

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
NOTICE OF MOTION NO. 188 OF 2016
IN
SUIT NO. 63 OF 2016**

Rajesh Gopal Chawan and Ors

....Plaintiffs

Vs.

Aristo Reality Developers Ltd & Anr

....Defendants

Mr. Sanjay Jain a/w Mr. Suyash Gadre, Mr. Chetan Mhatre and Ms. Adithi Pathak i/b Utangale and Co. for the Plaintiffs.

Mr. Manesh Varkey Cherian for Defendant no. 1

Mr. U. J. Makhija a/w Mr. M. P. Maravoor and Mr. Rajesh Wamorkar i/b Maravoor Wamorkar and Co. for Defendant no. 2.

CORAM : K.R.SHRIRAM, J.

DATE : 21th JULY, 2017

P.C.:

1 This is another unfortunate family dispute where the greed of each family member prevails over love and affection that they can show to each other. Looking at the property involved, which run into crores of rupees, the parties to the suit, instead of enjoying the wealth and living a peaceful life, look like they are determined to spend rest of their life litigating and wrestling in and out of various courts. Alas, courts have to still do their duty when parties come knocking at its doors.

2 The unfortunate deceased father of the squabbling siblings was one Gopal Maruti Chawan (Hereinafter referred to as 'Gopal Chawan') who

was, on or about 07th January 1992, inducted as a tenant of the suit property by the then landlords. On 27th October 2000, an agreement was entered into between Gopal Chawan and defendant no.1 whereby defendant no. 1 agreed to allot certain areas on the first floor, second floor, second last floor and third last floor of a new building to be constructed on the suit property as permanent alternate accommodation to Gopal Chawan in view of his tenancy rights in the said property. It should be noted that this property is at Prabhadevi, Mumbai, one of the more expensive locations in the city.

3 Gopal Chawan prepared a Will dated 15th September 2001 in which he appointed his wife Anusaya Chawan (since deceased) (Hereinafter referred to as 'Anusaya'), mother of plaintiffs and defendant no.2, as the executor of the will. At this stage, the building was yet to be constructed and as it was not possible to identify each of the flat to be given to Anusaya and their 5 children, Gopal Chawan made bequest of percentage areas in favour of his heirs, i.e., 20% was to go to Anusaya and the remaining 80% was to be distributed equally to his 5 children (4 plaintiffs and defendant no.2.) at 16% apiece. On 15th December 2001, after defendant no.1 identified which area could be given in the to be constructed building, Gopal Chawan prepared two Codicils, first Codicil dated 15th December 2001 and second Codicil dated 23rd December 2002 whereby the entire first floor was to go to Anusaya, 4 flats on 2nd floor, 2 big and 2 small to go to

his daughters Archana Mohite and Rupali Patil, 4 flats on the 3rd last floor to go to 2 sons Suresh Chawan and Rajesh Chawan and 4 flats on the 2nd last floor to go to his wife Anusaya and defendant no. 2 Shalini Sawant. It would be useful to reproduce the following from the Will dated 15th September 2001 and the Codicil dated 15th December 2001:

From will dated 15th September 2001:

"I am a tenant of factory at 81-A, Sayani Road, Prabhadevi, Mumbai. The landlord of the building alongwith his builder have entered into an agreement with me whereby the landlord/builder are going to construct a new building and agreed to give me certain areas on the 1st and Ground floor of the building on the tenancy basis which I have further right to turn into ownership as per the agreement entered into with them.

It is my desire that whatever consideration is received or realised as per the above referred agreement and the property be shared among the following persons in the following proportion:

20% (Twenty percent) to my wife Smt. Ansuya Gopal Chawan.

16% (Sixteen percent) to my son Rajesh Gopal Chawan

16% (Sixteen percent) to my Daughter Rupa Vilas Patil.

16% (Sixteen percent) to my Daughter Shalini Bajirao Sawant.

8% (Eight percent) to my Grand son Siddesh Suresh Chawan (Son of my son Suresh Gopal Chawan)

8% (Eight percent) to my Grand Daughter Sonal Suresh Chawan (daughter of my son Suresh Gopal Chawan).

Codicil dated 15th December 2001:

"AND WHERE the landlord/builder has agreed to give the following floors areas on final construction of the building Landlord/Builder has agreed to give entire first floor, 2nd floor, 2nd last but one i.e. 2nd last floor and last but two i.e. third last floor. Each floor admeasuring about 5100 sq. ft.

The description of each floor is as under :

- | | |
|--|--|
| 1. Entire 1 st flr;
admeasuring 5100 sq.ft. | Total commercial
premises |
| 2. Entire 2 nd flr;
Entire last but one flr
i.e. 2 nd last floor
and
Entire last but two i.e.
3 rd last floor
(in all third entire flr) | Each floor admeasuring
about 5100 sq. ft.
consisting of 4 flats
Two flat (1 two bedroom
flat and 1-three bedroom
flat admeasuring in toto
2550 sq. ft.) on the north
east side and south east
side of the building and
identical two flats on
the north west side and
south west side of the
building. |
- 3) Cash consideration for deficiency in area, the said amount is to be adjusted with the deposit received from landlord/Builder.
- 4) Five garages or parking space in the building

AND WHEREAS IT IS MY DESIRE To allot different flats to different heirs on the basis of the plans submitted by landlord/builder, so that there may not be any dispute in the future, regarding distribution of the area/flats.

Now I hereby revoke the bequest of the area to be received from the landlord/builder in lieu of my existing tenancy at 81-Sayani road, Prabhadevi, Mumbai which I have made by my said WILL dated 15th September, 2001. The same should be substituted as under.

I hereby bequeth the said area (floor consisting of flat) and garages to my different heirs as under.

- a) AREA OF ENTERE FIRST FLOOR To be given to my wife

SMT.ANUSAYA GOPAL CHAWAN

- b) FOUR FLATS ON 2ND FLOOR (TWO BIG AND TWO SMALL FLATS)

On two bed room flat and one three bed room flat on the North east side and South east side be given to my daughter SMT.ARCHANA VILASRAO MOHITE.

One two bedroom flat and one three bed room flat on the North West side and South West side be given to my daughter SMT. RUPALI VILASRAO PATIL.

c) FOUR FLATS ON THE LAST BUT TWO i.e.3RD LAST FLOOR (TWO BIG FLATS AND TWO SMALL FLATS)

One two bedroom flat and one three bedroom flat, on the North east side and South east side be given to my son Shri Suresh G. Chawan and one two bedroom flat and one three bedroom flat on the north west side and south west side to be given to my son Shri Rajesh G. Chawan.

d) FOUR FLATS ON THE LAST BUT ONE i.e. 2ND LAST FLOOR (TWO BIG FLATS AND TWO SMALL FLATS)

One two bedroom flat and one three bedroom flat on the Northeast side and southeast side to be given to my wife Smt. ANUSAYA G.CHAWAN.

One two bed room flat and one three bedroom flat to the Northwest and South west side to be given to my daughter Smt.SHALINI B SAWANT”.

In the second Codicil dated 23/12/2002, Ganesh Chawan only tweaked the will dated 15th September 2001 to the extent it related to some other assets but not those which are subject matter of this suit.

4 Gopal Chawan expired on 18th August 2003 and on 26th November 2003, Anusaya, as executor, filed probate petition no. 788 of 2003. Each of the 16 flats in the said building were shown as assets of Gopal Chawan in the schedule of assets annexed to the probate petition. Plaintiffs and defendant no. 2 granted consent for grant of probate of the will and

Codicils of Gopal Chawan. The probate was granted on 31st March 2004 wherein Anusaya gave an undertaking to distribute the estate of Gopal Chawan in accordance with his will and Codicils.

5 On 22nd May 2009, Anusaya prepared an alleged will in which Anusaya set out her assets. Anusaya expired on 25th December 2013, more than 10 years after Gopal Chawan expired. On 06th May 2014, defendant no. 2, the alleged executor of Anusaya's alleged will dated 22nd May 2009, filed a probate petition no. 160 of 2014. The probate petition also contains a schedule of assets that was owned and bequeathed by Anusaya. Plaintiffs herein filed caveats against grant of probate and hence, the petition has been converted into suit (Suit No. 160 of 2014) and recording of evidence of 3 witnesses in that suit is already concluded. The defendant no. 2 who is plaintiff therein is under cross-examination. If we see the mother's will, so far as the suit property is concerned, the mother has only stated that her own property comprise among other things, entire 1st floor of the building of approximately 6000 sq. ft. and 2 flats on the 16th floor, one small and one big in the building yet to be constructed (the building is since completed). These are the flats Anusaya got from the bequeathal by Gopal Chawan to her.

“८१—ए सयानी रोड, प्रभादेवी मुंबई २५ येथील भाडेतत्वावर असणारी जागा व शेड्स व त्याबाबत लॅडलॉर्डशी झालेला करार व त्या करारानुसार मला भविष्यात मिळणारी पूर्ण बांधकाम केलेली खालील जागा म्हणजेच संपूर्ण पहिला मजला अंदाजे ६००० स्क्वे. फुट व १६ व्या मजल्यावर मिळणारे दोन

फ्लॅट एक मोठा व एक लहान फ्लॅट यांचे वाटप खालीलप्रमाणे करावे.

अ) पहिल्या मजल्यावरील उत्तरेकडील असलेले एक मोठा व एक लहान असे दोन्ही फ्लॅट माझी मुलगी सौ. शालीनी बाजीराव सावंत हिला द्यावेत.

ब) पहिल्या मजल्यावरील दक्षिणेकडील एक मोठा व एक लहान असे दोन्ही फ्लॅट एकत्र करून त्याचे विभाजन न करता संयुक्तरित्या माझ्या दोन्ही मुलांच्या म्हणजेच चि. राजेश गोपाळ चव्हाण व चि. सुरेश गोपाळ चव्हाण यांना समसमान हिस्साने द्यावेत.

क) मला मिळणारे १६ व्या मजल्यावरील दोन्ही फ्लॅट माझी मुलगी सौ. शालीनी बाजीराव सावंत हिंस द्यावेत.”

6 In the probate petition T.S. No. 160 of 2014 filed by defendant no.2, propounding Anusaya's Will, para 7 reads as under:

“That the Petitioner as to the best of her knowledge and information truly set forth in the Schedule No. I, hereto annexed marked Exhibit “C”, all the property and credits which the deceased died possessed of or was entitled to which have or are likely to have come to the hands of the deceased at the time of her death. So far as the Petitioner has been able to ascertain or is aware of, there are no Property and Credits other than what are specified in the Schedule attached to the Petition”.

In Exhibit 'C', serial no. 4 contains the following:

“Immoveable properties being 1) Flat No. 101, First Floor, admeasuring 965.30 sq. ft. (Carpet), 2) Flat No. 102, First Floor, admeasuring 1181.92 sq. ft (Carpet) 3) Flat No. 103, First Floor, admeasuring 1181.92 sq. ft (Carpet) 4) Flat No. 104, First Floor admeasuring 965.30 sq. ft (Carpet) 5) Flat No. 1701, Sixteenth Floor, admeasuring 965.30 sq. ft. (Carpet) 6) Flat No. 1702, Sixteenth Floor, admeasuring 1182.92 sq. ft. (Carpet) in Building No. 2, 'PEARL RESIDENCY', Sayani Road, Prabhadevi, Mumbai – 400 025. Out of the aforesaid properties the deceased had entered in Agreement with the builder M/s. Aristo Realty Developers Ltd., and has received possession of Flat No. 104 and 1702”.

7 Plaintiffs filed a suit for partition bearing suit no. 684 of 2014 and took out notice of motion no. 1162 of 2014. In the affidavit-in-reply filed by defendant no. 2, in para 7, it is stated as under:

“7. With reference to para 2 of the Plaint, it is true that the mother of the Defendant was appointed as Sole Executrix of the Will of her father which was duly probated on 29.06.2004. However, I deny that the father of the Defendant (Late Mr. Gopal Maruti Chawan) bequeathed his properties in equal share to all the legal heirs. The properties were bequeathed inter alia as under.

Properties bequeathed by Late Gopal Maruti Chawan:

- a) -----
- b) -----
- c) -----
- d) -----
- e) -----
- f) 16 Flats at 'Pearl Residency' Prabhadevi were distributed as follows:
 - i) 6 Flats to A. G. Chawan (Wife)
 - ii) 10 Flats equally distributed to his children (Plaintiff no. 1,2,3,4 & Defendant)”.

In paragraph 20 it is stated as under:

“With reference to para 14 of the Plaint, I say that the Schedule of properties as mentioned in Exhibit – 'E' is not correct as stated in detail in my Affidavit dated 7.5.2014. I repeat the same herein for convenience...

“Para 4-I say that bare perusal of the Schedule E to the Plaint would show as follows:

- (i) As regards Property mentioned at A1 i.e. 6 Flats in Pearl Residency- the Building is under construction and I have included the said property in the Schedule of immovable properties annexed to the Probate Application”.

Paragraph 14 of the suit no. 684 of 2014 reads as under:

“14. The Plaintiffs state that the said Smt. Anusaya Chawan has left

*behind various movable and immovable properties as more particularly set out in the schedule. Hereto annexed and marked **Exhibit "E"** is a copy of the Schedule of the various movable and immovable properties of the said deceased".*

8 Therefore, it has to be noted that defendant no. 2 all the while has admitted, accepted and taken a stand that 8 flats mentioned at serial no. B, C, D & F of Exhibit 'L' to the plaint in this suit should go to plaintiffs. Defendant no. 2 has accepted that these eight flats were originally to go to Gopal Chawan and by his bequest as per the Will and Codicils for which probate was granted to Anusaya, these 8 flats should go to the 4 plaintiffs. In furtherance to that, an agreement with defendant no. 1 has already been entered into by plaintiff no. 4 with respect Flat No. 1601.

9 Plaintiffs have filed this present suit for (a) declaration that plaintiffs are entitled to possession of these 8 flats which are mentioned in Exhibit 'L'. Mr. Jain restricted it to 8 flats at B, C, D & E of Exhibit 'L' along with garages for parking vehicles in that building next to 'Pearl Residency' as and by way of permanent alternate accommodation and defendant no. 1 be directed to hand over vacant and peaceful possession of the said flats to plaintiffs; (b) declaration that defendant no. 1 is bound and liable to execute and register agreement for permanent alternate accommodation in respect of the said flats along with garages; (c) appointment of Court Receiver; and (d) injunction against defendant no. 1.

10 Relief sought in the notice of motion is for appointment of Receiver with respect to the 8 flats with power to hand over vacant and peaceful possession of the said flats to plaintiffs as agent of the Court Receiver without security and royalty and to restrain defendant no. 1 from dispossessing or alienating or creating 3rd party interest.

11 Counsel appearing for defendant no. 1 submitted that so far as the dispute between plaintiffs and defendant no. 2 are concerned, he has nothing to offer and defendant no. 1 will abide by the orders of this Court and defendant no.1 is ready and willing to execute the agreement with parties based on directions given by this Court. At the same time, defendant no. 1 stated that society has been formed for the building called 'Pearl Residency' and his instructions are that there is outstanding of almost Rs.66 Lakhs payable to the society with respect to 16 flats which were to go to the 4 plaintiffs, Anusaya and defendant no. 2.

In my view, the issue relating to society dues is beyond the purview of the present suit or application and it is open to defendant no. 1 to take such steps in accordance with the development agreement with respect to those amounts.

12 At the same time, Mr. Jain appearing for plaintiffs states that if defendant no. 1 executes the agreement and put plaintiffs in possession of the 8 flats, so far as the society dues of the 8 flats are concerned, plaintiffs

will pay such amounts as required under the agreement with defendant no.

1.

13 Mr. Makhija for defendant no.2 stated that disputes have to be resolved as per the tenancy rights that Anusaya had and the plaintiffs cannot be granted the reliefs as sought in the plaint. Mr. Makhija also stated that there are agreements and correspondence with respect to creating tenancy rights in favour of Anusaya, which have been suppressed by plaintiffs and therefore, on that ground alone, the reliefs as sought should not be granted.

14 I have heard the counsel and considered the documents relied upon by the parties and my views are as follows:

i) *The tenant of the suit premises was late father Gopal Chawan.*

ii) *The agreement for development was also initially entered into with late Gopal Chawan, and late Gopal Chawan was entitled to 16 flats as alternate accommodation.*

iii) *Late Gopal Chawan bequeathed 16 flats as per Will and Codicils mentioned in favour of his wife Anusaya and the 5 children. This was also accepted by all the legal heirs i.e. wife Anusaya and 4 plaintiffs and defendant no. 2.*

iv) *They not only accepted but even acted upon the probate granted of the will and Codicils of Gopal Chawan.*

v) *The arguments of defendant no. 2 that the mother was the tenant cannot be accepted at face value.*

15 The documents relied upon by counsel for defendant no. 2 are as under.

(A) An agreement dated 18/10/2001 between Sanjivani Developers (Nominee of defendant no. 1) and Anusaya Chawan, where at clause 7 & 8 it is stated that Anusaya Chawan is the tenant (her husband original tenant).

(B) Letter dated 16/08/2002 from father Gopal Chawan to Sanjivani Developers by which late Gopal Chawan is supposed to have transferred the tenancy rights to Anusaya Chawan.

(C) Letter dated 22/08/2002 from Sanjivani Developers to late Gopal Chawan agreeing to enter into correspondence with Anusaya Chawan.

(D) Declaration of Gopal Chawan by which he has transferred and assigned all tenancy rights and interests in favour of Anusaya Chawan.

(E) Plaintiffs' advocate's letter dated 20/02/2014 to defendant no. 1. It is counsel's case itself that plaintiffs' advocates have accepted that Anusaya was a tenant.

16 The reason I am unable to accept the contention that Anusaya Chawan was tenant is because first of all the agreement dated 18th October 2001, cannot be looked into because the document is not properly stamped. Secondly, in the letter dated 16th August 2002, it is only stated that due to old age, Gopal Chawan has authorised his wife Anusaya Chawan to deal with this particular transaction. If according to defendant no.2 tenancy rights had been transferred as recorded in the agreement dated 18th October 2001, then the question of Gopal Chawan writing to defendant no.1 on 16th August 2002 informing them that he was authorising Anusaya to deal with them does not arise. Thirdly, if tenancy

had already been transferred to Anusaya as claimed by defendant no.2, there is no reason for nominee of defendant no. 1 to address a letter dated 22nd August 2002 to Gopal Chawan that all correspondence in future will be made with Anusaya Chawan. Fourthly, the declaration is dated 30th September 2002. If this were true Gopal Chawan would have stated about it in his second Codicil dated 23rd December, 2002.

17 Moreover, in the agreement that defendant no.1 has entered into with defendant no. 2 copy whereof is at Exhibit 'C' to the plaint, in the recitals, reference is made only to the two letters dated 16th August 2002 and 22nd August 2002 (Sr. No. (b) and (c) of para 15 above). It would also be useful to reproduce recitals (xxi) and (xxii) of the agreement between defendant no. 1 and defendant no. 2 with respect to flat no. 1704.

“(xxi) AND WHEREAS one Mr. Gopal Maruti Chavan was tenant of the land admeasuring 3343 Sq. yards consisting of structures being 7 factory sheds since prior to 1958 at a monthly rent of Rs. 1600/-. The tenant was carrying on various business activities ioncluding New India Wood Works, Nav Bharat Saw Mills etc. The tenanted premises and the structures were assessed to the property tax under various Numbers as Godown No. 1, 2 and 3 Building No. 73B, 81A, 73 BE BASAR MANZIL, 81, Sayani Road, Prabhadevi - Municipal Ward No. FS/GS.Ward. The developer under the development rules as required to provide permanent alternate accommodation to all the tenant/occupiers of the property in the event of the redevelopment and as far as the commercial tenants are concerned the Developers are required to provide them with equivalent area as Permanent Alternate Accommodation. The developers intended to re-develop the said property by demolishing all the structures standing thereon and for that purpose it was necessary to settle the claims of all the tenants occupying the said plot. As the tenant was occupying the land and the building i.e. 7 sheds the developer negotiated and agreed to provide to the tenant alternate accommodation in the building to be newly constructed by agreeing to provide a constructed premises, in lieu of

the tenant handing over to the developer the vacant possession of the property tenanted and occupied by him. The developer agreed to provide to the tenant the constructed premises in the building namely 'Pearl Residency' constructed on the plot of land bearing FP No. 956 TPS IV Mahim Division Sayani Road, Prabhadevi”.

(xxii) AND WHEREAS the said tenant Mr. Gopal Maruti Chavan by his letter dated 16.08.2002 informed the developer that he was taken seriously ill and therefore, he would not be able to complete the transaction and therefore, in future the transaction would be carried out through his wife Mrs. Anusaya Gopal Chavan and further authorising Anusaya Gopal Chavan to deal with in respect of the rights of the tenant. The developer by the letter dated 22.08.2002 acknowledged the receipt of the letter dated 16.08.2002 and confirming that in future they will deal with the wife of Mr. Gopal Maruti Chavan in regard to the rehabilitation of the said tenant. Ultimately on 18.08.2003, the said tenant Mr. Gopal Maruti Chavan expired and as intimated by legal heirs, leaving behind him his only legal heirs as follows:

*1. Mrs. Shalini Bajirao Sawant – Daughter,
the Tenant herein*

AND

- 2) Mrs. Anusuya Gopal Chavan – Wife,*
 - 3) Mrs. Archana Vilasrao Mohite – Daughter,*
 - 4) Mrs. Rualee Vilasrao Patil – Daughter,*
 - 5) Mr. Rajesh Gopal Chavan – Son,*
 - 6) Mr. Suresh Gopal Chavan – Son,*
- the confirming parties herein.*

The heirs of late Mr. Gopal Maruti Chavan the Tenant, therefore, are entitled to the tenancy rights and vis-a-vis to the permanent alternate accommodation.

AND WHEREAS upon the death of the original tenant Mr. Gopal Maruti Chavan, the legal heirs of the tenants became entitled to be rehabilitated”.

(Emphasis supplied).

It should also be noted that even plaintiffs have signed this agreement as confirming parties.

Therefore, if tenancy had been transferred to Anusaya as alleged by defendant no.2, certainly that would have been mentioned in the said

agreement. The agreement only recognises the tenancy of Gopal Chawan and defendant no.1 agreeing to the request of Gopal Chawan to deal with Anusaya due to his ill health.

18 Therefore, it is quite clear that the 16 flats have to be allotted to the legal heirs of Gopal Chawan as per their respective entitlements based on the Will read with the Codicils of Gopal Chawan. This is also the understanding of defendant no. 2. Moreover, if Anusaya was to be considered as tenant, it should also be noted that Anusaya acted as executor of the will read with Codicils of Gopal Chawan. Anusaya never challenged the Will or Codicils. Further, an executor cannot challenge the depositions made by the deceased. Anusaya and defendant no.2 were also given substantial bequest under the will read with the Codicils.

Section 180 of the Indian Succession Act reads as under:

“180. Circumstances in which election takes place.-Where a person, by his will, professes to dispose of some thing which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will”.

19 Therefore, legatee has to elect whether to accept the bequest done in the will and if the legatee accepts such bequests, then even if the property of the legatee has been given by the deceased to some other person, the legatee cannot challenge the legacy. Anusaya could not have and never challenged the Will and Codicils of Gopal Chawan. Defendant no.2 has also

accepted the flats as per the agreement annexed to the plaint and also consented for grant of probate and Codicils of Gopal Chawan. Hence even defendant no.2 cannot challenge.

I find support in this view from **Mani Mani Vs. Mani Joshua [1969**

(1) SCC 828] in which paragraph no. 7 reads as under:

“The circumstances in which election takes place are set out in Section [180](#) of the Indian Succession Act. According to its provisions, "where a person by his will professes to dispose of something which he has no right to dispose of, the person to whom the thing belongs shall elect either to confirm such disposition or to dissent from it, and, in the latter case, he shall give up any benefits which may have been provided for him by the will." The English law, however, applies the principle of compensation also to election. It means the electing legatee has to compensate the disappointed legatee out of the property given to him. As pointed out in the Indian Succession Act by N.C. Sen Gupta, p. 295, the rule which has been embodied in Section [180](#) does not recognise the principle of compensation. Under its provisions if the legatee has been given any benefit under the will and his own property has also been disposed of by that very will he must relinquish all his claims under the will if he chooses to retain his property. It is not disputed, in the present case, that if the testator has, by Exh. 3, disposed of the property which had been gifted to Joshua the rule embodied in Section [180](#) would become applicable and Joshua cannot take the property which had been gifted to him if he has chosen to retain the property bequeathed to him by the will. The question is whether the testator having omitted to state in Exh. 3 that he was giving away the properties which had been gifted to Joshua in the year 1935 to Mani to whom only a residuary bequest of the entire remaining assets had been made the principle of election will become inapplicable”.

20 If the executor, i.e., late Anusaya Chawan was actually tenant as suggested by defendant no. 2 now, though earlier she had accepted that tenancy rights are in favour of Gopal Chawan, still so called tenant Anusaya herself did not claim to be a tenant. On the contrary, she filed a

probate petition for grant of probate of the will and Codicils of late Gopal Chawan. Defendant no. 2 has also acted upon and accepted by entering into an agreement with defendant no. 1. She has also filed probate petition for grant of probate of an alleged will of Anusaya where also it is not mentioned that Anusaya was the tenant and she was entitled to all the 16 flats. Even in the affidavit-in-reply filed to the notice of motion no.1162 of 2014 taken out by plaintiffs in partition suit no.684 of 2014, defendant no. 2 does not state that Anusaya was the tenant. On the contrary, defendant no. 2 accepts that the flats have to be allotted based on the will of Gopal Chawan. Therefore, I cannot accept the submissions made by defendant no.2 that Anusaya was the tenant.

So far as allegation of defendant no.2 against plaintiffs of suppression of documents, I do not find any merit, particularly, in view of the fact that defendant no. 2 herself has been economical with truth and her conduct tilts towards being labelled not honest.

21 Coming to the point of Mr. Makhija's submission that if the Court grants relief as sought in prayer clause (a) of the notice of motion, it would effectively decree the suit, it will be useful to reproduce paragraphs 10, 11, 12, 15, 16 and 17 of **Dorab Cawasji Warden V. Coomi Sorab Warden**¹

“10. The trial court gave an interim mandatory injunction directing the fourth respondent not to continue in possession. There could be no doubt that the courts can grant such interlocutory mandatory injunction in certain special circumstances. It would be very useful to

1 [(1990) 2 Supreme Court Cases 117]

refer to some of the English cases which have given some guidelines in granting such injunctions.

11. In *Shepherd Homes Ltd. v. Sandham* [1970] 3 All ER 402, Megarry J. observed:

“(iii) On motion, as contrasted with the trial, the court was far more reluctant to grant a mandatory injunction; in a normal case the court must, *inter alia*, feel a high degree of assurance that at the trial it will appear that the injunction was rightly granted; and this was a higher standard than was required for a prohibitory injunction”.

12. In *Evans Marshall & Co. Ltd. v. Bertola SA* the Court of Appeal held that:

“Although the failure of a plaintiff to show that he had a reasonable prospect of obtaining a permanent injunction at the trial was a factor which would normally weigh heavily against the grant of an interlocutory injunction, it was not a factor which, as a matter of law, precluded its grant.”

The case law on the subject was fully considered in the latest judgment in *Films Rover International Ltd. and Ors. v. Cannon Film Sales Ltd. Hoffmann, J.* observed in that case:

“But I think it is important in this area to distinguish between fundamental principles and what are sometimes described as 'guidelines', i.e. useful generalisations about the way to deal with the normal run of cases falling within a particular category. The principal dilemma about the grant of interlocutory injunctions, whether prohibitory or mandatory, is that there is by definition a risk that the court may make the 'wrong' decision, in the sense of granting an injunction to a party who fails to establish his right at the trial (or would fail if there was a trial) or alternatively, in failing to grant an injunction to a party who succeeds (or would succeed) at trial. A fundamental principle is therefore that the court should take whichever course appears to carry the lower risk of injustice if it should turn out to have been 'wrong' in the sense I have described. The guidelines for the grant of both kinds of interlocutory injunctions are derived from this principle”.

Again at page 781 the learned Judge observed:

“The question of substance is whether the granting of the injunction would carry that higher risk of injustice which is normally associated with the grant of a mandatory injunction. The second point is that in cases in which there can be no dispute about the use of the term 'mandatory' to describe the injunction, the same question of substance will determine whether the case is 'normal' and therefore within the guideline or 'exceptional' and therefore requiring special treatment. If it appears to the court that, exceptionally, the case is one in which

withholding a mandatory interlocutory injunction would be in fact carry a greater risk of injustice than granting it even though the court does not feel a 'high degree of assurance' about the plaintiff's chances of establishing his right, there cannot be any rational basis for withholding the injunction".

and concluded that:

"These considerations lead me to conclude that the Court of Appeal in Locabail International Finance Ltd. v. Agroexpon, was not intending to 'fetter the court's discretion by laying down any rules which would have the effect of limiting the flexibility Of the remedy', to quote Lord Diplock in the Cyanamid case. Just as the Cyanamid guidelines for prohibitory injunctions which require a plaintiff to show no more than an arguable case recognise the existence of exceptions in Which more is required (compare Cayne v. Global Natural Resources plc, , so the guideline approved for mandatory injunctions in Locabail recognises that there may be cases in which less is sufficient".

On the test to be applied in granting mandatory injunctions on interlocutory applications in 24 Halsbury's Laws of England (4th Edn.) para 948 it is stated:

"A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steel a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of ad interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application".

15. In one of the earliest cases in Rasul Karim A Anr. v. Pirubhai AMrbhm, , Beaman, 3. was of the view that the court's in India have no power to issue a temporary injunction in a mandatory form but Shah, J. who constituted a Bench in that case did not agree with Beaman, J. in this view. However, in a later Division Bench judgment in Champsey Bhimji & Co. v. The Jamna Flour Mills Co. Ltd., two learned Judges of the Bombay High Court took a different view from Beaman, J. and this view is now the prevailing view in the Bombay High Court. In M. Kandaswami Chetty v. F. Subramania Chetty, a Division Bench of the Madras High Court held that court's in India have the power by virtue of Order 39 Rule 2 of the CPC to issue temporary injunction in a mandatory form and differed from Beaman's view accepting the view in Champsey Bhimji & Co. v. Jamna Flour Mills Co. (supra). In Israil v. Shamser Rahman, it was held that the High Court was competent to issue an interim injunction in a mandatory form. It was further held in

this case that in granting an interim injunction what the Court had to determine was whether there was a fair and substantial question to be decided as to what the rights of the parties were and whether the nature and difficulty of the questions was such that it was proper that the injunction should be granted until the time for deciding them should arrive. It was further held that the Court should consider as to where the balance of convenience lie and whether it is desirable that the status quo should be maintained. While accepting that it is not possible to say that in no circumstances will the Courts in India have any jurisdiction to issue an ad interim injunction of a mandatory character, in Nandan Pictures Ltd. v. Art. Pictures Ltd. and Ors. a Division Bench was of the view that if the mandatory injunction is granted at all on an interlocutory application it is granted only to restore the status quo and not granted to establish a new state of things differing from the state which existed at the date when the suit was instituted”.

16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guideline. Generally stated these guidelines are:

(1) The plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.

17. Being essentially an equitable relief the grant or refusal of an interlocutory mandatory injunction shall ultimately rest in the sound judicial discretion of the Court to be exercised in the light of the facts and circumstances in each case. Though the above guidelines are neither exhaustive or complete or absolute rules, and there may be exceptional circumstances needing action, applying them as prerequisite for the grant or refusal of such injunctions would be a sound exercise of a judicial discretion”.

22 In Dorab Cawasji Warden (Supra) the Appellant was a plaintiff in a suit filed for permanent injunction before the Hon'ble City Civil Court, Bombay against his sister in law and her children (Respondent Nos. 1 to 3) as also against a third party in whose favour rights were created by her (Respondent no. 4). The Appellant filed an application inter alia for interim injunction against the Respondent no. 4 restraining him from entering into or taking possession and/or remaining in possession or enjoyment of the suit property or part thereof. The Trial Court granted an interim mandatory injunction restraining the Respondent no. 4, his servants and his agents "from remaining in possession or enjoyment of the suit property" or any part or portion thereof.

The said Order was set aside in Appeal before the Hon 'ble Bombay High Court but it was directed that during the pendency of the suit the Respondent no. 4 shall not make any permanent alterations in the suit premises nor shall they induct any third party, or create any third party interest over the suit property. This order was challenged before the Hon'ble Supreme Court.

The Hon'ble Supreme Court, after discussing various case laws on grant of injunction observed that over time, general guidelines have evolved for grant of an injunction. These guidelines are: (1) The plaintiff has a strong case for trail. That is, it shall be of a higher standard than a *prima facie* case that is normally required for a prohibitory injunction. (2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money. (3) The balance of convenience is in

favour of the one seeking such relief. However, since the relief is equitable in nature, judicial discretion would have to be exercised while granting the same depending upon the facts and circumstances of each case.

The Hon'ble Supreme Court, in exercise of its discretion, set aside the Order of the Hon'ble High Court while upholding the Order passed by the Trial Court.

23 In light of the aforesaid discussion, it becomes clear that broad guidelines evolved over time have to be followed before granting any interlocutory relief. The Court can exercise its judicial discretion to alter the status quo and pass necessary interlocutory orders to ensure that all parties stand at an equal footing before the trial of the Suit commences if a more than prima facie case has been made out. Counsels opposing the grant of such interlocutory reliefs would argue that such a reliefs would decree the suit finally and irreparable harm and loss would be caused to their client in case they ultimately succeed. However, in the facts and circumstances of the present case, a suitable arrangement could be arrived at between the parties hereto to ensure that such a situation does not arise.

24 In **Nimbus Communication V. BCCI**² a Division Bench of this court has held that if a more than prima facie case is made out, the court can give mandatory injunction/order at the interim stage.

2 [2012 (5) BCR 114]

25 Plaintiffs have made out more than a strong *prima facie* case. Defendant no.2 has entered into agreement with defendant no.1 based on the Will and Codicils of Gopal Chawan but is coming in the way of plaintiffs entering into agreement with defendant no.1. Since the relief of an interim injunction is all the same an equitable relief, the court shall also consider whether the comparative mischief or inconvenience which is likely to ensue from withholding the injunction will be greater than that which is likely to arise from granting it, which means that the balance of convenience is in favour of plaintiffs seeking the relief. The facts clearly establish that not only a refusal to grant an interim mandatory injunction will do irreparable injury to plaintiffs but balance of convenience is in favour of plaintiffs for the grant of such injunction. Therefore, plaintiffs are entitled to interim reliefs.

26 Counsel for defendant no.1 submits that defendant no.1 is a victim of inter se disputes between 5 quibbling siblings and defendant no.1 would like to get out. Counsel also states they would like to enter into permanent alternate accommodation agreements with whoever was entitled to and leave the site. In my view, defendant no.1 is justified in its request. There is no need for defendant no.1 to be tied to this litigation. If the relief as prayed for is not granted today, defendant no. 1 will also be unnecessarily dragged into this litigation. Counsel for defendant no. 1 has made it very

clear that his client is ready and willing to perform their obligations under the contract and once the agreements are entered into, defendant no. 1 would like to be out of this litigation.

27 At the same time, to strike a balance, the Court Receiver has to be appointed for all the 16 flats in the said building. The Court Receiver, if put in possession of the flats and tomorrow if defendant no. 2 succeeds, the flats can be handed over to defendant no. 2. Mr. Makhija states that at that stage, question of payment of stamp duty will again arise because now defendant no. 1 will pay the stamp duty but if the court comes to the conclusion that all the 8 flats have to be transferred to defendant no. 2, there will be a further litigation for payment of stamp duty. Mr. Jain, on instructions states that the undertaking of all plaintiffs be noted in this order that should such a situation arise, that plaintiffs have to retransfer 8 flats in favour of defendant no. 2, plaintiffs will pay the stamp duty as applicable in law. I had to also note that so far as flat no. 1601 is concerned, for which an agreement has been entered into between defendant no. 1 and plaintiff no. 4, counsel for defendant no. 2 had mentioned that they have no objection. Mr. Makhija also stated that Receiver could be appointed for all 16 flats so that both plaintiffs and defendant no. 2 are equally protected. In my view, it is a very fair suggestion.

28 Therefore, following order is passed, considering the facts and submissions as recorded earlier.

(a) Defendant no. 1 shall enter into permanent alternate accommodation agreement with plaintiffs and pay stamp duty and other charges with respect to flat no. 201, 202, 203, 204, 1602, 1603, 1604 and 1703 as per the Will read with Codicils of Gopal Chawan.

(b) So far as flat nos.101, 102, 103, 104, 1701 and 1702 are concerned, defendant no.1 will enter into permanent alternate accommodation agreement with Court Receiver and pay necessary stamp duty and other charges.

(c) The Court Receiver shall take physical possession of all the 16 flats being flat nos.101, 102, 103, 104, 201, 202, 203, 204, 1601, 1602, 1603, 1604, 1701, 1702, 1703 and 1704.

(d) The Court Receiver, if any of the plaintiffs are interested, can appoint plaintiffs as agent of the Receiver for flat nos. 201, 202, 203, 204, 1601, 1602, 1603 and 1604 at such rate of royalty as to be determined by the Receiver, keeping in mind the market rate.

(e) The Court Receiver, if defendant no. 2 is interested, can appoint defendant no. 2 as agent of the Receiver for flat nos. 1703 and 1704 at such rate of royalty as to be determined by the Receiver, keeping in mind the market rate.

(f) If any/all the plaintiffs and defendant no. 2 wish to give

their respective flats to any third party to occupy the respective flats on leave and licence basis, the Court Receiver can give flat on leave and licence basis to the third party, the leave and licence agreement will be between the Court Receiver and the licensee.

(g) So far as flats 101, 102, 103, 104, 1701 and 1702 that was to go to Anusaya, the Court Receiver shall appoint anyone as agent of Court Receiver.

(h) The licence fee/royalty which is earned by Court Receiver, should be used to pay the society charges and other expenses related to the respective flat, including taxes. The balance amount to be kept with the Court Receiver and to be invested in fixed deposit in multiples of Rs.1 lakh with a nationalised bank for an initial period of one year to be renewed year to year until the disposal of the suit.

29 Notice of motion accordingly stands disposed of.

(K.R. SHRIRAM, J.)