

Shailaja

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

TESTAMENTARY AND INTESTATE JURISDICTION

**NOTICE OF MOTION NO. 118 OF 2017
IN
TESTAMENTARY SUIT NO. 56 OF 2001
IN
TESTAMENTARY PETITION NO. 689 OF 2001**

Mrs. Ujjwala Mhatre] Applicant

IN THE MATTER BETWEEN:

Ujjwala Mhatre] Plaintiff

Vs.

Mrs. Phyllis Fernandes & Ors.] Defendants

.....
Mr. Mayur Khandeparkar i/b Mr. Mehul Shah, for
applicant/plaintiff.

Mr. B.G. Saraf, for defendant No. 3.

.....
CORAM : R.G. KETKAR, J.

DATE : 11TH SEPTEMBER, 2017.

P.C.:

Heard Mr. Khandeparkar, learned Counsel for the applicant/plaintiff and Mr. B.G. Saraf, learned Counsel for defendant No.3 at length.

2. This Motion is taken out by the plaintiff, inter alia, praying for following reliefs:

[a] That pending the hearing and final disposal of the above suit, this Hon'ble Court be pleased to appoint

an officer of this Hon'ble Court or such other person as this Hon'ble Court may deem fit and proper, under Section 269 of the Indian Succession Act, 1925, to take and keep possession of the residential Flat bearing No. 101, situate on 1st Floor of Cozydell C.H.S Ltd, facing St. Andrew's Road, Bandra, Mumbai 400 050, solely owned by the deceased Mr. Anthony Paul Fernandes.

- [b] In the event of granting prayer (a) above, this Hon'ble Court further be pleased to :
- (I) Direct the Bandra [West] Police Station, Hill Road, Mumbai 400 050 to provide all assistance and depute its police officer to accompany the officer or such other person that may be appointed by this Hon'ble Court, under Section 269 of the Indian Succession Act, 1925 to take and keep possession of the said residential Flat bearing No. 101, situate on 1st Floor of Cozydell C.H.S Ltd, facing St. Andrew's Road, Bandra, Mumbai 400 050;
 - (ii) Permit the appointed officer or such other person, in the event of the said Flat No. 101 is found to be locked, to break open the lock thereof, to make inventory of all the movables lying therein if any and then to seal the said Flat No. 101 and affix his own lock on the said Flat No. 101 and put the board on the conspicuous part of the said Flat No. 101 notifying his possession thereof;
 - (c) That pending the hearing and final disposal of this

Notice of Motion, this Hon'ble Court may be pleased to appoint a commissioner to visit the said Flat bearing No. 101, situate on Cozydell C.H.S Ltd, facing St. Andrew's Road, Bandra, Mumbai 400 050 and submit his report about the current occupation thereof;

3. In support of this Motion, Mr. Khandeparkar has invited my attention to the order dated 4th March, 2004 passed by this Court [Coram: S.J. Vazifdar, J. as his Lordship then was] in Notice of Motion No. 697 of 2002. He submitted that the said order recorded agreement between the parties that defendant No.1 Phyllis, mother of plaintiff and defendant No.3 will occupy one Flat facing St. Andrew Road, Bandra, Mumbai. As far as the rear flat on the first floor is concerned, the parties were at liberty to negotiate and obtain offers for the sale thereof. Order also clarified that it does not affect the rights of the respondent Cozyhome Builders qua the estate including the said flat in any manner whatsoever. Defendants were restrained from creating any right, title and/or interest of any nature in favour of any person/persons whatsoever in, to, upon or in respect of the said flat which may be occupied by defendant No.1.

4. Mr. Khandeparkar submitted that defendant No.1 only was permitted to occupy the said flat after furnishing an undertaking personally on affidavit not to dispose of, alienate, encumber or create any third party right, title and/or interest in, to, upon or in respect of the said flat which may be occupied by

her. Defendant No.1 was permitted to occupy the said flat, in any event, after handing over possession of the alternative accommodation to the builder/respondent. It is common ground between the parties that flat facing St. Andrews Road is Flat No. 101.

5. Mr. Khandeparkar further submitted that defendant No.3 has his own premises and under the Will executed by Anthony D'souza [for short 'deceased'], the said flat is bequeathed in favour of the plaintiff. He, therefore, submitted that defendant No.3 is in illegal occupation of the said flat and he is a trespasser and, therefore, this is a fit case to grant reliefs as prayed for in the Motion.

6. On the other hand, Mr. Saraf has invited my attention to the affidavit in reply filed by defendant No.3 on 31st July, 2017. He submitted that defendant No.3 is the only sibling who had taken care of the parents and no other siblings have contributed for day-to-day expenses for the parents. He submitted that defendant No.1 shifted to Flat No.3, Flora Villa, 39, St. Andrew's Road along with his family members. When possession of flat No. 101 was obtained, defendant No.1 shifted along with family of defendant No.3 in Flat No. 101 in the year 2004. He has produced ration card as also Bank statement showing address of defendant No.3 of flat No. 101. Ration card was obtained on 16th August, 2004 which shows that defendant No.3 along with his family is residing in flat No. 101. Passbook of Citizen Credit Co-operative Bank Limited, Turner Road Branch also shows address of

defendant No.1 as Flat No.101. Mr. Saraf relied upon commissioner's report dated 28th June, 2017 which records that defendant No.3 is currently occupying Flat No. 101. In short, he submitted that since 2004, defendant No.3 is residing along with his family in Flat No. 101. He submitted that plaintiff is residing in Australia. He, therefore, submitted that as defendant No.3 is occupying Flat No. 101 since 2004, plaintiff is not entitled to any relief. Defendant No.3 is present in the Court. Upon taking instructions from him, Mr. Saraf states that defendant No.3 will neither create third party interest nor part with possession in respect of Flat No. 101. .

7. I have considered rival submissions of learned Counsel for the parties. I have also perused the material on record. Mr. Khandeparkar heavily relied upon the order dated 4th March, 2004 passed by this Court in Notice of Motion No. 697 of 2002. The said order undoubtedly records that defendant No.1 shall be entitled to occupy Flat No. 101. It is the case of defendant No.3 that from August, 2004, he is residing in the said flat along with his family members and defendant No.1. As against this, plaintiff is residing in Australia. The ration card and the bank statement shows that defendant No.3 is occupying flat No. 101 since 2004. Commissioner's report records that defendant No.3 is occupying Flat No. 101. Not only that perusal of the statement of Citizen Credit Co-Op. Bank Ltd. prima facie shows that defendant No.3 was paying maintenance charges of flat No.101 initially to Cozy Home Builders from 2006 and thereafter to Cozy Co-operative Housing Society from 11th June, 2008. Plaintiff has not produced

any document to show that it was he who was paying maintenance charges. Defendant No.3 has made statement that he will neither create third party interest nor part with possession of flat No.1. Statement made by defendant No.3 is accepted in the form of undertaking.

8. In view thereof, no case is made out for grant of relief in the Motion and the same is dismissed.

[R.G. KETKAR, J.]