

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 11460 OF 2016**

Mr. Raghunath Dagadu Bhorde
and Ors.

..Petitioners.

Vs

Mr. Pandurang Dattatraya
Gadewar

.. Respondent

Mr. Sudhir S. Sadavarte, Advocate for Petitioners.

Mr.Mihir Raut i/b Mr. Nitin P. Deshpande, Advocate for
Respondent.

CORAM : R.G.KETKAR,J.

DATE : 08/12/2016

PC:

1. Heard Mr.Sudhir Sadavarte, learned counsel for the petitioners and Mr. Mihir Raut, learned counsel for the respondent at length. Rule. Mr. Raut waives for the respondent. At the request and by consent of the parties, Rule is made returnable forthwith and petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, the petitioners, hereinafter referred to as 'plaintiffs', have challenged the Judgment and order dated 18.7.2016 passed by the learned District Judge-14, Pune in Misc. Civil Appeal No.479 of 2015. By that order, the learned District Judge allowed the Appeal preferred by the respondent, hereinafter referred to as 'defendant', and quashed and set aside the Judgment and order dated 15.10.2015 passed below Exhibit-5 in Spl. Civil Suit No.452 of 2015. The learned trial Judge rejected Application- Exhibit-5 taken out by the plaintiffs.

3. Plaintiffs have instituted the suit against the defendant, inter alia, praying for cancellation of registered agreement of sale dated 19.12.2012 as also registered sale deed dated 21.6.2014 on the ground that it is without consideration and without possession; for perpetual injunction restraining the defendant from (a) causing disturbance to the plaintiff's possession; (b) creating third party interest; (c) mortgaging property for obtaining loan; and (d) forcibly taking possession of the suit property.

4. During the pendency of the suit, the plaintiffs filed Application Exhibit-5 for injunction in the aforesaid terms. The learned trial Judge allowed the application and issued injunction restraining the defendant from creating third party interest in the suit property as also restraining the defendant from causing obstruction to the peaceful enjoyment and vacant possession of the plaintiff over the suit property till the disposal of the suit. Aggrieved by this decision, the defendant preferred Appeal which is allowed by the learned District Judge. It is against this order, the plaintiffs have instituted the present Petition.

5. In support of this petition, Mr. Sadavarte submitted that the plaintiffs allegedly executed registered agreement in favour of the defendant on 19.12.2012. Clause (7) of that agreement recorded that possession is to be handed over at the time of execution of the sale deed. He submitted that on 19.6.2014

Consent Deed was executed by (i) Sou. Vaishali Vilas Chavan;(ii) Sou.Vandana Vaibhav Kumbhar; (iii) Sou. Manisha Rajendra chavan; (iv) Sou. Bhagyashri Rohit Mane. Clause (8) thereof, however, recorded that the consenting parties accepted that possession of the suit property was handed over on 19.12.2012 when agreement for sale was executed.

6. Mr. Sadavarte also invited my attention to sale deed dated 21.6.2014. Clause (5) thereof recorded that actual physical possession is to be handed over on execution of the sale deed. He submitted that the learned trial Judge held that the plaintiffs are in possession and that the defendant is not in possession. As against this, the learned District Judge held that the defendant is in possession of the suit property in pursuance of the agreement of sale dated 19.12.2012. He submitted that this finding is contrary to clause (7) of the agreement for sale.

7. He further submitted that from the material on record, it is evident that as against total consideration of Rs.28 lakhs, the defendant had paid Rs. 23 lakhs. In other words, the defendant has not paid balance consideration of Rs. 5 lakhs and, therefore, possession was not handed over to the defendant.

8. On the other hand, Mr.Raut supported the impugned order and submitted that the defendant is in possession of the suit property. The learned district Judge has considered the fact that the parties entered into registered agreement of sale on

19.12.2012. It is also brought on record that out of total consideration of Rs. 28 lakhs, the defendant has paid Rs. 23 lakhs. He has also tendered affidavit of the defendant dated 23.11.2016 which is taken on record and marked "X" for identification. In paragraph 2 the defendant has undertaken to deposit Rs. 5 lakhs (Rs five laks only) in the trial Court on or before 31.1.2017. In paragraph 3, the defendant has stated that he shall not part with possession nor create third party interest with respect to the suit property. Undertakings given by the defendant in clauses 2 and 3 of the affidavit dated 23.11.2016 are accepted.

9. I have considered the rival submissions advanced by the learned counsel appearing for the parties. I have also perused the material on record. Section 54 of the Transfer of Property Act, 1882 defines the expression 'sale' to mean a transfer of ownership in exchange for a price paid **or promised or part-paid or part-promised**. Prima facie, it has come on record that out of total consideration of Rs. 28 lakhs, the defendant had paid Rs. 23 lakhs to the plaintiff. Parties entered into registered agreement of sale on 19.12.2012. Clause (7) thereof clearly recorded that possession is to be handed over to the defendant at the time of execution of the sale deed. The sale deed is executed on 21.3.2014. Clause 5 thereof also recorded that possession is to be handed over at the time of execution of the

sale deed. It is no doubt true that in consent deed dated 19.6.2014 the consenting party accepted that possession was handed over to the defendant on 19.12.2012 when the agreement of sale was executed. Even if one excludes from consideration, the consent deed in respect of handing over possession, perusal of clauses in the agreement of sale and the sale deed prima facie indicates that defendant is in possession. The learned District Judge also considered clause (6) of the sale deed and observed that clause 6 recorded that the defendant became owner of the suit property and he can enjoy the suit property as per his wish and that the plaintiff or his legal representatives will not cause any obstruction to the defendant. Clause (7) thereof also permitted the defendant to take appropriate steps for recalling his name in the relevant record. Clause (8) thereof provided that taxes were paid upto date and future taxes are to be paid by the defendant. After considering the material on record, I do not find that the learned District Judge has committed any error in holding that the defendant is in possession of the suit property.

10. As it has come on record that the defendant has not paid balance consideration of Rs. 5 Lakhs, on the last date of hearing it was indicated to the learned counsel for the defendant that he has to deposit Rs. 5 lakhs. Accordingly, the affidavit is made by the defendant. I have already accepted the undertakings given

in clauses (2) and (3) thereof. Hence, petition requires to be allowed partly in the following terms;

- (i) The impugned order is modified by directing the defendant to deposit Rs. 5 lakhs (Rupees Five Lakhs only) in the trial Court on or before 31.1.2017.
- (ii) Defendant shall neither create third party interest nor part with possession. All contention of the parties are expressly kept open.
- (iii) Rule is made absolute in the aforesaid terms with no order as to costs. Order accordingly.

(R.G.KETKAR, J.)