

Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O.O.C.J.

NOTICE OF MOTION NO. 1576 OF 2015
IN
SUIT NO. 693 OF 2015

Sudha Aziz Jhaveri and Ors.

Applicants /
.. Orig. Plaintiffs

Versus

Bharat Amarchand Doshi and Ors.

.. Defendants

.....

- Mr. Ravi Kadam, Senior Advocate a/w. Mr. Ashish Kamat, Senior Advocate a/w. Mr. Vaibhav Bhure, Mr. Ashwin Shete, Mr. Abhay Dhadiwal, Ms. Isha Bafna, Ms. Mihir Kakade i/by Jayakar & Partners for Plaintiffs.
- Mr. Rohaan Cama a/w. Mr. Anish Karande and Ms. Bhakti Bhanushali i/by Sonal Doshi & Co. for Defendant No.1.
- Mr. Mustafa Kachwala a/w. Ms. Ketki Pansare i/by Kachwala Misar & Co. for Defendant Nos.2 & 3

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CORAM : MILIND N. JADHAV, J.

Reserved on : APRIL 27, 2023.

Pronounced on : JUNE 05, 2023.

JUDGMENT:

1. Heard Mr. Kadam learned Senior Advocate for Plaintiffs; Mr. Cama, learned Advocate for Defendant No.1 and Mr. Kachwala, learned Advocate for Defendant Nos.2 and 3.

2. The present Notice of Motion is filed in 2015 for the following reliefs:-

- (a) *that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass an order of injunction restraining Defendant nos. 1 and 5, their servants, agents, assigns or any person or entity claiming by under of through them, from in any manner transferring, alienating, encumbering or creating any third party rights, title or interest or parting with possession*

of or inducting any third party in the suit property, more particularly described in Exhibit A to the Plaint or any part thereof or in respect of any right of interest therein;

- (b) that pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver, High Court, Bombay as the Receiver of the suit property with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908, including to collect all rent / license fees / income / amounts in respect of the suit property including to take possession of the suit property and to handover possession of the same to the Plaintiffs;*
- (c) that pending the hearing and final disposal of the present suit, this Hon'ble Court be pleased to order and direct the Defendant No. 1 to :*
 - (i) deposit in Court the rent / license fees or such other income / amounts received by or to be received by Defendant No. 1 in respect of the suit property;*
 - (ii) Disclose the entire accounts in respect of the payments made to Defendant No. 1 towards rent, compensation and / or license fees for using and / or occupying the suit property.*

3. Parties shall be addressed to as Plaintiffs and Defendants for convenience. Plaintiffs and Defendant Nos. 1 to 4 are children of late Mr. Amarchand Sunderji Doshi who passed away on 15.08.1984 and late Mrs. Chandangauri Amarchand Doshi who passed away on 07.10.2012. Plaintiffs have filed the present Suit, *inter alia*, seeking partition of the suit property being land hereditaments and premises lying and being situate at Bail Bazar Road, i.e. Kurla Andheri Road and now known as Kale Marg, Kurla, Mumbai – 400 070 as in Greater Bombay in registration District of Mumbai city and suburban bearing CTS No. 117 forming part of land of a larger plot admeasuring area of 3169.17 sq. mtrs. or thereabouts along with the structure consisting of ground floor having an area admeasuring 2,234 sq. mtrs. Recorded in

the Municipal Assessment No. L-3113(1B) 33 C.2202.00 sq.mtrs. (“**Suit property**”) in four equal shares as gifted by Chandangauri under Gift Deed dated 31.03.2001 in favour of Plaintiffs and Defendant No. 4 and put the Plaintiffs in possession of their $\frac{1}{4}^{\text{th}}$ share each.

3.1. Notice of Motion is filed seeking, *inter alia*, injunction from creating third party rights in respect of the suit property, appointment of Court Receiver to collect all rent, license fee, income in respect of the suit property including to take possession of the suit property and direct Defendant No. 1 to deposit in Court the rent / license fee received by him in respect of the suit property.

4. Facts which are relevant for the purpose of passing order on interim relief are outlined herein under:-

4.1. Amarchand Doshi was the owner of properties described as “the said estate” at Exh. “B” to the Plaint. The said estate includes Survey Nos. 115, 116 and 117. Suit property i.e. Survey No. 117 forms part of the said estate. During his life time he created a Trust in connection with the adjoining property (suit property in another companion Suit No. 733 of 2016) in favour of Defendants to the exclusion of the Plaintiffs and Defendant No. 4. On 15.12.1965, Amarchand Doshi made a Will and appointed his wife Chandangauri as executor and bequeathed the said estate in her favour. On 15.08.1984, Amarchand Doshi passed away. This being the position,

the mother Ms. Chandangauri during her life time thought it fit that the suit property in this suit proceedings be gifted to the daughters i.e. Plaintiffs and Defendant No.4. On 24.09.1984, Plaintiffs and Defendant Nos. 1 to 4 executed an Affidavit / Declaration acknowledging the fact that in view of the Will dated 15.12.1965, only Chandangauri had right, title and interest in the said estate. It is crucial to note that in the said Affidavit, it was declared that Plaintiffs and Defendant Nos. 1 to 4 had no objection to grant of probate of Amarchand Doshi's Will dated 15.12.1965 in favour of their mother Chandangauri. On 09.10.1986, Chandangauri executed a Power of Attorney in favour of Defendant No. 1 for performing certain acts as mentioned therein for and on her behalf in respect of the said estate. During the course of submissions, copy of the Power of Attorney has been placed on record by Defendant No. 1. It is Plaintiffs' case that Defendant No. 1 misused the Power of Attorney and entered into several fraudulent transactions purportedly acting in breach of the said Power of Attorney by taking advantage of the failing health and old age of Chandangauri. This is infact alleged by Chandangauri herself in her Affidavit in support dated 11.06.2002 to Notice of Motion No. 1690 of 2002 in Testamentary Suit No. 16 of 2002 seeking dismissal of the caveat filed by Defendant No. 1. On 23.08.1989, Chandangauri filed petition being Petition No. 558 of 1989 in this Court for seeking probate of late Amarchand Doshi's Will in her capacity as the executrix

of the said Will. On 23.08.1989, Defendant No. 1 filed an Affidavit giving his consent for the grant of probate in favour of Chandangauri. It needs to be noted that after the Affidavit dated 24.09.1984 filed by the Plaintiffs and Defendant Nos. 1 to 4 acknowledging that only Chandangauri had right, title and interest to the said estate, this is the second instance of Defendant No. 1 having given his consent for grant of probate of Amarchand Doshi's Will in favour of Chandangauri. Incidentally, the Probate Petition was dismissed for want of certain compliances on 26.06.1994. Acting on the Power of Attorney given by Chandangauri to Defendant No. 1, Defendant No. 1 was permitted to deal with the suit property by letting it out to third parties thereafter. On 05.06.1998, Chandangauri by her letter of Authority addressed to one Lalit Kapur permitted Defendant No. 1 to rent out the suit property to Lalit Kapur. Similarly by another letter dated 27.10.1998, Chandangauri addressed a letter to M/s. BPL Ltd permitting Defendant No. 1 to rent out the suit property to M/s. BPL Ltd. Defendant No. 1 entered into agreement with Lalit Kapur and M/s. BPL Ltd subsequently. Substantial amounts were received per month towards lease rent by Defendant No. 1 in respect of the suit property including security deposit. It is Plaintiffs' case that Defendant No. 1 never disclosed the true accounts of the rent received by him in respect of the suit property which belonged to Chandangauri. Because of the above happenings on 15.03.2001, Chandangauri by her Advocate's

notice revoked the Power of Attorney dated 09.10.1986 executed in favour of Defendant No. 1. Thereafter by a registered Gift Deed dated 21.03.2001, Chandangauri gifted the suit property to Plaintiffs and Defendant No. 4 (her four daughters) to be equally distributed between them. By the said registered Gift Deed, right, title and interest in the suit property has been conveyed and transferred in favour of Plaintiffs and Defendant No. 4 jointly. It is pertinent to note here that Defendant No. 1 has not disputed the gift deed nor challenged it in any proceedings. Thereafter on 30.03.2001, Chandangauri by her Advocate's notice called upon Defendant No. 1 to disclose the details of all documents and transactions executed by him in respect of the properties belonging to her acting under the Power of Attorney and called upon him to furnish details of various bank accounts operated by him as her Constituted Attorney along with the bank statements. By the said notice, it was also informed to Defendant No. 1 that suit property was gifted by Chandangauri to Plaintiffs and Defendant No. 4. It is pertinent to note that on 02.04.2001, Defendant No. 1 by his Advocate's reply to the notice dated 30.03.2001 gave false and evasive response without disputing Chandangauri's ownership nor pleadings in family arrangement nor referring to any documents, *inter alia*, pertaining to his alleged tenancy. In view of Defendant No. 1's non-cooperation, Chandangauri was forced to address letters to the occupants of the suit property

through her Advocate seeking information about the documents / deeds under which they were occupying the suit property and details with respect to the compensation/rentals/security deposit paid by them to Defendant No. 1. The occupants of the suit property namely M/s. BPL Ltd replied to Chandangauri's letters and informed her that they were in possession of the suit property under an agreement executed with Defendant No.1 but declined to give any information. This resulted in Chandangauri taking steps for restoration of Probate Petition No. 558 of 1989 which was dismissed for want of compliances as far back as on 26.06.1994. Probate Petition No. 558 of 1989 was restored on 26.09.2001. As soon as the Probate Petition was restored, Defendant No. 1 filed a caveat opposing the grant of probate in favour of Chandangauri despite earlier granting consent by his own affidavit dated 23.08.1989. No specific reasons were assigned or given by Defendant No. 1 for withdrawal of his consent granted through his earlier affidavit. Chandangauri and Defendant No. 1 filed opposing affidavits against each other due to which Probate Petition No. 558 of 1989 was converted to Testamentary Suit No. 16 of 2002. Chandangauri filed Notice of Motion No. 1690 of 2002 in Testamentary Suit seeking dismissal of the caveat filed by Defendant No. 1. By order dated 23.09.2002, Notice of Motion was dismissed. On 03.06.2003, Chandangauri filed a complaint with the Dy. Commissioner of Police against Defendant No. 1 stating that he had

forged her signature and manipulated her income tax returns and misappropriation of funds. Correspondence ensued between Defendant No. 4 and Defendant No. 1 in respect of the suit property thereafter. On 08.07.2005, this Court in its order passed in Testamentary Suit recorded that Defendant No. 1 prayed for withdrawal of the caveat which was allowed to be withdrawn. The order further recorded that in view of the withdrawal of the caveat, Testamentary Suit No. 16 of 2002 and the Motion did not survive and were disposed of accordingly. Throughout the above instances / time line, Defendant No. 1 did not plead and place reliance on any family arrangement of 1986 whatsoever.

4.2. On 17.08.2005, Defendant No. 4 filed a partition suit bearing Suit No. 2492 of 2005 against Defendant No. 1 seeking partition of the suit property between Plaintiffs and Defendant No. 4 on the basis of the registered Gift Deed dated 21.03.2001. Notice of Motion No. 2747 of 2005 was filed along with the Suit for appointment of the Court Receiver in respect of the suit property. By order dated 27.09.2005, this Court appointed a Court Receiver in respect of the suit property recording that Plaintiffs therein i.e present Defendant No. 4 was claiming right in the suit property pursuant to the registered Gift Deed dated 21.03.2001 and that occupation of Defendant No. 1 of the suit property was unlawful. It is pertinent to

note that despite appointment of the Court Receiver, Defendant No.1 failed and neglected to execute the Agency Agreement. Court Receiver filed Report No. 132 of 2006 seeking appropriate directions. By order dated 06.10.2006, the statement of Defendant No. 1 was recorded that Defendant No. 1 shall execute Agency Agreement in respect of the suit property. However, despite the aforesaid statement having been recorded, Defendant No. 1 failed and neglected to execute the Agency Agreement. On 09.03.2007, this Court directed the Court Receiver to take forcible possession of the suit property. However on 07.06.2007, Defendant No. 4 withdrew her Notice of Motion No. 2747 of 2005 wherein the above orders were passed with liberty to file a fresh Motion. Thus, the order of appointment of Court Receiver got automatically subdued in view of the withdrawal of the Notice of Motion by Defendant No. 4.

4.3. Defendant No.1 has pleaded that sometime in March 2006, he entered into an agreement with M/s. Hiranandani Developers Pvt Ltd to develop the said estate belonging to Chandangauri which also include the suit property (Survey No. 117). In the said agreement, it was stated that Defendant No. 1 and his family members namely Plaintiffs and Defendant Nos. 1 to 4 are the absolute owners and possession holders of the said estate. According to Defendant No. 1, M/s. Hiranandani Developers Pvt Ltd agreed to pay each individual

i.e. son and daughter of Chandangauri certain amounts in respect of their share in the property and accordingly, Plaintiff No. 1 received Rs. 15 Lakhs, Plaintiff No. 2 received Rs. 30 Lakhs from Hiranandani Developers and Rs. 25 Lakhs from Defendant No. 1 and Plaintiff No. 3 received Rs. 35 Lakhs from Defendant No. 1. However, the agreement with M/s. Hiranandani Developers Pvt Ltd did not fructify as none of the parties were called upon to execute any document in that regard thereafter. On 07.10.2012, Chandangauri passed away. On 10.12.2012, Defendant No. 1 filed Chamber Order (L) No. 889 of 2012 in Testamentary Suit No. 16 of 2002 for substituting his name in place of late Chandangauri in Probate Petition No. 558 of 1989 on the basis of a purported Will dated 18.09.2012 supposedly executed by Chandangauri in favour of Defendant No. 1 only to the exclusion of all other legal heirs. The said Will dated 18.09.2012 of Chandangauri was placed on record by Defendant No. 1 by filing an additional affidavit dated 08.01.2013 in the Chamber Order. According to the Plaintiffs, the said Will is forged by Defendant No. 1 and is fabricated document. Plaintiffs have challenged the genuineness and validity of execution of the said Will dated 18.09.2012.

4.4. On 05.11.2014, Suit No. 2492 of 2005 filed by Defendant No. 4 came to be dismissed for non prosecution as none was present. According to Plaintiffs, Defendant No. 4 and Defendant No. 1 arrived

at some arrangement between themselves in view of which Defendant No. 4 did not pursue Suit No. 2492 of 2005 and allowed it to be dismissed for non-prosecution. Plaintiffs thereafter sought details of occupation of Defendant No. 5 of the suit property which was replied to by Advocate for Defendant No. 5. On 23.04.2015, Plaintiffs filed the present Partition Suit i.e. Suit No. 693 of 2015 along with present Notice of Motion.

4.5. Defendant No. 1 filed his written statement on 12.02.2016 wherein for the first time, he pleaded the case of an oral family settlement which was the basis for Suit No. 2492 of 2005 filed by Defendant No. 4 (Plaintiff therein) to be withdrawn as dismissed. It needs to be corrected that the suit was not dismissed as withdrawn but was dismissed for non prosecution as none was present. The factum of an oral family settlement arrived at between the parties first in the year 1986 and thereafter having modified was placed on record for the first time by Defendant No. 1 in his written statement. On 02.05.2016, this Court by a common order allowed Chamber Summons No. 88 of 2014 filed by Plaintiffs and Defendant No. 3 seeking substitution in place of Chandangauri as Petitioners in Testamentary Petition No. 558 of 1989 on the ground that this Court found that Plaintiff and Defendant No. 3 were more suitable as administrators and in the process dismissed Chamber Summons No.

889 of 2012 filed by Defendant No. 1 seeking a similar relief of substitution. On 15.02.2017, Letters of Administration granted by this Court in Testamentary Suit No. 16 of 2002 to Plaintiffs and Defendant No. 3.

4.6. On 12.04.2017, Defendant No. 1 filed his affidavit-in-reply to the Notice of Motion by relying upon his written statement and annexing a copy thereof to the affidavit-in-reply. On 12.05.2017, Defendant Nos. 2 and 3 filed their affidavit-in-reply to the present Notice of Motion categorically denying any oral family settlement as alleged by Defendant No. 1. Plaintiffs in their rejoinder also denied any oral family settlement as alleged by Defendant No. 1. On 25.08.2022, Defendant No. 4 filed affidavit in the present Notice of Motion stating that she had got paid as per the purported oral family settlement and had no claim against Defendant No. 1.

4.7. From the above , it is clear that Defendant No. 4 who had initially filed the Suit for partition on the basis of the registered Gift Deed by Chandangauri in favour of Plaintiff Nos. 1 to 3 and Defendant No. 4 allowed her Suit to be dismissed for non prosecution and is now supporting Defendant No. 1.

5. Mr. Kamat, learned Senior Advocate appearing for the Plaintiffs has made the following submissions:-

5.1. That the above Suit has been filed, *inter alia*, for partition of a plot of land bearing CTS No. 117, admeasuring an area of 3169.17 Sq.mtrs. along with the structure standing thereon admeasuring 2,234 Sq.mtrs., more particularly described at Exh. "A" to the Plaint which has been gifted to the Plaintiffs and Defendant No.4 by their mother Mrs. Chandangauri Amarchand Doshi ("late Chandangauri") under a duly stamped and registered Gift Deed dated 31.03.2001 and for consequential reliefs. Defendant No.1 has unlawfully misappropriated the rents, Security Deposit and other gains / income received from the suit property and not provided the details in respect thereof to the Plaintiffs, who are the legal and rightful owners of the said property. Plaintiffs have therefore sought an order and decree against Defendant No.1 in respect of the unlawful gains made by him in respect of the suit property and an order directing Defendant No.1 to disclose on oath the entire accounts in respect of amounts received by him in respect of the suit property;

5.2. That the manner in which the Plaintiffs have acquired right, title and interest in the suit property under the registered and stamped Gift Deeds has been stated in detail in the Plaint. As stated in the plaint, Defendant No.1 without any authority in law has been enjoying the benefits in the form of rents and monies generating from the suit property and despite repeated requests, Defendant No.1 has not

provided to the Plaintiffs who are the rightful owners of the suit property accounts of the income derived from the suit property;

5.3. That in the year 2005, Defendant No.4 filed Suit No. 2942 of 2005, *inter alia*, against Defendant No.1, Mr. Lalit Kapur and M/s. BPL Limited for partition of the suit property on the basis of the same Gift Deed dated 31.03.2001. The Plaintiffs and Defendant Nos. 2 and 3 were proforma Defendants in the said Suit No. 2492 of 2005. Several orders came to be passed in the said Suit, including the appointment of the Court Receiver in respect of the suit property and order directing the Court Receiver to take forcible possession of the suit property as Defendant No.1 had failed and neglected to execute the agency agreement with the Court Receiver.

5.4. That as Suit No. 2492 of 2005 was pending, the Plaintiff therein (Defendant No. 4 herein) did not take any action to pursue her rights under the Gift Deed dated 31.03.2001. However, subsequently somewhere in or around 05.11.2014, Plaintiffs came to know that on account of some arrangement arrived at between Defendant No.4 and the 1st Defendant, Defendant No.4 was not pursuing the Suit filed by her and accordingly the said Suit had been dismissed for non-prosecution by order dated 05.11.2014;

5.5. That Defendant No.1 has all along been aware about the registered Gift Deed dated 31.03.2001 under which the Plaintiffs and

Defendant No.4 are the absolute owners of the suit property. Defendant No.1 has not disputed the Gift Deed dated 31.03.2001 nor challenged it. Defendant No.1 is aware and had been put to notice about the execution of Gift Deed since 2001. In spite of the same he has refused to provide any information with respect to the Tenants / Licensees inducted by him in the Suit property and has been illegally and unlawfully using and occupying the same. That Defendant No.1 has illegally earned huge rents from the suit property upon which the Plaintiffs have a lawful claim. Plaintiffs apprehend that the Defendant No.1 may sell out the Suit property without informing them and hence seek urgent reliefs. That today the suit property is vacant and Defendant No.1 has not been successful in preserving and augmenting it & hence Receiver be appointed.

6. *PER CONTRA*, Mr. Cama, learned Advocate for Defendant No. 1 has in his reply made the following submissions:-

6.1. That Plaintiffs have filed the present suit in respect of the suit property described at Exh. "A" to the Plaint. It is the case of Defendant No. 1 that he has substantiate legal and judicial rights in the suit property in the following manner:-

- (i) That Defendant No.1 has 100% ownership of the suit property under an oral family arrangement, duly acted upon by the parties under which

substantial payments were made by / on behalf of Defendant No. 1 to the Plaintiffs and Defendant Nos. 2 to 4;

- (ii) That Strictly without prejudice and in the alternative to the above submission, he would submit that even assuming that the Gift Deed dated 31.03.2001 under which the Plaintiffs' claim subsists and holds the field, Defendant No. 4 was a 1/4th co-owner of the property. Defendant No. 1 has admittedly settled the claims / disputes with Defendant No. 4 Ms. Jyoti Choudhary (for short '**Jyoti**') and Jyoti has executed a Release Deed dated 23.11.2022 in favour of Defendant No.1, releasing unto him any and all rights, title and interest that she may have in the suit property. As per the Plaintiffs' case, Jyoti would be entitled to 1/4th share in the suit property under the subject Deed of Gift. Thus, even going by the Plaintiffs' case, upon Jyoti releasing her rights to Defendant No. 1, Defendant No. 1 has 1/4th share in the suit property. According to him one co-owner can, in law, enjoy and occupy the entire suit property and

there is no question of dispossessing the Defendant No. 1 therefrom. This is, as aforesaid, and as specifically recorded in Recital 4 of the Deed of Release, without prejudice to the aforesaid family arrangement and Defendant No.1's case that Defendant No. 1 is entitled to a 100% share in the suit property;

- (iii) Even otherwise, assuming *arguendo* that the Gift Deed subsists, Defendant No.1 was a tenant of the suit property and has been recognized as such by his mother Chandangauri and the Plaintiffs as is evident from the documents placed on record, including but not limited to the letters from Chandangauri placed on record by Defendant No. 4 (Page Nos.6 and 7 of D4's Affidavit). That Plaintiffs' claim through Chandangauri is therefore bound by her prior acceptance of Defendant No. 1 as a tenant of the suit property. Therefore Defendant No. 1 has every right to continue in exclusive possession of the entire suit property;

6.2. That the fact that Defendant No. 1 is in exclusive possession of the suit property is an admitted position and is borne out *inter alia*

from (i) the nature of the reliefs sought in the Notice of Motion i.e. seeking that the Court Receiver take possession from Defendant No. 1 and (ii) paragraph No.22 of the affidavit-in-rejoinder, in which it has specifically been stated that over the years Defendant No. 1 has “....*exclusively enjoyed benefits of immovable properties....*” which include the suit property. Thus exclusive possession of Defendant No.1 is admitted;

6.3. That the interim order sought, is in effect to dispossess Defendant No. 1 and to hand over possession to the Court Receiver. This relief which is entirely misconceived as it seeks interim relief which is not in furtherance or in aid of the final reliefs. The final reliefs in the Plaint are only for a decree partitioning the property and to put “the Plaintiffs” jointly with Defendant No. 4 in possession of $\frac{1}{4}^{\text{th}}$ share each in the suit property and for a direction to Defendant No.1 to deposit rent / license fees / income received and to be received in respect of the suit property and to disclose accounts in respect of payments made for his using the suit property. That it is evident from the above that there is no final relief seeking a declaration that Defendant No. 1 is either a trespasser, or in unauthorized occupation and possession of the suit property. There is no prayer for handing over of possession by Defendant No. 1. This being the case, there is no final relief sought for in the Plaint which

could ever have the effect, even if the suit is decreed, of removing Defendant No. 1 from possession of the suit property. Thus no interim relief having the effect of dispossessing Defendant No. 1 can be granted in aid of, or in furtherance of the above final reliefs. Before I proceed to Mr. Cama's next submission, prayer clause (d) in the suit plaint prays for Receiver in the interim. Hence, the above submission of Mr. Cama is incorrect.

6.4. That the case of Defendant No. 1 is that under an oral family arrangement, as set out below, Defendant No. 1 is the sole and exclusive owner, and is entitled to the suit property in full. This is borne out from the following facts and events:

- (a) The father of the parties, Amarchand Doshi was admittedly the owner of the subject property. Amarchand Doshi died on 15.08.1984. Under his Will dated 15.12.1965, the suit property was bequeathed to his wife Chandangauri;
- (b) From 09.10.1986, under a Power of Attorney executed by Chandangauri in favour of Defendant No. 1, Defendant No. 1 has been in exclusive possession of the suit property (apart from the then tenancies existing thereon). Defendant No. 1 has from time to time admittedly given the subject property or parts thereof

on leave and license from 1998 *inter alia* to BPL Limited and Skoda. At no point in time have any of the Plaintiffs, vide any legal proceedings, ever asserted any right, title or interest in the suit property till the present suit filed in 2015 and they have never taken any steps whatsoever for the purpose of clearing the existing tenants and / or (even for 8 years after the filing of the suit) maintaining the subject property and / or preserving the property. Once again, this submission is again incorrect. Defendant No. 4 filed the Partition Suit in 2005 for self and the Plaintiffs on the basis of registered Gift Deed.

6.5. That on 31.03.2001, the subject Gift Deed purportedly came to be executed by Chandangauri in favour of the Plaintiffs and Jyoti. It is only at this stage that questions were raised against Defendant No. 1 for the first time. As borne out from the facts set out hereafter, the Gift Deed was never acted upon and was given a go-by and eventually superceded by the oral Deed of Family Arrangement. From the execution of the Gift Deed in March, 2001 and the Advocates' correspondence in 2001 there is absolutely nothing on record to show that the Plaintiffs had at any prior point in time asserted their right to the suit property. That Plaintiffs neither sought possession thereof nor

sought to enforce any rights in respect of the suit property. They did not offer to maintain the suit property or pay a rupee in this regard. In fact, from the record it appears clear that Plaintiffs did nothing whatsoever in respect of the suit property as they were well aware that the Gift Deed was never intended to be acted upon;

6.6. That for carrying out the settlement, one Hiranandani Construction Private Limited (for short ‘**HCPL**’) and Hiranandani Developers Private Ltd. (for short ‘**HDPL**’) were found as appropriate Developers to pay off the Plaintiffs and Defendant Nos. 2 to 4 and between 2008-2012 HCPL / HDPL and / or Defendant No. 1 made the following payments to parties herein:

Jyoti Choudhary – Defendant No. 4	1.50 Crores
Nalini Shah – Plaintiff No. 3	35 Lakhs
Sudha Jhaveri – Plaintiff No. 1	15 Lakhs
Sonal Dhanak – Plaintiff No. 2	45 Lakhs (55 Lakhs according to the Plaintiffs)
Harish Doshi – Defendant No.2	1.50 Crores
Kirit Dohsi – Defendant No.3	77 Lakhs

6.7. That it is an admitted position that from and after 1986 Defendant No. 1 has exclusively been in possession and has been handling the subject property, including giving the same on leave and license. No objection was ever taken to the same by the Plaintiffs. Certain letters have been written by Chandangauri and one by the

Plaintiffs in 2001, through Advocates which were entirely given a go-by and no action was taken further to the same. The Plaintiffs have not asserted any rights in respect of the subject property either before or after the execution of the Gift Deed on 31.03.2001. The Plaintiffs have never shown any interest whatsoever in the property or in its maintenance. While the Plaintiffs initially sought to take cover of the suit filed by Jyoti, they did not at any point themselves assert any rights. That even after the Court Receiver stood discharged on 07.06.2007 and until filing of the present suit 8 years later, the Plaintiffs did not take any steps whatsoever to assert any rights whatsoever in respect of the suit property;

6.8. That strictly without prejudice to Defendant No. 1's ownership rights, either 100% or as a $\frac{1}{4}$ th co-owner to Jyoti i.e. Defendant No. 4, Defendant No. 1 is entitled to continue in possession of the property on the basis of his admittedly being a tenant of the subject property. The Plaintiffs claim only through Chandangauri. Chandangauri has however specifically acknowledged that the Plaintiff was, in fact, a tenant of the subject property. This admission is contained in the following documents :-

- (a) A letter dated 14.05.1998 addressed by Chandangauri certifying that Defendant No. 1 had been granted tenancy rights *inter alia* for the suit property and all structures, along with the basement

underneath the building. The letter records that there is a specific right vested in Defendant No. 1 “*to sublet, assign, transfer these rights and/or carry on any lawful business*”. Thus, it is clear that Chandangauri has granted a tenancy in respect of the subject property and Defendant No. 1 has been given unfettered rights to sublet, assign, transfer and/or carry on any lawful business on the subject property;

- (b) Further, by a letter dated 30.03.2001, addressed on behalf of Chandangauri, her Advocates specifically stated that Defendant No. 1 is one of the tenants in respect of the premises standing on the subject plot, and instructed Defendant No. 1 to make payment of the monthly rent to Jyoti. It was further noted that Defendant No. 1 had sublet the premises and the documents in that regard were sought for by the Advocates for Chandangauri;
- (c) Pertinently, Defendant No. 4 has set out at length and accepted the existence of Defendant No. 1’s tenancy right in paragraphs 4 and 5 of her Affidavit dated 26.08.2022 filed in the present Notice of Motion;
- (d) The Plaintiffs too rely on Defendant No. 1’s tenancy

right to contend, albeit, out of context, that Defendant No. 1 recognized Chandangauri as the owner of the suit property. This too is a clear admission of Defendant No. 1's tenancy rights;

6.9. Hence, accordingly, Defendant No. 1 cannot be evicted from the subject property as he has tenancy rights therein. The appointment of the Court Receiver would amount to, in effect, dispossessing Defendant No. 1 of his tenancy rights. Even otherwise, this Court respectfully, would not have jurisdiction to pass such orders, as all matters relating to possession of a tenanted property, either under the Rent Act or under the Transfer of Property Act, 1882, lie within the exclusive jurisdiction of the Hon'ble Small Causes Court.

6.10. On the basis of the above submissions, he would pray for dismissal of the Notice of Motion.

6.11. Mr. Cama in support of his above submissions has referred to and relied upon the following decisions:-

- (i) **Nargindas Ramdas Vs. Dalpatram Ichharam @ Brijram & Ors.**¹;
- (ii) **Bombay Forging Ltd Vs. M/s. Manilal & Son**²;
- (iii) **Therakan D. Joseph Vs. M/s. Dolphin Developers**³;
- (iv) **Govind Narain Rao Desai Vs. Vallabhrao**

¹ (1974) 1 SCC 242

² Judgment dated 22nd & 23.03.2016 in OS Appeal (L) No. 579 of 2015

³ Judgment dated 15.10.2013 in Appeal from Order No. 1108 of 2013

Narayanrao Desai⁴;

- (v) Ravindra Kumar Agarwal Vs. Ashok Kumar Agarwal & Ors⁵;
- (vi) Pralhad Rai Dalmia Huf & Ors. Vs. Sat Narain Dalmia Huf & Ors⁶;
- (vii) S. Saleema Bi Vs. S. Pyari Begum & Anr⁷;
- (viii) Maharaj Jagat Singh Vs. Lt. Col. Sawal Bhawani Singh & Ors.⁸;
- (ix) Metro Marins & Anr. Vs. Bonus Watch Co (P) Ltd & Ors.⁹;
- (x) Rajiv Sanghvi & Ors. Vs. Pradip R. Kamdar & Ors.¹⁰

7. Mr. Kachwala, learned Advocate for Defendant Nos. 2 and 3 has drawn my attention to the affidavit-in-reply dated 12.04.2017 and supported the Plaintiffs' case. He would submit that Defendant No. 1 has not only intermeddled with the suit property but also the Trust property out of the said estate to the exclusion of the other family members. These Defendants have categorically denied the oral family settlement alleged by Defendant No. 1. These Defendants have supported each and every submission made by Mr. Kamat and for brevity sake, I am not repeating the same.

8. I have heard the submissions from the respective Advocates and perused the pleadings. Submissions made by the Advocates has

4 1919 SCC OnLine Bom 165

5 Judgment dated 26.10.2005 in OS Appeal No. 983 of 2005

6 1999 SCC OnLine Del 503

7 (2000) 9 SCC 560

8 1991 SCC OnLine Del 191

9 (2004) 7 SCC 478

10 Judgment dated 30.06.2022 in OS Interim Application No. 571 of 2022 in Suit No. 44 of 2021

received due consideration of the Court.

9. At the outset, it is seen that though Defendant No. 1 claims substantive legal rights in the suit property since 1986, it is only for the first time in 2016 i.e. in the written statement dated 12.02.2016 he has averred his substantive right. He has said so on the basis of a purported oral family settlement of 1986 and modified later. No explanation is forthcoming for his continued silence on this alleged family settlement prior to 2016.

10. Next the most crucial circumstance for consideration in the present case is the registered Gift Deed in favour of Plaintiffs and Defendant No. 4. Defendant No. 1 has been specifically informed as far back as on 30.03.2001 by Chandangauri's Advocate in his legal Notice about this fact. Despite being aware, he has not taken any steps, if he claims to hold 100% right in the property or even tenancy rights in the suit property as argued by Mr. Cama.

11. It is seen that from 24.09.1984 upto the filing of the written statement on 12.02.2016 in the present suit 19 specific events / incidents took place which are relevant and have a direct nexus to Defendant No. 1 now claiming to be 100% owner of the suit property and / or tenant in respect of the suit property. These 19 incidents are outlined herein under:-

- (i) On 24.09.1984, Defendant No. 1 along with all parties in the present suit filed an affidavit / declaration acknowledging the fact that in view of his father's Will dated 15.12.1965 only his mother Chandangauri had absolute right, title and interest in the said estate including the suit property.
- (ii) On 09.10.1986 Chandangauri gave a Power of Attorney to the Defendant No. 1 to manage the estate. At the time of hearing copy of the Power of Attorney was shown to me. Perusal of the same clearly shows that Defendant No. 1 has been appointed as agent of Chandangauri to manage the said estate. The said Power of Attorney cannot be interpreted differently as alleged by Defendant No. 1. It does not in any manner create tenancy in favour of Defendant No. 1.
- (iii) On 23.09.1989 Defendant No. 1 gave his consent for grant of probate of his father's Will in favour of Chandangauri in Probate Petition No. 558 of 1998. If he would have claimed tenancy, which he does now, he could never have given his consent. Hence the case of he being a tenant since 1986 of the suit property is not acceptable. Claim of tenancy cannot be based upon

convenient interpretation of some documents. It has to be based on strong proven facts. Mr. Cama in his usual fairness submitted that Defendant No. 1 does not have any tenancy agreement or rent receipt issued in his favour by Chandangauri. The letter dated 14.05.1998 produced by Defendant No. 4 cannot be accepted by me at face value. I will also not give any benefit of tenancy to Defendant No. 1 on the basis of the contents of the letter dated 30.03.2001 by the solicitor of Chandangauri.

- (iv) On 05.06.1998 Chandangauri issued letter of Authority to Lalit Kapur permitting Defendant No. 1 to let out the suit property. Defendant No. 1 never objected to this letter if he claimed tenancy or ownership of the suit property since 1986.
- (v) On 15.03.2001 Chandangauri revoked the Power of Attorney given to Defendant No. 1 since he did not disclose the dealings in respect of the suit property.
- (vi) On 21.03.2001 Chandangauri by registered Gift Deed gifted the suit property to Plaintiffs and Defendant No. 4 (the daughter). Incidentally this registered gift deed is not challenged by Defendant No. 1 till date.

(vii) On 30.03.2001, Advocate of Chandangauri issued a notice to Defendant No. 1 and informed him about the registered Gift Deed. Thus since 2001, Defendant No. 1 was aware of this position. No family arrangement and / or tenancy was pleaded by him to assert his substantive rights, until the written statement was filed by him.

(viii) On 02.04.2001 Defendant No. 1 replied to the above Advocate's notice and did not plead the oral family arrangement and / or tenancy in respect of the suit property.

(ix) On 26.09.2001 Probate Petition No. 558 of 1989 which was dismissed for default earlier was restored.

(x) Defendant No. 1 filed a caveat withdrawing his consent given earlier and opposed the grant of probate. It is pertinent to note that Defendant No. 1 did not cite any specific reason for opposing the probate much less pleading ownership / oral family arrangement and / or tenancy in respect of the suit property.

(xi) On 03.06.2003 Chandangauri filed a Criminal Complaint against Defendant No. 1 with the Dy. Commissioner of Police for cheating, forgery and

misappropriation of funds in respect of the suit property.

(xii) On 08.07.2005, Defendant No. 1 himself strangely withdrew his caveat of objection to his father's Will in favour of Chandangauri. On that date the Testamentary Suit No. 16 of 2002 (from Probate Petition No. 558/1989) was disposed of.

(xiii) On 17.08.2005, Defendant No. 4 (Jyoti) filed her suit for partition of the suit property on the basis of the registered Gift Deed against Defendant No. 1.

(xiv) On 27.09.2005 Court Receiver was appointed in respect of the suit property.

(xv) Record clearly indicates that for the next two years Defendant No. 1 did not abide by orders of this Court, did not co-operate with the Court Receiver, resultantly requiring this Court to pass an order in the Notice of Motion directing the Court Receiver to take forcible possession from Defendant No.1.

(xvi) On 07.06.2007, Defendant No. 4 withdrew her Notice of Motion since she compromised with Defendant No. 1 and is now supporting him. Defendant No. 1 claims to

have purchased the $\frac{1}{4}$ th share of Defendant No. 4 in the suit property. This is argued by Mr. Cama in the alternative to claiming tenancy / ownership of the suit property.

(xvii) On 08.01.2013 after Chandangauri's demise, Defendant No. 1 filed her Will from his custody which bequeathed the said estate to him to the exclusion of all other parties / siblings.

(xviii) On 23.04.2015, the present Partition suit is filed.

(xix) On 12.02.2016, Written Statement is filed by Defendant No. 1 alleging an oral family settlement of 1986 and in the alternative claiming tenancy of the suit property from Chandangauri. It is also claimed that the family settlement was modified subsequently.

12. It is further seen that save and except averments, no substantive documents / material evidence are placed on record to *prima facie* get convinced with Defendant No. 1's case. All that Mr. Cama has argued is that this Court should not disturb the long standing possession of the suit property with Defendant No. 1. On the basis of the abovementioned observations and findings, it is clear that the suit property is being clearly wasted. I am informed across the bar that for almost the past one year it is lying vacant. No concrete and

fruitful steps are taken by Defendant No. 1 to let it out so as to preserve and augment the same and receive proceeds from the same. The suit property is a substantial commercial property. The same is being wasted today causing immense prejudice to the Plaintiffs. Record shows that Defendant No. 1 is in charge of the said estate and a parallel suit by Defendant Nos. 2 and 3 is also pending in this Court regarding the Trust property which is also held by Defendant No. 1 though that property has no nexus with the suit property.

13. I am not convinced with Mr. Cama's submissions. *Prima facie* on the basis of the above findings, the Plaintiffs have made out a case for appointment of Receiver. While hearing the matter, I suggested to Mr. Cama that if Defendant No. 1 cannot get a Lessee / Licencee within the next two months, then the Receiver would stand appointed automatically for the suit property. The suggestion was given since Defendant No. 1 had volunteered to get the lessee / licensee on his own. This was in view of the order dated 20.07.2022 passed by this Court. After taking instructions from Defendant No. 1, the suggestion was rejected resulting in passing the present order on merits. On the issue of delay also I am not convinced. It is seen that from 2005 to 2014 the Partition Suit filed by Defendant No. 4 was pending. The timeline of events alluded to herein above suggests the manner in which the parties conducted themselves. Defendant No. 1

was also prevented by this Court to implead himself in the probate petition in place of his mother late Chandangauri. It is also claimed by the Plaintiffs that the alleged Will dated 18.09.2012 of Chandangauri is an act of forgery by Defendant No. 1. All these contentions will require parties to lead evidence.

14. On Mr. Cama's submissions that admissions in pleadings will constitute a waiver of proof cannot be countenanced in the facts and circumstances of the present case. Much more substantive evidence, *prima facie*, will have to be shown by the Defendant No. 1 beyond the mere letter dated 30.03.2001 by the Solicitor for Chandangauri. There is otherwise overwhelming evidence for consideration as alluded to and discussed herein above against Defendant No. 1. Hence the Judgment in *Nagindas Ramda (supra)* will not apply. Further the Judgment in *Bombay Forging (supra)* will also not apply as no proof of tenancy, rent receipts, Agreement etc has been produced by Defendant No. 1. Decision in the case of *Therakan D. Joseph (supra)*, *Govind Narain Rao Desai (supra)* and *Ravindra Kumar Agarwal (supra)* are clearly distinguishable on facts for appointment of Receiver in the present case. On delay I have already dealt with herein above. So also on *prima facie* case, I am not convinced with the submissions of Mr. Cama. They stand comprehensively rejected. In the facts of the present case, Court

Receiver is thus required to be appointed. Notice of Motion is made absolute in terms of prayer clause (b) and c(ii) except the bracketed portion which reads thus:-

- “(b) that pending the hearing and final disposal of the suit, this Hon’ble Court be pleased to appoint the Court Receiver, High Court, Bombay as the Receiver of the suit property with all powers under Order XL, Rule 1 of the Code of Civil Procedure, 1908, including to collect all rent / license fees / income / amounts in respect of the suit property including to take possession of the suit property [and to handover possession of the same to the Plaintiffs].*
- (c) that pending the hearing and final disposal of the present suit this Hon’ble Court be pleased to order and direct the Defendant No. 1 to:*
- (ii) disclose the entire accounts in respect of the payments made to Defendant No. 1 towards rent, compensation and / or license fees for using and / or occupying the suit property.”*

15. It is further directed that the Court Receiver shall take immediate steps to let out the suit property to prospective lessees / licencees in accordance with law. After complete disclosure in terms of c(ii) is made, liberty to apply.

16. Notice of Motion is disposed of in the above terms.

[MILIND N. JADHAV, J.]

17. After the Judgment is pronounced, Mr. Karande, learned Advocate for Defendant No. 1 seeks stay of the Judgment / Order. Mr. Bhure, learned Advocate for the Plaintiffs opposes the said

request.

18. Considering the observations and findings which have been recorded and the gross facts in the present case, I am not inclined to accede to the request of Mr. Karande. Hence, the oral application for stay stands rejected.

[MILIND N. JADHAV, J.]

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