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IN THE HIGH COURT OF JUDICATURE AT MUMBAI

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3516 OF 2015

ALONG WITH

WRIT PETITION NO. 3517 OF 2015

ALONG WITH

WRIT PETITION NO. 3518 OF 2015

Shri Santosh Pundlik Pagare ... Petitioner

Vs.

Smt.Shobha Raghunath Jadhav and others ... Respondents

Mr.Girish R.Agrawal, Advocate for Petitioner.

Mr.Rameshwar N.Gite, Advocate for Respondents no. 1 to 5.

CORAM : R. G. KETKAR, J.

DATE : 18th JUNE, 2015

P.C. :

. Heard Mr.Girish R.Agrawal, learned Counsel for the petitioner and Mr.Rameshwar N.Gite, learned Counsel for the respondents No. 1 to 5 at length. Mr.Agrawal orally seeks leave to delete respondent No.6. Leave to delete respondent No.6 is granted. Amendment shall be carried out forthwith. Rule. Mr.Gite waives service. At the request and by consent of the parties, rule is made returnable forthwith and the petitions are taken up for final hearing.

2. Writ Petition No. 3516 of 2015 is preferred by the petitioner, hereinafter referred to as the plaintiff, challenging the judgment and order dated 26/03/2015 passed by the learned District Judge-2 Niphad, Dist.Nashik in Misc. Civil Appeal No. 24 of 2015.

By that order, the learned District Judge allowed the appeal preferred by respondents No. 1 to 5, hereinafter referred to as defendants No.1 to 5 and quashed and set aside the judgment and order dated 12/02/2015 passed by the learned Joint Civil Judge, Senior Division, Niphad below Exhibit 5 in Special Civil Suit No. 20 of 2014. The learned trial Judge had allowed Exhibit 5. The learned District Judge rejected application Exhibit 5. The plaintiff had filed application Exhibit 5 restraining the defendants No. 1 to 5 from creating third party interest.

3. Writ Petition No. 3517 of 2015 is preferred by the plaintiff challenging the judgment and order dated 26/03/2015 passed by the learned District Judge – 2, Niphad, in Civil Misc. Appeal No. 25 of 2015. By that order, the learned District Judge allowed the appeal and quashed and set aside the judgment and order dated 12/02/2015 passed by the learned Joint Civil Judge, Senior Division, below Exhibit 32 in Special Civil Suit No. 20 of 2014. The learned trial Judge had allowed Exhibit 32. The learned District Judge rejected the application at Exhibit 32 taken out by the plaintiff for restoration of electric supply.

4. Writ Petition No. 3518 of 2014 is preferred by the plaintiff challenging the judgment and order dated 26/03/2015 passed by the learned District Judge – 2, Niphad, Dist.Nashik in Misc. Civil Appeal No. 26 of 2015. By that order, the learned District

Judge allowed the appeal and quashed and set aside the judgment and order dated 03/03/2015 passed by the learned Joint Civil Judge, Senior Division, Niphad below Exhibit 43 in Special Civil Suit No. 20 of 2014. The learned trial Judge had allowed Exhibit 43. The learned District Judge rejected the application at Exhibit 43 taken out by the plaintiff for temporary injunction restraining the defendants No. 1 to 5 from disturbing his possession over the suit property bearing Gram Panchayat House No. 405/1 bearing City Survey No. 1852 admeasuring 136.04 sq.meters situate at Mauze Ozarmig, Taluka – Niphad, Dist.Nashik (for short suit premises').

5. In support of these petitions, Mr.Agrawal submitted that the plaintiff has instituted suit for specific performance of agreement of sale dated 06/08/2013 executed by defendants No. 1 to 4 in favour of the plaintiff. He submitted that since 2003, plaintiff is in possession of the suit premises as a tenant. In the year 2004, plaintiff had advanced hand loan of Rs.2,50,000/- to the defendants No. 1 to 4. On 07/10/2004, plaintiff and defendants No. 1 to 4 entered into an agreement to execute agreement of sale in future. Accordingly, on 06/08/2013, defendants No. 1 to 4 executed agreement of sale in favour of plaintiff. He submitted that total consideration fixed between the parties was Rs.8,00,000/- . The plaintiff had paid Rs. 4,00,000/-. Thus, out of total consideration of Rs.8,00,000/-, plaintiff had paid Rs.6,50,000/- and remaining

amount of Rs.1,50,000/- was to be paid at the time of execution of sale deed.

6. Mr.Agrawal submitted that defendants No. 1 to 4 issued an advertisement on 28/12/2013 expressing their intention to sell the suit premises in favour of the defendant No.5. The plaintiff issued notice on 18/01/2014 calling upon defendants No. 1 to 4 to execute the sale deed. On 28/01/2014, reply was given to that notice. He submitted that in paragraph 7 of that reply, it was admitted by defendants No. 1 & 2 that plaintiff was inducted as a tenant in the suit premises and that even after expiry of tenancy, he is occupying the suit premises unauthorizedly for which defendants No. 1 & 2 will adopt appropriate legal proceedings. On 07/02/2014, plaintiff instituted suit for specific performance of agreement of sale. Along with the suit, plaintiff filed application at Exhibit 5 for injunction restraining defendants from creating third party interest. On 28/02/2014, suit summons was served on defendant No.5. On 05/03/2014, suit summons was served on defendants No. 1 to 4. On 12/03/2014, defendants No. 2 to 5 appeared in the suit. Despite defendants No. 1 to 5 being aware of the pendency of the suit, on 04/04/2014, defendants No. 1 to 4 executed sale deed in favour of defendant No.5. Mr.Agrawal submitted that on 10/06/2014, the plaintiff took out application at Exhibit 32 for restoration of the electric supply. On 31/08/2014, defendants No. 1 & 4 and

defendant No.5 gave threats to the plaintiff for vacating the suit premises. In view thereof, on 05/09/2014, the plaintiff filed application at Exhibit 43 seeking injunction restraining defendants from disturbing his possession. The learned trial Judge allowed the applications. Aggrieved by that order, Misc. Civil Appeals were preferred before the District Court. The same were allowed by the learned District Judge by the impugned orders. It is against these decisions, the plaintiff has instituted petitions in this Court.

7. In support of these petitions, Mr.Agrawal strenuously contended that the learned District Judge allowed the appeals and dismissed the applications at Exhibits No. 5, 32 & 43 mainly on the following grounds :

- i) Agreement of sale dated 06/08/2013 is signed by defendant No.1. It is not a registered instrument and therefore, is in violation of Section 17 of the Registration Act, 1908. The said document is also insufficiently stamped.
- ii) The plaintiff is claiming protection of Section 53A of the Transfer of Property Act, 1882(for short 'Act'). The essential requirement for invoking Section 53A of the Act is that the agreement of sale has to be a registered instrument.
- iii) The plaintiff relied upon receipt dated 07/10/2004 which does not have any description of the house mentioned in that receipt.

8. He submitted that the learned District Judge, however, did not consider clearcut admission as regards possession of the plaintiff in the suit premises in reply dated 28/01/2014. He submitted that learned District Judge failed to properly consider Section 49 of the Registration Act, 1908 and in particular proviso thereto. He submitted that proviso thereto lays down an unregistered document affecting immovable property and required by the Registration Act, 1908 or the Act, to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 or as evidence of any collateral transaction not required to be effected by registered instrument. He submitted that the agreement of sale is admissible in evidence of any collateral transaction.

9. In support of this proposition, he relied upon following decisions.

- I) *S.Kalavati v. Vs.V.R.Somasundaram*, **AIR 2010 Supreme Court 1654.**
- II) *Bondar Singh Vs. Nihal Singh*, **AIR 2003 Supreme Court 1905.**

10. He submitted that the learned District Judge committed serious error in interfering with the discretionary order passed by the learned trial Judge. He submitted that the Apex Court in the case of **Wander Limited and another Vs. Antox India Private Limited**,

1990 (Supp.) SCC 727 has observed in paragraph 14 as under:

“....., the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court’s exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Limited Vs. Pothan Joseph*, (1960) 3 SCR 713, (SCR 721)

He, therefore, submitted that the impugned orders deserve to be set aside.

11. On the other hand, Mr.Gite supported the impugned orders. He submitted that admittedly, document dated 06/08/2013 is not a registered instrument. That apart, the learned District Judge in paragraph 11 has categorically recorded a finding that the said agreement is insufficiently stamped. He submitted that the learned District Judge rightly held that agreement of sale is inadmissible in evidence for any purpose which will also include collateral purposes as mentioned in Section 49 of the Registration Act, 1908. In support of this submission, he relied upon the decision of the Apex Court in the following decisions.

- i) *AvinashKumar Chauhan Vs. Vijay Krishna Mishra, (2009) 2 Supreme Court Cases 532.*
- ii) *Omprakash Vs. Laxminarayan, (2014) 1 Supreme Court Cases 618.*

12. He further submitted that during the pendency of the suit, the plaintiff and defendant No. 5 entered into compromise on 17/09/2014 whereunder plaintiff accepted that possession of the suit premises is given to defendant No. 5 as owner thereof and that plaintiff or others have no right, title and interest. Defendant No.5 is at liberty to use the suit premises as per his wishes. The plaintiff has received Rs.40,000/- from defendant No.5 out of Court. The plaintiff has given up all his claims in the suit and the Court fee may be refunded to the plaintiff. Along with that application, the compromise deed was also enclosed. By order dated 17/09/2014, the learned trial Judge, however, rejected the application and directed to proceed with hearing of the applications at Exhibits No.30, 32 & 43. Nonetheless, perusal of this application clearly shows that the plaintiff accepted that defendant No.5 is in possession of the suit premises. Mr.Gite further submitted that the plaintiff has also filed application dated 03/03/2015 seeking police protection for breaking open the lock. This shows that plaintiff is not in possession. He, therefore, submitted that no case is made out for invocation of powers under Article 227 of the Constitution of India.

13. I have considered the rival contentions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, the learned District Judge, while allowing the appeals has given reasons noted in paragraph 7 above. It is observed that the receipt dated 07/10/2004 does not give description of the said house. It is not possible to uphold this finding. In the receipt dated 07/10/2004, it is recorded that defendants No. 1 & 2 had agreed to sell property situate in Sutar Gali at Mauze Ozhar, Taluka-Niphad, Dist.Nashik. Defendants No.1 & 2 also accepted that they have received Rs.2,50,000/- as earnest amount from the plaintiff. No material is produced on record to show that the defendants No. 1 & 2, apart from the suit premises, have any other premises at Mauze Ozhar, Taluka-Niphad, Dist. Nashik. I, therefore, do not find that the learned District Judge was justified in recording that no description of the suit house is mentioned specifically in the said receipt.

14. The learned District Judge held that agreement of sale dated 06/08/2013 is not a registered instrument. That document is also insufficiently stamped. Mr.Agrawal relied upon the decisions of the Apex Court in the cases of **S.Kalavati & Bonder Singh** (supra). In both the judgments, the Apex Court considered Section 49 of Registration Act,1908 and held that the proviso to Section 49 would show an unregistered document affecting immovable property and

required by Registration Act, 1908 or the Act to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. It is no doubt true that if the learned District Judge had recorded the finding only to the effect that agreement of sale dated 06/08/2013 is not a registered instrument and therefore, inadmissible in evidence, certainly, these two decisions will come to the rescue of the plaintiff. However, the learned District Judge has also recorded a categoric finding that agreement of sale is not sufficiently stamped. Mr.Agrawal did not attack this finding. This aspect is considered by the Apex Court in the case of **Avinash Kumar Chauhan** (*supra*). In that case, the Apex Court has considered Sections 33 & 35 of the Stamp Act, 1899. Section 35 was extracted in paragraph 14 which is to the following effect.

Section 35 provides that an instrument shall be inadmissible in evidence if the same is not duly stamped in the following terms :-

"35 - Instruments not duly stamped inadmissible in evidence, etc. No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer, unless such instrument is duly stamped :

Provided that--

(a) any such instrument shall be admitted in evidence on payment of the duty with which the same is chargeable, or, in the case of an instrument insufficiently stamped, of the amount required to make up such duty, together with a

penalty of five rupees, or, when ten times the amount of the proper duty or deficient portion thereof exceeds five rupees, of a sum equal to ten times such duty or portion ;

(b)where any person from whom a stamped receipt could have been demanded, has given an unstamped receipt and such receipt, if stamped, would be admissible in evidence against him, then such receipt shall be admitted in evidence against him on payment of a penalty of one rupee by the person tendering it;

(c)where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(d)nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a Criminal Court, other than a proceeding under Chapter XII or Chapter XXXVI of the Code of Criminal Procedure, 1898(5 of 1898);

(e)nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act."

15. In paragraph 17, the Apex Court observed that the Parliament has, in Section 35 of the Act, advisedly used the words "for any purpose whatsoever". Thus, the purpose for which a document is sought to be admitted in evidence or the extent thereof would not be a relevant factor for not invoking the aforementioned provisions.

16. In paragraph 23, the Apex Court considered its decision in **Bonder Singh** and observed that Apex Court was not concerned with the provisions of Stamp Act, 1899. In paragraph 25, it was observed thus:

Section 35 of the Act, however, rules out applicability of such provision as it is categorically provided therein that a document of this nature shall not be admitted for any purpose whatsoever. If all purposes for which the document is sought to be brought in evidence are excluded, we fail to see any reason as to how the document would be admissible for collateral purposes.

17. Section 35 of the Stamp Act, 1899 was also considered by the Apex Court in the case of **Omprakash** (supra). In paragraph 17, the Apex Court referred the decision of **Avinash Kumar Chauna's** case and the Apex Court reproduced paragraphs 21 & 22.

Section 34 of the Maharashtra Stamp Act reads as under :

“34. Instruments not duly stamped inadmissible in evidence etc.- No instrument chargeable with duty shall be admitted in evidence for any purpose by any person having by law or consent of parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person or by any public officer unless such instrument is duly stamped [or if the instrument is written on a sheet of paper with impressed stamp [such stamp paper is purchased in the name of one of the parties to the instrument].

Provided that -

[(a) any such instrument shall, subject to all just exceptions, be admitted in evidence on payment of,-

- (I) the duty with which the same is chargeable, or in the case of an instrument insufficiently stamped, the amount required to make-up such duty, and
- (II) a penalty at the rate of 2 per cent, of the deficient portion of the stamp duty for every month or part thereof, from the date of execution of such instrument :

Provided that, in no case, the amount of the penalty shall exceed double the deficient portion of the stamp duty.]

(b) Where a contract or agreement of any kind is effected by correspondence consisting of two or more letters and any one of the letters bears the proper stamp, the contract or agreement shall be deemed to be duly stamped;

(c) nothing herein contained shall prevent the admission of any instrument in evidence in any proceeding in a

Criminal Court, other than a proceeding under [Chapter IX or Part D of Chapter X of the Code of Criminal Procedure 1973.]

d) nothing herein contained shall prevent the admission of any instrument in any Court when such instrument has been executed by or on behalf of the Government or where it bears the certificate of the Collector as provided by Section 32 or any other provision of this Act;

(e) nothing herein contained shall prevent the admission of a copy of any instrument or of an oral admission of the contents of any instrument, if the stamp duty or a deficient portion of the stamp duty and penalty as specified in clause (a) is paid.]

18. Comparison of Section 34 of the Maharashtra Stamp Act and Section 35 of the Stamp Act, 1899 shows that they are *parimateria*. In view thereof, the decisions of the Apex Court in **Avinash Kumar Chauhan** (*supra*) and **Omprakash** (*supra*) will apply with all fours to the facts of the present case.

19. Though as per Section 49 of the Registration Act, 1908, agreement of sale dated 06/08/2013 which is admittedly an unregistered instrument may be admitted in evidence for collateral purposes, having regard to the categorical finding recorded by the learned District Judge that agreement of sale is insufficiently stamped, in my opinion, in view of decisions of the Apex Court in the case of **Avinash Kumar Chauhan** and **Omprakash**, the learned District Judge rightly held that agreement of sale is inadmissible in evidence. To that effect, I do not find any fault in the findings recorded by the learned District Judge.

20. In view thereof, even if I exclude from consideration

agreement of sale dated 06/08/2013, being inadmissible in evidence as it is insufficiently stamped, in my opinion, the learned District Judge has over looked the reply dated 28/01/2014 given on behalf of the defendants No. 1 & 2 and in particular, paragraph 7 thereof. In paragraph 7 of that reply, defendants No. 1 & 2 clearly admitted that plaintiff was inducted as a tenant in the suit premises. Despite the tenancy period was over, he is in possession of the suit premises unauthorizedly and that defendants No.1 & 2 intend to adopt legal proceedings. In other words, there is categorical admission on the part of the defendants No. 1 & 2 as regards possession of the plaintiff in the suit premises. The learned trial Judge has considered this aspect in paragraph 7 of the order. The learned District Judge, however, has not considered this aspect which is a relevant circumstance in favour of the plaintiff.

21. Mr. Gite relied upon the application for compromise dated 17/09/2014 entered into by and between plaintiff and defendant No.5 as also the compromise deed annexed to that application. He submitted that in the application dated 17/09/2014, the plaintiff clearly admitted possession of the defendant No.5. He also accepted Rs.40,000/- and prayed for refund of the Court fee on the ground that he has given up all his claims in the suit. It is not possible to accept this submission for more than one reason. In the first place, perusal of compromise deed annexed to the application

records that the plaintiff admitted that he was never in possession of the suit premises. Prima facie, the said recital is contrary to the material on record and even contrary to the reply dated 28/01/2014 given by the defendants No. 1 & 2. Secondly, the learned trial Judge also did not pass any order on that application at Exhibit 50. On the other hand, the learned trial Judge rejected that application on the ground that compromise is contrary to Order 23 Rule 3 of C.P.C. Thirdly, no argument based on the compromise deed was advanced before Courts below. The Courts below also did not deal with this compromise deed. In view thereof, I do not find that reliance placed by Mr.Gite on this application and compromise deed shows that plaintiff lost possession of the suit premises.

22. In case of **Wander Limited** (*supra*) the Apex Court has held that the appellate court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. The Appellate court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by that court was reasonably possible on the material. The appellate court would

normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion.

23. After considering the material on record, I do not find that the learned trial Judge exercised discretion arbitrarily, or capriciously or perversely. By applying test of the Apex Court in the case of **Wander Limited** (*supra*), I am clearly of the opinion that the learned District Judge committed error in allowing the appeals.

24. Mr.Gite further submitted that the plaintiff has also filed application dated 03/03/2015 seeking police protection for breaking open the lock. This shows that plaintiff is not in possession. It is not possible to accept this submission. Perusal of application dated 03/03/2015 in its entirety shows that plaintiff expressed his apprehension that defendants are threatening him and his family members to vacate the suit premises which plaintiff impossible to reside in the suit premises. It is in that context, plaintiff sought police protection. Perusal of prayer in paragraph 7A also shows that plaintiff has sought police protection for himself and his family members. By order dated 03/03/2015, the learned trial Judge

allowed the application and in paragraph 2, the learned trial Judge recorded that applications at Exhibits No. 5, 32 & 43 were allowed. It was, prima facie, found that plaintiff is in possession of the suit premises and despite that it the case of the plaintiff that defendants have put the lock on the suit premises. In order to ensure that plaintiff resides in the suit premises, it is necessary to extend the police protection for breaking open lock. It is in that context, the learned trial Judge allowed the application. I, therefore, do not find any merit in the submission of Mr.Gite that plaintiff is in possession of the suit premises.

25. As prima facie, plaintiff is in possession of the suit premises, Exhibit 43 deserves to be partly allowed and defendants No. 1 to 5 are restrained from i) dispossessing the plaintiff from the suit premises ii) disturbing his possession over the suit premises without following due process of law. The plaintiff has filed application at Exhibit 32 for restoration of electric supply. It hardly needs to be emphasized that the supply of electricity is essential in its very nature. Even otherwise, it is settled position in law that if the Court has power to grant final relief, it has also power to grant interim relief unless the provisions of the particular Statute expressly say otherwise. As held by the learned Single Judge of this Court (Coram: V. C. Daga, J.) in *Deshmukh and Company Vs. Avinash V. Khandekar*, **2006(2) Bom.C.R.321**, while granting interim relief, the

Court has also to take into account whether the interim relief is claimed in the aid of final relief so as to maintain status quo ante or to preserve status of parties. In the present case, interim relief is claimed by the plaintiff in the aid of final relief. In view thereof, Exhibit 32 deserves to be allowed.

26. The plaintiff has also taken out application at Exhibit 5 for injunction restraining defendants from creating third party interest. As noted earlier, on 07/02/2014, the plaintiff instituted suit for specific performance of agreement of sale. He also filed application at Exhibit 5 for injunction restraining defendants from creating third party interest. The suit summons was served on defendant No.5 on 28/02/2014. The suit summons was served on defendants No. 1 to 4 on 05/03/2014. Defendants No. 2 to 5 appeared in the suit on 12/03/2014. Despite defendants No. 1 to 5 being aware of the pendency of the suit, on 04/04/2014, defendants No. 1 to 4 executed sale deed in favour of defendant No.5. In view thereof, application at Exhibit 5 also deserves to be allowed.

27. In the light of the above discussion, Petitions succeed and same are allowed. Rule is made absolute in terms of prayer clause (b). Applications at Exhibits 5, 32 and 43 are allowed. As indicated earlier, defendants No.1 to 5 are restrained from i) dispossessing the plaintiff from the suit premises ii) disturbing his possession over the suit premises without following due process of

law. In the circumstances of the case, there shall be no order as to costs.

(R. G. KETKAR, J.)