

SHEPHALI

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 476 OF 2012
IN
SUIT NO. 422 OF 2012
WITH
NOTICE OF MOTION NO. 499 OF 2014**

Smt. Renu Balwant Maru ...Plaintiff
Versus
Bhupendra Damjibhai Tank & Ors. ...Defendants

**WITH
TESTAMENTARY SUIT NO. 81 OF 2013
IN
TESTAMENTARY PETITION NO. 971 OF 2012**

Jitendra Bhogilal Kkothari ...Plaintiff
Versus
Renu Balwant Maru ...Defendant

**Mr. Atul G. Damle, Senior Advocate, i/b Rupesh R. Lanjekar, for
the Plaintiff.**
Mr. M. G. Gawde, for the Plaintiff in TS/81/13.
**Mr. Anil Anturkar, Senior Advocate, with Ms. Minoo Siodia, i/b D.
Dalal & J. Carsol, for Defendants Nos. 1 to 4.**
**Mr. Fredun DeVitre, Senior Advocate, a/w Mr. Vishwajeet
Sawant, Mr. Raju Yamgar, Mr. Manish Gitay, i/b Raju Yamgar,
for Defendant No. 7.**

Mr. Rohaan Cama, i/b Mohanty & Associates, for Defendants Nos. 5 and 6 in NMS/499/14.

CORAM: G.S. PATEL, J
DATED: 7th December 2016

PC:-

NOTICE OF MOTION NO. 476 OF 2012

1. Although this matter is on board today for directions, by consent, it is taken up for hearing and final disposal. Heard.
2. The Suit purports to be for partition in respect of a large tract of land of 5 acres and 20 Gunthas at Dindoshi. This is Survey No. 29, Hissa No. 2 and Survey No. 39, Hissa No. 7. The Plaintiff, Renuka, is the daughter of one Damodar Tank, whose father was one Raghavji Tank. Defendant No. 7 is a developer in possession of the property.
3. There are at least two immediate problems facing Mr. Damle for the Plaintiffs. The first of these is that this property is the subject matter of more than one prior disposition dating back to the time of Damodar, if not earlier. Third party rights have been created. There is no prayer to set aside those documents of transfer.
4. What the Plaintiff claims is a share in that property derived from the ancestor on account of her being one of Damodar's daughters and one of Raghavji's grand-daughters. There is a dispute

as to the Plaintiff's precise share. The controversy turns on an interpretation of the relevant statutory provisions.

5. I find, however, that it is unnecessary to travel that distance for the purposes of this Notice of Motion. Paragraph 1 of the Plaint makes it abundantly clear that the Plaintiff seeks partition of the estate left behind by Raghavji, the grandfather. Raghavji is described in the Plaint "*the deceased father*". There is a family tree annexed at Exhibit "A" showing the relationship and kinship of the parties. Mr. Anturkar for Defendants Nos. 1 to 4 and Mr. DeVitre for Defendant No. 7 point out that the Dindoshi property was purchased by Raghavji and Damodar from one Habiba Begum under an Indenture dated 9th May 1967, a copy of which is at Exhibit "B" to the Plaint. This Indenture make it clear (at page 20) that Damodar and his father, Raghavji took that property "as joint tenants with the right of survivorship". The document says so in terms; and that is not all. The very same clause further clarifies that Damodar and Raghavji did *not* take the property as tenants in common. There is, therefore, no ambiguity at all about the nature of ownership. Raghavji died on 12th July 1975. In view of this provision in the Indenture, Damodar would succeed to the entirety of the property by survivorship, there being a right of survivorship in his favour, and since Damodar and his father did not hold that property as tenants in common.

6. The direct consequence of this is that *prima facie* the entire Suit is at the very list misdirected if not actually misconceived. Prayer (a) of the Suit seeks a declaration that the property described in Exhibit "C" is the property left behind "by the deceased father" — *i.e.*, Raghavji — and a Plaintiff has a 1/7th share in it. On the

documents annexed to the Complaint itself this cannot be correct, because the property in question vested on the death of Raghavji (“the deceased father”) entirely in Damodar. Prayer (a) of the Complaint in its present form cannot possibly be granted.

7. Mr. Damle urges me to read paragraph 1 of the Complaint “as a whole”. These are pleadings on the Original Side. They must be construed strictly. At any rate, even a ‘holistic’ reading will not assist Mr. Damle, and I must therefore decline his invitation. For, paragraph 1 of the Complaint itself makes it clear that the partition sought is of Raghavji’s estate and not Damodar’s estate. If there was any doubt about this, it is put to rest by the fact that throughout the Complaint, Damodar is referred to as “*the deceased Damodar*” and the expression “*deceased father*” is clearly a specific reference to Raghavji.

8. I also have a great difficulty having regards to paragraphs 4 and 5 of the Complaint. These paragraphs 4 and 5 seem to be at odds with prayer (a). They speak of Damodar having made several promises to the Plaintiff and Damodar’s other children including about their shares in the Dindoshi property. Whether or not these promises were ever made, and to whom and when, are, of course, matters that must await trial. But even if these promises were made, they would obviously then indicate that the property vested in “*the deceased Damodar*” and not in “*the deceased father*”. That is not the frame of the Suit. That is not what is claimed in paragraph 1. That is not what is sought in prayer (a). I do not know in these circumstances it is possible to grant the Plaintiff interim reliefs of the nature sought which include restraining Defendants Nos. 1 to 4 from carrying out

further work and restraining Defendants Nos. 1 to 4 and 7 from creating any third party rights in respect of the property in question.

9. Mr. DeVitre is also correct in pointing out that Damodar himself created development rights in respect of the property in his lifetime, and that the promises of which the Plaintiff speaks in paragraph 4 are promises of a share in the value of the property; that is, a promise of payment of money. This means that, even on the Plaintiff's showing, the suit is at best a money claim and nothing higher.

10. The Notice of Motion is dismissed. There will be no order as to costs.

11. In the view that I have taken, at present there exists no question of compelling any disclosure from any of the Defendants.

NOTICE OF MOTION NO. 499 OF 2014:

1. Heard Mr. Cama for Defendants Nos. 5 and 6 in support. Since I have not granted the Plaintiff an order of disclosure, I do not see how I can grant that order of disclosure to Defendants Nos. 5 and 6. The Notice of Motion is dismissed.

2. Liberty to Defendants Nos. 5 and 6 to file a separate Suit, if so advised.

(G. S. PATEL, J.)