

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
REVIEW PETITION NO.55 OF 2015
IN
WRIT PETITION NO. 594 OF 2015**

Arun Mittal & Ors.

..Petitioners

Vs.

Merwan Feroze Cama & Ors

..Respondents

Mr. Ravi Kadam, Senior Advocate a/w Mr. Naushad Engineer a/w Ms Rashida F. Savliwala a/w Mr. Nirali Sanghavi i/b M/s. Dhruv Liladhar & Co. for the Petitioner

Mr. V. P. Sawant a/w Mr. K. S. Patil for the Respondent No.1

CORAM : R. M. SAVANT, J.

DATE : 10th July, 2015

P.C.

1 The above Review Petition has been filed pursuant to the order dated 27-4-2015 passed by the Apex Court in SLP No.12351 of 2015 filed by the Review Petitioners. The said order reads thus :

“Heard.

The Special Leave Petition is dismissed.

However, liberty is given to the Petitioners as prayed to file review Petition before the High Court for clarification as to the extent of land injunction was granted.

Needless to say that if the order thus may be passed in review petition goes against the petitioners, they may approach this court to assail the same.”

2 Hence having regard to the order passed by the Apex Court, the scope of the Review Petition is restricted to the clarification to be issued in respect of the extent of the land in respect of which the injunction has been granted by the Lower Appellate Court i.e. the District Court, Pune. In the context of the clarification that is sought by the above Review Petitioners, it would be apposite to refer to the adjudication that has taken place which has given rise to the filing of the above Writ Petition No.594 of 2015. The Respondent No.1 herein is the original Plaintiff and the Review Petitioners are the original Defendants. The Respondent No.1 has filed the Suit in question for a declaration that the Release Deed dated 26-8-2008 is legal and valid. The subject matter of the Suit is the land bearing Gat No.236 area admeasuring 10 Hectors and 30 Ares and Survey No.238 admeasuring 9 Hectors and 35 Areas of Village Lohegan, District Pune. The said land was of the ownership to the extent of 50% of one Muncherji Pherozshaw and the balance of 50% of Bachhubai Wadia. It is the case of the Plaintiff that the suit properties are of his maternal grandfather. The case of the Plaintiff seems to be that the said properties were gifted to his father and mother i.e. one Feroze Cama and Mackly Cama by his maternal grandfather. Support to the said case can be found in the Written Statement filed by the Defendants. Per contra it is the case of the Defendants that the properties were of the ownership of Muncherji Pherozshaw to the extent of 50% and Bachhubai Wadia to the extent of the other 50%. The said properties to the extent of 50% which was the share of

Muncherji Pherozshaw devolved upon Feroze Cama and Mackly Cama who are the parents of the Plaintiff. It is the case of the Defendants that the said Feroze Cama being a joint tenant with his wife on the death of his wife he is exclusively entitled to the suit property i.e. the 50% share. There are certain events which have transpired in the matter of a Development Agreement and Power of Attorney being executed in favour of the Defendants and thereafter a Sale Deed being executed in favour of one Ganesh Construction Company with which the Review Petitioners are concerned, which events are not material in so far as the present Review Petition is concerned.

3 Suffice it would be to state that for the present matter, that the Plaintiff in the said Suit filed an application for injunction being Exhibit 5 seeking relief that the Defendants not to disturb his possession. The Defendants in turn also filed an application Exhibit 27 seeking the relief that the Plaintiff should not disturb their possession. The Trial Court rejected the application Exhibit 5 and allowed application Exhibit 27 filed by the Defendants. The Plaintiff carried the matter in Appeal challenging both the orders passed on Exhibit 5 and Exhibit 27. The Lower Appellate Court dismissed the Appeal and upheld the order passed by the Trial Court that the Defendants are in possession. The earlier round ended in the Writ Petition filed by the Plaintiff being Writ Petition No.1655 of 2011 being dismissed by a Learned Single Judge of this Court. However, at the hearing of the said Petition, the

Defendants made a statement that they are withdrawing the application Exhibit 27 which they had filed for injunction against the Plaintiff.

4 The Plaintiff thereafter filed the application Exhibit 78 for injunction restraining the Defendants from dealing with the suit properties by creating third party interests or gaining any benefit out of the suit properties and to preserve the suit properties as they are. The said application was founded on the alleged dispossession of the Plaintiff on 31-8-2011 in support of which case, the Plaintiff sought to rely upon certain material. The Trial Court by its order dated 8-5-2013 rejected the said application Exhibit 78 filed by the Plaintiff. The Plaintiff aggrieved by the order passed by the Trial Court carried the matter by way of an Appeal being Misc Civil Appeal No.245 of 2013. The Lower Appellate Court i.e. the District Court Pune by the order impugned in the above Writ Petition allowed the Appeal. In the context of the present Review Petition, it is required to be noted that the Lower Appellate Court observed that the Plaintiff has raised triable issues which require a full fledged trial and that the Plaintiff has proved prima facie case in his favour. The Lower Appellate Court at the prima face stage came to a conclusion that the Plaintiff would be entitled to an equal share as his father in the property of his mother i.e. Mackly Cama in the suit property. The Lower Appellate Court also held that the challenge to the Release Deed and the Conveyance dated 25-5-1989 executed by the Constituted Attorney of the father of the Plaintiff in

favour of the Defendants would have to be tested during the trial of the Suit. The order passed by the Lower Appellate Court was challenged by the Review Petitioners by filing the above Writ Petition. The said Writ Petition came to be dismissed by this Court (R.M. Savant J.) by order dated 27-2-2015. This court therefore did not deem it appropriate to interfere with the exercise of discretion by the Lower Appellate Court having regard to the reasons mentioned in the impugned order of the Lower Appellate Court, which reasons revolve around the triable issues which arise for consideration in the Suit in respect of the entitlement of the Plaintiff in the share which belongs to his mother Mackly Cama. Hence injunction granted by the Lower Appellate Court was confirmed by this Court. As indicated above, the Review Petitioners carried the matter to the Apex Court by way of an SLP being No.12351 of 2015. The said SLP came to be dismissed. However, the Petitioners were granted liberty to file a Review Petition for seeking the clarification which has been referred to in the earlier part of this order.

5 The question that is therefore posed is whether it is possible to clarify the extent of the land to which the injunction granted by the Lower Appellate Court applies.

6 The Learned Senior Counsel Mr. Kadam appearing for the Review Petitioners would be relying upon the order passed by the Lower Appellate

Court contend that at the highest the Plaintiff has $\frac{1}{2}$ share in the 25% share of Mackly Cama which comes to 12.5% share in the suit property and therefore by identifying the said share in the suit property, the Plaintiff's interest can be protected pending the Suit. The Learned Senior Counsel would contend that the Defendants i.e. the Review Petitioners who have an undisputed 87.5% share cannot be prevented from developing the property by a person who has only 12.5 % share. The Learned Senior counsel sought to place reliance on the judgment of a Division Bench of this Court dated 18-12-2013 in Appeal (L) No.451 of 2013 in Notice of Motion No.1213 of 2013 in Suit No.629 of 2013 in the matter of Man Chandak Developers Pvt Ltd. Vs. Dilip Mangilal Jain. The Learned Senior Counsel also sought to place reliance on the order of a Learned Single Judge of this Court dated 9-5-2014 in Notice of Motion No.976 of 2013 in Suit No.489 of 2013 in the matter of Sun Star Space Pvt Ltd. Vs. Dunichand Matumal Chhabtiya & Anr. It is the submission of the Learned Senior Counsel that in the said cases by protecting the interest of the Plaintiff, the Courts have permitted the Defendants to undertake the development. The Learned Senior Counsel tendered an affidavit on behalf of the Review Petitioners dated 9-7-2015 to which affidavit is annexed the location map depicting the area of the suit property which is mentioned in the body of the affidavit which the Defendants are ready to keep aside to protect the interest of the Plaintiff pending the Suit.

7 Per contra the Learned Counsel Mr. V. P. Sawant appearing for the Plaintiff i.e. the Respondent No.1 herein would contend that the scope of the Review Petition is only restricted to the clarification sought. In the guise of seeking clarification the Defendants can not reopen the matter and seek to re-argue the above Petition. The Learned Counsel would contend that the Plaintiff lays a claim to the property i.e. the entire 50% share of Feroze Cama and Mackly Cama on the basis of the Release Deed dated 26-8-2008 and therefore the Plaintiff's claim cannot be restricted to $\frac{1}{2}$ share in the 25% of his mother Mackly Cama. The Learned Counsel would submit that it is on account of the triable issues which arise in view of the claim based on the Release Deed that the Lower Appellate Court has deemed it appropriate to grant injunction in favour of the Plaintiff and therefore the Plaintiff cannot be restricted to 12.5% share in the suit property as is sought to be contended by the Learned Senior Counsel appearing on behalf of the Review Petitioners. The Learned Counsel appearing for the Respondent No.1 also sought to question the manner in which the above Review Petition has been filed after a change in Advocates.

8 Having heard the Learned Counsel for the parties, I have considered the rival contentions. As indicated above, in the earlier part of this order, the issue that arises is whether a clarification can be issued as regards the extent of the land to which the injunction granted by the Lower Appellate Court applies. In the said context, it is required to be noted that the Lower

Appellate Court has recognised at the prima facie stage that the Plaintiff has an undivided share in the suit property which findings the Lower Appellate Court has arrived on the basis of the provisions of the Indian Succession Act, which applies to Parsis to which the Plaintiff belongs. The extent of the undivided share would be contingent upon the adjudication of the Suit. If the Plaintiff succeeds in the getting the declaration that he is seeking in the instant Suit filed by him in respect of the Release Deed executed in his favour by his father he would be entitled to the entire 50% of the suit property i.e. share of Feroze Cama and Mackly Cama. It is only in the event the Plaintiff fails in the Suit then the question would arise whether the Plaintiff is at least entitled to 12.5% share in the Suit property. However, according to Defendants, the Plaintiff would not be entitled to anything as the father of the Plaintiff was a joint tenant with the mother and on the death of the mother the entire 50% share vests in the father. Hence in the absence of adjudication of the Suit no conclusiveness can be attributed to the share of the Plaintiff. The observation of the Lower Appellate Court that the Plaintiff has $\frac{1}{2}$ share in the share of his mother would not mean that the Plaintiff's share is determined as the said finding if any is at the prima facie stage and the exact share that the Plaintiff would be entitled to, would be contingent upon the decision in the Suit and especially on the fate of the Release Deed, on the basis of which, the Plaintiff lays a claim. In the absence of any definiteness in respect of the share of the Plaintiff, the same at this stage can only be said to be an undivided share in the

suit property. Hence till the Suit is decided, it is not possible to pass any order where the equities between the parties can be adjusted or balanced by earmarking a specific portion equivalent to $\frac{1}{2}$ share in the share of Mackly Cama in the suit property whereby the Plaintiff's interest can be protected. b

9 Now coming to the Judgments (supra) cited on behalf of the Review Petitioners by the Learned Senior Counsel, in my view, the said judgments would not aid the Review Petitioners in their pursuit of the Plaintiff's share being earmarked pending the Suit and for the Defendants to be permitted to carry out development in the rest of the property. In both the judgments i.e. in the case before the Division Bench as well as the Learned Single Judge, the share of the Plaintiff /Defendants was an ascertained share and was a minuscule share compared to the share of the Defendants / Plaintiffs.

In the case before the Division Bench i.e. Man Chandak Developers Pvt Ltd., the Plaintiff had a share to the extent of about 581.38 sq.mtrs. in the total property admeasuring 57601.43 sq.mtrs. which the Division Bench thought it fit to protect by earmarking a larger share i.e. 1000 sq.mtrs. pending the Suit.

In the second case i.e. the case before the Learned Single Judge i.e. Sunstar Space Pvt. Ltd., the Defendants in the said case had 12.5 % share in the property which was a land with a building which was taken for redevelopment. The Plaintiff in the said case had not even bothered to appear

in the Notice of Motion to oppose the relief sought on behalf of the Defendants. It is in the said context that the Learned Single Judge asked the Plaintiffs, who were the developers not to create any third party right to the extent of 12.5% sale component pending the Suit. It is also required to be noted that the said orders have been passed in the Suits which are filed in this Court and this Court was therefore exercising original jurisdiction. In the instant case, the above Writ Petition has arisen out of the orders passed by the courts below and therefore in that sense the proceedings cannot be said to be original proceedings. Secondly as indicated above, there is no conclusiveness and definiteness as regards the extent of the share of the Plaintiff in the instant case and the only thing that can be said is that the Plaintiff has an undivided share in the suit property. But such was not the case in the Judgments (supra) where the share was an ascertained share.

10 In my view therefore, no relief can be granted to be Review Petitioners in the above Review Petition. It is having regard to the facts of the case as aforestated that the Lower Appellate Court had deemed it appropriate to expedite the hearing of the Suit and directed it to be disposed of within a particular time frame which is reflected in the order passed by the Lower Appellate Court. The Review Petition is accordingly dismissed.

11 Needless to state that the Suit would be tried on its own merits and in accordance with law.

[R.M.SAVANT, J]