocates. For such purpose, the counsel for the respective parties waive notice.

2. The appeal arises out of the interim order dated 10th April, 2013 passed by the learned Single Judge on Notice of Motion No.2607 of 2012 in Suit No.2561 of 2012. The suit is filed by the respondent No.1 herein claiming his share in the properties ,which were various kinds, movable as well as immovable, left behind by his deceased father. In such suit, he had filed the above numbered notice of motion, mainly praying for appointment of the Court Receiver, for injunction to the defendants from disposing of or alienating the suit property and further for defendant Nos.1 and 2 to disclose a detailed list of the estate of the deceased. While disposing off the said notice of motion by the impugned order dated 10th April, 2013, the learned Judge gave series of directions and declarations which read as under :

"17. Hence, the following order :

(a) Defendant Nos.1 and 2 shall not deal with, dispose off, alienate, encumber, part with possession, transfer or create any 3rd party rights in any of the suit properties in any manner without the consent of the plaintiff and defendant No.3.

(b) Parties shall obtain the valuation/market value of flat No.243 in Jupiter, Mumbai, considering also the Ready Reckoner of 2013-14 as the base value. Defendant Nos.1 and 2 shall pay 2/7th of that valuation to the plaintiff and 1/7th to defendant No.3. If Defendant Nos.1 and 2

cannot or do not pay the valuation, the flat would have to be sold to the third party and all the parties would be entitled to their share as per Sheriat law. Liberty to apply to all parties.

(c) The credit balance in the bank accounts of the deceased shall be divided and distributed between the parties. Defendant Nos.1 and 2 shall pay the plaintiff and defendant No.3 thier 2/7th and 1/7th shares therein.

(d) The parties shall be entitled to apply for transmission of the equity shares in Afsons Pvt. Ltd., to their names to the extent of their admitted 2/7th and 1/7th shares therein.

(e) The parties shall apply for and get other immovable properties of the deceased transferred to the names of the heirs of the deceased as stated above.

(f) With regard to the properties in which Court Receiver is appointed and which are pending in appeal against the arbitration award, the parties shall be entitled to be represented as the heirs of the deceased.

(g) The parties to the suit shall be entitled to apply to the Development Credit Bank for being provided the statement of account of the deceased, if any, in Development Credit Bank. The Manager, Development Credit Bank, Crawford Market Branch, shall issue a statement of account of the deceased from October 2010 to any of the parties to the suit, certified as a true copy under the Bankers' Book Evidence Act.

(h) No share of defendant No.3 shall be paid to her until she pays the Court Fees in respect of her 1/7th share in the estate of the deceased.

(i) Defendant Nos.1 and 2 shall file an affidavit disclosing on oath any further estate of the deceased comprising movable and immovable properties.

(J) Notice of Motion is disposed of accordingly.

(k) On the application of Counsel on behalf of Defendant Nos.1 and 2 the above order except the order of injunction is stayed till 10th June, 2013.

(l) Defendant nos.1 and 2 shall file their written statement within 30 days as they have been represented in the suit and are deemed to have been served the writ of summons."

3. The directions and declarations issued by the learned Judge in the impugned order speak for themselves. It does not require extensive study of the documents on record to come to the conclusion that majority of these declarations and directions travelled far beyond the prayers made in the notice of motion. Virtually, the powers are exercised for drawing up preliminary decree without passing any such decree, though the purport of the order would show that the learned Judge desired to pass such a decree on the premise that the defendants had admitted portion of the claim made in the suit. In our opinion, some of the directions are also open to multiple interpretations. Clause (e) of paragraph 17 for example, is in general nature and specific application thereof, would pose challenge. Since the final order that we propose to pass is broadly agreed to, though not conceded by the learned counsel for the parties, we do not find it necessary to give further elaborate reasons.

5. Under the circumstances, the impugned order dated 10th April, 2013 is set aside.

6. The notice of motion is placed back before the learned Single Judge for fresh

consideration and disposal in accordance with law.

7. It would be open for the Plaintiff to apply for ad-interim injunction. Such application shall be filed within four weeks from today. Till expiry of four weeks from today and if within such time the application is filed, till such ad-interim application is disposed of by the learned Single Judge, the following interim arrangement shall continue :

(a) The Court Receiver appointed in the impugned order shall continue in the same position as of now.

(b) Both the sides shall maintain status quo with respect to the title and possession of the properties in question.

9. With these directions, the appeal and notice of motion are disposed of.

(S.J.KATHAWALLA, J.)

(AKIL KURESHI, J.)