

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
TESTAMENTARY AND INTESTATE JURISDICTION**

**INTERIM APPLICATION NO.2315 OF 2021  
IN  
TESTAMENTARY SUIT NO.167 OF 2013**

Yogita Kumar Shetty ...Applicant

**In the matter of :-**

Veena Wellington (Nee Shetty) ...Petitioner/Plaintiff  
V/S

Yogita Kumar Shetty & Anr. ...Caveatrices/Defendants

Mr. Chirag Balsara a/w Mr. Akshay Doctor, Mr. Himank Singh, Ms.  
Huzan Bhumgara i/by M/s. Desai & Diwanji for Applicant.  
Mr. Clive D'souza for Caveatrices/Plaintiff.

**CORAM : R. I. CHAGLA, J.  
DATED : 17<sup>th</sup> NOVEMBER, 2021.**

**P.C.**

Heard learned counsel for the parties.

2. By this Interim Application, the Applicant is seeking relief pending the grant of probate of the last Will and testament of the deceased, Mr. K. Sunder Shetty, Hindu inhabitant, Mumbai, in respect of Flat No.05 in the building known as Dawn Co-operative Housing Society Limited (Dawn premises) and Flat No.101 in Joanna Co-

operative Housing Society Limited (Joanna premises). The Applicant has stated that the Petitioner/Plaintiff by having transferred the share certificates in her name appropriated the Dawn premises and Joanna premises in her name to defeat the rights of the Applicant. The Applicant is the grand-daughter of the deceased. The Applicant has also stated that the transfer of the share certificate in the name of the Petitioner/Plaintiff was much before the citation was even prepared on 26<sup>th</sup> August 2013. The Applicant has also contended that the Applicant as legal heir of the deceased has right in the Dawn premises as well as in Joanna premises and that status quo ante be restored as existing at the time of the demise of the deceased in respect of the said Joanna premises and Dawn premises.

3. The learned counsel for the Applicant has referred to Section 269 of the Indian Succession Act, 1925, to contend that this Court as the Probate Court can pass orders protecting the property of the deceased till the probate is granted of the Will of the deceased. He has referred to the decision of Single Judge of this Court (Coram: D. K. Deshmukh J.) in the case of Rupali Mehta Vs. Smt. Tina

Narinder Sain Mehta, 2006 (6) Mh.L.J. 786, which though referring to Section 269 of the Indian Succession Act has not dealt with the exclusion of that Section provided in Sub-section 2 of Section 269. He has submitted that this Court had without interpreting in Sub-section 2 of Section 269 held that, there is no provision made authorizing the Testamentary Court to make an interim order as a matter of course for protection of property during the pendency of the Testamentary Suit.

4. The learned counsel for the Applicant has also referred to the Division Bench order (Coram: R. M. Lodha and S. A. Bobde, JJ.) in the case of Rupali Mehta vs. Tina Narinder Sain Mehta, in Appeal No.734 of 2006, dated 9<sup>th</sup> October 2006, which had recorded that the Appeal from the decision of the Single Judge (Coram: D. K. Deshmukh J.) in the case of Rupali Mehta (supra) has raised an important issue about the power of Testamentary Court granting appropriate suitable interim relief for preservation of the estate of the deceased pending probate and/or letters of administration proceedings. The appeal had been admitted by the Division Bench of

this Court. He has thereafter, referred to the subsequent order of the Division Bench of this Court (Coram: A.M. Khanvilkar and R. Y. Ganoo, JJ.), dated 20<sup>th</sup> June 2011, which had permitted the appeal in Rupali Mehta (Supra) being Appeal No.734 of 2011 to be withdrawn as a settlement had been arrived between the parties. This issue has remain unanswered. He has also referred to the decision of Division Bench of this Court (Coram: D. Y. Chandrachud and Anoop V. Mohta, JJ.) reported in 2011(4) Maharashtra Law Journal, which had though considering that Section 269 of the Indian Succession Act had been excluded by Sub-section (2) thereof had not interpreted the exclusion in Sub-section (2) of Section 269 of the Indian Succession Act, 1925. He has submitted that the exclusion was restricted only to intestate succession. He has submitted that this Court has the power to grant suitable interim relief for preservation of the property of the deceased pending the hearing of the Testamentary Suit for grant of probate. He has submitted that in view of the case made out by the Applicant, status-quo ante be restored in respect of the Dawn premises and Joanna premises pending the hearing and final disposal of the Testamentary Suit.

5. The learned counsel for the Petitioner/Plaintiff has referred to the Affidavit-in-reply of the Petitioner/Plaintiff to the Interim Application dated 8<sup>th</sup> November 2021. He has referred to in particular paragraph Nos.3 and 4 of the Affidavit-in-reply. He has submitted that the Petitioner/Plaintiff is co-owner of the Joanna premises, having a 50% undivided share, right, title and interest in the said flat and was nominated by the deceased in respect of the balance 50% share held by the deceased. As regards the Dawn premises, the Petitioner/Plaintiff was together with his brother nominated by the deceased on 18<sup>th</sup> May 2007 under Section 30 of Maharashtra Co-operative Societies Act, 1960 and by virtue of which, the name of the Petitioner/Plaintiff was brought on record on the share certificate as nominee member on 13<sup>th</sup> September 2012. The share certificate of Joanna Co-operative Housing Society Limited, nomination form dated 18<sup>th</sup> May 2007 and duplicate share certificate of Dawn Co-operative Housing Society Limited have been annexed to the Affidavit-in-reply.

6. The learned counsel for the Petitioner/Plaintiff has thereafter, relied upon Section 30 of the Maharashtra Co-operative Societies Act, 1960, which provides that on the death of the member of the society, the society shall transfer the share or interest of the deceased member to a person or persons nominated in accordance with the rules. Such nominee, heir or legal representative as the case may be would thereafter be duly admitted as member of the society. He has also referred to bye-law 34 of the Model Bye-Laws of the Co-operative Housing Societies, which provides for such transfer of share or interest of the deceased member in the property to the nominee/nominees. This Bye-Law is subject to the provisions of Section 13 of the Maharashtra Co-operative Societies Act, 1960. The note in the said Bye-Law 34 provides that, in case of acquiring membership on the basis of nomination, such member shall hold the Flat/Unit in trust till all the legal heirs are brought on record and shall not have the right of ownership and shall not create any third party interest or alienation in anyway whatsoever. He has submitted that in view of the said Bye-Law 34 and the note in that Bye-Law, it is not necessary to pass any interim order, assuming that the Probate

Court has such power to grant interim order pending the Testamentary Suit for grant of probate.

7. The learned counsel for the Petitioner/Plaintiff has submitted that the Petitioner/Plaintiff is the co-owner of the Joanna premises having 50% undivided share, right, title and interest therein. Upon the name of the deceased having been deleted in the share certificate of Joanna Co-operative Housing Society Limited on 12<sup>th</sup> June 2012, the Petitioner/Plaintiff has been brought in as nominee in respect of the balance 50% share of the deceased. Likewise, the name of the Petitioner/Plaintiff has been brought in the share certificate of the Dawn Co-operative Housing Society Limited as nominee member on 13<sup>th</sup> September 2012. In view of Bye-law 34 and the note therein, the rights of the heirs of the deceased including the Applicant are protected.

8. Having considered the submissions and the averments made in the Affidavit-in-reply of the Petitioner/Plaintiff, it appears that the rights of the Applicant including the other legal heirs of the deceased are protected in respect of both the Dawn premises and

Joanna premises. It is apparent from the averments made in paragraph 4 of the Affidavit-in-reply, that the Petitioner/Plaintiff has 50% undivided share, right, title and interest in the Joanna premises and the balance 50% was held by the deceased. Upon the demise of the deceased, his name has been deleted by the Joanna Co-operative Housing Society on 12<sup>th</sup> June 2012. It further appears from the averments in the Affidavit-in-reply that the Petitioner/Plaintiff is a nominee of the deceased, both in respect of the 50% share of the deceased in the Joanna premises and the share of deceased in Dawn premises together with the Petitioner/Plaintiff's brother Mr. Ramesh S. Shetty. The name of the Petitioner/Plaintiff has been mentioned in the share certificate in respect of the said Joanna premises and Dawn premises as being nominated by the deceased. It is clear from Section 30 of the Maharashtra Co-operative Societies Act that on death of the member of the Society, the society shall transfer the share interest of the deceased member to a person or persons nominated by the deceased in accordance with the rules. Further it is clear from Bye-Law 34 read with the note appearing therein that on acquiring membership on the basis of nomination, such member shall hold the

flat/unit in trust till all the legal heirs are brought on record and shall not have the right of ownership and shall not create third party interest or alienation in any way whatsoever. Thus, the Applicant is protected in respect of the Joanna premises and the Dawn premises and thus no relief can be granted.

9. Having so held, it would not be necessary to decide the issue raised by the learned counsel for the Petitioner/Plaintiff on the interpretation of Sub-section 2 of Section 269 of the Indian Succession Act and particularly as to whether the Testamentary Court has the power to grant appropriate suitable interim relief for preservation of the Estate of the deceased pending grant of probate and/or letters of administration or not.

10. The Interim Application is disposed of in the above terms.

**(R. I. CHAGLA, J.)**