

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

NOTICE OF MOTION NO. 253 OF 2016
IN
TESTAMENTARY SUIT NO. 40 OF 2016
IN
TESTAMENTARY PETITION NO. 800 OF 2014

Sakubai Radhakisan Avhad ...Applicant /Plaintiff/ Petitioner

Versus

Prakash Devram Avhad ...Defendant

- Mr. Bhushan Deshmukh a/w Mr. Vedant Bende, for Plaintiff.
- Mr. Rajiv Matkar i/b Mr. Sanjay Prabhu, for Defendant.

CORAM : MANISH PITALE, J.

DATE : 11th MARCH, 2024.

P. C. :

1. Heard learned counsel for the parties.
2. By this notice of motion, the petitioner has applied for appointment of Court Receiver to take physical possession of Room No. 401, Adarsh CHS Ltd 146, Modi Building, Alibai Premi Marg, Mahada, D-2 Maji Sagar, Grant Road, Mumbai. A further direction is sought for the Court Receiver to give the said premises on Leave and License and to deposit the licence fee in this Court during the pendency of the disputes between the parties.
3. This notice of motion has been moved in a testamentary suit which has arisen from testamentary petition for grant of Letters of Administration in respect of the properties belonging to the

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deceased Shantabai Keru Palve.

4. The applicant / petitioner claims to be the step daughter of the deceased, while the caveator claims interest in the properties left behind by the deceased, being the son of the brother of the deceased.

5. The stage of the suit is for recording of cross-examination of the witnesses of the plaintiff. This notice of motion has been pending since the year 2016.

6. Issues were framed in the present suit on 21st March, 2016, which essentially concerned the entitlement of the plaintiff in terms of Section 15(1)(b) read with Section 16 (2) of the Hindu Succession Act, 1956.

7. In support of the notice of motion, the learned counsel appearing for the plaintiff invited attention of this Court to the exhibited documents, to claim that the plaintiff indeed has a strong *prima facie* case to claim Letters of Administration and that the caveator / defendant does not even have a semblance of right in the property of the deceased.

8. It is submitted that the defendant has conceded in the reply affidavit that the aforesaid premises is ready for occupation. It is submitted that in such circumstances, it would be appropriate that the Court Receiver is appointed and the premises is given on Leave

and License, so that the said premises earns certain amounts, which would ultimately accrue to the benefit of the estate of the deceased.

9. The learned counsel appearing for the defendant has opposed the prayer made in the notice of motion by inviting attention of this Court to the documents at Exhibits “E”, “F” and “G”. It is submitted that the aforesaid documents clearly show that while redevelopment of the MHADA property was undertaken, the father of the defendant along with his family, including the defendant herein, occupied the transit camp.

10. It is submitted that in the reply affidavit, it is specifically stated that the defendant has continued in the transit camp and that if the prayer made in the present notice of motion is granted, it would result in the defendant and his family being thrown out of the transit camp. It is specifically stated that the transit camp is the only shelter of the family of the defendant. The learned counsel for the defendant has also submitted that unless the competing claims of the parties are decided authoritatively by this Court, it would not be appropriate to allow the notice of motion. It is further indicated that the as on today, due to the pending dispute, MHADA has locked the premises, thereby indicating that the same is secured and being immovable property, it is obviously not perishable.

11. This Court has considered the rival submissions. As

regards the competing claims made by the rival parties, the issues framed by this Court will have to be decided upon recording of evidence and appreciation of the oral and documentary evidence that would come on record.

12. It is an admitted position on record that as on today MHADA has locked the premises, so that there is no encroachment, while the dispute between the parties is pending.

13. The plaintiff is unable to dispute the position that in the event the notice of motion is allowed and Court Receiver is appointed with further permission for giving the premises on Leave and License, the defendant and his family will be thrown out from the transit camp. This position could not be disputed by the plaintiff and in the facts and circumstances of the present case, the said aspect assumes significance.

14. At first blush the contention raised on behalf of the plaintiff appears attractive, for the reason that the appointment of the Court Commissioner and permission to give the premises on Leave and License would lead to amounts being earned for the benefit of the estate of the deceased. But, if the effect of such a direction is of throwing out the defendant and his family from the transit camp, which is the only shelter for them, it would not be appropriate.

15. Therefore, the prayer made in the present notice of motion cannot be granted. Accordingly, the notice of motion is dismissed.

16. Insofar as the suit is concerned, by an order dated 22nd February, 2024, this Court had appointed an Advocate as a Court Commissioner with consequential directions for recording of cross-examination of the witnesses of the plaintiff.

17. The parties have tendered copy of e-mails exchanged between the Court Commissioner and the advocate of the defendant. It appears that the Court Commissioner has indicated that he would recuse from the proceedings.

18. In such a situation, since the suit is pending from the year 2016, it would be appropriate that another Court Commissioner is appointed and the matter is expedited.

19. Accordingly, Ms. Dhruhi M. Kapadia, Advocate, is appointed as the Court Commissioner. The details of the Court Commissioner are as follows :

Ms. Dhruhi M. Kapadia
513, Prospect Chamber
Dr. D.N. Road, Opp. Petit Library,
Fort, Mumbai - 1.
Email : kapadiadhruhi@gmail.com
Mob.No. 9757095290

20. All cross examination shall be conducted strictly in question and answer form.

21. The Commissioner is at liberty to exercise discretion under Order XVIII, Rule 4(4) of the Code of Civil Procedure, 1908 to note the demeanour of the witness, wherever necessary.

22. The Commissioner will also be at liberty to direct that the whole or any part of the cross-examination should be video recorded for later reference of the Court. Should that be done, the original audio visual recording will be submitted along with the Commissioner's report to the Registry.

23. Costs of the commission shall be borne by the plaintiff.

24. The plaintiff shall also pay costs of Rs. 500/- per hearing to the Court Clerk, who attends the Commission with the Court papers. This is required since these Clerks attend the Commission in addition to their duties and outside their normal working hours.

25. The Commissioner is not to permit any application for adjournment on the dates fixed, except where absolutely unavoidable.

26. The commissioner is directed to complete the process of cross-examination at the earliest. The parties are directed to co-operate with the Court Commissioner for completing the aforesaid

exercise.

27. The Court Commissioner shall submit a report along with notes of evidence before this Court on or before 22nd April, 2024.

28. List the notice of motion for further consideration on 24th April, 2024.

(MANISH PITALE, J.)