

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION**

**NOTICE OF MOTION NO. 190 OF 2015
IN
NOTICE OF MOTION NO. 1667 OF 2007
IN
SUIT NO. 1260 OF 2007**

Indira Narayan Shet Vernekar & ors. ...Applicants
In the matter between
Vilas Kapoor & ors. ...Plaintiffs
Versus
Vishwanath M. Rayker & ors. ...Defendants

Mr. A. R. Mishra, for the Applicants.
Mr. Nitin G. Raut, for the Plaintiffs.
Mr. Ravish Mishra, a/w Jayraj Shinde, i/b V. B. Dhingreja,
for Defendant nos.1 to 5, 8, 11 to 13.

CORAM: N. J. JAMADAR, J.
DATED : 29th JANUARY, 2021

Order :-

1. This notice of motion is taken out by defendant nos.14 to 16, for setting aside and/or vacating the order of injunction passed by this Court on 4th September, 2009, in Notice of Motion No.1667 of 2007, and for dismissal of the suit.

2. The instant suit is instituted for a declaration that the Memorandum of Understanding dated 6th December, 2006, is valid, subsisting and binding on defendant nos.1, 2(a), 2(b), 2(c), 3, 4, 6(a), 6(b) and 7 and for a decree of specific performance of the contract contained in the said agreement.

3. The plaintiffs averred that Mr. Manjunath B. Raykar, was the owner of the premises bearing Plot no.15A admeasuring 545 square yards situated at 3rd Khar, comprising of structure Manjunath Niwas (the suit premises). Manjunath died on 22nd April, 1960 leaving behind the last will and testament dated 1st March, 1960, whereby the suit premises was bequeathed to his wife Sushila M. Raykar. Pursuant to grant of probate in Petition No.810 of 1960 Sushila became the sole and absolute owner of the suit premises.

4. The Manjunath had five sons and four daughters. Defendant nos.1 and 2 are the sons of the deceased, defendant nos.14, 15 and 16 are the daughters of the deceased. Defendant nos.4, 6 and 7 are the children of one of the deceased son Shrinawas. Defendant no.5 is the wife of defendant no.6. Defendant no.3 is the son of Krushna, another deceased son of the deceased Manjunath. Defendant nos.8 to 13 are the heirs of another deceased son Shivshankar. Defendant no.17 is the daughter of the deceased daughter namely, Smt. Sumitra Nagesh Vernekar.

5. Sushila died on 29th May, 1993, leaving behind her last will and testament dated 18th December, 1992. The said Will dated 18th December, 1992 was initially probated in Probate Petition

No.238 of 1994. A dispute thereafter arose amongst the heirs of the deceased Manjunath and Sushilabai. Defendant nos.1, 15 and 16 filed a caveat in Probate Petition No.238 of 1994 and the said petition came to be converted into Testamentary Suit No.511 of 1994.

6. In pursuance of the Consent Terms executed between defendant nos.1, defendant no.2, the husband of defendant no.11 and father of defendant nos.12 and 13, the Testamentary Petition No.238 of 1994/Suit No.51 of 1994, came to be disposed of in accordance with the Consent Terms. Defendant nos.14, 15, 16 and 17 filed Miscellaneous Petition No.26 of 2006 and the said order on Consent Terms dated 19th March, 1999 was set aside, by order dated 15th February, 2007.

7. The plaintiffs claimed that defendant nos.1 to 5 agreed to sell the suit premises on 'as is whereas basis' by executing the Memorandum of Understanding dated 6th December, 2006. Defendant nos.1 to 5 made a representation that they were the exclusive owners of the suit premises on the strength of the Consent Terms filed in the probate petition in respect of the Will dated 18th December, 1992 of Deceased Sushilabai. Under the said Memorandum of Understanding, the defendants agreed to sell the suit premises for a consideration of Rs.6,25,00,000/-

and received and acknowledged a sum of Rs.1 Crore towards part consideration. As the dispute arose between the heirs of the deceased Sushilabai, the defendant nos.14, 15 and 16 claimed that the deceased Sushilabai had executed another Will under which all the heirs of the deceased were the beneficiaries. Eventually, defendant nos.1 to 5 by communication dated 19th February, 2007, informed the plaintiffs that in view of the order dated 15th February, 2007 passed in Miscellaneous Petition No.26 of 2006, whereby the order dated 10th March, 1999 passed in Petition No.238 of 1999 (Suit No.51 of 1994) was set aside, the contract comprised in the Memorandum of Understanding can not be executed. The plaintiffs thus realised that the defendants would not perform their part of the contract contained in the said Memorandum of Understanding dated 6th December, 2006. Hence, the suit for the specific performance of the contract and damages in lieu of and in addition to the decree for specific performance.

8. In the suit, the plaintiffs took out a notice of motion, being Notice of Motion No.1667 of 2007, for restraining the defendants from alienating the suit premises and/or creating third party rights therein. By an order dated 4th September, 2009, the said notice of motion came to be allowed and pending the hearing and final disposal of the suit, the defendants were restrained

from selling, alienating, transferring, encumbering, parting with or disposing of or creating any third party right, title and interest in, to, upon or in respect of the suit premises.

9. In the order dated 4th September, 2009, this Court observed, *inter alia*, as under;

6. In effect therefore, whereas according to Defendant Nos.1 to 4, 6 and 7 they are the sole owners of the said property being the only beneficiaries under the Will dated 18.12.1992 of the said Sushila M. Raykar, according to Defendant Nos.14, 15 and 16 all the parties to the suit are beneficiaries under another Will. The date of the Will has not been furnished at present.

7. It is important to note however that as far as the Plaintiffs are concerned, they purchased the property pursuant to an agreement which was entered into when the probate of the Will dated 18.12.1992 was still valid and subsisting. As stated above, grant of probate was set-aside on 15.2.2007.

8.

9. Two Wills set up by different parties are pending adjudication of this Court. There is nothing to indicate that the agreement dated 6.12.2006 was not validly entered into or that there were any mala-fides at least on the part of the Plaintiffs in respect thereof. If the Will dated 18.12.1992 is probated, the Plaintiffs would have a strong case in their favour. It is necessary therefore to protect the Plaintiffs' rights pending the hearing and final disposal of the suit which must await the result of the pending proceedings filed by the Defendants inter-se."

10. In this notice of motion, it is the case of the applicants – defendants that Testamentary Suit No.51 of 1994 in Testamentary Petition No.238 of 1994 and Testamentary Suit No.110 of 2011 in Testamentary Petition No.346 of 2007 were decided by this Court by judgment and order dated 4th October, 2012. The operative order reads as under:

- “1. The will of the deceased Sushilabai Manjunath Raykar dated 16.02.1984 shall be probated.
2. Testamentary Suit No.110 of 2011 is accordingly made absolute as prayed.
3. Testamentary Petition No.346 of 2007 is accordingly allowed.
4. The Prothonotary and Senior Master shall issue probate of the registered will of the deceased Sushilabai Manjunath Raykar dated 16.02.1984 registered on 22.02.1984.
5. Testamentary Suit No.51 of 1994 as also Testamentary Petition No.238 of 1994 stand dismissed.
6. The probate of the unregistered writing dated 18.12.1992 of the deceased Sushilabai Manjunath Raykar is refused.”

11. In view of the aforesaid adjudication, the Will, on the strength of which the Memorandum of Understanding was executed claiming exclusive ownership over the suit premises by defendant nos.1 to 5, is invalidated. In contrast, the Court directed that the Will of the deceased Sushilabai, dated 16th February, 1984 be probated. The defendants further claimed that the judgment and order dated 4th October, 2012 was assailed in Appeal (L) No.99 of 2013 with Appeal (L) No.100 of 2013. The Appeal Bench, by a judgment and order dated 20th June, 2013, was persuaded to uphold the judgment of the learned Single Judge dated 4th October, 2012 in so far as it holds that the alleged Will dated 18th December, 1992, has not been proved, and thus the Testamentary Suit No.51 of 1994 was dismissed and Appeal (L) No.99 of 2013 also stood dismissed. Testamentary Suit No.110 of 2011 was, however, restored for a

decision afresh by the learned Single Judge. Resultantly, the finding of the learned Single Judge which invalidated alleged Will of Sushilabai dated 18th December, 1992 (which constitutes the basis of the title claimed by the vendors) gets reinforced. Since the said finding has attained finality, the basis of the order dated 4th September, 2009, whereby the defendants were restrained by an order of injunction also gets dismantled. Therefore, this motion for vacating the said order.

12. The plaintiffs have resisted the prayer in the notice of motion by filing an affidavit-in-reply. It is averred that the plaintiffs have parted with a substantial amount of Rs.1 Crore in favour of defendant nos.1 to 5, out of the total consideration of Rs.6,25,00,000/- for which the defendants had agreed to sell the suit premises. There were no *mala fides* on the part of the plaintiffs. The agreement was entered into on the assurance of defendant nos.1 to 5 that they would obtain a clear and marketable title to the suit premises. The mere fact that the Will date 16th February, 1984 is probated cannot be a ground to set aside the order dated 4th September, 2009. The applicants ought to institute a substantive suit and they are not entitled to seek reliefs in the instant proceedings.

13. I have heard Mr. A. R. Mishra, the learned Counsel for the applicants, Mr. Nitin Raut, the learned Counsel for the plaintiffs and Mr. Ravish Mishra, the learned Counsel for defendant nos.1 to 5, 8, 11 to 13.

14. The learned Counsel for the applicants – defendant nos.14 to 16 would urge that the very basis of the order dated 4th September, 2009, is the claim of defendant nos.1 to 5 rested on the Will dated 18th December, 1992 of Sushilabai M. Raykar. The Court while passing the said order dated 4th September, 2009 expressly observed that if the Will dated 18th December, 1992 is probated the plaintiffs would have a strong case in their favour. With the judgment and order dated 4th October, 2012, the validity of the Will dated 18th December, 1992 came to be decided against the said propounders, and the Court refused to probate the said Will. With this, the claim of the exclusive ownership of defendant nos.1 to 5 also fell through. Conversely, the Court had ordered that the Will dated 16th February, 1984 be probated. In this backdrop, according to the learned Counsel for the applicants, the order dated 4th September, 2009 is required to be vacated.

15. In opposition to this, Mr. Raut, the learned Counsel for the plaintiffs would urge that the instant notice of motion is

misconceived. The said order in Notice of Motion No.1667 of 2007 was passed on merits. None of the defendants had challenged the said order. The mere fact that the Will propounded by defendant nos.14 to 16 was ordered to be probated, or for that matter, the Will dated 18th December, 1992 was invalidated, does not confer title on the parties. The proper remedy for the applicants – defendant nos.14 to 16 is to institute a suit and get their rights in the suit premises adjudicated.

16. Mr. Ravish Mishra, the learned Counsel for defendant nos.1 to 5, 8, 11 to 13, submitted that in view of the order passed by the learned Single Judge in Testamentary Suit No.51 of 1994 and Testamentary Suit No.110 of 2011 and the judgment and order in Appeal (L) No.99 of 2013, the defendants cannot at this stage claim exclusive ownership over the suit premises. The continued validity of the order dated 4th September, 2013, thus becomes contentious.

17. To begin with, it is imperative to note the material terms of the Memorandum of Understanding dated 6th December, 2006, which constitutes the substratum of the plaintiffs claim. Defendant nos. 1 to 5 professed to convey the suit premises, on the premise that they were the solely entitled surviving heirs and legal representatives of Mr. Manjunath Raykar, the original

holder. In the said Memorandum of Understanding, it was specifically noted that Miscellaneous Petition No.20 of 2015 was instituted by Indira N. Shet (defendant no.14), Smt. Shakuntala S. John (defendant no.15), Smt. Kalavati S. Balse (defendant no.16) and Smt. Sulochana D. Raykar (defendant no.17), seeking the relief of setting aside the probate granted on 19th March, 1999. This implies that the parties were conscious about the nature of the claim of the vendors as well as the challenge to their claim of exclusive ownership over the suit premises.

18. Indisputably, the plaintiffs claim hinges upon the extent of the title of the vendors over the suit premises. In fact, in the order dated 4th September, 2009, while granting interim relief, this Court had noted that the claim of the plaintiffs would be strengthened if the Will dated 18th December, 1992 is probated. The Court was also conscious of the proceedings between the defendants *inter se* and, thus, expressly observed that it was necessary to protect the plaintiffs right pending the hearing and final disposal of the suit, which must await result of the pending proceedings filed by the defendants *inter se*.

19. The learned Counsel for the plaintiffs urged that the grant or refusal of the probate is of no consequence in determining the question of title to the property. To bolster up this submission,

the learned Counsel placed a strong reliance on a judgment of the learned Single Judge of this Court in the case of *Rupali Mehta vs. Tina Narinder Sain Mehta (Notice of Motion No.30 of 2006 in Testamentary Suit No.75 of 2005 in Petition No.378 of 2005)*, wherein it was, *inter alia*, observed that in a petition for probate of a Will or a petition for grant of letters of administration, the sole question that arises for consideration is, whether or not the Will is genuine or not? The property left behind by the deceased is not the subject matter of decision of the probate court.

20. There can be no duality of opinion on the legal position that the Testamentary Court has no jurisdiction to delve into the question of title of the deceased to the property. The property is not the subject matter of the testamentary suit. However, the aforesaid proposition does not advance the cause of the plaintiffs in the case at hand.

21. Firstly, the plaintiffs claim arises out of the Memorandum of Understanding dated 6th December, 2006. In the said agreement, the vendors have claimed exclusive title over the suit premises on the strength of the Will. Thus, the plaintiffs can have no better title than the one the vendors possess.

22. Secondly, while granting the interim relief what weighed with this Court is the fact that the grant of probate of the Will dated 18th December, 1992 would strengthen the case of the plaintiffs. Eventually, in the testamentary suits, the Will dated 18th December, 1992 came to be invalidated. Thus, a crucial factor which influenced the Court to grant the interim relief was rendered inoperable by the order passed in the testamentary suits. The decision in the testamentary suits bears upon the claim of the plaintiffs. On the one hand, the claim of exclusive title of the vendors of the plaintiffs, which rested on the Will dated 18th December, 1992, becomes suspect. On the other hand, the foundational fact which persuaded this Court to grant the interim relief is dismantled.

23. Thirdly, even if the Memorandum of Understanding dated 6th December, 2006 is taken at par and the plaintiffs are held to be entitled to obtain the specific performance of the contract, the vendors namely defendant nos.1, 2(a) to 2(c), 3, 4, 6(a), 6(b) and 7 cannot bind the rest of the sharers in the suit premises. In fact, the prayers in the suit are restricted qua defendant nos.1, 2(a) to 2(c), 3, 4, 6(a), 6(b) and 7 in respect of the declaration of validity of the agreement dated 6th December, 2006, as well as the decree for specific performance and the alternative reliefs.

24. Conversely, the rest of the defendants owe no contractual or other obligation to the plaintiffs. Since there is no serious dispute about the relationship of the applicants – defendants with the deceased, in the absence of any obligation the defendant nos.14 to 16 cannot be restrained from exercising possessory or proprietary rights over the suit premises, especially at the instance of the plaintiffs on the strength of the Memorandum of Understanding.

25. The conspectus of aforesaid consideration is that, though the prayer of the applicants - defendant nos.14 to 16 to set aside and vacate the order of injunction passed on 4th September, 2009, in its entirety, does not merit acceptance, yet the said order cannot continue to operate qua the applicants – defendant nos.14 to 16. It is, therefore, necessary to modify the said order. The notice of motion thus deserves to be allowed to this extent.

26. Hence, the following order:

: O R D E R :

- (i) The notice of motion stands partly allowed.
- (ii) The order dated 4th September, 2009, in Notice of Motion No.1667 of 2007, stands modified to the extent that it does not bind and operate against the applicants – defendant nos.14 to 16.

27. The Notice of Motion accordingly stands disposed of.

[N. J. JAMADAR, J.]

At this stage, the learned Counsel for the plaintiffs prays for stay to the operation and execution of this order. Since the injunction is in operation since the year 2006, the operation and execution of this order is stayed for a period four weeks.

[N. J. JAMADAR, J.]