

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

**SECOND APPEAL NO.746 OF 2013
ALONG WITH
CIVIL APPLICATION NO.1541 OF 2013
IN
SECOND APPEAL NO.746 OF 2013**

1. Madhukar s/o. Baburao B.Savle,) age : 40 yrs., Occupation : Business,) R/at.Balajinagar, Dhankavdi,) Dist. Pune.)	.. Appellant (original deft. no.2)
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Versus

1. Smt.Nanda Madhukar Yene) age : 51 yrs., Occupation : Service,) R/at Antar Bharati Balgram,) Lonavala, Tal. Maval,) District – Pune.)	
2. Nitin Madhukar Yene) Occupation- Service,) R/at Sr.No.34/3/2/1,) Flat No.4, Ganesh Apartment,) Dhankavdi, District – Pune.)	.. Respondents (original plaintiff and original defendant no.1)

Mr.K.P. Shah for the appellant.

Mr.Telesh Dande for the Respondents.1

CORAM : R.D. DHANUKA, J.

DATE : 10th October 2016.

Judgment :-

. By this second appeal filed under Section 100 of the Code of Civil Procedure, 1908, the appellant (original defendant no.2) has

impugned the judgment and decree dated 2nd September 2013 passed by the learned District Judge-5, Pune allowing the Civil Appeal No.666 of 2008 filed by the respondent no.1 herein (original plaintiff) and setting aside the judgment and decree dated 22nd August 2008 passed by the 7th Joint Civil Judge, Junior Division, Pune in Regular Civil Suit No.1944 of 2004 filed by the respondent no.1 and modifying the said decree.

2. The first appellate Court has directed the appellant herein to hand over vacant and peaceful possession of the suit flat to the original plaintiff within 60 days from the date of the said decree and has restrained the appellant herein from alienating the suit property and creating any third party interest therein. The respondent no.2 herein was the original defendant no.1 before the trial Court. Parties described in this judgment are as per their original status before the trial Court. Some of the relevant facts for the purpose of deciding the second appeal are as under :-

3. The plaintiff is mother of defendant no.1. It was the case of the plaintiff that she has purchased the suit flat i.e. bearing flat No.4 admeasuring 530 sq.ft. situated on the first floor in the apartment known as 'Ganesh Apartment' constructed on Survey No.34/3/2/1 at Dhankavdi by executing a Deed of Apartment and had obtained loan from Rajeshree Shahu Sahakari Bank Ltd. The said document was registered with Sub-Registrar of Assurance. It was her case that she was in exclusive possession of the suit flat. The defendant no.1 is her son and was serving as a driver with Rajya Parivahan Mahamandal, Kopergaon. The plaintiff is a widow and was working with Antar Bharati Balgram, Lonavala

and had to stay at Lonavala. The defendant no.1 after his marriage was staying in the suit flat. It was the case of the plaintiff that on 10th December 2004 when the plaintiff had been to Pune for paying the last installment of the loan, she went to the suit flat and found the same locked. The plaintiff came to know that the defendant no.1 was showing the said flat to the public in order to sell the suit flat. The defendant no.1 had also issued a notice in the newspaper 'Daily Prabhat.'

4. The plaintiff came to know that on the basis of an alleged power of attorney which was never entered into by the plaintiff in favour of the defendant no.1, the defendant no.1 had alleged to have been entered into an agreement with the defendant no.2 and since 10th December 2004, the defendant no.2 has been staying in the suit flat.

5. The defendant no.1 filed written statement and denied the suit claim. The defendant no.1 also denied the title of the plaintiff in the suit flat and alleged that he had in fact paid the entire loan of the Rajeshree Shahu Sahakari Bank Ltd. He alleged that the plaintiff had given him a power of attorney on 7th July 2004 at Ahmednagar in respect of the suit flat and on the basis of the said power of attorney, he had entered into transaction with the defendant no.2 and since 10th December 2004, the defendant no.2 has been staying in the suit flat.

6. The defendant no.2 who claims to be the purchaser of the suit flat from the defendant no.1 filed an application below Exhibit-5 and later on adopted the said reply as his written statement. He also denied the allegations made in the plaint and opposed the relief sought

by the plaintiff. The defendant no.2 alleged that the plaintiff had filed the said suit in collusion with the defendant no.1. It was the case of the defendant no.2 that the defendant no.1 told him that due to old age of the plaintiff, it was not possible for her to remain present every time and therefore, the power of attorney was executed by her at Ahmednagar in favour of the defendant no.1. He alleged that he had paid various amounts to the defendant no.1 in respect of the said transaction and was in actual and physical possession of the suit flat by the defendant no.1.

7. Learned trial Judge framed four issues and rendered various findings in favour of the plaintiff. The plaintiff had examined herself and also relied upon various documents including the copy of Deed of Apartment extract of Index No.2, notice published in the Daily Prabhat, certificate issued by Antar Bharati Balgram etc. The defendants did not adduce any evidence in support of their contention.

8. The defendant no.1 was absent at the time of the arguments inspite of several opportunities given by the learned trial Judge. The plaintiff and the defendant no.2 through their learned counsel made oral submissions.

9. The learned trial Judge held that the plaintiff had proved that she was the exclusive owner of the suit flat and that the defendant no.1 had without any authority was trying to sell the suit flat to the defendant no.2. The learned trial Judge also held that the defendant no.2 had failed to prove that he was in authorised possession of the suit flat. The learned trial Judge held that the plaintiff had admitted during the

cross-examination that before filing of the suit, the defendant no.2 was in possession of the suit flat and thus the learned trial Judge refused to grant prayer of the plaintiff that the defendants should not obstruct open and actual possession of the plaintiff over the suit flat.

10. Being aggrieved by the said judgment and decree dated 22nd August 2008, the plaintiff filed an appeal (Civil Appeal No.666 of 2008) in the Court of District Judge-5, Pune against the defendants. None of the defendants filed any cross-objection. The plaintiff filed an application before the first appellate Court for seeking amendment in the suit for taking possession of the suit flat. None of the defendants raised any objection to the application for amendment for taking possession of the suit flat. The first appellate Court accordingly framed two additional issues namely (i) whether the defendant no.2 is residing in the suit flat without authority and (ii) whether the plaintiff is entitled to possession of the suit flat.

11. The first appellate Court remitted the said two additional issues along with record and proceedings to the trial Court for recording findings therein. The trial Court granted opportunity to both the parties upon remand to adduce evidence on the said additional issues framed by the first appellate Court. None of the defendants adduced any evidence in respect of those two additional issues. The trial Court rendered additional findings and forwarded the same to the first appellate Court after rendering those findings in favour of the plaintiff on those two additional issues.

12. Thereafter, the first appellate Court heard both the parties. The defendant no.1 did not appear before the first appellate Court. The first appellate Court framed six points for determination. After considering the oral and documentary evidence, the first appellate Court held that the plaintiff had purchased the suit flat under the registered agreement dated 27th November 1998. It is held that the plaintiff had not executed power of attorney in favour of the defendant no.1 for alienation of the suit flat at any point of time. It is held that the possession of the defendant no.2 in the suit flat was not authorised. The first appellate Court also held that the plaintiff was justified in claiming the suit flat and refused to set aside the judgment and decree passed by the trial Court.

13. Being aggrieved by the judgment and decree dated 2nd September 2013 passed by the learned District Judge-5, Pune, the defendant no.2 has filed this second appeal under Section 100 of the Code of Civil Procedure, 1908.

14. Mr.Shah, learned counsel appearing for the appellant (original defendant no.2) invited my attention to the decree passed by the learned trial Judge on 22nd August 2008. It is submitted by the learned counsel that in the plaint filed by the original plaintiff, there was no prayer for possession of the suit flat against any of the defendants. He submits that the defendant no.2 admittedly was placed in possession by the defendant no.1 who had sold the suit flat by executing the agreement in favour of the defendant no.2 by exercising power of attorney executed by the plaintiff in his favour.

15. It is submitted by the learned counsel that the defendant no.2 admittedly is in possession of the suit flat. He submits that the appeal against the refusal of the relief by the learned trial Judge against the defendants not to obstruct the alleged open and actual possession of the plaintiff over the suit flat itself was not maintainable. He submits that the first appellate Court for the first time could not have permitted the plaintiff to amend the plaint and to seek possession of the suit flat. He submits that the defendant no.1 deliberately remained absent in both the proceedings and had colluded with the plaintiff after accepting the consideration amount and various other amounts from the defendant no.2. He submits that the agreement entered into between the defendant no.1 in favour of the defendant no.2 was not challenged by the plaintiff. There was no prayer for cancellation of the agreement between the defendant no.1 and the defendant no.2 in the plaint. He submits that the learned trial Judge as well as the first appellate Court did not frame any issue on the validity of the agreement entered into between the defendant no.1 and the defendant no.2.

16. Mr.Dande, learned counsel appearing for the plaintiff invited my attention to some of the findings rendered by the trial Court as well as the first appellate Court. He submits that the plaintiff had not executed any power of attorney in favour of the defendant no.1. The defendant no.2 admittedly could not produce any alleged power of attorney on the basis of which the defendant no.1 had executed an agreement in favour of the defendant no.2 inspite of various opportunities given by the learned trial Judge.

17. It is submitted by the learned counsel for the plaintiff that when the plaintiff had made an application before the first appellate Court for amendment in the plaint and to include the relief for taking possession of the suit flat, none of the defendants raised any objection. The first appellate Court had thus rightly framed additional two issues regarding possession of the suit flat as to whether the plaintiff was entitled to possession of the suit flat or not. He submits that though the matter was remanded back to the trial Court for recording findings on those two additional issues and opportunities were rendered to the defendants to adduce the evidence in respect of two additional issues, none of the defendants led any evidence. He submits that the additional findings recorded by the learned trial Judge upon remand were rendered after considering the additional evidence led by the plaintiff. He submits that the defendant no.2 now cannot be allowed to challenge the order passed by the first appellate Court allowing the amendment to the plaint and framing two additional issues and remanding to the trial Court for recording findings thereon.

18. In so far as the submission of the learned counsel for the defendant no.2 that there was no prayer for possession sought by the plaintiff and thus no decree for possession could be granted is concerned, he submits that the defendant no.2 not having challenged the order passed by the first appellate Court allowing the amendment cannot be allowed to raise this issue at this stage.

19. In so far as the submission of the learned counsel for the defendant no.2 that the agreement entered into between the defendant

no.1 and the defendant no.2 not having been challenged by the plaintiff and no issues having been framed by the two Courts below, no decree for possession could be ordered is concerned, it is submitted by the learned counsel for the plaintiff that the plaintiff had not executed any power of attorney in favour of the defendant no.1. He submits that since the power of attorney on the basis of which the alleged agreement for sale was entered into by the defendant no.1 in favour of the defendant no.2 was not proved by the defendant no.2, the question of right, title and interest of the defendant no.2 in the suit flat did arise. He submits that findings rendered by two Courts below being concurrent findings and are not perverse, cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908.

REASONS AND CONCLUSIONS:-

20. There is no dispute that the plaintiff was the owner of the suit flat. The defendant no.2 has not disputed before this Court that the plaintiff had no title in respect of the suit flat. It was the case of the defendant no.2 that the defendant no.1 had exercised his right under the power of attorney alleged to have been executed by the plaintiff in his favour. It is not in dispute that the defendant no.2 did not produce any such alleged power of attorney before the learned trial Judge inspite of various opportunities granted to him. The defendant no.2 could not prove transfer of any title by the defendant no.1 in favour of the defendant no.2. There is no dispute that the defendant no.2 came to be in possession of the suit flat and was placed in possession by the defendant no.1.

21. In my view, since the defendant no.1 had no power to deal with the suit flat and being not the owner could not place the defendant no.2 in possession of the suit flat. In my view, possession of the defendant no.2 was thus ex facie illegal. After considering the oral and documentary evidence, the learned trial Judge came to the conclusion that the plaintiff had proved that she was the exclusive owner of the suit flat and had further proved that the defendant no.1 was without any authority was trying to sell the suit flat to the defendant no.2. No cross-objection was filed by any of the defendants before the first appellate Court.

22. It is not in dispute that there was no prayer for possession initially made by the plaintiff in the plaint. There is no dispute that the plaintiff had prayed for amendment before the first appellate Court. The first appellate Court after hearing the plaintiff and the defendant no.2 and having found that there was no objection to the said amendment, allowed the amendment on the issue of possession and framed two additional issues regarding possession and had remanded the matter back to the trial Court for rendering findings on those two additional issues. It is not in dispute that the defendant no.2 did not challenge the said order allowing the amendment to the plaint. Though the learned trial Judge rendered fresh opportunity to the defendants upon remand before rendering additional findings on those two additional issues, none of the defendants bothered to avail of such opportunity granted by the learned trial Judge. The learned trial Judge after considering the additional evidence rendered findings in favour of the plaintiff on those two additional issues.

23. In my view, since the defendant no.2 did not challenge the order passed by the first appellate Court allowing the amendment and claim for possession of the suit flat and framing the additional issues, the defendant no.2 cannot be allowed to urge this issue for the first time in this second appeal. The order of amendment passed by the first appellate Court in favour of the plaintiff has attained finality and cannot be challenged across the bar at this stage.

24. The findings rendered by the learned trial Judge that plaintiff was the exclusive owner of the suit flat and that the defendant no.1 without any authority was trying to sell the suit flat to the defendant no.2 have attained finality in view of the defendant no.2 not having filed any cross-objection.

25. In so far as the relief of possession granted by the first appellate Court in favour of the plaintiff is concerned, since the first appellate Court having found that the plaintiff had purchased the suit flat and had not executed any power of attorney in favour of the defendant no.1 for alienation of the suit flat in favour of the defendant no.2 and that the possession of the defendant no.2 in the suit flat was not authorised, the first appellate Court, in my view, is right in passing the decree of possession of the suit flat in favour of the plaintiff.

26. I am not inclined to accept the submission of the learned counsel for the defendant no.2 that no such decree for possession could be passed by the first appellate Court. In my view, since the defendant no.2 failed to prove any power of attorney alleged to have been executed

by the plaintiff in favour of the defendant no.1 on the basis of which the defendant no.1 had alleged to have executed the agreement for sale in favour of the defendant no.2, no right, title and interest of any nature whatsoever could be conferred upon the defendant no.2. In my view, there is no substance in the submission of the learned counsel for the defendant no.1 that no finding is rendered by the Courts below on the validity of the agreement entered into by the defendant no.1 in favour of the defendant no.2.

27. In my view, the finding rendered by the first appellate Court that the power of attorney is not placed on record by both the defendants and also the agreement dated 11th December 2004 on the basis of which the defendant no.2 is in possession over the suit flat, the only inference can be drawn that the defendant no.1 had with malafide intention inducted the defendant no.2 in the suit flat on the basis of bogus power of attorney and thus the possession of the defendant no.2 over the suit flat cannot be said to be permissive is not perverse. In my view, both the Courts have considered the evidence led by both the parties and have rendered findings of facts which are concurrent findings and being not perverse, cannot be interfered with by this Court under Section 100 of the Code of Civil Procedure, 1908. In my view, there is no substantial question of law arises in this appeal. Appeal is totally devoid of merit.

28. I therefore pass the following order :-

- (i) Second Appeal No.746 of 2013 is dismissed.
- (ii) In view of dismissal of the second appeal, civil application does not survive and is accordingly dismissed. No order as to costs.
- (iii) There shall be no order as to costs.

29. At this stage, learned counsel for the appellant seeks continuation of the ad-interim order passed by this Court which is vehemently opposed by the learned counsel for the respondent no.1 on the ground that his client is widow and is senior citizen and has been illegally deprived of the suit property by the appellant for last several years. Appellant has lost in all three Courts and does not deserve any further extension of ad-interim order passed by this Court. Application for continuation of the ad-interim order is rejected.

R.D. DHANUKA, J.