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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

SUIT NO. 716 OF 2008

Fatehali Hassanali Karim & Ors.

...Plaintiffs

Vs.

Gulamhussein A. Karim & Ors.

...Defendants

Mr. U.J. Makhija i/b. Thakore Jariwala & Assoc. for Plaintiffs

Mr. M.R. Irani for Defendants 1 to 4

Mr. Faisal Sayyed i/b. M.K. Ambalal & Co. for
Defendants 5 to 7

CORAM : SMT. ROSHAN DALVI, J.

DATED : 8TH OCTOBER, 2010

P.C. :

1. The suit is for partition of the suit property which is a bungalow of ground plus one floor at Dr. Peter Dias Road, Bandra(West), Mumbai-400 050.
2. The suit property belonged to one Manbai and one Malekbai. Manbai is the mother of Plaintiffs 1 to 4, the husband and father of Defendants 5 to 7 and the mother of Defendants 8,9 and 10. These parties claim through Manbai and are entitled to Manbai's $\frac{1}{2}$ equal share with Malekbai. Plaintiffs 5,6 and 7 and Defendants 1 to 4 are the children of Malekbai. They claim through Malekbai the equal $\frac{1}{2}$

share that she owned with Manbai.

3. The relationship of these parties is admitted. The fact that they claim through Manbai and Malekbai is admitted. The equal $\frac{1}{2}$ share of Manbai and Malekbai is also admitted.
4. Manbai lived on the ground floor of the suit bungalow. Malekbai lived on the first floor of the suit bungalow.
5. It is, therefore, admitted that the Plaintiffs 1 to 4 Defendants 5, 6 and 7 and Defendants 8,9 and 10 would be entitled to whatever share that they inter se claim in the ground floor of the suit bungalow. It is, therefore, also admitted that the Plaintiffs 5, 6 and 7 and Defendants 1 and 4 would be entitled to whatever share that they inter se claim in the first floor of the suit bungalow.
6. Defendants 2 and 3 are the children of Defendant No.1 and hence do not have any separate share. They claim through Defendant No.1. They have filed their written statement adopting the written statement of Defendant No.1. Defendant No.4 has also adopted the written statement of Defendant No.1.
7. Defendants 8, 9 and 10 have accepted the claim of the Plaintiffs 1 to 4. They claim together with Plaintiffs 1 to 4.

Defendants 5, 6 and 7 who are the heirs and legal representatives of one Badruddin, the deceased son of Malekbai have made a claim against Plaintiffs 1 to 4.

8. The claim of Plaintiffs 5, 6 and 7 is against the claim of Defendants 1, 2, 3 and 4 and vice versa.
9. The Plaintiffs 1 to 4 claim their share in the $\frac{1}{2}$ share of the bungalow against Defendants 5,6 and 7 under a Will dated 23rd July 1970. Defendants 8, 9 and 10 admit the Will. Defendants 5, 6 and 7 dispute the Will. Defendants 5, 6 and 7 claim to the exclusion of Plaintiffs 1 to 4 and Defendants 8, 9 & 10. However Defendants 5, 6 and 7 do not claim under any Will. Defendants 5, 6 and 7 claim the entire $\frac{1}{2}$ share of Manbai upon their case that since their predecessor in title (husband/father Badruddin) looked after Manbai in her old age and maintained the property, Manbai “created right and interest” in favour of Badruddin under which he remained in possession of the ground floor of the suit bungalow. They claim that hence the suit property vested in Badruddin and hence he occupied the ground floor except one bedroom occupied by Plaintiff No.1.
10. Plaintiffs 5, 6 and 7 claim under the Will dated 25th November 1994 of Malekbai. Defendants 1 to 4 have disputed that Will. Defendant No.1 claims under the first

Will of Malekbai dated 25th October 1967 and the last Will of Malekbai dated 1st January 2000.

11.Hence it is seen that there are 3 Wills of Malekbai which are put up by these parties. The first Will propounded by Defendant No.1 is dated 25th October 1967, the second Will propounded by Plaintiffs 5, 6 and 7 is dated 25th November 1994. The third and last Will of Malekbai propounded by Defendant No.1 is dated 1st January 2000.

12.The controversy in dispute between the parties is, therefore, as follows in respect of the two admitted $\frac{1}{2}$ equal portions of Manbai and Malekbai.

1. Manbai's $\frac{1}{2}$ equal share:-

(i) Plaintiffs 1 to 4 supported by Defendants 8, 9 and 10 would have to prove the Will dated 23rd July 1970.

(ii) Since Defendants 5, 6 and 7 have not put up any Will, but only claim an oral “right and interest” created by Manbai in favour of Badruddin, it would have to be seen whether in law any such oral interest without any registered documents or without any testamentary disposition can be granted by Manbai in their favour.

(iii) If Plaintiffs 1 to 4 fail to prove the Will dated 23rd July 1970 and if Defendants 5,6 and 7 fail to prove the question of law as to whether Badruddin could have been orally granted the right and interest of Manbai by her during her life time the estate of Manbai would devolve by intestate succession.

2. Malekbai's ½ equal share:-

(I) The Defendant No.1 would have to first prove the last Will of Malekbai dated 1st January 2000.

(II) If he proves that Will the earlier testamentary dispositions need not be considered.

(III) If he fails to prove that Will Plaintiffs 5, 6 & 7 would have to prove the Will dated 25th November 1994.

(IV) If the Plaintiffs 5, 6 and 7 failed to prove the Will dated 25th November 1994, the Will dated 25th October 1967 would have to be proved by Defendant No.1.

(V) If none of these Wills is proved the estate of Malekbai would devolve by intestate succession.

13.The parties are Khojas. They would be governed by Mohammedan Law i.e. The Shariat Act 1937 in matters of

intestate succession and by their customary law which is the Hindu law as it prevailed essentially in Sind and Kutch from where they essentially hail in matters of testamentary succession, unless they file the statutory declaration under Section 3 of Shariat Act 1937 restricting their own testamentary power. No party has shown or alleged that Manbai or Malekbai signed the declaration under Section 3 of the Shariat Act 1937. Hence in case of testamentary disposition of Manbai and Malekbai they would be governed by Hindu law and they would be entitled to dispose off their entire property by their respective Wills. If the suit property was to devolve upon them by intestate succession they would be governed by Mohammedan law applicable to Shias.

14. With regard to the proof of the Wills to be probated by the parties as aforesaid they would be governed by Section 58(1) of the Indian Succession Act, 1925. As they are Mohammedans the provisions of part VI of the Indian Succession Act 1925 relating to Testamentary Succession will not apply to them.

15. Since they are Mohammedans they would be governed by Section 213(2) of the Indian Succession Act 1925 and hence the mandate contained in Section 213 (1) of the Indian Succession Act requiring the legatees to obtain probate of

the Will would not apply to them.

16. In the conclusion the twin principle that would be applicable to the parties in this case is that they can dispose off their property by Will. The Will is not required to be probated. The Will will have to be nonetheless proved as any other document. Hence they would not require to apply for probate in the Court having testamentary and intestate jurisdiction; they can prove the Wills which they propound in the Civil Court viz: in this suit itself.

17. The ambit of this suit is, therefore, to :

- (a) see whether Plaintiffs 1 to 4 can prove the Will dated 23rd July 1970 as against Defendants 5, 6 and 7.
- (b) Defendants 5, 6 and 7 can prove the question of law that an oral right or interest could have been created by Manbai in favour of Badruddin.
- (c) Whether Defendant No.1 can prove the Will dated 1st January 2000, failing which whether Plaintiffs 5, 6 and 7 can prove the Will dated 25th November 1994 and failing which whether Defendant No.1 can prove the Will dated 25th October 1967.

18. Hence the following issues:

1. Whether the Plaintiffs 1 to 4 prove that the deceased Manbai validly executed her Will dated 23rd July 1970.
2. Whether Manbai could have created any right or interest in favour of Badruddin during her life time for the entire equal $\frac{1}{2}$ share owned by her and whether upon creation of such right and interest the entire equal $\frac{1}{2}$ share of Manbai came to be vested in Badruddin.
3. Whether Defendant No.1 proves that the deceased Malekbai validly executed her Will dated 1st January 2000.
4. If the answer to issue No.3 is in the negative whether Plaintiffs 5, 6 and 7 prove that the deceased Malekbai validly executed her Will dated 25th November 1994.
5. If issue No.4 is also answered in the negative, whether Defendant No.1 proves that the deceased Malekbai validly executed her Will dated 25th October 1967.
6. Are Plaintiffs 1 to 4, Badruddin Karim and

Khanambanoo Abdulla Merchant entitled to share the ground floor of the suit bungalow upon intestacy of Manbai and in what proportion ?

7. Are Plaintiffs 5, 6 and 7 and Defendants 1 and 4 entitled to share first floor of the suit bungalow upon intestacy of Malekbai and in what proportion?
8. What relief, if any, are the parties entitled to and upon what conditions?

19. Since the parties claim upon their separate and individual documents and acquisition of right and interest each of them would be entitled and required to file their separate and independent affidavits of evidence. Hence Plaintiffs 1 to 4 shall file their affidavit of examination-in-chief, if any, as well as the affidavit of documents, if any, within 2 weeks.

20. Similarly Defendants 5, 6 and 7 shall file their affidavit of examination-in-chief, as well as the affidavit of examination-in-chief of any further witnesses, if any, as well as their affidavit of documents within 2 weeks.

21. Defendant No.1 shall file his affidavit of examination-in-chief as also the affidavit of examination-in-chief of any further witnesses, if any, as well as affidavit of documents, if any, within 2 weeks.

22.The admissibility of the documents of Plaintiffs 1 to 4, Defendants 5, 6 and 7, if any, and Defendant No.1 shall be considered on the next date of hearing.

23.The Suit is adjourned to 26th October 2010 for considering the admissibility of the documents of these parties.

24.It may be mentioned that the parties are family members. Their claim is to a portion of the share that devolves upon them on the ground floor and the first floor respectively, only. It would be in the interest of all the parties to consider the real equities of their relationship and create options for settlement of their dispute through mediation.

25.The parties may also consider resolving their dispute by creation of option through mediation rather than adjudication.

(SMT. ROSHAN DALVI, J.)