

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION
APPEAL NO. 97 OF 2024
IN
INTERIM APPLICATION(L)NO.7722 OF 2023
IN
SUIT NO.260 OF 2018**

WITH

**INTERIM APPLICATION NO.1981 OF 2024
IN
APPEAL NO. 97 OF 2024
IN
INTERIM APPLICATION(L)NO.7722 OF 2023
IN
SUIT NO.260 OF 2018**

Girish Waman Firke
B-16/3, [C13-X-5), Sahar P & T Colony
Sahar Road, Andheri (E), Mumbai
400099
Alt Add:A-503, Sunrise Tower, Rani Sati Rd
Malad (E), Mumbai-400097

..Appellant/Applicant
[Orig. Defendant No. 1]

Versus

1. Yashwanti Jaisinghrao Suryavanshi
(deleted since deceased)

..Respondent No.1/
[Orig.Plaintiff]

1(a). Mr. Kunal Jayasingrao Suryavanshi
Residing at 11341, Brandy Hall Lane,
North Potomac MD 20878 USA
Also residing at Ritusamhar Bungalow
99, Hill Road, Bandra (W),
Mumbai-400050

1(b). Mrs. Madhuri Nikhil Desai
Residing at 1246 Madison Lane,
Hockessin DE 19707 USA also
residing at Ritusamhar Bungalow,
99 Hill Road, Bandra (W), Mumbai

..Respondent Nos.1(a)

and 1(b) [the legal
heirs of the Orig.
Plaintiff]

2. RakeshKumar S. Gaud
C/o C-13-X, Block No.5
Sahar P & T Colony
Sahar Road, Ville Palle(E),
Mumbai-400099
3. Ramvikash R. Kahar
C/o C-13-X, Block No.5,
Sahar P & T Colony
Sahar Road, Vile Parle (E),
Mumbai 400099
4. Tushar Chavan
residing at B-303, Akruti Orchid Park
Andheri (E), Mumbai 400072
5. Dr.Sheetal Kamble
Residing at Ha Colony,
C-13-X/4, Sahar Road,
Andheri (E), Mumbai 400099
6. Rakesh D. Chavan
residing at B/203, Akruti Orchid Park,
Saki Nalca, Andheri (E), Mumbai
400072
7. Deepa S. More
Flat No.11, Parth Sadan,
Lokmanya Nagar, Lane No.4,
Paud Road, Pune 411038
8. Priya S. Sawant
SUNARA, Bungalow No.2,
Yashashree Colony, S. No.3/3A,
Off Cummins College Road,
Lane Opposite AREA, 52,
Karvenagar, Pune 411052

..Respondent Nos.2
to 6 [Orig. Defendant
Nos.2 to 6]

-
9. Rupa S. Lingras
Alliance Shanti, Flat No.102,
Shanti Shila Society,
Law College Road, Pune
411004
..Respondent No.7 to 9
[Orig Defendant
Nos.7(a) to 7(c) and
now transposed as
Plaintiff Nos.2(a) to
2(c)]
10. SRR Estate & Financial Pvt Ltd
At Flat No.42, in The Kshitij CHS Ltd
situated at Hill Road, Badra (West),
Mumbai 400 050
..Respondent No.10
[Orig. Defendant No.8]

Mr. Girish Waman Firke, the Appellant in-person [Original Defendant No.1 in the Suit].

Mr. Sharan Jagtiani, Senior Advocate with Mr. Piyush Raheja, Mr. Siddharth Joshi i/b Jayesh Mestry, Advocates for Respondent Nos. 1, 7 to 9 [Original Plaintiff and Defendant Nos.7(a) to 7(c) now transposed as Plaintiff Nos. 2(a) to 2(c)]

Mr. Rakesh Chavan, Respondent No.6 present in Court.

Mr. N. C. Pawar, Court Receiver is present in Court.

**CORAM: B. P. COLABAWALLA &
FIRDOSH P. POONIWALLA, JJ.**

Reserved On: February 13, 2026.

Pronounced On: April 07, 2026.

JUDGMENT: [Per B. P. Colabawalla, J.]

1. The above Appeal is filed by Original Defendant No.1 (party appearing in-person) challenging the order dated 18th April 2024 (for short “***the impugned order***”) passed by the learned Single Judge of this Court in Interim Application (L) No.7722 of 2023 in Administrative Suit No.260 of 2018. By the impugned order, the learned Judge allowed the Interim Application filed by the Original Plaintiff in terms of prayer clauses (a) and (b) which read thus:-

*“(a) that this Hon’ble Court may be pleased to allow and direct the Court Receiver High Court Bombay to sell the properties, viz. (i) Lonavala bungalow Shakuntal Villa, situated at Survey No.181, admeasuring 3498.46 sq. mtrs. at Lonavala, Taluka-Maval, District- Pune. (**Shakuntal Villa**); (ii) Lonavala plot viz bearing Survey No.186/5, admeasuring 2163.89 sq. mtrs. at Lonavala, Taluka- Maval, District- Pune. (**Lonavala Plot**); and (iii) the entire Bhimrao House Building viz land and building situated at situated at 6/54, Survey No.307, Shankarsheth Road, Girgaon, Charni Road (East), Mumbai 400004 (**Bhimrao House**) and/or Flat No.22 on the 5th Floor admeasuring about 650 sq ft and Flat Nos.24, 25 and 26 and totally admeasuring about 2350 sq ft on the entire 6th Floor of the Bhimrao House property;*

*(b) that this Hon’ble Court may be pleased to direct the Court Receiver, High Court, Bombay, that from the sale-proceeds of the said the properties viz. (i) Lonavala bungalow Shakuntal Villa, situated at Survey No.181, admeasuring 3498.46 sq. mtrs. at Lonavala, Taluka- Maval, District- Pune. (**Shakuntal Villa**); (ii) Lonavala plot viz bearing Survey No.186/5, admeasuring 2163.89 sq. mtrs. at Lonavala, Taluka- Maval, District- Pune. (**Lonavala Plot**); and (iii) the entire Bhimrao House Building viz land and building situated at situated at 6/54, Survey No.307, Shankarsheth Road, Girgaon, Charni Road (East), Mumbai 400004 (**Bhimrao House**) and/or Flat No.22 on the 5th Floor admeasuring about 650 sq ft and Flat Nos.24, 25 and 26 and*

totally admeasuring about 2350 sq ft on the entire 6th Floor of the Bhimrao House property, to pay 1/3rd share equally to the Applicant / Plaintiff and Defendant Nos.7(a) to (c) and the balance 1/3rd share be retained with the Court Receiver, High Court, Bombay and the same may be directed to be invested on a long term investment in any Nationalized Bank being the estate of late Shri Ghanshyam Kalsekar;”

2. During the pendency of the above Appeal, the Original Plaintiff (Respondent No.1 in the Appeal) expired, and his legal heirs have been brought on record as Respondent Nos.1(a) and 1(b) respectively. For the sake of convenience, we shall refer to the parties as they were arrayed before the learned Single Judge.

3. As can be seen from the reliefs sought in the aforesaid Interim Application (reproduced above), the Plaintiff had filed the said Interim Application for directions to the Court Receiver to sell three properties in question, namely, (i) *Shakuntal Villa*, (ii) *the Lonavala Plot*, and (iii) *Bhimrao House*. It is the specific case of the Plaintiff that the aforesaid three properties belonged to their father Gajanan Bhimrao Kalsekar (for short “**Gajanan**”). *Gajanan* was married to Saraswati Bhimrao Kalsekar (for short “**Saraswati**”). *Gajanan* and *Saraswati* had seven children as follows:-

- (1) Shakuntala – daughter – unmarried – expired on 16th April 2005
- (2) Advocate Purushottam – Son – unmarried – expired on 7th July 2013

- (3) Adv. Krishnarao – son – married – expired on 10th May 1969.
- (4) Adv. Ghanashyam (**the deceased**) – son – unmarried - expired on 20th May 2016
- (5) Malini – daughter – unmarried – expired on 14th October 2014.
- (6) Yashwanti J. Suryavanshi – daughter – married – expired on 28th February 2025 (i.e. the Plaintiff who expired after passing of the impugned order)
- (7) Rajshree – daughter – married (Original Defendant No.7) who expired on 22nd March 2022 (i.e. after the filing of the above Suit).

4. As far as *Krishnarao* was concerned, though he was married, he, his wife and his son who was unmarried, all expired before the filing of the present Suit. It is on the basis of this family tree that the Plaintiff contends that the only surviving heirs of *Gajanan* and *Saraswati* (her parents) were two daughters and one son, namely herself, the aforesaid *Ghanashyam* – the deceased, and *Rajshree* – Original Defendant No.7. Hence, *Ghanashyam* – the deceased, who expired on 20th May 2016, had a 1/3rd share in the estate of *Gajanan* and *Saraswati*.

5. The above Suit is filed by the Plaintiff seeking a declaration that she and Original Defendant No.7 (her sister), are joint owners [to the extent of 50% each] of the properties left behind by their deceased parents *Gajanan* and *Saraswati* as they are the only surviving legal

heirs, and also seeking administration of the 1/3rd share of their deceased brother *Ghanashyam*, in accordance with the Succession Laws as are applicable to them.

6. The Plaintiff has also sought a declaration that the purported Will of the deceased – *Ghanashyam* dated 16th April 2016 being propounded by Defendant No.1 is null and void, and for a consequent declaration that the Plaintiff and Original Defendant No.7 [now Defendant No.7(a) to 7(c) as the heirs] are each entitled to a 50% share in the Suit properties as the sole surviving legal heirs of their late parents. It is relevant to note that Defendant No.1, as the Executor of the purported Will of the deceased, has filed a Testamentary Petition for grant of probate which is pending.

7. In this factual background, the Plaintiff filed the above Interim Application that the three properties mentioned-above, namely, *Bhimrao House, the Lonavala Plot and Shakuntal Villa* (also at Lonavala) can be disposed of at this stage itself as the Court Receiver is already appointed in relation to these properties and the proceeds to the extent of 1/3rd share each can be disbursed in favour of the Plaintiff and Defendant Nos.7(a) to 7(c). As far as the 1/3rd share of *Ghanashyam* was concerned, since the Will propounded by Defendant No.1, and who is a

rank outsider, is being contested by the Plaintiff and Defendant Nos.7(a) to 7(c), Ghanashyam's $1/3^{\text{rd}}$ share of the sale proceeds can be kept with the Court Receiver and invested till the outcome of the Probate Petition filed by Defendant No.1 propounding the purported Will of the deceased – *Ghanashyam* dated 16th April 2016.

8. The basis for this Interim Application was that the Plaintiff and Defendant No.7(a) to 7(c), at the very least, would have an undisputed $2/3^{\text{rd}}$ share in the aforesaid three properties, and which share is not disputed even by Defendant No.1. At the highest, the deceased – *Ghanashyam*'s share in the aforesaid three properties would be only $1/3^{\text{rd}}$. If the Will propounded by Defendant No.1 is finally probated, then the deceased – *Ghanashyam*'s $1/3^{\text{rd}}$ share would be distributed as per his purported Will dated 16th April 2016. If on the other hand, the Will propounded by Defendant No.1 is not proved, then admittedly, as per the laws of succession the deceased – *Ghanashyam*'s $1/3^{\text{rd}}$ share would also devolve upon the Plaintiff and Original Defendant No.7, who then, would each be entitled to a 50% share in the aforesaid three properties. It is on this basis that the Plaintiff sought sale of these three properties so that at-least during her lifetime, she as well as Defendant Nos.7(a) to 7(c) [the heirs of Original Defendant No.7] could enjoy the fruits of their undisputed $2/3^{\text{rd}}$ share.

9. After hearing the Plaintiff, Defendant No.1, Defendant No.6 as well as Defendant Nos.7(a) to 7(c) in the said Interim Application, the learned Single Judge, by the impugned order, and which is quite elaborate, used his discretion and directed the sale of the aforesaid three properties and to pay $1/3^{\text{rd}}$ share thereof equally to the Plaintiff and Defendant Nos.7(a) to 7(c). The balance $1/3^{\text{rd}}$ was to be retained with the Court Receiver and invested in any Nationalized Bank, being the estate of the deceased – *Ghanashyam*. It is this order that is assailed before us.

10. In this factual backdrop, Mr. Firke – Defendant No.1 (the Appellant appearing in-person) submitted that the impugned order cannot be sustained for the following reasons:-

- (a) The impugned order grants final relief of sale under the guise of interim relief.
- (b) These three properties, form the subject matter of the pending Probate Petition (Testamentary Suit No.45 of 2017). Once sold, the subject matter of this Probate Petition would stand extinguished rendering the probate proceedings infructuous. According to him, sale before grant of probate violates Section 307 of the Indian Succession Act, 1925 and amounts to granting a final decree without trial.

- (c) The impugned order directly contradicts binding coordinate bench orders dated 10th October 2018, 22nd October 2018 and 1st April 2022 which mandated strict preservation, status quo and non-alienation of the estate. Modification without vacating prior binding orders was not permissible and judicial discipline required that consistency be followed.
- (d) There is a statutory bar for sale of testamentary estate before grant of probate, and in this regard, Mr. Firke relied upon the provisions of Sections 211, 213 and 307 of the Indian Succession Act, 1925. To put it in a nutshell, it was his submission that a Civil Court in an Administration Suit cannot authorize what the Statute expressly prohibits pending the probate. This is a patent jurisdictional error.
- (e) The Original Complaint contains no prayers seeking sale of the suit properties, and hence, granting relief not prayed for violates the fundamental principle that the Courts cannot travel beyond the pleadings. The impugned order, therefore, not only grants relief not prayed for, but reflects an excess of jurisdiction and results in miscarriage of justice.
- (f) There was no tearing urgency for ordering sale of the aforesaid three properties merely because the Plaintiff was around 90 years old. In any event, the Plaintiff has now expired on 28th February 2025, and hence, the substratum of urgency, if any, is completely extinguished.

- (g) The impugned order erroneously records that the *Bhimrao House* is dilapidated and loss making, to justify the sale. This finding is contrary to earlier orders dated 10th October 2018 and 1st April 2022 which held that *Bhimrao house* generates appropriately Rs.12 lakhs per month. Temporary vacancy of two flats in *Bhimrao House* cannot justify sale of the entire property. This finding is contradictory and based on a misreading of the facts.
- (h) The impugned order directs retention of 1/3rd of the sale proceeds purportedly to safeguard the beneficiaries under the Will dated 16th April 2016. This treats the Will as merely a numerical share and destroys the specific testamentary intent. Once the testamentary property is sold, no property remains in the Will, the Trust corpus is diluted, and the testator's intent is frustrated. According to Mr. Firke, probate adjudicates property-specific bequests, not monetary equivalents.
- (i) The impugned order erroneously concludes that the balance of convenience favours the sale. According to Mr. Firke, if the sale takes place, the grant of probate becomes infructuous, and the estate is destroyed. However, if the sale is stayed, the estate remains intact, the Respondents in the Appeal [in other words the Plaintiff and Defendant Nos. 7(a) to 7 (c)] continue to receive substantial income subject to compliance with the undertakings to the Court, and no irreversible prejudice occurs. Hence, the balance of convenience is in favour of maintaining status-quo as the

Respondents [Plaintiff and Defendant Nos.7(a) to 7(c)] would suffer no prejudice.

- (j) By ordering sale and ring-fencing only the 1/3rd share of the deceased – *Ghanashyam*, the learned Judge has prejudged the Will, a matter reserved exclusively for the Testamentary Court. In fact, fate of the Administrative Suit and as to how the aforesaid three properties are to be dealt with, depends upon the final adjudication of the probate, if granted to the Will dated 16th April 2016.
- (k) There is an application filed under Order 7 Rule 11 seeking a rejection of the Plaint on the ground that it does not disclose any cause of action. According to Mr. Firke, the deceased died testate and the Suit is filed as if there is no Will. In other words, it proceeds as if the deceased – *Ghanashyam* passed away intestate. If the Suit is dismissed, all interim orders, including the sale order would be void. Proceeding with the sale while the Suit's existence is in jeopardy, is legally unsound, and hence, the impugned order is also bad on that count.

11. For all these reasons, Mr. Firke would submit that the impugned order is wholly unsustainable and hence the Appeal ought to be allowed and the impugned order be set aside.

12. On the other hand, Mr. Jagtiani, the learned Senior Counsel appearing on behalf of the Plaintiff as well as Defendant Nos.7(a) to 7(c), submitted that there is nothing exceptionable in the impugned order

passed by the learned Single Judge. Mr. Jagtiani submitted that admittedly in the facts of the present case, in the three properties of which the Plaintiff sought sale, the Plaintiff and Defendant Nos.7(a) to 7(c) have an undisputed $\frac{2}{3}$ rd share. As far as the $\frac{1}{3}$ rd share of the deceased – *Ghanashyam* is concerned, and to which Defendant No.1 now makes a claim under a purported Will dated 16th April 2016, is disputed. He submitted that under the aforesaid Will, the deceased – *Ghanashyam*'s $\frac{1}{3}$ rd share is to be distributed in the following manner: (a) 50% to G. K. Trust of which Defendant No.1 claims to be a Trustee; and (b) 50% to Defendant Nos.2 and 3 who were purportedly the caretakers (domestic help) of the deceased – *Ghanashyam*. Defendant Nos.2 and 3 have not filed any affidavit or appeared before the Court to oppose the relief of sale of the aforesaid three properties by the Plaintiff. It was only Defendant No.1 (as the Executor of the Will and a Trustee of G. K. Trust) that has opposed the sale.

13. In other words, if one looks at the matter really strictly, the Plaintiff and Defendant Nos.7(a) to 7(c) who undisputedly and admittedly have a $\frac{2}{3}$ rd share in the aforesaid three properties seek a sale of the same. In contrast, Defendant No.1, as a Trustee of the G. K. Trust, would at the highest, have only a $\frac{1}{6}$ th share in the aforesaid three properties, and which share is also disputed. It is taking these facts into

consideration, coupled with the fact that the Plaintiff at the time of the application was 90 years old and required funds in the twilight years of her life, that the learned Single Judge correctly ordered sale of the aforesaid three properties.

14. Mr. Jagtiani submitted that once a Receiver was appointed of the aforesaid properties, and which orders have become final, the Court always has the power to direct the Court Receiver to sell the immovable properties, if the facts and circumstances of the case so warrant. This power can be exercised by the Court even while the Suit is pending. There is no fetter on the Court to sell the immovable property pending the Suit, if the facts and circumstances of the case so warrant. It is, therefore, completely incorrect on the part of Mr. Firke to contend that the Court has no power to order sale during the pendency of the Suit.

15. Mr. Jagtiani next submitted that equally absurd is the argument of Mr. Firke that these properties could not be sold pending the Probate of the Will of the deceased – *Ghanashyam*, who had, at the highest, only a $1/3^{\text{rd}}$ share in the Suit properties. It is to safeguard the share of the deceased – *Ghanashyam*, and assuming that the Probate would be granted of the deceased – *Ghanashyam's* Will dated 16th April 2016, that the learned Single Judge directed the $1/3^{\text{rd}}$ share of the sale

proceeds be deposited with the Court Receiver so that the same is available for distribution if the Will dated 16th April 2016 is eventually probated. It is weighing the competing claims that the learned Single Judge used his discretion and directed the sale of the aforesaid three properties. He submitted that this being the case, unless the Court finds that the discretion exercised by the learned Single Judge is either perverse or against the settled principles of law, this Court ought not to interfere with the discretion exercised even if this Court were to come to a different opinion. In other words, once the discretion is exercised by the learned Single Judge and the Court finds that the discretion is exercised on sound and well settled principles, this Court should be loathe to interfere with the exercise of such discretion.

16. Taking us through the impugned order, Mr. Jagtiani pointed out the circumstances that weighed with the learned Single Judge for exercising the discretion in favour of the Plaintiff and order the sale of the aforesaid three properties. He submitted that the learned Single Judge, looking at the totality of the facts of the case, directed the sale of the aforesaid three properties. There is nothing exceptionable in this course of action being undertaken by the learned Single Judge. Consequently, he submitted that there was no merit in the above Appeal and the same ought to be dismissed.

17. We have heard Mr. Firke, the party appearing in-person, as well as Mr. Jagtiani, the learned Senior counsel appearing on behalf of the Plaintiff and Defendant Nos.7(a) to 7(c). Since Mr. Firke was appearing in-person, we had given him a long rope. Mr. Firke has tendered Written Submissions and which we have briefly referred to above as arguments recorded on his behalf. From the record, and the orders passed in the above Suit on earlier occasions, we find that at least as far as these aforesaid three properties are concerned, the Plaintiff and Defendant Nos.7(a) to 7(c) undisputedly have a $\frac{2}{3}$ rd share in the aforesaid three properties. In contrast, assuming for the sake of argument that the Probate Proceedings of the Will dated 16th April 2016 were to succeed, Defendant No.1, as a Trustee of G.K. Trust, would be entitled to a $\frac{1}{6}$ th share. As far as this $\frac{1}{6}$ th share is concerned, or even the other $\frac{1}{6}$ th share of Defendant Nos.2 and 3, is yet to be crystallized. In fact, another learned Single Judge, by his order dated 10th October 2018 has at least *prima facie* opined that the road to a judgment in the Probate Petition is long, and if what is before him was anything to go by, undoubtedly very rocky. This order was passed by the learned Single Judge in a Notice of Motion No.444 of 2018 filed by the Plaintiff.

18. It is in this factual scenario that we have to examine whether the order passed by the learned Single Judge was either perverse and/or

not in-consonance with the well settled principles of law. The principle ground of opposition before the learned Single Judge was the pendency of the Probate Proceedings which was converted into a Testamentary Suit in light of the objections to the Will dated 16th April 2016 raised on behalf of the Plaintiff. It was contended before the learned Single Judge that in such circumstances, the Probate Proceedings ought to be decided first and only then this Court can consider the prayers made on behalf of the Plaintiff. On this argument of Defendant No.1, the learned Single Judge opined that since the question of interim reliefs cannot be considered in the Probate Proceedings, as the parties are Hindus and the bar under Section 269 (2) of the Indian Succession Act 1925 operates, there can be no impediment in considering the prayers made in the aforesaid application.

19. The learned Judge took the view that merely because the Probate Petition is pending, it cannot lie in the mouth of Defendant No.1 that no interim reliefs can be considered in respect of the share of the Plaintiff and Defendant Nos.7(a) to 7 (c) in the properties left behind by the parents of the Plaintiff. The Will would, at the most, cover the 1/3rd share of the deceased – *Ghanashyam* in the properties of his parents, and Defendant No.1 claiming to be a Trustee of the G.K. Trust created under the Will, can claim only 50% from the said 1/3rd share. It is for

this reason that the learned Judge came to the conclusion that if protective orders are passed in respect of the share of the deceased – *Ghanashyam*, there cannot be any reason for non-consideration of the prayers made in the aforesaid Application for sale of the aforesaid three properties.

20. The learned Judge thereafter noted that the Plaintiff was of an advanced age of about 90 years old and in her twilight years. Apart from this, the learned Judge also noted that *Bhimrao House* is in a dilapidated condition, and this fact is also admitted by Defendant No.1 in a letter dated 11th May 2023 addressed by him to the Court Receiver, which was annexed in the additional affidavit of the Plaintiff in Interim Application (L) No.7722 of 2023. The learned Judge also noted that an amount of approximately Rs.30 Lakhs had been spent only on the renovation of the two flats lying vacant in *Bhimrao House*, and which expense was not disputed by Defendant No.1. The learned Judge noted that *Shakuntal Villa* at Lonavala as well as the *Lonavala plot* were also lying idle with the structure of said Villa deteriorating with each passing day. The Court noted that in fact Defendant No.7 expired during the pendency of the Suit and she could not, during her lifetime, enjoy her share which would inure to her benefit from the properties left behind by her parents. As on today, her legal representatives are on record. It is

taking all these facts into consideration that the learned Judge found substance in the arguments of the Plaintiff that due to pendency of the proceedings and in the absence of any positive orders, the Plaintiff and Defendant Nos.7(a) to 7(c) are unable to enjoy their respective undisputed shares from the property left behind by their parents. The learned Judge also found substance in the argument that if the Plaintiff is found to be justified in claiming that her deceased brother – *Ghanashyam* died intestate, the fact that he was a bachelor, would mean that the properties left behind by their parents would be shared equally between the Plaintiff and Defendant Nos. 7(a) to 7(c). The learned Judge was of the opinion that the aforesaid would certainly be a relevant factor to be taken into consideration, while examining as to whether the prayers in the aforesaid Interim Application for sale of the properties should be granted.

21. The learned Judge thereafter noted that the material on record indicates that substantial amounts were spent for renovation on two flats in *Bhimrao House*, and despite repeated attempts being made by the Court Receiver, the flats could not be given on leave and license. He noted that in this situation, Defendant No.1 himself, in his two Interim Applications bearing Nos.4572 of 2022 and 4189 of 2022, had prayed for the sale of the aforesaid two flats. Considering that Defendant

No.1 had himself prayed for sale of the aforesaid two flats, and coupled with the fact that it was his case also that the *Bhimrao House* is in a dilapidated condition, the learned Judge thought it appropriate that the three properties be disposed of with a direction that the sale proceeds to the extent of 1/3rd share of the deceased – *Ghanashyam* be deposited in this Court to be invested appropriately.

22. We, after carefully perusing the impugned order, are clearly of the view that the discretion exercised by the learned Single Judge can by no means be either termed as perverse or exercised not in consonance with the well settled principles. We say this because we find no merit in the argument canvassed by Mr. Firke that under no circumstances, can the sale of the properties take place while the Probate Petition is pending. This is too drastic a proposition which we are not ready to accept. In fact, the law seems to suggest otherwise.

23. The Hon'ble Supreme Court in the case of ***Industrial Credit and Investment Corporation of India Ltd & Ors v/s Karnataka Ball Bearings Corporation Ltd & Ors [(1999) SCC Online SC 840:(1999) 7 SCC 488]*** has clearly opined that the question of having restrictions imposed on the Court's power to direct sale of immovable property prior to the passing of a Decree does not and cannot arise. The words "just and convenient" appearing in Order 40

Rule 1 of the Code of Civil Procedure, 1908 have to be attributed a proper meaning and the intent of the Legislature as regards the extent of the empowerment by the Code, is rather categorical in nature. The Supreme Court opined that the discretion conferred cannot be said to be non-existing, having regard to the language of Order 40 Rule 1. However, the Court should be cautious in its approach and use proper circumspection, and only where the Court feels it expedient that in the event the property is not sold, the initiator of this action would be subjected to a perpetration of a fraud, the diminution in value of the assets, wastage and wrongful entrants or trespassers' attempting to make an inroad for their permanent settlement, etc., are some such instances which may be taken into consideration.

24. The Supreme Court hastened to add that the instances noted above were only illustrative in nature and no hard and fast rule could be laid down regarding the exercise of the Court's powers under Order 40 Rule 1, the same being dependent on the facts and circumstances of each case. In fact, the Supreme Court appreciated the opinion of the Full Bench of the Bombay High Court that the Court should take a more pragmatic approach in exercising the powers under Order 40 Rule 1. The relevant portion of the ratio laid down by the Hon'ble Supreme Court read as under:-

“5. Incidentally, the Full Bench, as a matter of fact has dealt with the matter in great detail and having due regard to the present economic policy of the Government. The Full Bench, however, went on to record its observation pertaining to the appointment of a receiver under Order 40 Rule 1 of the Code for “just and convenient” reasons. The Bench has duly taken note of the present market tendencies and the grant of loan by the banks and other institutions for the purposes of industrial growth and development in the country. It is significant to note that though the Full Bench at the end of para 10 of its judgment, has recorded that the court should be conscious of these facts and should be more pragmatic in exercising powers under Order 40 Rule 1 of the Code of Civil Procedure but in fact this pragmatism has been given a very restrictive meaning; otherwise the Full Bench could not have debarred the sale of immovable property prior to the decree in favour of the bank or financial institution more so by reason of incorporation of Section 29 in the statute-books of various State Financial Corporation Acts.

6. Order 40 Rule 1 of the Code of Civil Procedure expressly provides for the appointment of a receiver over a property whether before or after the decree and the court may by an order confer on the receiver all powers of realisation, management, protection, preservation and improvement of the property. Order 40 Rule 1(d) specifically provides for realisation and the words “or such of those powers as the court thinks fit” appearing in Order 40 Rule 1(d) ought to be interpreted in a manner so as to give full effect to the legislative intent in the matter of conferment of powers by the court to preserve and maintain the property through the appointment of a receiver. Needless to record here that there is existing a power which is totally unfettered in terms of the provisions of the statute. Law courts, however, in the matter of appointment of a receiver through a long catena of cases, imposed a self-imposed restriction to the use of discretion in a manner which is in consonance with the concept of justice and to meet the need of the situation — “unfettered” does not and cannot mean unbridled or unrestrictive powers and though exercise of discretion is of the widest possible amplitude, but the same has to be exercised in a manner with care, caution and restraint so as to subserve the ends of justice. The law courts are entrusted with this power under Order 40 Rule 1 so as to bring about a feeling of securedness and to do complete justice between the parties.

7. The language of Order 40 thus being of the widest possible import, any restriction as regards the power of the court to direct a receiver to effect a sale of immovable property prior to the decree does not and cannot arise. Order 40 Rule 1 and various sub-rules thereunder unmistakably depict that the Court has unfettered powers in the event the court feels that the sale of property would be just and convenient having due regard to the situation of the matter. The pronouncement of the Full Bench as regards creation of an embargo in regard thereto seems to be rather too wide. The court must consider whether special interference with the possession of the defendant is required or not and in the event the court comes to such a conclusion that there is likelihood of the immovable property in question being dissipated or some such occurrences as is detailed more fully hereinafter or party initiating the action suffering irreparable loss, unless the court gives appropriate protection, there should not be any hesitation in directing the sale of immovable property. The Privy Council in *Maharajadhiraj Sir Rameshwar Singh Bahadur v. Hitendra Singh* [AIR 1924 PC 202 : 29 CWN 43] at p. 204 observed:

“In particular, under the terms ‘realisation, management, protection,’ etc., of the properties a power of sale is not taken away from but is still vested in the Receiver. And if, for instance, such a power of sale had been exercised in good faith and in the interests of the estate with the sanction of the Court, such a transaction could not have been challenged as ultra vires.”

10. At this juncture reference may be made to a passage from *Kerr on Receivers and Administrators* (7th Edn.) as below:

“A receiver acquires no power of sale by virtue of his appointment, but in most cases the court has power to direct a sale of the property over which the receivership extends; for instance, where the appointment is made in an action for foreclosure, redemption or sale, including, of course, debenture-holders' actions, or in the administration of the estate of a deceased person. The court has power, under RSC, Order 29 Rule 4, on the application of any party, to make an order for the sale by any persons and in any manner, of any goods, wares or merchandise which may be of a perishable nature or likely to be injured from keeping, or which for any other just and sufficient reason it may be desirable to have sold at once. A sale may be ordered to

enforce a charge over land under the Charging Orders Act, 1979, even if a receiver has been appointed thereunder.”

11. In that view of the matter, the question of having restriction imposed on the court's power to direct sale of immovable property prior to the passing of a decree does not and cannot arise. The words “just and convenient” have to be attributed a proper meaning and the intent of the legislature as regards the extent of the empowerment by the Code, is rather categorical in nature. The discretion empowered cannot thus be said to be non-existing, having due regard to the language of Order 40 Rule 1 though, however, the court shall have to be rather cautious in its approach and use proper circumspection as stated hereinbefore and it is only in the case, where the court feels it expedient that in the event property is not sold, the initiator of the action would be subject to perpetration of a great fraud: the diminution in value of the assets, wastage and wrongful entrants or trespassers' attempt to make an inroad for their permanent settlement, (the factum of which is not very uncommon in the country presently) — are some such instances which may be taken into consideration. We, however, hasten to add that the instances noted above are only illustrative in nature and no hard and fast rule can be laid down in regard to the exercise of the court's powers under Order 40 Rule 1, the same being dependent on the facts and circumstances of each case as is available before the court. A court may appoint a receiver not as a matter of course but as a matter of prudence having regard to the justice of the situation.”

25. We are mindful of the fact that the Hon’ble Supreme Court has laid down the aforesaid propositions in a case where a Receiver ought to be appointed in the case of Suits filed by the Banks and Financial Institutions. However, the enunciation of the law would not be restricted only to Suits filed by Banks and Financial Institutions as the discussion in the aforesaid decision is with reference to the power of the Court to order sale through the office of the Court Receiver even before a decree is passed in the Suit. We, therefore, find that the extreme

proposition propounded by Mr. Firke that under no circumstances can the Court order a sale in an Administrative Suit until the Probate Proceedings are pending, is rejected.

26. This is more-so, when at least *prima facie*, we find that the Probate Proceedings themselves are quite speculative, and as opined by another learned Single Judge of this Court, the journey in the Probate proceedings is not only long but rocky.

27. We also find support in the view that we take by another decision passed by a learned Single Judge of this Court in the case of ***Amresh J. Divecha v/s Shirish Krishnaram Divecha & Anr [2015 SCC Online Bom 2829]***. In fact, this order was passed in a Testamentary Suit itself. In that Testamentary Suit, an application was filed for sale of the property which was the subject matter of the Testamentary Suit. The Court noted that under the Will the two Defendants were entitled only to a legacy of Rs. 5 Lakhs and Rs.50 Lakhs respectively. This is the very least to which they were entitled. If one was to go by intestacy, they would be entitled to more ($\frac{1}{3}^{\text{rd}}$ share each). Even if one were to go by intestacy, there was no dispute that the Plaintiff's father was entitled to at least $\frac{1}{3}^{\text{rd}}$ of the estate and consequently $\frac{1}{3}^{\text{rd}}$ of the consideration of the flat that was sought to be

sold. The Court noted the urgency in selling the aforesaid flat because the son of the Plaintiff was in the terminal stages of acute renal failure and was on continuous dialysis. Noting that he was in desperate need of funds, the learned Single Judge ordered the sale of the flat. The relevant portion of this order is as under:-

“4. Under the Will, the two Defendants are entitled only to a legacy of Rs. 5 lakhs and Rs. 50 lakhs respectively from these sale proceeds. This is a very least to which they are entitled. On intestacy, they would be entitled to more (one-third each). Should the Will be proved, the Plaintiff would be entitled to the remainder of the consideration less the amount of Rs. 55 lakhs. However, as on intestacy there is no dispute that the Plaintiff's father is entitled to at least one-third of the estate and consequently one-third of the consideration of this flat.

5. In paragraph 19 of the affidavit in support, the Plaintiff has set out the fact that his son is in the terminal stages of acute renal failure and is on continuous dialysis. He is in desperate need of funds. He spends at least Rs. 65,000/- per month on the medical treatment of his son.

6. In my view, it would be in the interests of justice if the Plaintiff is permitted to complete the sale. There is certainly no reason why the Respondents, the purchasers who are willing to pay the entire consideration, should be asked to wait indefinitely while these probate proceedings are decided. It seems to me, *prima facie*, that the Plaintiff is in need of funds. He is certainly entitled to one-third of the sale proceeds at a minimum, and about that there can be no dispute.

7. In order to ensure that the transaction is completed in the most transparent manner possible, the Court Receiver, High Court, Mumbai, will complete the same transaction under the MoU dated 9th November 2011 acting under the present order. The entire balance sale consideration, less deductions as indicated above, will be received by the Court Receiver in his name. The Court Receiver will pay:

(a) One-third of the net amount received by him to the Plaintiff.

- (b) Rs. 5 lakhs to Defendant No. 1, subject to the terms set out below;
- (c) Rs. 55 lakhs to Defendant No. 2, subject to the terms set out below.

8. The remaining amount will be deposited with the Prothonotary & Senior Master. By consent, the amount shall be invested in any scheduled bank (not necessarily a nationalized bank) at an optimal rate of interest, initially for a period of one year and thereafter for subsequent like periods at the best possible interest rates. It is clarified that the consent of the Defendants to the order of investment does not indicate that they have consented to the rest of this order.

28. This order of the learned Single Judge was subjected to an Appeal which was also dismissed by a Division Bench of this Court on 29th September 2016 (Appeal No.153 of 2015 with Appeal (L) No.222 of 2015).

29. In view of the foregoing discussion, we find that the learned Single Judge, in our view, has correctly exercised his discretion in ordering sale of the aforesaid three properties, namely, *Shakuntal Villa*, the *Lonavala Plot*, and *Bhimrao House*, which form the subject matter of the aforesaid Interim Application.

30. In light of our findings, we find no merit in the arguments canvassed by Mr. Firke. We do not find that the impugned order is in any way contradictory to earlier orders passed by this Court in the above Suit as sought to be contended by him. We do not find that ring-fencing

$\frac{1}{3}^{\text{rd}}$ of the sale proceeds in any way violates any of the provisions of law. In fact, we have no hesitation in holding that the opposition to the sale is only to ensure that the Plaintiff (now the Plaintiff's heirs) as well as Defendant Nos.7(a) to 7(c) do not enjoy the fruits of their $\frac{2}{3}^{\text{rd}}$ undisputed and admitted share in the aforesaid three properties.

31. Accordingly, the above Appeal is dismissed. However, in the facts and circumstances of the case, only because Mr. Firke appears in person that we refrain from imposing any costs.

32. In light of the disposal of the above Appeal, nothing survives in any of the Interim Applications pending therein, and the same are disposed of accordingly.

33. This order will be digitally signed by the Private Secretary/ Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[FIRDOSH P. POONIWALLA, J.]

[B. P. COLABAWALLA, J.]