

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION**

**INTERIM APPLICATION NO. 1003 OF 2019
IN
TESTAMENTARY SUIT NO. 6 OF 2004**

Jayshree P. Madhwani & Ors. ... Applicants/Orig.
Defendants/Caveators

In the matter between

Lajwanti B. Madhwani & Ors. ... Plaintiffs

Versus

Jayshree P. Madhwani & Ors. ... Defendants/Caveators

Mr. Rajiv Narula i/b V.T. Lulla for the Applicants/ Defendants.
Mr. Amit Yadav for the Plaintiffs.

CORAM : R.I. CHAGLA, J.

DATED : 30th SEPTEMBER, 2022.

ORDER :

1 Heard the learned Counsel for the parties.

2 By this Interim Application the Applicants/Original Defendants/Caveators have sought leave to execute the decree dated 21.04.2018 passed in R.A.E. & R Suit No.420/608 of 2003 by the Small Causes Court, Mumbai, in respect of flat being situated at Flat No.3 plot

No.186, Madhav Niwas, near Sion Hospital, Sion (West), Mumbai - 400 022. The Applicants have stated that the aforementioned Suit had been filed in the Small Causes Court, Mumbai, for an order and decree against the Defendants for handing over vacant and peaceful possession of the subject flat as well as other relief of payment of rent against Defendant No.1 and consequential injunction in respect of the subject flat. The Suit was decreed and by the Small Causes Court, Mumbai, on 21.04.2018. Thereafter, an Appeal had been preferred before the Appellate Bench of the Small Causes Court, Mumbai, which had stayed the operation/ execution of the judgment and decree dated 21.04.2018 passed in the said Suit still hearing and disposal of the Appeal subject to terms and conditions which include deposit of interim monthly compensation as well as arrears and other such conditions as laid down in the operative part of the order and judgment dated 22.03.2019 passed by the Appellate Bench of the Small Causes Court, Mumbai.

3 The Applicants have stated in paragraph 6 of the Interim Application that Defendant Nos.2(a) to 2(c) in the said Suit failed to deposit the compensation from April, 2018 till March, 2019 which was one of the conditions laid down by the Appellate Bench of the Small Causes Court, Mumbai, for stay of execution of the judgment and decree dated 21.04.2018 passed in the said Suit. Therefore, the Applicants were

entitled to execute the decree dated 21.04.2018 passed in the said Suit.

4 Mr. Rajiv Narula, the learned Counsel appearing for the Applicants has relied upon an order of this Court dated 22.07.2005 passed in Notice of Motion No.1346/2004 taken out by the Plaintiffs in the present Testamentary Petition which had sought injunction, appointment of Court Receiver and stay of proceedings taken out by the Applicants which is the said Suit filed in the Small Causes Court, Mumbai, against the existing tenants. This Court had passed consent order dated 22.07.2005 by which the parties had agreed that in the event decree is passed in the said Suit, the same will not be executed by the Applicants without prior leave of this Court and after notice of such application to the Plaintiffs therein.

5 Mr. Narula has submitted that since the decree dated 21.04.2018 passed in the said Suit filed in Small Causes Court, Mumbai, is now executable in view of the failure of Defendant Nos.2(a) to 2(c) to satisfy the conditions on which the stay of the said decree had been granted, the present Interim Application has been taken out for obtaining such leave of the Court pursuant to order dated 22.07.2005 for execution of the decree dated 21.04.2018.

6 Mr. Amit Yadav appearing for the Plaintiffs has relied upon the affidavit in reply dated 13.01.2020 filed in the present Interim Application. He has submitted that since the judgment and decree dated 21.04.2018 is under challenge and judgment and decree has not become final and if the same is set aside than the question of restoration of possession will arise and the Applicants would be required to restore the same. Further he has submitted that in the Testamentary Suit, if the Plaintiff succeeds, then in that case the Applicants would have to restore and handover quite and peaceful possession of the said premises which is subject matter of the judgment and decree dated 21.04.2018 to the Plaintiff herein. Further, the Applicants after taking possession of the said premises cannot create third party rights of any nature whatsoever as agreed under the consent order dated 22.07.2005 passed by this Court. He has further submitted that if the above Testamentary Suit is dismissed than also all the heirs become entitled to the properties of the deceased in equal share and if the permission as prayed for is granted to the Applicants and possession of the said premises is taken, the other heirs of the deceased would have to file Partition Suit to get their share in the said premises. He has accordingly submitted that in order to avoid multiplicity of proceedings and future litigation, it is not in the interest of the parties that the Applicants should be granted permission to execute the decree.

7 Having considered the submissions and particularly taking note of the fact that the decree dated 21.04.2018 passed in R.A.E. & R Suit No.420/608 of 2003 by Small Causes Court, Mumbai, has become executable in view of the failure on the part of the Defendants therein to satisfy the conditions on which execution of the decree dated 21.04.2018 had been stayed till hearing and final disposal of the Appeal, being Appeal No.2 of 2018, filed in the Small Causes Court, Mumbai, the Applicants are entitled to execute the said decree. The Applicants have sought leave of this Court by virtue of the order dated 22.07.2005 passed by the Single Judge of this Court in the Notice of Motion No.1346 of 2004 which had been filed by the Plaintiff herein in the above Testamentary Suit. By the said order which is a consent order, it was agreed that the decree passed in the aforementioned Suit filed in the Small Causes Court, Mumbai, will not be executed by the Applicants without prior leave of this Court and after notice of such application to the Plaintiff herein. Thus, the present Interim Application has been filed in the Testamentary Suit for grant of leave to the Applicants to execute the decree dated 21.04.2018.

8 The concern of the Plaintiffs herein which is that there will be multiplicity of proceedings and future litigation cannot come in the way of the Applicants herein executing the decree. Further, in order to obviate such apprehensions on the part of the Plaintiffs herein that in the event of

the Applicants executing the decree and taking possession of the aforementioned premises, they may create third party rights of any nature whatsoever which would run contrary to that agreed upon in the consent order dated 22.07.2005 passed in Notice of Motion No.1346 of 2004, Mr. Narula for the Applicants states on instructions that by executing the decree and taking possession of the said premises, the Applicants will not in any manner deal with the said premises and/or create third party rights of any nature whatsoever and that this will be without prejudice to the rights and contentions of the parties in the above Testamentary Suit. The statement is accepted.

9 Concerning the other grievance expressed on behalf of the Plaintiffs herein that in the event the Testamentary Suit is dismissed, all the heirs would be entitled to equal shares in the estate of the deceased including in the said premises and that they may have to file Partition Suit to get their share in the said premises, this cannot come in the way of the Applicants executing the decree. Further, in view of the aforementioned statement the other legal heirs of the deceased will in no manner be prejudiced. In view thereof, relief sought for in the Interim Application is being granted. Hence, the following order is passed :

- i) The Applicants/Defendants/Caveators are granted leave to execute the decree dated 21.04.2018 passed in R.A.E. & R Suit No.420/608 of 2003 by Small Causes Court, Mumbai, in respect of the said premises being Flat No.3, Plot No.186, Madhav Niwas, near Sion Hospital, Sion (West), Mumbai - 400 022.
- ii) The aforementioned statement recorded by Mr. Rajiv Narula is accepted as an undertaking to this Court.
- iii) It is clarified that the Applicants upon executing the said decree dated 21.04.2018 and obtaining possession of the said premises shall bear all necessary expenses including maintenance insofar as said premises are concerned.
- iv) Interim Application is accordingly disposed of in the above terms.
- v) Place the matter on 13.10.2022 for directions.

(R.I. CHAGLA, J.)

Digitally signed
by WAISHALI
SUSHIL
WAGHMARE
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