

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO.450 OF 2013
IN
SUIT NO.95 OF 2013**

Bharat Amratlal Bhagat

....Applicant

IN THE MATTER BETWEEN :

Bharat Amratlal Bhagat

....Plaintiff

V/s.

Ranjana R.Jethwa & Ors.

....Defendants

Mr.Sarosh Bharucha a/w Mr.Zain Mookhi, Mr.Rajindra Shah, Mr.Bhushan Shah and Ms.Neha Lakshman i/by Mansukhlal Hiralal and Co. for plaintiff/applicant.

Mr.Arif Bookwala, senior Advocate i/by Anand Kumar & Daulat Jehangir for defendant no.1.

CORAM : K.R.SHRIRAM,J

DATE : 10.8.2017

P.C.:-

1 This court while considering the ad-interim application on 20.2.2013 has recorded that defendant no.1 was at that time in exclusive use, occupation and possession of the suit flat and defendant no.1 has given an undertaking that she shall not dispose of, sell, encumber, alienate, part with possession and/or create any 3rd party rights in respect of the suit flat until further orders of this court. The court has accepted the undertaking.

2 Today the Notice of Motion has come up for final hearing. Mr.Bookwala senior counsel appearing for defendant no.1 on

instructions states that statement made by defendant no.1 on 20.2.2013 be continued in this Notice of Motion and the Notice of Motion be disposed and the Suit be taken up for trial expeditiously. Mr.Bookwala states that issues have been framed and plaintiff has also filed his evidence together with compilation of documents and affidavit of documents. Defendant no.1 who is the main contesting defendant has also filed compilation of documents. Mr.Bookwala states that court has to fix a date for recording of evidence/markings of documents.

3 Mr.Bharucha counsel appearing for plaintiff states that though he is happy with the order of 20.2.2013 to be confirmed as the order in the Notice of Motion, the plaintiff also wants a further order in terms of prayer clause-(b) to the Notice of Motion in as much as the plaintiff and defendant no.1 both are residing in United States of America and the flat is kept locked. Mr.Bharucha states that plaintiff visits India for two weeks in a year and during that visit plaintiff should be permitted to occupy and use the said flat. Mr.Bharucha states that house key can be kept either with the Court Receiver or with anybody as the Court may direct with liberty to the plaintiff to take the key, use and occupy the suit flat during his stay in Mumbai and hand over the key back to the Receiver/person appointed by the Court.

4 Mr.Bookwala strongly opposes any such arrangement.

5 Mr.Bharucha submitted that plaintiff and defendants are siblings and the flat was 50% owned by their father and 50% was owned by the mother. Mr.Bharucha submitted that when the mother died, she had left behind a Will. The father as the executor of the will had filed a Probate petition and in the schedule of assets it is mentioned that 50% of the suit flat belonged to the mother but later father had a change of heart and challenged mother's entitlement of 50% in the suit flat. The father therefore was removed as executor and matter was converted from Petition for Probate to Letters of administration. Mr.Bharucha states that defendant no.1 never filed a caveat challenging the grant of letters of administration and letters of administration has been granted on 25.4.2011. Plaintiff based on the letters of administration has conveyed 50% of the shares that the mother had, in his own name and therefore, plaintiff is 50% owner of the suit flat. Mr.Bharucha also states that share certificate of the society shows the flat is in the joint name of the father and the plaintiff.

6 Mr.Bharucha in support of his submissions also referred to a photo copy of an affidavit of defendant no.1 affirmed on 15.9.1997 and used in some proceedings in America in which defendant no.1

has admitted that the suit flat belonged to both the parents and in 1991 when the mother passed away without a Will, she was advised to exercise her rights by objecting the transfer of ownership of the said rights to the name of father and brothers.

7 The suit as filed is on the basis that after the letters of administration was granted on 25.4.2011 but the father purportedly gifted the entire suit flat to defendant no.1 by a registered gift deed dated 12.8.2011 and that gift deed is the subject matter of challenge in this suit.

8 Mr.Bookwala submitted that gift deed is still valid and the same has not been set aside. Mr.Bookwala further submitted the plaintiff was shown only as an associate member in the records of the society and associate member has no right in the property. Mr.Bookwala also showed copies of application to be made associate member filed by the father to first add mother as associate member and after the mother expired the name of the mother was struck off and the suit flat remained in the sole name of father and later father applied to the society to add the name of the plaintiff as associate member. He also submitted that letters of administration does not confer title to any property. He relied upon the judgment of the Apex court in ¹***Delhi Development Authority Vs. Vijaya C.Gurshaney &***

1 (2003) 7 Supreme Court Cases 301

Anr. in which the Apex court has held that testamentary court is only concerned with finding out whether or not the testator executed the testamentary instrument of his free will and it is settled law that the grant of a probate or letters of administration does not confer title to property. They merely enable administration of the estate of the deceased. Mr.Bookwala also submitted that in the same judgment the Apex court has also held that it is always open to a person to dispute title even though probate or letters of administration have been granted.

9 Mr.Bookwala also showed an affidavit of the father filed in a Chamber summons in Suit 2545 of 2011 in which the father has confirmed that he was inclined to give the suit flat and the shares of the suit flat to defendant no.1. Mr.Bookwala submitted that father himself has confirmed that flat was to be gifted to defendant no.1 and there is no question of anyone else occupying the said flat.

10 Therefore, it has to be noted that there has been contradictory stand taken by the plaintiff, his father as well by defendant no.1.

11 We are today at the interim stage. The title of the flat is yet under challenge. Defendant no.1 has challenged the letters of

administration granted in favour of the plaintiff. Plaintiff is challenging the gift deed made by the father to defendant no.1. Ad-interim order was passed on 20.2.2013 in which the undertaking of defendant no.1 has been accepted that she will not dispose off or sell or encumber or part with possession or create any 3rd party rights in respect of the suit flat until further orders of this Court. That order has been in force for almost 4 ½ years. Evidence by the plaintiff has already been filed. In my view, plaintiff having lived with this order for 4 ½ years, I see no reason why this order should be modified at this stage.

12 In the circumstances, the order dated 20.2.2013 is confirmed as order in this Notice of Motion and Notice of Motion stands disposed. The undertaking of defendant no.1 recorded in the order dated 20.2.2013 to continue until the hearing and final disposal of the suit.

13 Suit be listed for marking of documents/receiving of evidence on 18.9.2017 at 3.00 P.M. at which time the plaintiff's first witness shall remain present in Court. The defendants are put to notice that they may have to start cross-examination of the plaintiff from 19.9.2017 itself before the Commissioner.

(K.R.SHRIRAM,J)