Agk

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
TESTAMENTARY AND INTESTATE JURISDICTION
NOTICE OF MOTION NO. 151 OF 2014
IN
TESTAMENTARY SUIT NO. 166 OF 2013
IN
TESTAMENTARY PETITION NO. 89 OF 2013

Amresh J. Divecha …Plaintiff
Versus
Shirish Krishnaram Divecha & Anr. …Defendants
And
Govind Iyer & Anr. ...Respondents

Mr. Farhan Dubash, *i/b Vigil Juris, for the Plaintiff.*
Mr. A.A. Thakkar, *i/b Federal & Rashmikant, for the Respondents.*
Mr. Sahil Saiyed, *i/b M/s. Wadia Ghandy & Co., for Defendant No. 1.*
Mr. Ameya Tamhane, *with Ms. Seema Sarnaik, for Defendant No. 2.*

CORAM: G.S. PATEL, J
DATED: 12th January 2015

PC:-

1. The application is by the Plaintiff, who seeks probate of a Will dated 23rd September 2009 of one Ms. Harshada Krishnaram

Divecha ("**Ms. Divecha**"). During her lifetime, Ms. Divecha lived in Flat No. B2, Pallonji Mansion, 43A-43B, Cuffe Parade, Mumbai – 400 005. Ms. Divecha passed away on 8th December 2011. During her lifetime, she executed a Memorandum of Understanding ("**MoU**") dated 9th November 2011 for sale of the Pallonji Mansion flat to the two Respondents to this Notice of Motion.

2. The MoU itself is not disputed by the Defendants, who challenge the Will and oppose the grant of probate to the Plaintiff, the sole executor named in that Will. There is no dispute that under the Will, the bulk of the estate has been left to the Plaintiff with only relatively minor legacies in favour of the Defendants. There is also no dispute that if the Will is not proved, the Plaintiff's father and the two Defendants would each be entitled to one-third share in Ms. Divecha's estate.

3. What the Plaintiff now seeks is that he be permitted to complete the sale for the sum agreed in the MoU, i.e., an amount of a little over Rs. 14 crores. Of course, the oustanding dues to the Cooperative Housing Society will have to be deducted from this amount as will be other agreed payments, such as 50% of the transfer charges.

4. Under the Will, the two Defendants are entitled only to a legacy of Rs. 5 lakhs and Rs. 50 lakhs respectively from these sale proceeds. This is a very least to which they are entitled. On intestacy, they would be entitled to more (one-third each). Should the Will be proved, the Plaintiff would be entitled to the remainder of the consideration less the amount of Rs. 55 lakhs. However, as on intestacy there is no dispute that the Plaintiff's father is entitled to at least one-third of the estate and consequently one-third of the consideration of this flat.

5. In paragraph 19 of the affidavit in support, the Plaintiff has set out the fact that his son is in the terminal stages of acute renal failure and is on continuous dialysis. He is in desperate need of funds. He spends at least Rs. 65,000/- per month on the medical treatment of his son.

6. In my view, it would be in the interests of justice if the Plaintiff is permitted to complete the sale. There is certainly no reason why the Respondents, the purchasers who are willing to pay the entire consideration, should be asked to wait indefinitely while these probate proceedings are decided. It seems to me, *prima facie*, that the Plaintiff is in need of funds. He is certainly entitled to one-third of the sale proceeds at a minimum, and about that there can be no dispute.

7. In order to ensure that the transaction is completed in the most transparent manner possible, the Court Receiver, High Court, Mumbai, will complete the same transaction under the MoU dated 9th November 2011 acting under the present order. The entire balance sale consideration, less deductions as indicated above, will be received by the Court Receiver in his name. The Court Receiver will pay:

(a) One-third of the net amount received by him to the Plaintiff.

(b) Rs. 5 lakhs to Defendant No.1, subject to the terms set out below;

(c) Rs. 55 lakhs to Defendant No.2, subject to the terms set out below.

8. The remaining amount will be deposited with the Prothonotary & Senior Master. By consent, the amount shall be invested in any scheduled bank (not necessarily a nationalized bank) at an optimal rate of interest, initially for a period of one year and thereafter for subsequent like periods at the best possible interest rates. It is clarified that the consent of the Defendants to the order of investment does not indicate that they have consented to the rest of this order.

9. In order to allay any anxieties on the part of any of the parties, the Plaintiff shall, before this transaction is complete, submit an undertaking to this Court to bring back the entire amount with accrued interest, if so ordered by this Court.

10. Mr. Dubash, learned Advocate for the Plaintiff, has no objection if the 1st and 2nd Defendants are permitted to withdraw 50% each of the amount so deposited, subject to the provision of such security as the Prothonotary & Senior Master may think fit. Liberty to both the Defendants to apply to the Prothonotary & Senior Master at any time for withdrawal of 50% each of the amount deposited, upon furnishing security to the satisfaction of the Prothonotary & Senior Master. Needless to say, any such application for withdrawal must be accompanied by an undertaking to bring back the amount withdrawn with accrued interest if so ordered, and this undertaking is to be over and above any other security that may be required by the Prothonotary & Senior Master.

11. The Notice of Motion is disposed of in these terms. The order for payment and the liberty to apply for withdrawal are without prejudice to the rights and contentions of all parties.

(G. S. PATEL, J.)