

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY.
CIVIL APPELLATE JURISDICTION.**

WRIT PETITION (ST) NO. 13850 OF 2016

Smt. Shantabai Mhadu kamble & Ors.	... Petitioners
V/s.	
Shri. Krishnath Shamrao Khade & Ors.	... Respondents

Mr. Gaurav Shah with Umesh Waghmare i/b Sonali Patil for the Petitioner.
Mr. Sandeep Koregawe for the Respondent.

**CORAM : K. K. TATED, J.
DATED : 08/07/2016**

P.C.:

. Heard learned Counsel for the parties.

2 By this petition under Article 227 of the Constitution of India the Petitioner original Defendant nos. 1 to 3 challenges the concurrent findings of facts recorded by both the courts below an interim relief about the possession.

3 In the present proceeding, the respondents plaintiffs filed Regular Civil Suit No. 206 of 2014 before Civil Judge, Junior Division, Kagal under Section 10 and 38 of the Specific Relief Act in respect of agreement for sale dated 13.12.2011 executed by Defendant no.1 in their favour. In that suit, the plaintiffs preferred application below Exh.5 under Order 39 Rule 1 and 2 of Code of Civil Procedure, 1908 for an order of injunction restraining the defendants from disturbing their possession in respect of suit property bearing Gat No. 877 admeasuring 2 H 42 R land situated at Vannur, Taluka Kagal, District

Kolhapur. The defendants had not disputed the possession of the plaintiffs in respect of the suit property. Considering this fact, the Trial Court as well as the Appellate Court held that plaintiffs are entitled to an order of injunction against the defendants from disturbing their possession over suit property. Being aggrieved by the said order, defendants preferred the present Writ Petition.

4 The learned Counsel for the defendants submits that both the courts below failed to consider the facts that the Agreement for sale on which the plaintiffs relied for specific performance as well as injunction was not admissible in evidence. He submits that agreement for sale was executed before the Notary only. Neither, same was registered, nor plaintiffs paid any stamp duty on those documents. He submits that if the document is not admissible in evidence, then court cannot rely on those documents, even at the time of deciding the application for injunction under order 39 Rule 1 and 2 of Code of Civil Procedure, 1908. In support of these contentions, he relied on following judgments.

i) *SMS Tea Estates Pvt. Ltd. V/s. Chandmari Tea Company Pvt. Ltd. reported in MANU/SC/0836/2011.*

ii) *Shri. Annasaheb Kallappa Upadhye & Ors. V/s. Shri. Ramesh Football Chougule & Ors. reported in 2016 SCC Online Bom 2068.*

iii) *Mr. Rafique Barkatulla Khan V/s. Mr. Shahenshah Hussai Iqbal Munshi & Ors. in Appeal from Order No. 977 of 2011 dated 28.09.2011 of Bombay High Court.*

iv) Lakdawala Developers Pvt. Ltd. V/s. Badal Mittal & Ors. in Appeal (L) No. 272 of 2013 in Arbitration Petition No. 221 of 2013 dated 25.06.2013 of Bombay High Court.

v) Rafique Barkatulla Khan v/s. Shahenshah Hussain Iqbal Munshi & Ors., reported in MANU/SCOR/6751/2012

5 The learned Counsel for the defendants submits that defendants No.1 executed registered sale deed of suit property in favour of defendant Nos. 2 and 3. He submits that even the Appellate Court in the impugned judgment recorded that the defendant Nos. 2 and 3 have registered Sale Deed in their favour in respect of suit property. Hence, the impugned order passed by both the courts below are required to be set aside because in prayer clause (a) of the plaint, plaintiffs have not claimed any relief against the defendant Nos. 2 and 3. He further submits that even the observations made by both the courts below required to be set aside because those may come in their way, if they decide to file the suit on the basis of registered sale deed for the possession. Hence, on the basis of these submissions, the learned Counsel for the defendants submits that this Hon'ble Court be pleased to set aside the impugned order passed by both the courts below.

6 On the other hand, the learned Counsel for the Respondents Plaintiffs vehemently opposed the present Writ Petition. He submits that the Trial Court as well as Appellate Court at the time of deciding their application below Exh. 5 considered the fact that plaintiffs proved their possession in respect of the suit property. He submits that even the defendants admitted the plaintiffs possession. He submits that whether the documents filed by the plaintiffs are admissible in

evidence or not, that can be decided at the time of the trial. Hence, there is no substance in the Writ Petition and same to be dismissed with costs.

7 I heard both the sides at length. It is to be noted that in the present proceeding, the Trial Court as well as the Appellate Court allowed the plaintiffs' application below Exh.5 under Order 39 Rule 1 & 2 of Code of Civil Procedure, 1908 only on the ground that defendants admitted plaintiffs' possession in respect of suit premises. Whether plaintiffs are entitled to specific performance of agreement dated 13.12.2011 or not, that can be decided at the time of trial of the suit. The authorities cited by the learned Counsel for the defendants are not applicable to the facts and circumstances of the present case. In the present case, the defendants themselves admitted that plaintiffs are in possession of the suit premises.

8 Considering these facts, I do not find any reasons to interfere with the concurrent findings of the facts recorded by both the courts below.

9 Hence, following order is passed:

- a) Writ Petition stands dismissed.
- b) No order as to costs.
- c) Considering the facts and circumstances of the present case, hearing of Regular Civil Suit No. 206 of 2014 is expedited.

(K.K.TATED, J.)