

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

WRIT PETITION NO. 2795 OF 2017

M/s. Metro Development

...Petitioner
(Defendant No.9)

Versus

Dr. Hemang Dayashankar Koppikar & Ors.

...Respondents

.....

Mr.Atul Rajadkshya, Senior Advocate a/w. Mr. Nishant Tripathi i/b. M. Tripathi & Co. for the Petitioner.

Mr. P.K. Dhakepalkar, Senior Advocate a/w. Dr.Birendra Saraf a/w. Mr. Rohan Sawant, Mr. Farid Karachiwala, Ms. Shoma Maitra and Mr. Ahuramazda Postvala i/b. Wadia Gandhi & Co. for Respondent No.1.

Mr.S.M.Kamble for Respondent No. 6.

Mr.A.A.Kumbhakoni, Senior Advocate i/b. Mr. Suresh M. Sabrad for Respondent No. 7.

Mr. Jeetendra Sachdev for Respondent Nos. 2 (b), 2(c) and 3 (b).

Mr. Pankaj J. Das for Respondent Nos, 4,5, and 8.

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**CORAM : Mrs.MRIDULA BHATKAR, J.
FOR ORDERS ON : 05th JUNE 2017**

ORDER

1. This Writ Petition under article 227 of the Constitution of India is filed by the petitioner against the order dated 18.12.2017 passed by the learned District Judge-11, Thane in Miscellaneous Appeal No. 35 of 2017 thereby confirming the order dated 07.12.2016 passed by the learned Joint Civil Judge, Junior Division, Vashi, Navi Mumbai in Regular Civil Suit No. 140 of 2012.

2. The original plaintiff i.e. respondent no.1, had filed Regular Civil Suit No. 140 of 2012 for a declaration, injunction and other reliefs in respect of the suit property. During the pendency of the suit, the original plaintiff has filed the application for amendment and added the present petitioner as a party defendant no.9 on 18.12.2015 and therefore, the petitioner i.e. defendant No. 9 has filed the application under section 9A of Code of Civil Procedure (hereinafter referred to as C.P.C.) challenging the jurisdiction of the Court on the ground of limitation. On 09.12.2016, the original plaintiff, i.e. respondent no.1, has moved the application under section 9 A (2) of C.P.C. and therefore, defendant No. 9 has filed a reply to the said application. However, the trial Court by order dated 07.12.2016 partly allowed the application below Exhibit 169 and the preliminary issues under section 9A of C.P.C. in respect of incorrect valuation, deficit court fees and the pecuniary jurisdiction were framed on Exhibit 1. However, issue of limitation was not framed. The trial Court has partly allowed the application below Exhibit 180 under section 9A (2) of C.P.C. and directed that defendant nos. 7 and 9 shall not create or allow to create third party interest in the suit property and directed to maintain the status quo

of the suit property, till the preliminary issue will be decided on merits. The said order was challenged by original defendant nos. 7 and 9 in Miscellaneous Appeal No. 35 of 2017 before the District Judge, Thane. However, the learned District Judge has dismissed the said appeal by order dated 18.12.2017. Hence, this Writ Petition.

3. Mr. Rajadkshya, learned senior counsel for the petitioner, has submitted that the suit land was allotted to one Ms. Maya Kaikini at Neurl, Navi Mumbai under 12.5 schemes by CIDCO.

4. On 26.07.2000, Ms. Maya Kaikini had executed a Power of Attorney in favour of respondent no.9 i.e. defendant no. 8 i.e. Jagdish Thakkar. On 09.04.2001, respondent no. 9 executed agreement to transfer and assign the suit property to one Mr. Madan Kolambekar. On 22.04.2001, Mr. Madan Kolambekar agreed to transfer the suit property to Mr. Harbans Singh, then Mr. Madan Kolambekar and Mr. Harbans Singh jointly agreed to transfer the suit property to M/s. Basant Realty Private Limited and thereafter the proprietary right of the suit property was transferred and assigned to many persons. Finally, it was respondent no. 6, who transferred the right to respondent no. 7 and then on 14.09.2012,

CIDCO, respondent nos. 6 and 7 had executed a tripartite agreement whereby the suit property came to be vested with respondent no. 7. On 18.12.2014, respondent no. 7 negotiated a deal with the petitioner. On 11.02.2015, CIDCO, respondent no. 7 and the petitioner had executed tripartite Agreement whereby the suit property came to be vested with the petitioner. On 12.02.2015, respondent no. 7 executed agreement to assign and transfer the right to the petitioner for total consideration of Rs. 5.3 crores. Thereafter, the petitioner has started construction on the suit property. The petitioner has already invested Rs. 79 crores and he has also constructed 79 flats and 13 storied buildings. Out of 79 flats, he has already sold 31 flats. He has further submitted that the petitioner has raised this project on loan from the Bank. He has further submitted that till October 2016, there was no injunction or status quo in respect of the suit property in favour of the defendants by any Court. The petitioner has moved the application dated 20.10.2016 under section 9A of C.P.C. challenging the jurisdiction of the Court. Thereafter, respondent no. 1 moved the application under section 9A (2) of C.P.C. for interim relief. The trial Court has decided this application, but the issue of limitation was not framed and therefore, the petitioner has challenged the order passed by the

learned trial Court by filing Writ Petition No. 1466 of 2016 directing the trial Court to frame issue of limitation and the present petitioner to file appeal against the order under section 9A (2) of C.P.C. However, the petitioner has filed appeal, but it was dismissed, vide order dated 18.02.2017. The learned senior counsel has further submitted that respondent no.1 is claiming his right in the suit property through an alleged Will executed by Ms.Maya Kaikini in his favour and the petitioner is claiming his right through original predecessor in title i.e. two sisters of Late Maya Kaikini. He has further submitted that the said Will was earlier probated and it was revoked and still it is pending.

5. Mr. Rajadkshya, learned senior counsel for the petitioner, has pointed out that earlier there was first round of litigation between the plaintiff and defendant nos. 5 and 6. The plaintiff had moved the application for temporary injunction against defendant no. 6, which was marked at Exhibit 96 and the application against defendant no.5 based on the same facts was also marked at Exhibit-107 in the same Suit. Defendant nos. 5 and 6 are the predecessors-in-title of the present petitioner i.e. original defendant no. 9 of the suit plot. Defendant nos. 1 and 2 are the real sisters of deceased

Maya Kaikini, who have obtained the heirship certificate in Civil Miscellaneous Application No. 460 of 2005 in the Court of Civil Judge, Senior Division, Thane. The said certificate was obtained on 05.09.2007. On the basis of the said certificate, defendant nos.1 and 2 obtained possession of the suit plot from CIDCO and entered into tripartite agreement with defendant nos.1 and 2, CIDCO and defendant no. 5 and thereafter with the consent of CIDCO, defendant no.5 started construction on the suit plot. Initially, in the year 2012, when the Suit was filed against defendants, defendant no. 9 was not in the picture. The plaintiff has prayed for temporary injunction only against defendant no. 5 and 6 from alienating the suit property. The learned senior counsel has further submitted that the said applications were rejected by the learned Civil Judge, Junior Division, Vashi, vide order dated 26.11.2013. The said order was challenged before the District Court, Thane in Miscellaneous Civil Appeal No. 233 of 2013 and it was dismissed with costs on 19.04.2014 by the learned Ad-hoc District Judge -2 and Assistant Sessions Judge, Thane. Thereafter, the order dated 19.04.2014 passed by the learned District Court, Thane was challenged by the plaintiff and the same was taken before the High Court in Writ Petition No. 5669 of 2014. The writ petition was dismissed by this

Court, vide order dated 05.11.2014 and the said order was confirmed in the Supreme Court in Petition for Special Leave to Appeal No. 35118 of 2014. Thus, there was no order of injunction as on today against the petitioner before the order dated 07.12.2016 was passed.

6. The learned senior counsel for the petitioner has further submitted that as Maya Kaikini has herself entered into the agreement with CIDCO and the respondents. The Court has observed that she herself could not have obtained injunction because she was party to the agreement. The learned senior counsel has relied on the observations made by this Court while rejecting injunction to the original plaintiff against defendant nos. 5 and 6 and also relied on the relevant portion of the order dated 26.11.2013 passed by the trial Court in the first round of the proceeding. He has further submitted that when injunction was not granted against defendant nos. 5 and 6, from whom the petitioner had purchased the land, then it ought to have been given to the plaintiff against the petitioner. He further relied on the relevant portion of application below Exhibit 39 filed by the plaintiff against defendant nos. 5 and 6. He argued that identical pleadings and

prayers are made against defendant no. 9 in other injunction application. He has argued that the plaintiff is claiming property through Will, which is not probated. He relied on Section 213 of the Indian Succession Act and has submitted that a legatee has no right unless a Court of competent jurisdiction grants probate of the Will. In support of this submission, the learned senior counsel has relied on the case of *Krishna Kumar Birla Versus Rajendra Singh Lodha* and others reported in *(2008) 4 SCC 300*. He has further submitted that in the application filed under section 9A(2) of C.P.C, it is not necessary for the Court to grant relief or injunction to the applicant. He has further submitted that the said relief is to be granted only in emergency. He relied on the case of *Kranti Mohan Guruprasa Mehra and another Versus Fatechand Vasuram Behal* reported in *AIR 1982 Bom 263, (1981)*

7. On the point of section 9A of C.P.C., the learned senior counsel for the petitioner relied on the case of *Tayabbhai M. Bagasarwalla & Anr. Versus Hind Rubber Industries Pvt. Ltd.* reported in *(199) 3 SCC 443*.

8. The learned senior counsel for the petitioner has finally

submitted that the plaintiff is not a relative of Maya Kaikini and she herself had disposed of this property to defendant no. 8 Jagdish Thakkar. The property mentioned in the Will is some salt part property at Belapur and it is not the suit property which is an agriculture land. He has also submitted that the contesting witnesses of the so called Will are the relatives of the plaintiff and are the beneficiaries of the Will. The defendants have challenged the Will and the order of interim injunction passed in this case is illegal.

9. Mr. Kumbhakoni, learned senior counsel appearing for original defendant no. 6 i.e. Fine Arts, has submitted that the suit property was originally allotted to Maya Kaikini by CIDCO. Thereafter, through Yash Developers i.e. defendant no.5 and one Perfect Associates, it was sold to Fine Arts i.e. defendant no.6. The plaintiff has earlier first round of interim relief when he filed the application below Exhibit 39 for injunction against defendant no.6. However, he could not succeed in getting injunction in respect of construction of the building against defendant no.6. The Bombay High Court has dismissed the Writ Petition filed against defendant no.1 and the Supreme Court has also dismissed the SLP and thus that order remains in force. He has further submitted that Metro Development i.e. defendant no.9 has come in possession of the

property by tripartite agreement, which was executed between Metro Development, Fine Arts and the CIDCO. Thus, when the plaintiff did not succeed in getting injunction against defendant no.6, who is the predecessor-in-title of defendant no. 9, how at this stage, injunction can be granted of any nature and how he is entitled to get injunction against defendant no.9. He further relied on the observation of the High Court in earlier round of injunction. He argued that even the High Court in the earlier round of seeking injunction has considered the facts of this case, the original allottee Maya Kaikini could not have granted injunction against defendants. On the point of scope of section 9A(2) of C.P.C., the learned senior counsel has relied on the statement, object and reasons of the amendment and introduction of section 9A of C.P.C. He argued that when the application is pending, such injunction is not to be granted loosely, but it is to be granted only in the exigency of the situation. In support of his submissions, he relied on the judgment of the single bench of this Court in **Writ Petition No. 9256 of 2015 decided on 06.06.2016** [Madhu Ramesh Jain vs. The State of Maharashtra through the Collector District Jalgaon & Ors.]

10. Mr. Dhakepalkar, learned senior counsel, in reply, has submitted that the petition is without merit and he supported the impugned orders passed by the District Judge. He has submitted that though earlier interim injunction was rejected by the trial Court, High Court and the Supreme Court, after amendment in the plaint, the plaintiff took out second application for interim injunction. He argued that the agreement of sale executed between Jagdish Thakkar and Maya Kaikini, as the plaintiff was not aware of it, was not relied in the Suit before the trial Court and therefore, it could not be challenged. Jagdish Thakkar i.e. respondent no. 9 had filed the Special Civil Suit for specific performance bearing Special Civil Suit No. 512 of 2010 on the basis of purported agreement which was unconditionally withdrawn on 11.09.2012. He has further submitted that the original plaintiff did not have knowledge of this order earlier and it was only when Fine Arts i.e. respondent no. 7 relied on the purported agreement first time before the High Court in Writ Petition No. 5669 of 2014, then the said agreement was subsequently challenged in the Suit by way of amendment, so also earlier, the petitioner did not have knowledge regarding the purported agreement executed on 09.04.2001 between Jagdish Thakkar i.e. respondent no. 9 and one Mr. Kolambekar. i.e. also the

reason of second round of interim relief as these documents were not known to the plaintiff. He has further submitted that the administrative suit was filed by the plaintiff in the year 2009 and the written statement filed by the respondents on 27.11.2009. First time, the plaintiff had knowledge that the agreement of lease had already been executed in favour of Shankutla i.e. respondent no.2 on 25.11.2008.

11. The learned senior counsel Mr.Dhakepalkar has further submitted that in the absence of challenge to these documents, the prayer of interim relief could not be entertained by the High Court, therefore, after amendment application for second round of interim relief is persuaded by the plaintiff. He has further submitted that the respondents themselves have filed the Suits against each other and have taken contradictory stands. The Suit was filed by Jagdish Thakkar for specific performance. Yash Developers i.e. respondent no. 6 in his written statement has denied the agreement executed between Jagdish Thakkar i.e. respondent no. 9 and Yash Developer i.e. respondent no. 6. It was categorically stated that the said documents were sham, bogus, forged and fabricated documents. Then Shakuntla i.e. respondent no. 2 had filed the written statement

denying that Maya Kaikini, original allottee of the suit land, had ever executed any agreement during her lifetime in respect of the suit plot and all those agreements between Maya Kaikini and Jagdish Thakkar are sham and bogus. On 10.11.2010, the plaintiff has also realized that Shakuntla had already transferred the suit plot in favour of Yash Developers i.e. respondent no. 6 by executing registered tripartite agreement dated 28.07.2010. He has further submitted that the plaintiff has filed the Administrative Suit No. 610 of 2009 before the District Court, Thane for protection and reservation of the Suit plot. Respondent no. 6 Fine Arts appeared before Vashi Court. However, at that time, they did not produce the agreement purportedly executed by Jagdish Thakkar in favour of Mr. Kolambekar and the other purported subsequent agreements. He has further argued that the original owner Maya Kaikini was not having good relationship either with respondent no.2 or respondent no.3. During her lifetime, Maya Kaikini had filed Suit No. 2099 of 1984 against Shakuntala and Yashodhara for injunction that they should not dispossess her from the residence. The original property was owned by Dr. Vasantrao Kaikini, the father of Maya Kaikini, Pratibha, Shakuntla and Yashodhara. His wife Ahilyabai also died leaving behind last Will and Testament. Pratibha died prior to her

mother. Thus, the entire property was distributed as per 1/3 share i.e. 66 Acres 22 Guntas 12 R between three sisters i.e. Maya, Shakuntla i.e. respondent no.2 and Yashodhara i.e. respondent no.3. He has further submitted that both the sisters have got their shares and yet they worked to grab the share of Maya Kaikini. He argued that Maya Kaikini was not residing with them, but she was residing with her distant cousin. She was spinster living alone and her cousin Dr. Dhanvanti Ambadkhambadkoni and her husband were residing as her tenants and were taking care of Maya Kaikini. The plaintiff is the real brother of Dhanvanti Ambadkhambadkoni. She therefore has executed her last Will and Testament on 24.11.2002 in favour of the plaintiff. She bequeathed all her immovable and movable property to the plaintiff i.e. original respondent no.1 in this petition. On 11.08.2005, Maya Kaikini died leaving behind her last Will. Being a sole executor of the last Will, the original plaintiff i.e. respondent no.1 Dr. Koppikar instituted probate proceedings bearing petition no. 1015 of 2006 before the High Court, Bombay. However, in between respondent no. 2 Shakuntla had filed Misc. Appeal No. 460 of 2005 before the District Court, Thane and obtained heirship certificate. However, the plaintiff was not aware of this proceeding of heirship certificate.

12. Mr.Dhakepalkar, learned senior counsel has further submitted that on 31.08.2007, Shakuntla i.e. respondent no.2 obtained heirship certificate without disclosing the facts of the Will though she was aware of the same. On 10.04.2007, the probate proceeding was converted into Testamentary Suit No. 26 of 2007, which is still pending. He has further submitted that in the Suit, the trial Court has rightly granted status quo to the construction carried out by the present petitioner.

13. On the point of section 9A(2) of C.P.C., the learned senior counsel Mr. Dhakepalkar has relied on the judgment and order dated 17.07.2012 passed by the learned Single Judge of this Court in *Notice of Motion No. 748 of 2012 and others Notices of Motion* between *Freny Kersi Irani & anr. Vs. Soona Kali Contractor & 13 ors.* He has submitted that by this order, the learned Single Judge of this Court has disposed off many Notices of Motion holding that at the time of preliminary issue, interim injunction application filed under section 9A (2) of C.P.C. can be granted, though, earlier application is rejected or not pressed. The learned senior counsel said that this hearing is the answer to the main objection of the

petitioner about maintainability and illegality of the order granting interim injunction passed by the learned Judge.

14. The learned senior counsel for the petitioner submits that on the basis of heirship certificate, the ownership of the suit property cannot be determined. It is just an authority to be care taker of the property. The heirship certificate is an archaic law in the British era and no rights are determined on this basis.

15. By way of reply, the learned senior counsel Mr. Rajadkshya has submitted that respondent no. 1 is in fact pressing for interim relief, which cannot be sustained in the light of earlier orders. Now, this issue is also decided by the High Court in Writ Petition No. 5669 of 2014, vide order dated 05.11.2014, wherein interim relief was granted by this Court to the respondents through whom respondent no. 6 claims. He has further submitted that respondent no.1 was fully aware of the earlier sale deed entered into between the parties. Moreover, he was also aware about sale deed of the petitioner with respondent nos. 4 and 5, which has taken place by the present petitioner and thus challenged all sale deeds by way of amendment, is a change of circumstance to modify the earlier order of this Court. He has further submitted that this Court cannot sit in appeal of the

earlier order passed by the Hon'ble Single Judge. Hence, the order passed by the learned Judge is to be set aside. Mr. Rajadkshya, learned senior counsel for the petitioner has submitted that respondent no. 1 claims his right through Will. In the said Will nothing is mentioned regarding plot no. 14. He further relied on section 213 of the Indian Succession Act for heirship of Shakuntla. After dismissal of SLP, no immediate steps were taken by respondent no.1 to amend the application.

16. Whether the order of status quo passed in application filed under section 9A (2) of C.P.C. is sustainable when already the application for Notice of Motion under Order 39 Rule 1 and 2 of CPC is either not pressed or not made or rejected, is the issue to be answered. The learned single Judge of this Court in **Writ Petition No. 9256 of 2015** had an opportunity to deal with such an issue and has decided it by order dated **06.06.2016** [Madhu Ramesh Jain vs. The State of Maharashtra through the Collector District Jalgaon & Ors.]. The learned single Judge has laid down the directions and has stated the exigency under which the order of interim protection can be granted under section 9A (2) of the C.P.C. when the application for preliminary issue under section 9A of C.P.C. is

pending. Section 9A (2) of the C.P.C. is a very special provision, which enables the Court to protect the party in exigency, though the jurisdiction of the said Court is under challenge. Thus the Court is not powerless to protect the interest of the party, when there is urgency to grant relief during the decision of jurisdiction. The power of the Court to grant interim relief during the pendency of the application filed under section 9A of CPC is not curtailed and it is also further extended even though the application filed under Order 39 Rules 1 and 2 of CPC is not pressed or rejected.

17. It is useful to see the statement of objects and reasons dated 06.12.1969 which was issued while enacting section 9A of Code of Civil Procedure. It is amply clear that the section is obligatory and the Court is required to frame and decide the preliminary issue at the threshold whenever it is raised by the defendant. However, the legislature keeping in mind the complexity of the issues and the facts which are litigated before the Court found it necessary to provide power to grant interim relief in between the filing of the application under section 9A of C.P.C. and the decision of the application of preliminary issue, enacted section 9A(2) of C.P.C. Section 9A(2) of C.P.C. does not contemplate of using powers routinely and cannot

be equated with the powers of the Court under Order 39 Rules 1 and 2 of CPC.

18. In the case of **Kranti Mohan Guruprasad Mehra** (supra) the learned Single Judge of this Court has observed as follows:

“13. When sub-clause (2) comes into operation, it is not as if that the entire field for the interim relief is re-opened, but what is contemplated by that provision is that if the exigencies of the situation impress the Court that either of the sides should be protected without wasting any time, howsoever short it may be, which may be consumed for determining the said preliminary issue, then the Court may on merits grant such an interim relief as it thinks proper....”

19. The Supreme Court in Tayabbhai's case (supra) has held that if the application is made under section 9A of C.P.C, then it does not become helpless forthwith. It is also not incompetent to grant the interim relief. However, it is obligatory on the part of the Court to decide the objection to jurisdiction at the earlier possible moment.

20. In the case of **Freny Kersi Irani** (supra), the learned Single Judge of this Court had an opportunity to deal with the identical issue raised by the petitioner in the case in hand. While considering various Notices of Motion, the learned Judge has referred and relied on the judgment of Supreme Court in the case **Tayabbhai M.**

Bagasarwalla (supra). He has stated that in many matters, ad-interim relief is not granted or though such application is not pressed, as the application under section 9A of CPC raising preliminary issue challenging the jurisdiction of the said Court is moved by the defendants. Under such circumstances, that Court is not powerless to consider the application for interim relief. During the pendency of the application filed under section 9A of C.P.C. for grant of interim relief pending the Suit. The learned Single Judge has observed -

“8..... In any case, by now it is a settled principle of law that the procedural laws are hand maid of substantive justice. The niceties of procedural requirement cannot be permitted to come in the way of the Court in making substantive justice between the parties. Merely because an application for ad-interim relief is not pressed at an earlier stage or for some reasons not granted at an earlier stage, neither the party would be precluded from renewing its request nor Court would be precluded from considering the same in the given facts and circumstances of each case”.

21. However, the facts in the proceedings in the case of **Notice of Motion No. 748 of 2012 and others** between **Freny Kersi Irani & anr. Vs. Soona Kali Contractor & 13 ors.** which were decided by judgment and order dated 17.07.2012 and the facts in case in hand are somewhat different.

22. In the case in hand, earlier interim injunction was pressed. It was heard and rejected by all the Courts and the said order was not disturbed by the High Court and the Supreme Court also. Therefore, the learned senior counsel for the petitioner has challenged the illegality of granting interim injunction in application filed under section 9A (2) of the C.P.C. Earlier interim relief is rejected in the application filed under Order 1 Rule 39 of C.P.C., then also under section 9A (2) of C.P.C, such relief can be granted. The rejection of interim relief in the application filed under Order 1 Rule 39 of CPC is after considering the *prima facie* merit of the case. So, the application under section 9A(2) of CPC should provide very strong reason and very urgent circumstance to allow the application for interim relief under section 9A (2) of the C.P.C.

23. In the present case, earlier, there was a full-fledged hearing of Notice of Motion seeking interim relief injunction under Order 39 Rules 1 and 2 of C.P.C., but it was rejected on the merits. Once such application under Order 39 Rules 1 and 2 of C.P.C. is rejected, then same relief under section 9A (2) of C.P.C can be granted only if any special and urgent circumstance is shown. It is made clear that mere change of circumstance or pleadings or prayer due to amendment

cannot make out a case under such set of facts and previous orders to invoke power under section 9A (2) of the C.P.C.

24. Thereafter, respondent no. 1/original plaintiff by way of an amendment in April 2016 challenged the agreements executed on 26.07.200 between Maya Kaikini/original allottee and defendant no. 8/Jagdish Thakkar and the Agreement for Sale dated 03.07.2005 executed between Maya Kaikini on one part and Jagdish Thakkar on the other part and the Agreement of Lease dated 25th November, 2008 between original defendant no. 1, i.e., sister Shakuntala Gajanan Kulkarni and defendant no. 3/CIDCO and also challenged tripartite Agreement dated 28.07.2010 between defendant no. 1 Shakuntala, CIDCO and defendant no. 5/Yash Developers. He challenged the Release Deed dated 11.09.2012 executed by defendant no. 8/Jagdish Thakkar in favour of defendant no. 5/Yash Developers. He also challenged the registered tripartite Agreement dated 11th September, 2012 between defendant no. 5/Yash Developers, defendant no. 6/Fine Arts Project Management Consultant Pvt. Ltd. and defendant no. 7/CIDCO Ltd. He further challenged tripartite Agreement dated 11.02.2015 executed between defendant nos. 6/Fine Arts Project Management Consultant Pvt. Ltd., defendant no.7/CIDCO and defendant no.9, i.e., present

petitioner/Metro Development. By way of amendment, respondent no. 1/original plaintiff challenged and sought declaration that all these Agreements and Deeds are void, bad-in-law and not executable. After this amendment, the present petitioner,i.e., defendant no. 9 who was added subsequently, moved an application under section 9A challenging the limitation and also the jurisdiction of the Court and while hearing this Application, an Application for interim relief pending the said Application was made and it was allowed.

25. It was mainly allowed by the learned Civil Judge and learned District Judge on the ground that in the earlier plaint, these Agreements were not challenged and this Court in its earlier order dated 05.11.2014, has specifically observed that when these Agreements were not challenged, the relief prayed cannot be granted. It is also contended by respondent no. 1/original plaintiff that the plaintiff was not aware of the earlier transactions between the defendants so also was not aware that defendant no. 8/Jagdish Thakkar compromised and withdrew the suit which he had filed against Maya Kaikini. However, after considering the submissions made by both the parties, I am of the view that the petitioner was

aware of the transaction between the parties and he has pleaded about the same earlier but he chose not to challenge the Agreements between defendant nos. 1, 3, 5, 6, 7 & 8. It is true that present petitioner, i.e., defendant no. 9 was aware of the litigation between the plaintiff and his earlier owner when he entered into the registered Agreement on 11.02.2015. However, this Court has dismissed the prayer for interim injunction on 05.11.2014 and it was not set aside by the Supreme Court. It is also clear that defendant no. 9 has taken the risk of entering into the transaction in respect of the property which is under litigation and, therefore, he is before the Court.

26. Be that as it may, it is necessary to see whether such circumstances and exigencies are made out to grant interim relief pending Application of challenging the jurisdiction of the Court. I am of the view that once this Court has rejected the Application for interim relief and there is concurrent finding given by the Civil Court, District Court and this Court and which remained undisturbed by the Supreme Court, then on the basis of amended pleadings and prayers, no such exigency is made out especially on the background of the order of the Supreme Court wherein the High Court is directed to dispose of Testamentary Suit of 2007.

27. It is useful to reproduce the order of the Supreme Court in S.L.P. No. 35118 of 2014 dated 17.12.2014 in this matter which is as under :-

“It has been submitted at the Bar that Probate Petition No. 1015 of 2006, which has been converted into Testamentary Suit No. 26 of 2007, is pending in the High Court of Bombay.
The High Court is requested to dispose of the above suit expeditiously.

The learned senior counsel appearing for both the sides have assured this Court that their counterparts appearing in the High Court shall extend their cooperation, without asking for unnecessary adjournments, so that the suit can be disposed of as soon as possible.

In view of the above, the Special Leave Petition is disposed of.”

28. In this case, there are allegations and counter allegations in respect of legality of valid succession of Late Maya Kaikini. The submissions of learned senior counsel Mr. Dhakepalkar for respondent no.1 may be accepted at this stage that Maya Kaikini was not on good terms with her sister Shakuntala/defendant no. 1 and she has filed the suit against her, therefore, Maya executed will in favour of original plaintiff/respondent no. 1 and bequeathed all her movable and immovable properties to him. Maya Kaikini also

appointed respondent no. 1 as executor of the will. However, on the other hand, there is another set of facts which is also very strong to dislodge the claim of respondent no. 1/original plaintiff. Maya Kaikini has entered into an Agreement of Sale during her life time with defendant no. 8/Jagdish Thakkar first in the year 2001 and thereafter fresh Agreement for Sale was executed with defendant no. 8/Jagdish Thakkar on 03.07.2005 i.e., a month prior to her death, as Maya expired on 11.08.2005. Thus, the fact remains that the Agreement dated 03.07.2005 was executed during the life time of Maya Kaikini. Thus, it shows *prima facie* that Maya Kaikini had intended to dispose of suit property, i.e., plot no. 14 admeasuring 3680 sq.mts. situated in Sector 50 at Nerul, Navi Mumbai, during her life time. She has created interest of defendant no. 8/Jagdish Thakkar in the suit property, who had also created further interest in favour of one Madan Kolambekar in April 2001 itself.

29. It was submitted by the learned senior counsel for the petitioner that in the will, there is no reference of the suit property. It is to be noted that the learned senior counsel for respondent no. 1/original plaintiff though relied on the will, no relevant portion in respect of bequeath of the suit property in favour of respondent is

shown to me. Moreover, the probate granted in favour of the petitioner is revoked by the Court and the said Testamentary Suit is pending before this Court since last 10 years.

30. In the case of **Krishna Kumar Birla** (supra), the Supreme Court while dealing with the issue of Will and caveatable interest in the Will held that no legal right accrues under an unprobated Will except in case where taking of probate is not mandatory. In the present case, the plaintiff's probate proceedings are pending.

31. However, the heirship certificate is granted in favour of Shakuntala by this Court. The submission of learned senior counsel Mr. Dhakepalkar for the respondent no. 1/original plaintiff that this heirship certificate is not a proof of the valid succession but it only empowers party to be a caretaker, are not required to be considered and discussed at this stage because whether Maya Kaikini died intested or had executed will or not are pending issues before the Testamentary Court. There are many aspects to this issue which are required to be adjudicated by the said Court.

32. Time is the key factor in many litigations. Maya Kaikini died in 2005. Thereafter the suit property was transferred from one to other. Now defendant no. 9 has carried out the construction. No

stay is granted on the construction of the suit property. As per the case of the respondent, 31 flats are constructed and sold. Under such circumstances and considering the background of this case, the order of stay cannot be justified and hence it is revoked and Petition is allowed with following rider :

Unless the genuineness of the will is not decided, the rights between the parties cannot be fully adjudicated by this Court. Under such circumstances, I am of the view that upto certain extent the interest of the petitioner can be protected. I am fully aware that it is very difficult to quantify or evaluate the interest of the original plaintiff, if any, at this stage, but only by some guess work it can be done. Therefore, the plaintiff can be restrained from creating third party interest in only two flats till hearing of application made under section 9A of C.P.C. and the trial Court is directed to decide the said Application till 15.07.2017.

33. Learned Senior Counsel for respondent no.1 has submitted that this order of stay was passed on 07.12.2016 and it continued till today. Respondent no.1 wants to challenge this order before the

Hon'ble Supreme Court and therefore the stay be continued.

34. The learned counsel for the petitioner objects to granting stay to this order.

35. In view of the submissions made by learned counsel for respondent no.1 and as stay granted by the trial Court is still continued, the stay is extended by eight weeks from today.

(MRIDULA BHATKAR, J.)