

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

**INTERIM APPLICATION NO. 3194 OF 2022
IN
SUIT NO. 177 OF 2022**

Kushroo Deolaliwalla

...Applicant/
Plaintiff

vs.

Achal Krishnarao Pansare
and Anr.

...Respondents

Adv. Hrushi Narvekar a/w Gargi Maides i/by Deven Dwarkadas and Partners - Advocate for the Plaintiff.

Mr. Anupam Surve a/w Mr. Nikhil Mutha a/w Ashwini Sonawane i/by Nanu Hormasjee and Co. – Advocate for the Defendant.

CORAM : S. M. MODAK, J.

DATE : 04th NOVEMBER 2023

P. C. :-

- 1.** Heard learned Advocate for the Applicant-Plaintiff and learned Advocate for the Defendant No.1-Respondent No. 1. Defendant No. 2 is Society in whose building the flat in question is situated. Though served, the Society has not appeared. The affidavit of service is filed.
- 2.** The suit is for declaration about exclusive ownership of the Plaintiff over the movable and immovable property left by his mother-Zarin Deolaliwalla. There are also other reliefs.
- 3.** Pending hearing of this suit, the present interim application is filed claiming for various reliefs against Defendant No. 1. It includes injuncting

him from creating third party interest in respect of movable and immovable properties. Though interim relief is sought against Society also, if relief is granted against Defendant No.1, Plaintiff is not pressing that relief. Relationship in between the parties is admitted. Description of the property is admitted.

4. The description of the immovable property and moveable properties is given on page no. 30 Exhibit A of the plaint. Whereas the detail description of the movable property is given in Schedule I attached to testamentary petition which is on page nos. 411 to 416 of the present plaint. The description is as follows :--

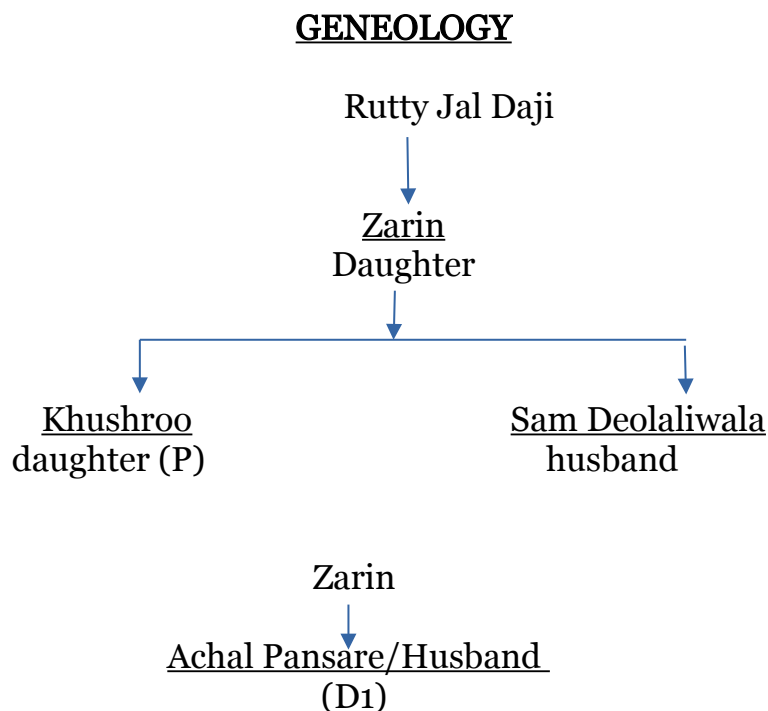
a. immovable property consists of flat no. 702, situated in C wing of building Chandan, Vile Parle (West) Mumbai alongwith car parking space.

b. The movable property consists of :--

- i. ancestral jewellery;
- ii. amounts in joint accounts of his late mother and defendant no. 1 and;
- iii. investment in the name of his late mother.

5. Defendant No. 1 has also filed Written Statement. There are two rival claims. One by the plaintiff being the daughter of one Zarin Dealaliwala and by the defendant no.1 being the second husband of deceased Zarin and the sole beneficiary of the will left by deceased Zarin.

The genealogy is as follows :--



6. The facts pleaded by the plaintiff are as follows :--
- a. Maternal grandmother Ruty Jal Daji owns a flat at Dobi Talao.
 - b. She sold the flat in or around 1981-82 and purchased new flat in Chandan building, Vile Parle.
 - c. However Ruty purchased in her name and in the name of mother Zarin.
 - d. Plaintiff Khushroo is the daughter of Zarin born out of wedlock of Zarin and Sam.
 - e. They divorced each other in the year 1978.
 - f. Zarin and D-1 married on 12/2/1984.
 - e. Ruty grandmother of the plaintiff passed away in 1997 and

the flat entirely devolved of Zarin.

- f. D-1 added his name as nominee in the record of D-2 Society on 29/8/1998.
- g. there was development of the building and Agreement for Permanent Alternate Accommodation was executed with Zarin and D-1.
- h. Zarin passed away on 9/12/2021.
- I. D-1 filed testamentary Petition on the basis of will dated 15/7/2017.
- j. **Plaintiff objected for grant of probate. It is converted into Testamentary Suit.**

7. On this background, this suit is filed for declaration that the plaintiff is the sole beneficiary of the property left by her mother. D-1 pleaded that he married with Zarin on 12/12/84 and he gave ornaments to Zarin at the time of their marriage. He was having income from his salary and he has contributed for purchase of the flat at Chandan building. On the basis of letter given by Zarin, his name was entered in the record of the D-2. It is the Defendant no.1 who has taken care of Zarin through out and plaintiff had never looked after her.

8. Both the counsels relied upon different provisions of Indian Succession Act. Plaintiff's relied upon the provisions of Section 51 and 213 whereas defendant's counsel relied upon the provisions of section 211 of

the said Act.

9. There are two issues: -

- (A) About intestate succession in case of Parsi.
- (B) What is the effect of un-probated will?

10. It is true that as per the provisions of Section 51 of the Indian Succession Act property of Parsi who dies intestate devolves upon widow/widower/children in equal proportion. There is no dispute that Plaintiff is the son of the deceased Zarin. Whether he looks after mother or not is not the relevant issue. Admittedly, the agreement for permanent alternate accommodation and the share certificate records the name of the deceased-Zarin and defendant no.1. My attention is also invited to the will executed by the deceased-Zarin. It is on page no. 386 of the written statement. She has described herself as joint owner alongwith defendant no. 1. No doubt Section 211 of the Indian Succession Act deals with vesting of the property of deceased person in executor or administrator as the case may be. He is legal representative for all the purpose of the deceased. Whereas as per provision of Section 213 of the Indian Succession Act unless the probate is granted, executors of the will cannot be established his right in any court of justice. Yet testamentary petition is pending. So even though Defendant No. 1 placed reliance on provision of Section 211 of the Succession Act, till the time testamentary petition is pending, I think we cannot deny the Plaintiff of his rights. We have to

interpret the provisions harmoniously.

11. In view of the above, there is *prima facie* case in favour of the Plaintiff. As on today, the share certificate stands in the name of the Defendant No. 1 and the deceased - Zarin, if that is sold on the basis of these documents, the Plaintiff will face difficulty in executing the decree that may be passed in future.

12. So he will suffer irreparable loss if Defendant No. 1 is not enjoined. Balance of convenience also lies in the favour of the Plaintiff. Merely because there is an allegation that Plaintiff has not taken care of the mother cannot be amount to denial of the legal rights to the plaintiff.

13. The movable property consists of the jewellery and balance in the saving accounts and investment in funds. As on today, Plaintiff is claiming 25% share of these properties. It is for the reason that his mother - Zarin and Defendant No. 1 were the owners of 50% each. As per Section 51 of the Indian Succession Act, the Plaintiff can get 25% out of that 50%. Though initially both the Counsel submitted that let application be heard for ad-interim reliefs, later on they are consented for deciding the application finally.

14. The prayer clause 'a' reads thus:-

“a) That pending hearing and final disposal of the Suit, the Defendant No. 1 his family members, new wife, brother, sister or their families, servants or agents or any one claiming through him be retrained from in any manner.

dealing with, selling, transferring, gifting, disposing of or taking away or parting with possession or creating any charge, mortgage, encumbrance or third party rights whatsoever on the Suit Premises at Exhibit A, shares to be issued by Defendant No. 2 and the ancestral maternal jewellery or the amounts lying in the Joint Accounts including amounts received on redevelopment, investment, mutual funds of the late mother, described in Exhibit A or any part thereof to or in favour of any third party”.

15. So I am inclined to allow the application.

16. As it is claimed that Defendant No. 1 is aged about 70 years old. He has to incur expenses on medical also. There is an insistence that at least there should be interim relief so far as jewellery is concerned. I do not think interim relief can be granted in respect of movables because even if they are sold out, plaintiff can be compensated in terms of the money. Only Defendant no. 1 can be directed to maintain account of all these movable and to supply to it Plaintiff on demands.

17. Hence interim application is allowed in terms of prayer clause ‘a’ in the following terms:-

ORDER

- (i) To the extent of 25 % Defendant No. 1 is restrained from selling or creating third party interest in any manner in respect of the immovable property described on page no. 30 till disposal of the

suit.

- (ii) Interim relief so far as movable property to the extent of 25% is rejected.
- (iii) Let Defendant No. 1 to maintain accounts to the extent of 25% movable property described in schedule-I of testamentary petition and give those details on demand by the Plaintiff.
- (iv) Let Plaintiff also not disturb possession of the Defendant No. 1 in respect of that flat except by following due process of the law. This is recorded on the basis of the submission made on behalf of the Plaintiff.

[S. M. MODAK, J.]