

drp

IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

WRIT PETITION NO.5880 OF 2011

M/s Sai Shradha Developers, Sangamner
A Partnership Firm,
Through its Partners

PETITIONERS

1. Sunil Bansilal Rathi,
Age - 42 years, Occ - Business,
2. Harikisan Somnath Chandak,
Age - 43 years, Occ - Business
3. Shashikant Vishwanath Navandar,
Age - 38 years, Occ - Business
4. Pravin Arun Rudrabhate,
Age - 40 years, Occ - Business

Office - Vaishali Chambers,
First Floor, New Nagar Road,
Sangamner, Taluka - Sangamner
District - Ahmednagar

VERSUS

1. Ravindra Ganpatrao Bharitkar
Age - 45 years, Occ - Business
R/o B-12, Govind Co-operative Housing Society
Harekrishna Temple Road,
Model Colony, Pune - 16
2. Deelip Ganpatrao Bharitkar,
Age - 43 years, Occ - Business,
R/o C-59, Abhimanshri Co-operative
Griha Rachana Sanstha Ltd.,
Pashan Road, Aundh, Pune-8
3. Sunil Ganpatrao Bharitkar,
Age - 41 years, Occ - Service
R/o Through Deelip Ganpatrao Bharitkar,
Age - 43 years, Occ - Business,

RESPONDENTS

R/o C-59, Abhimanshri Co-operative
Griha Rachana Sanstha Ltd.,
Pashan Road, Aundh, Pune-8

4. Sow. Meena Arvind Bansode,
Age - 39 years, Occ - Household
R/o B-12, First Floor,
Govind Co-operative Housing Society,
Harekrishna Temple Road,
Model Colony, Punt - 16

.....
Mr. Anil S. Bajaj, Advocate for the petitioners
Mr. Ankush N. Nagargoje, Advocate for respondent No.2
.....

[CORAM : SUNIL P. DESHMUKH, J.]

DATE : 3rd AUGUST, 2015

ORAL JUDGMENT :

1. Rule. Rule made returnable forthwith and heard learned advocates for the appearing parties finally by consent.
2. The petitioner, who is original plaintiff, is before this court aggrieved by order dated 22nd July, 2011 on Exhibit-115 in Special Civil Suit No. 35 of 2008 whereby a document - an agreement of sale (Exhibit-71) dated 9th June, 2005, has been directed to be impounded.
3. Before reaching decision in the matter, it would be worthwhile to mention indisputable factual background. Briefly stated - one Ganpatrao Bharitkar executed an agreement of sale

in respect of property bearing survey No. 107 (2) 49 admeasuring about 36 Are, situated at Sangamner in favour of present petitioners. There does not appear to be dispute about that the property was owned by him. Under the agreement dated 9th June, 2005, said property was agreed to be sold to the plaintiff - petitioner. The agreement of sale is a written document, incorporating a term under clause "F", which may be relevant for decision in present matter, reads thus -

"(एफ) प्रस्तुत मिळकतीमध्ये प्रवेश करण्यासाठी तसेच मिळकतीची व्यवस्था करण्याकामी मिळकतीमध्ये जाणेयेणेसाठी लिहून देणार यांनी लिहून घेणार यांना याच दस्ताने लायसन्स प्रदान केलेले आहे, त्यामुळे लिहून घेणार यांना मिळकतीमध्ये प्रवेश करण्यास वेगळ्या लायसन्स /परवान्याची गरज नाही,"

4. Learned advocates for the parties fairly agree to that no other term under the agreement would be relevant, as far as present matter is concerned.

5. Subsequently, said Ganpatrao Bharitkar died and four persons succeeded said property, namely the respondents - defendants. After the death of Ganpatrao Bharitkar, the petitioners appear to have requested said four persons - defendants to execute sale deed, pursuant to the agreement of sale. However, it appears, except respondent No.1 - defendant No.1, rest of the persons declined the request and refuted the

agreement and as such, special civil suit No. 35 of 2008 had been filed by present petitioners in the court of civil judge, senior division, Sangamner seeking specific performance of agreement of sale dated 9th June, 2005 and for possession of suit property.

6. In the meanwhile, it appears that defendant No.1 - Ravindra has executed a registered sale deed in respect of his undivided share in the property and purported to have parted with the same to the plaintiff. Rest of the defendants, however, opposed the suit and claimed to be in physical possession of the property.

7. It further appears to be indisputable position that for quite a while the defendants did not attend the suit proceedings and under the circumstances, the plaintiff had started leading evidence. During the course of evidence, agreement of sale dated 9th June, 2005 came to be exhibited. Subsequently, notary and the attesting witness of said document came to be examined, proving the same, according to the contentions of the plaintiff. 'No cross' order had also been passed against the defendants.

8. It appears that the defendants had moved an application

Exhibit-105 seeking impounding of said agreement of sale dated 9th June, 2005, after the evidence aforesaid had been recorded. Thereafter, application Exhibit-105 had been withdrawn on 29th September, 2010.

9. Subsequently, defendants No.2 to 4 moved another application Exhibit-115 on 18th March, 2011, seeking recall of the order exhibiting agreement of sale (Exhibit-71) and to declare that said agreement of sale is inadmissible in evidence.

10. The trial court has passed an order considering that instead of de-exhibiting the agreement of sale dated 9th June, 2015 (Exhibit-71) the petitioner be granted an opportunity by impounding the document, and directed to deposit sufficient stamp duty with penalty as per provisions of Bombay Stamp Act. It further appears that for aforesaid purpose the trial court has taken into account, sale deed executed by defendant No.1 on 17th March, 2008, which according to it refers to delivery of possession.

11. Mr. Bajaj, learned advocate contends that the trial court has failed to consider basic term appearing under clause "F" of agreement of sale dated 9th June, 2005, which specifically refers to "*licence*" and "*not possession*". He submits that in licence,

possession in law always continues with the persons executing licence rather licensor unlike the "lease" wherein by execution of lease deed an interest in the property is created whereas in license it is not so. He submits that in the present matter, there are host of aspects, which the court has fallen oblivion of, for, the court has not at all given any attention or rather has forgotten the averments as appearing in the pleadings under the written statement of the defendants, which unequivocally or rather positively assert that the possession is indeed with the defendants. He, further submits that the suit itself is for specific performance and possession. He submits that the sale deed executed cannot be relied on as an evidence of delivery of possession, pursuant to agreement of sale for, the vendor has parted with his undivided share in the concerned property. He further goes on to submit that in such a case, if that is to be relied upon and the defendants agree that the petitioner is in lawful and physical possession of the property, he is prepared to do good and remove alleged deficiency in payment of stamp duty. In support of his submission, learned advocate for the petitioner relies on a judgment of the Apex Court, reported in 2011 (5) SCC 270 "*Pradeep Oil Corporation V. Municipal Corporation of Delhi & Another*" - paragraphs No.12 and 16 thereof read thus -

“12. It would be useful to examine at this stage the definition of “lease” and licence” as envisaged under Section 105 of the Transfer of Property Act, 1882 and Section 52 of the Easements Act, 1882 respectively. Section 105 of the Transfer of Property Act, 1882 reads:

“105 Lease defined – A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms.

On the other hand, Section 52 of the Easements Act, 1882 reads as :

“52 'Licence' defined – Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a licence”

16. It is quite clear that distinction between lease and licence is marked by the last clause of Section 52 of the Easements Act as by reason of a licence, no estate or interest in the property is created.”

12. Mr. Ankush Nagargoje, learned advocate for respondent No.2 submits that no fault can be found with the impugned order, for, with the execution of sale deed, the position stands clarified that the petitioner was put in possession of the property, pursuant to agreement of sale, for, there is reference to agreement of sale in the sale deed. He submits that explanation

1 of Article 25 of the Bombay Stamp Act, covers the present case squarely. He contends that it shall be deemed that there was an agreement to deliver possession, otherwise, such an agreement of sale would be a redundant agreement. He, therefore, contends that having regard to said legal provision coupled with the sale deed, no fault shall be found with the impugned order and that it is legal and proper. He supports his submissions with a judgment in the case of *"Sheshrao Bhikaji Kale V. Damodar Pandhare"* 2004 (3) Mh.L.J. 357. Perusal of said judgment discloses that it was a case which can be said to be on a reverse factual background, in the sense, that document unequivocally had included a term about delivery of possession, however, it was the contention of the petitioner therein that although the term is there, yet, the possession had not been delivered and that was yet to be delivered. In that context, the court had considered that since there is an agreement that possession would be transferred, the case was covered by explanation 1 of Article 25 of Schedule I to the Bombay Stamp Act. On facts, said citation appears to be starkly different.

13. In the present matter, the document which is sought to be impounded is an agreement of sale dated 9th June, 2005 in which the parties have no dispute that save clause "F" of the same,

referred to herein above, there is no other term which would be relevant for interpretation regarding delivery of possession. Bare perusal of said term does disclose that it authorizes the prospective purchasers a right of egress and ingress, it does not speak of giving possession of the property absolutely to them, nor there is anything which even by semblance refers to that they were allowed to enjoy said property. The definitions of "*licence*" and "*lease*" which are reproduced herein above from the judgment relied on by Mr. Bajaj would to a large extent provide guiding consideration.

14. Having regard to aforesaid, coupled with the averments in the written statement that the possession continues with the defendants, as far as present matter is concerned, it will have to be viewed accordingly. The sale deed refers to parting with undivided share of the vendor in the suit, albeit it makes reference to agreement of sale and purports to consider the same for delivery of possession, that appears to be with a view to shun defendant No.1 to raise a dispute on that count subsequently when it comes to delivery of possession if suit is decreed.

15. In such a case taking overall view of the matter and

especially having regard to conduct of the defendants of filing of application for impounding and then withdrawing the same and then again filing an application for de-exhibiting and declaration as inadmissible, the impugned order giving direction to impound the document appear to be unsustainable. Clause "F" of the agreement and the fact that undivided share has been parted with under the sale deed, have been absolutely disregarded by the trial court. It appears to have been carried by non germane considerations. As such, the impugned order dated 22nd July, 2011 passed by Civil Judge, Senior Division, Sangamner on Exhibit-115 in Special Civil Suit No. 35 of 2008 is quashed and set aside.

16. It has been informed that the suit has been detained for decision in this respect by this court. Having regard to this order, the suit be proceeded with by the trial court.

17. Writ petition stands allowed accordingly. Rule is made absolute in aforesaid terms with no order as to costs.

[SUNIL P. DESHMUKH, J.]