

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO.594 OF 2015**

**Arun Mittal and others**

**.. Petitioners**

**Versus**

**Shri. Merwan Feroze Cama and others**

**.. Respondents**

**Dr. Birendra Saraf a/w Ms. Neha Prashant and Ms. Monisha Mane i/by  
ALMT Legal, for the Petitioners.**

**Shri. V. P. Sawant with Shri. Kuldeep S. Patil, for the Respondent No.1.**

**CORAM : R.M. SAVANT, J.**

**DATE : 27<sup>th</sup> FEBRUARY, 2015**

**PC.**

1. The Writ Jurisdiction of this Court is invoked against the order dated 17.10.2014 passed by the Learned Additional Sessions Judge, Pune by which order the Appeal filed by the Respondent No.1 herein being Misc. Civil Appeal No.245 of 2013 came to be allowed and resultantly the order dated 08.05.2013 passed by the Learned Joint Civil Judge, Junior Division Pune, rejecting the application Exh.78 filed by the Respondent No.1 for restraining the Defendants from creating third party rights came to be set aside and the said application Exh.78 in turn came to be allowed. The parties would be referred to as per their status in the Trial Court.

2. The Petitioners herein are the Defendants in the suit in

question, whereas the Respondent No.1 herein is the original Plaintiff. The suit in question being Special Civil Suit No.1773 of 2010 has been filed by the Respondent No.1/Plaintiff for a declaration that the Release Deed executed by his father dated 26.08.2008 is legal and valid. The bone of contention in the proceedings is the land bearing Gat No.236 area admeasuring 10 Hectors 30 Ares and Survey No.238 area admeasuring 9 Hectors 35 Ares of village Lohgaon. It is the case of the Plaintiff that the said properties were ancestral properties of his maternal grandfather. The case seems to be that the said properties were gifted to his father and mother by his maternal grandfather. Support to the said case can be found in the written statement filed by the Defendants. However, it is the case of the Defendants that the said properties were of the ownership of one Khoshro Wadia to the extent of 50% and 50% of the said property was of the ownership of Firoze Cama and Macklay Cama who are undisputedly the parents of the Plaintiff. It has come on record that the said Khoshro Wadia and Firoze Cama have executed a development agreement dated 21.07.1981 in favour of the Respondent No.2 and the Respondent No.6 herein. The full consideration in respect of the said agreement was paid over on 28.03.1987 and receipt to that effect was executed. A Power of Attorney dated 25.03.1987 came to be executed in favour of the Defendants i.e. Parmeshwar, Shankarlal, and Mahendra Mittal. It appears

that thereafter a Sale Deed was executed in favour of one Ganesh Construction Company by the Power of Attorneys on 25.05.1989. The Petitioners are concerned with the said Ganesh Construction Company and in terms of the said Sale Deed, the name of the Petitioners came to be mutated in the revenue record. It is the case of the Plaintiff that after the Release Deed was executed in his favour on 26.08.2008 i.e. sometime in the year 2010. He became aware of the agreement executed by the Power of Attorneys and hence, filed the suit in question being Special Civil Suit No.1773 of 2010 for the declaration claimed. In the said suit, the Plaintiff filed an application for temporary injunction Exh.5. The said application was founded on the alleged long standing possession of the Plaintiff in respect of which the averments in that regard were made in the application. The Defendants in turn filed application Exh.27 seeking injunction against the Plaintiff so as to not to disturb their possession which possession was pursuant to the Sale Deed which was executed in their favour. The Trial Court considered the said applications Exh.5 and Exh.27 and by its order dated 15.12.2010 rejected the application Exh.5 and allowed the application Exh.27 filed by the Defendants. The Trial Court referred to the facts antecedent to the filing of the suit, whereby the development agreement was executed in favour of the Defendants and the Defendants names being mutated in the revenue record. The Trial Court

held that prima-facie the Plaintiff was not in possession and the Defendants were in possession of the suit property.

3. The Plaintiff aggrieved by the order dated 15.12.2010 carried the matter in Appeal by way of Misc. Civil Appeal No.8 of 2011 and Misc. Appeal No.9 of 2011 challenging the impugned orders passed on Exh.5 and Exh.27. Suffice it to say that the Lower Appellate Court reiterated the findings of the Trial Court in so far as the possession of the parties is concerned and held that it is the Defendants who are in possession and accordingly dismissed the Appeal by its order dated 27.01.2011.

4. The Plaintiff carried the matter to this Court by way of Writ Petition No.1655 of 2011. A Learned Single Judge of this Court did not deem it appropriate to interfere with the orders passed by the Courts below, so far as Exh.5 is concerned however in so far as Exh.27 is concerned, in view of the statement made by the Learned Counsel for the Defendants the said application Exh.27 was allowed to be withdrawn with liberty to file an application either in the suit that the Defendants may propose to file or in the counter claim, if it is allowed by the Trial Court. Hence, in so far as the earlier round is concerned, the adjudication in so far as possession of the suit property at the interim stage was concluded and it was held that the Defendants are in possession.

5. It is thereafter in the year 2012 i.e. on 7<sup>th</sup> March, 2013 that the instant application Exh.78 came to be filed and the substantive reliefs which are sought in the instant application Exh.78 are by way of prayer clauses 4(a) and 4(b) which for the sake of ready reference are reproduced herein under :-

“(4) It is most respectfully prayed as under :-

(a) During the pendency of the suit, the Defendants their servants, agents or other persons acting through them be prevented by injunction or other suitable orders or both from in any way dealing with suit properties including but not limited to creation of third party interests and/or garnering of any benefits out of the suit properties;

(b) During the pendency of the suit, the Defendants their servants, agents or other persons acting through them be directed to preserve the suit properties as they are under orders of 'status quo' or other orders as may be necessary to preserve the present nature of the suit properties.”

The said application was founded on the fact of the alleged dispossession of the Plaintiff on 31.08.2011. In support of which various facts were cited in the application namely the investigation carried out by the Police, CCTV footage etc.. The said application was opposed to on behalf of the Defendants vide their reply at Exh.87. The Defendants took up a plea that the application Exh.78 is not maintainable and is hit by the principles of constructive res-judicata. The Defendants adverted to the fact that their names have been mutated in the revenue record and the earlier

application Exh.5 filed by the Plaintiffs was rejected by the Courts below which was also confirmed by this Court. The Defendants therefore sought rejection of the application Exh.78.

The Trial Court considered the said application and by its order dated 8<sup>th</sup> May, 2013 rejected the said. The Trial Court observed that the documents on which the Plaintiff seeks to rely i.e. Release Deed would have to be tested in the suit. The Trial Court also observed that the documents relied upon by the Plaintiff in respect of his alleged dispossession i.e. electricity bills, CCTV footage and the release of the buffaloes kept at cattle-pond would require evidence to be led as the documents have come in being after the application Exh.5 was rejected. The Trial Court also observed that in the suit filed by the Plaintiff against the Pune Municipal Corporation i.e. Regular Civil Suit No.852 of 2011 an order of status-quo was granted and the Plaintiff has again in the present suit sought the same relief. The Trial Court therefore, held that the balance of convenience was not in favour of the Plaintiff and as indicated above by its order dated 08.05.2013 has rejected the application Exh.78.

6. The Plaintiff aggrieved by the said order dated 08.05.2013 took exception to the same by filing Misc. Appeal No.245 of 2013. The Lower Appellate Court by the impugned order dated 17.10.2014 allowed

the Appeal and set aside the order dated 08.05.2013 passed by the Trial Court rejecting the application Exh.78 and in turn granted injunction against Defendants not to create third party interest. The Lower Appellate Court observed that the Plaintiff has raised triable issues which requires fulfledge trial and hence, the Plaintiff has proved prima-facie case in his favour. The Lower Appellate Court at the prima-facie stage came to a conclusion that after the death of the Plaintiff's mother Macklay Cama in terms of the provisions of the Indian Succession Act, 1925 and more particularly Section 51(1)(a) of the Act, which confers equal right to a son and to a widower in the event of intestate death of a Parsee lady in respect of the immovable property owned by her. The Lower Appellate Court therefore, held that there is no iota of doubt that besides the father of the Plaintiff Firoz Cama, the Plaintiff was also entitled to equal share in the half share of deceased Macklay in the suit properties. Since the Defendants have questioned the Release Deed dated 20<sup>th</sup> August, 2008 which is executed in favour of the Plaintiff and since there is challenge to the conveyance dated 25.05.1989 executed by the Constituted Attorneys of the father of the Plaintiff in favour of the Defendants, the said aspect would have to be tested during the trial of the suit. The Lower Appellate Court held that having regard to the facts of the instant application Exh.78 what was sought is the injunction against Defendants from creating third

party rights, the application Exh.78 would therefore not be hit by the principles of constructive res-judicata. The Lower Appellate Court however rejected the direction which was sought by the Plaintiff to be issued to the revenue authority in the matter of registering lis-pendense. As indicated above the Lower Appellate Court has allowed the Appeal by the impugned order dated 17.10.2014 and thereby set aside the order dated 08.05.2013 passed by the Trial Court by restraining the Defendants from creating third party rights.

7. The Learned Counsel appearing for the Petitioners Dr. Birendra Saraf would reiterate the case of the Petitioners i.e. Defendants before the Courts below. The Learned Counsel would place reliance on the earlier adjudication which has taken place in respect of the application Exh.5. The Learned Counsel would seek to place reliance upon the development agreement executed in favour of the Defendants in the year 1989 by the Power of Attorneys of the Plaintiff. The Learned Counsel would contend that the Courts below in the earlier round have accordingly come to a conclusion that the Plaintiff has no right in respect of the property in question and therefore deemed it appropriate not to grant temporary injunction against the Defendants.

8. Per contra, the Learned Counsel appearing for the Respondent

No.1/original Plaintiff would support the impugned order and would contend that since it is an undisputed position that the Plaintiff is claiming through the Macklay Cama being her son is entitled to her share in the suit property. The Learned Counsel would contend that the earlier round was confined to the aspect of possession, where the Courts below have recorded finding against the Plaintiff, but the instant application being filed for an injunction restraining the Defendants from creating third party rights was maintainable notwithstanding the earlier adjudication.

9. I have heard the Learned Counsel for the parties and considered the rival contentions. In my view, having regard to the relief sought by the present application Exh.78 it could not be said that the said application was not maintainable as principles of constructive res-judicata do not strictly apply to interlocutory applications filed in a suit. The Lower Appellate Court having deemed it appropriate to exercise discretion in favour of the Plaintiff for the reasons mentioned in the impugned order which reasons revolve around the triable issues which arise for consideration in the suit on which the entitlement of the Plaintiff in the share which belongs to his mother Macklay Cama. In my view, the order passed by the Lower Appellate Court does not require any interdiction at the hands of this Court in its Writ Jurisdiction under Article 227 of the Constitution of India. In that view of the matter, no case for interference in

the Writ Jurisdiction of this Court is made out. The Writ Petition is accordingly dismissed. Since the suit has already been expedited by the Lower Appellate Court and was directed to be disposed of within one year i.e. on or before 16<sup>th</sup> October, 2015, the Trial Court would endeavour to dispose of the suit within the said stipulated time.

**[R.M. SAVANT, J]**