

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.400 OF 2019
WITH
INTERIM APPLICATION NO. 473 OF 2019
WITH
APPEAL FROM ORDER NO.401 OF 2019
WITH
INTERIM APPLICATION NO.474 OF 2019

1. Rajkumar Gobindram Nagpal
Age 60 years, Occu. Business
2. Sandhya Rajkumar Nagpal
Age 57 years, Occu. Housewife
Both R/o. Flat No. 401 and 402
4th floor, Kalpana Building
12th Road, Khar (W), Mumbai 52 ...Appellants

Versus

1. Beena Gobindram Nagpal
Age 56 years, Occu. Not known
2. Smt. Kavita Govindram Nagpal
Age 50 years, Occu. Service
Both presently R/o. Flat No.401
4th floor, Kalpana Building,
12th Road, Khar (W), Mumbai 52 ...Respondents

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Mr. Aseem Shekhar Naphade, a/w. Ms. Pragya i/b. Legal Vision for Appellants.

Mr. Vivek Sharma, for Respondent Nos.1 and 2.

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CORAM : SANDEEP V. MARNE, J.
DATE : 20 SEPTEMBER 2023.

JUDGMENT

By these appeals, Appellants challenge orders dated 14 November 2018 passed by the City Civil Court by which Notice of Motion No. 559 of 2012 filed in S.C. Suit No. 2479 of 2011 of Appellants is rejected and the Notice of Motion No.3134 of 2010 filed in S.C. Suit No. 2534 of 2010 of Respondents is made absolute in terms of prayer clause (a), (b), (c) and (d).

2. The dispute between the parties relate to Flat Nos. 401 and 402 in the building named 'Kalpana' 12th Road, Khar (W), Mumbai 400 052. Appellant No.1- Rajkumar Gobindram Nagpal (***Rajkumar***) is the brother of Respondents Beena Gobindram Nagpal (***Beena***) and Kavita Gobindram Nagpal (***Kavita***). Appellant No.2-Sandhya is Rajkumar's wife. The father of Rajkumar, Beena and Kavita was the owner of Flat Nos.401 and 402. The father executed the Will, by which Flat No.401 is bequeathed in favour of Beena and Kavita only till their marriage, after which the Executor has been authorized to deal with the flat as deemed fit by him. Flat No.402, on the other hand, is bequeathed absolutely in favour of Rajkumar.

3. It is Appellants' case that both flats are joined together with a common door through which, one can access both the flats. That since the joint family used to reside in both the flats during father's lifetime,

the kitchen is located in flat No. 401, which is being accessed by Rajkumar and his wife Sandhya. Dispute have arisen between the siblings about the right to use flat Nos. 401 and 402. Rajkumar and Sandhya therefore instituted S. C. Suit No.2479 of 2011 against Beena and Kavita seeking permanent injunction from dispossessing them from suit flats or from removing the interconnecting door between flat Nos.401 and 402. Beena and Kavita, on the other hand, filed S.C. Suit No.2534 of 2010 seeking injunction against Rajkumar and Sandhya from disturbing their possession of flat No.401. In both the Suits, Notices of Motion were filed seeking temporary injunction. City Civil Court proceeded to hear both the motions together and passed two separate orders on 14 November 2018. Notice of Motion No. 559 of 2012 filed by Rajkumar and Sandhya seeking temporary injunction against the sisters from interfering / disturbing possession of flat No. 401 and 402 has been rejected. Notice of Motion No. 3134 of 2010 filed by Beena and Kavita has been allowed in terms of prayer clause (a), (b), (c) and (d) of the Notice of Motion.

4. Mr. Naphade, the learned counsel appearing for Appellants would submit that the sisters Beena and Kavita have been granted a limited right to reside in flat No. 401 as against absolute title bequeathed in favour of Rajkumar in respect of flat No.402. That in exercise of limited right of residence in flat No.401, the sisters cannot defeat Appellant's absolute right. He would submit that the intention behind Will is required to be gathered from circumstances, where the joint family used to reside in both the flats during father's lifetime and location of

kitchen of the joint family was inside flat No.401. That Rajkumar and Sandhya have been using said kitchen after demise of their father in the year 1991. That on the basis of limited right of residence granted in favour of sisters, they are now illegally obstructing Rajkumar and Sandhya from accessing the kitchen located in flat No.401. He would take me through written statement filed by the sisters in S.C. Suit No.2479 of 2011 containing a specific admission that the entire family has always been using the kitchen located inside flat No.401. That the intention of the testator has to be gathered from the words used and surrounding circumstances, for which the Court will have to put itself on the armchair of the testator. That grant of limited right of residence to sisters coupled with admission on their part of access by the entire family to the kitchen located in flat No.401 would clearly indicate testator's intention in permitting Rajkumar and Sandhya for having full access to kitchen located in flat No.401. In support of his contention, Mr. Naphade would rely on judgment ***Bhagwan Krishan Gupta Vs. Prabha Gupta & Ors.***, 2009 (11) SCC 33. Lastly, he would submit that some of the findings recorded by the City Civil Court in impugned order seek to recognise right, title and interest of sisters in flat No.401, which they do not possess as per the Will.

5. *Per contra* Mr. Sharma, the learned counsel appearing for Respondent sisters-Beena and Kavita would oppose the appeals submitting that Rajkumar has not been granted any right in respect of flat No.401. That both the sisters still continue to be unmarried and therefore

are entitled to enjoy full rights in respect of flat No.401. He would dispute the contention of Appellants that mere right of residence is granted to the sisters in flat No.401. That the Appellants want to take over control in respect of flat No.401 despite not having any right in that flat. That the order passed by the City Civil Court would enable sisters to enjoy flat No.401 bequeathed in their favour by their father. He would pray for dismissal of the appeals.

6. After having considered the submissions of the learned counsels for the parties, it is seen that the suit flat Nos.401 and 402 were owned by the father Gobindram Chuharmal Nagpal. It appears that he had amalgamated two flats by creating an access door between flat Nos. 401 and 402. The family consisted of two sons and four daughters. The elder son Ashokkumar Nagpal had separated from the father and was apparently given dues under their family arrangement on 25 November 1987. The father executed a Will on 25 August 1989, bequeathing flat No.401 and 402 as under-

“3. That my estate consists of immovable property that is Flat No.401 which stands absolutely in my name which I want after my death Flat No.401 will go to my unmarried daughters namely Kavita G. Nagpal and Bina G. Nagpal. And after their marriage my executor Shri Mohanda T. Valecha is hereby authorised by me to deal with this flat as he deems fit in the interest of the family.

4. That the Flat No.402 in Kalpana Bldg., 12th Road, Khar which stands 50% share of my two sons namely Shri Rajkumar G. Nagpal and Ashokkumar G. Nagpal and after the family arrangements recorded on 25 Nov. 1987 and accordingly the 50% of Ashok G. Nagpal was received by me. Now, according

to this will and after my death the full rights of Flat No.402 would be of my son Rajkumar G. Nagpal.”

7. Thus, flat No.401 has been bequeathed to sisters Beena and Kavita till they remain unmarried. In the event of their marriage, the Executor has been authorized to deal with flat No.401 as he deems fit in the interest of the family. Thus, Rajkumar has not been given any right in respect of flat No.401. On the other hand, flat No.402 has been bequeathed exclusively to Rajkumar without any right therein in favour of Beena and Kavita.

8. On the strength of the contents of the Will, it is sought to be contended by Appellants that sisters have been granted only right of residence in flat No. 401. Mr. Naphade has made extensive submissions about limited right granted in favour of the sisters. However, at this juncture, it is not necessary to interpret paragraph No. 3 of the Will and determine the exact nature of rights created in favour of sisters Beena and Kavita. Till they remain unmarried, whether they hold flat No. 401 as owners or whether they have limited right of residence in that flat, is something which need not be decided at this stage. What is material at this stage is the undisputed position that the Will does not grant any right to Rajkumar in flat No.401. Thus, *prima facie* Rajkumar or his wife Sandhya do not have any rights in respect of flat No.401 under the Will.

9. Location of kitchen of the flat of the erstwhile joint family inside flat No.401 has sought to be highlighted by the Appellants to

buttress their claim to seek entry in flat No.401. However regardless of kitchen's location inside flat No.401, father has not granted any right in favour of Rajkumar in flat No.401. Father was aware of location of kitchen inside Flat N. 401, but consciously did not grant any right in Rajkumar's favour in that flat. If the judgment of the Apex Court in ***Bhagwan Krishan Gupta*** (supra) is to be applied to the present case, it will have to be held that father consciously kept Rajkumar out of flat No. 401 despite knowledge of location of kitchen in flat No.401.

10. Thus, far from intending to grant any access to Rajkumar in Flat No. 401, father's intention while executing the Will appears to keep sisters in flat No.401 and Rajkumar in flat No.402. The father has expired in the year 1991 and it was for Rajkumar to arrange for a kitchen inside flat No.402. Since Rajkumar does not have any right in flat No.401, he cannot seek any restraint orders against sisters in respect of flat No.401.

11. Thus, Appellants failed to make out any *prima facie* case for grant of any temporary injunction. Sisters on the other hand made out a *prima facie* case by demonstrating that Rajkumar does not have any right under the Will in flat No, 401. In my view therefore, City Civil Court has rightly granted injunction in favour of the sisters and refused any injunction in favour of Rajkumar.

12. The findings recorded by City Civil Court or by this Court in the present order are only *prima facie* for the purpose of examining whether

any case for grant of interim injunction was/is made out or not. Said findings do not amount to any final determination of rights between the parties. Therefore, apprehension expressed by Mr. Naphade in this regard is unfounded.

13. Impugned Orders of the City Civil Court are thus unexceptionable. Resultantly I do not find any merit in both the appeals. Appeals are accordingly rejected with no order as to costs.

14. Since the appeals are disposed of, nothing survives in Interim Applications, which are also disposed of.

SANDEEP V. MARNE, J.

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