

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

Writ Petition NO. 2886 OF 2016

Sou. Rekha Shantaram Waje
And Anr.

...Petitioners

Versus

Deelip Kashinath Bagal
And Ors.

...Respondents

....

Mr.Venkatesh A. Shastry, Advocate for the Petitioners.
Mr. Sachin Gite, Advocate for Respondent No.1.

....

CORAM : R. G. KETKAR, J.

DATE : 15th APRIL, 2016

P.C.

1. Not on board. At the request of Mr. Shastry, taken up for admission.
2. Heard Mr. Venkatesh Shastry, learned Counsel for the petitioner and Mr. Sachin Gite, learned Counsel for the respondent No.1, at length.
3. By this Petition under Article 227 of the Constitution of India, the petitioners have challenged the judgment and order dated 12.1.2016 passed by the learned District Judge-2, Niphad in Misc. Civil Appeal No.55/2015. By that order, learned District

Judge allowed the appeal preferred by respondent No.1, hereinafter referred to as the 'plaintiff', and quashed and set aside the judgment and order dated 27.5.2015 passed by learned 2nd Jt. Civil Judge, Junior Division, Niphad below Exhibit-5 in Regular Civil Suit No.57/2015. Learned District Judge allowed the application Exhibit-5 and issued injunction restraining the petitioners, hereinafter referred to as 'defendant Nos.1 and 2', from obstructing the peaceful possession and cultivation of the plaintiff over land bearing Gat No.210/2 admeasuring 53 Are inclusive 0.1 Are situate at Niphad, District-Nashi, (for short, 'suit land') as also restraining defendant Nos.1 and 2 from alienating the suit land and mutating their names in the revenue record on the strength of sale deed dated 25.2.2014.

4. The plaintiff has instituted suit *inter alia* for declaration that defendant Nos.1 and 2 have no right, title and interest and possession over the suit land; for declaration that the sale deed dated 25.2.2014 executed by defendant No.2 in favour of defendant No.1 is illegal; for perpetual injunction restraining defendant Nos.1 and 2 from causing obstruction to the plaintiff's possession and from creating third party interest

on the strength of sale deed dated 25.2.2014 and from entering name of defendant No.1 in the revenue record and from alienating the suit land. During pendency of the suit, the plaintiff took out application at Exhibit-5 for temporary injunction. Defendant Nos.1 and 2 filed written statement and say to Exhibit-5 opposing the suit as also application for interim relief. On the basis of the material on record, learned trial Judge rejected the application. Aggrieved by that decision, the plaintiff preferred Misc. Civil Appeal which was allowed by the impugned order. It is again this decision, defendant Nos.1 and 2 have instituted the present petition.

5. In support of this petition, Mr. Shastry strenuously contended that by registered agreement for sale dated 13.5.2004, Kashinath, father of the plaintiff agreed to sell the suit land to defendant No.1. Said agreement for sale is witnessed by the plaintiff amongst others. On 8.11.2006 document styled as 'Bharna Pavati' was executed by Kashinath. In that Bharna Pavati, there is recital to the effect that the possession delivered earlier to the defendant No.1 will be confirmed at the time of execution of the sale deed. In other words, defendant No.1 was

already put in possession before execution of 'Bharna Pavati' on 8.11.2006. Mr. Shastry also relied upon the irrevocable power of attorney executed by Kashinath, father of the plaintiff, the plaintiff and defendant No.1 and submitted that the plaintiff is the sole legal representative of Kashinath, since deceased. Defendant No.2 was authorized to execute the sale deed by Kashinath and the plaintiff. On the strength of this power of attorney, defendant No.2 executed sale deed in favour of defendant No.1 on 25.2.2014. In clause-9 of the said sale deed, there is a recital that defendant No.1 has taken possession of the suit land. He also invited my attention to the affidavit filed by Pandharinath Bagal dated 2.5.2015 wherein it is stated that from the date of execution of the agreement for sale, defendant No.1 is in possession. He also relied upon affidavit of Uddhav Bagal dated 2.5.2015. In this affidavit, it is stated that since 2004 i.e. from the date of agreement of sale defendant Nos.1 and 2 are in possession of the suit land.

6. Mr. Shastry further submitted that in the written statement and say to exhibit-5 and in particular paragraph-20 thereof, inadvertently it is mentioned that defendant No.1 is in

possession from the date of the sale deed. He submitted that during course of arguments before the learned District Judge, Advocate representing defendant Nos.1 and 2 submitted that inadvertently in the written statement it was set out that the possession was delivered on the date of execution of the sale deed. However, defendant Nos.1 and 2 are in possession after execution of the agreement for sale as is evident from Bharna Pavati dated 8.11.2006. In short, he submitted that on the date of filing of the suit, defendant Nos.1 and 2 are in possession. Mr. Shastri submitted that learned trial Judge has considered the material on record and in particular paragraph-13 held that *prima facie* the plaintiff failed to establish his possession over the suit property. He, therefore, submitted that learned District Judge committed serious error in interfering with the discretionary order passed by learned trial Judge.

7. On the other hand, Mr. Gite supported the impugned order. He submitted that the agreement for sale dated 13.5.2004 there is no recital to the effect that the possession is handed over by Kashinath, father of the plaintiff to defendant No.1. He further submitted that perusal of the power of attorney dated 8.11.2006

shows that Kashinath did not give authority to defendant No.2 to execute the sale deed in favour of defendant No.1. In fact Kashinath died in the year 2007 and, therefore, defendant No.2 could not have executed sale deed in favour of defendant No.1. He invited my attention to paragraph-20 of the written statement and submitted that in paragraph-20 defendant Nos.1 and 2 specifically averred that they are in possession of the suit land from the date of the sale deed. He further invited my attention to the declaration dated 25.2.2014 made by defendant No.2 which is part of the sale deed. Defendant No.2 specifically declared that none of the parties to the power of attorney has died or that the power of attorney is not cancelled. He submitted that this is totally false as Kashinath, father of the plaintiff had died in the year 2007 and was not alive at the time of execution of the sale deed.

8. I have considered the rival submissions advanced by the learned Counsel for the parties. I have also perused the material on record.

9. The short question is whether the learned District Judge was justified in interfering with the order passed by

learned trial Judge.

10. Perusal of the agreement for sale *prima facie* does not indicate that defendant No.1 was put in possession by Kashinath, father of the plaintiff. Though it is true that the plaintiff is one of the witnesses to the said agreement for sale, there is recital in the Bharna Pavati dated 8.11.2006 to the effect that after the removal of encumbrance of Maharashtra State Co-op. Bank Ltd., he will execute the sale deed before the Sub-Registrar-I, Niphad and will confirm the possession of defendant No.1 which was already handed over to her. This aspect is considered by the learned District Judge in paragraph-10 of the impugned order. Learned District Judge observed that in Bharna Pawati dated 8.11.2006 it is mentioned that the possession already delivered will be confirmed at the time of execution of the sale deed. It is however not mentioned in the said document as to when possession was delivered prior to execution of Bharna Pavati. If the defendants claimed that they are possession, the date of delivery of possession is a very vital aspect. I do not find that the learned District Judge has committed any error in recording that finding in paragraph-10.

11. That brings me to the irrevocable power of attorney dated 8.11.2006 executed on behalf of Kashinath, the plaintiff and defendant No.1 in favour of defendant No.2. This aspect is considered by the learned District Judge in paragraph-11 of the impugned order. It is not in dispute that the suit land was owned by Kashinath. Learned District Judge observed that what was the concern of the plaintiff and defendant No.1 is not understood. It is also not understood as to why names of plaintiff and defendant No.1 were mentioned in the power of attorney, when they were not owners of the suit land. Perusal of power of attorney and in particular clause-1 thereof shows that defendant No.2 was authorized by Kashinath to (1) to delete the name of bank after obtaining the certificate from the bank; and (2) to execute sale deed as general power of attorney holder to Kasinath in favour of defendant No.1. Perusal of power of attorney does not indicate that the plaintiff gave any authority whatsoever to defendant No.2. As noted earlier, Kashinath, father of the plaintiff died in the year 2007. After his death, *prima facie* the authority, if any given to defendant No.2, came to an end. This aspect was considered by the learned District Judge in paragraph-11 of the impugned order. Learned District

Judge observed that since Kashinath died, the power of attorney has no force of law and said document has no legal sanctity. It is also relevant to note that *prima facie* defendant No.2 misrepresented registration authorities while making declaration dated 25.2.2014, which is part of the sale deed. In this declaration, defendant No.2 represented that none of the parties to the power of attorney has expired or that the power of attorney is not revoked. As noted earlier, Kashinath died in the year 2007. In view thereof, I do not find that the learned District Judge has committed any error in passing the impugned order. Defendant Nos.1 and 2 *prima facie* are not in possession. Hence, Petition fails and the same is dismissed.

(R. G. KETKAR, J.)