

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

WRIT PETITION NO. 1195 OF 2017

1.Shri Vishnu Tukaram Davare
and Anr.

..Petitioners.

Vs

Shrikrishna Rajaram Pharakte

.. Respondent

Mr. Chetan G.Patil, Advocate for Petitioners.

**CORAM : R.G.KETKAR,J.
DATE : 30/01/2017**

PC:

1. Heard Mr. Chetan Patil, learned counsel for the petitioners at length.
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 dated 5.1.2017 passed by the learned District Judge-6, Kolhapur in M.C.A. No.176 of 2016. 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 8.7.2016 passed by the learned 2nd Jt. Civil Judge, Sr.Dn., Kolhapur below Exhibit 5 in Spl. Civil Suit No.115 of 2016. The learned District Judge dismissed the application taken out by the plaintiff for injunction restraining the defendant from disturbing their peaceful possession over the suit property or creating any third party interest in the suit property by himself or through his

agent, till final disposal of the suit.

3. Plaintiffs instituted suit under Sections 31, 34, 38 of the Specific Reliefs Act, 1963 (for short 'Act'), inter-alia praying for cancellation of sale deed dated 16.11.2015; for perpetual injunction restraining the defendant from causing obstruction to the plaintiff's possession as also creating third party interest/encumbrances over the suit property in any manner whatsoever. Pending the suit, the plaintiffs took out application for injunction which was allowed by the trial Court. Aggrieved by that 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.

4. In support of this petition, Mr. Patil strenuously contended that the recitals in sale deed dated 16.11.2015 shows that the plaintiffs never intended to sell the suit property. In paragraph 2 of the sale deed, it is specifically set out that due to financial difficulties, the plaintiffs are required to execute the sale deed. Paragraph 3 records that the entire consideration of Rs. 8,30,000/- was paid by the defendant to the plaintiffs and the plaintiffs have no grievance about the same. He submitted that it is not the case of the defendant that he paid the entire consideration of Rs. 8,30,000/- to the plaintiffs at the time of execution of the sale deed. The defendant had paid Rs. 1,30,000/- In other words, the recitals in paragraph 3 are

factually incorrect. Likewise, recitals in paragraph 5 to the effect that the plaintiffs handed over possession of the suit property to the defendant, is also factually incorrect. He submitted that the plaintiffs never intended to sell the suit property to defendant without receiving the entire consideration. He invited my attention to the Written Statement and Say filed by the defendant to the application Exhibit-5 and in particular paragraph 26 thereof. In paragraph 26, the defendant contended that it was agreed between the parties that the plaintiffs will sell the suit property for a total consideration of Rs. 35 lakhs. Out of that, the defendant had paid amount of Rs. One lakh by bearer cheque in the presence of witnesses. It was also agreed that remaining 34 lakhs was to be paid to the plaintiffs in cash. Accordingly, that condition was incorporated in the agreement of sale. The defendant further contended that possession was to be handed over only after the measurement of the suit property was carried out.

5. Mr. Patil, as per the defendant's case, submitted that possession was to be handed over only after carrying out measurement of the suit property. It is only after carrying out measurement, possession was to be handed over at the time of execution of the sale deed. As in the present case, measurement is not carried out, the defendant cannot claim possession of the suit property.

6. Mr. Patil further submitted that in view of proviso (1) and (3) of Section 92 of the Indian Evidence Act, 1872 (for short, 'Evidence Act'), the plaintiffs are entitled to prove any fact which would invalidate sale deed on the ground, such as, fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law. In the present case, the plaintiffs are entitled to pray for cancellation of the sale deed on the ground of failure of payment of consideration. He further submitted that existence of any separate oral agreement can also be proved under proviso (3) of Section 92 of the Evidence Act. The learned District Judge, however, observed in paragraph 8 that in view of section 92 of the Indian Evidence Act, such claim of oral agreement cannot be admitted for the purpose of contradicting, varying, adding to or subtracting the terms of written document. Such oral evidence has to be excluded from consideration when written document is on record. He also relied upon the decision of the Apex Court in the case of Kaliaperumal Vs. Rajagopal, (2009) 4 SCC 193 and in particular paragraph 17 thereof.

7. Mr. Patil further submitted that the learned District Judge committed error in interfering with the discretionary order passed by the learned trial Judge. He relied upon the decision of Apex Court in the case of Wander Ltd V. Antox India P Ltd, 1990 (Supp) Supreme Court Cases 727. He, therefore, submitted that the

impugned order deserves to be set aside thereby restoring the trial Court's order.

8. I have considered the submissions advanced by Mr Patil. I have also perused the material on record. Perusal of paragraph 5 of the sale deed shows that the plaintiffs have handed over actual physical possession of the suit property to the defendant on the date of execution of the Sale deed, i.e. 16.11.2015. Perusal of trial Court's order shows that the learned trial Judge did not refer to the contents of the sale deed as also Section 54 of the Transfer of Property Act, 1882 (for short, 'T.P.Act'). As against this, the learned District Judge referred to the recitals of the sale deed in paragraph 7 of the impugned order.

9. In paragraph 9, the learned District Judge referred to the decision of this Court in Govind Goltekar Vs. Dasharath Goltekar, AIR 2006 Bombay 174 in respect of the registered sale deed. This Court observed that the registered sale deed carries presumption of genuineness and burden to prove that it is not genuine, lies on the person who alleges that it is not so. In paragraph 11, the learned District Judge referred to Section 54 of the T.P.Act which defines the expression 'sale'. "Sale" is a transfer of ownership in exchange for a price paid or promised or part paid and part promised. In paragraph 12, the learned District Judge observed that the amount of Rs. 1,30,000/- was paid by the defendant. In view of definition of the expression 'sale' in

Section 54, it cannot be said that the title did not pass in favour of the defendant upon execution of the sale deed.

10. Mr. Patil relied upon the decision of the Apex Court in the case of Kaliaperumal (supra). In paragraph 17, the Apex Court referred to Section 54 of the T.P. Act. In paragraph 19, it was observed thus:

“19. The answer to the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of Evidence Act.”

Perusal of paragraph 19 extracted herein above shows that the question whether the parties intended that transfer of the ownership should be merely by execution and registration of the deed or whether they intended the transfer of the property to take place, only after receipt of the entire consideration, would depend on the intention of the parties. Such intention is primarily to be gathered and determined from the recitals of the sale deed. When the recitals are insufficient or ambiguous the surrounding circumstances and conduct of parties can be looked into for ascertaining the intention, subject to the limitations placed by Section 92 of the Evidence Act. Perusal of the decision shows that the said decision arose out of the Second Appeal decided by the

High Court. In the present case, we are considering the interlocutory application filed by the plaintiffs. In other words, evidence is yet to be recorded. In view thereof, at this juncture, the decision of Kaliaperumal (supra) will not assist the plaintiffs in any manner and it will be subject to their adducing evidence in support of their case as regards intention of the parties. In fact, as observed in paragraph 18 of that decision, normally, ownership and title to the property will pass on purchaser on registration of the sale deed, even if sale price is not paid.

11. Mr. Patil relied upon the decision of the Apex Court in the case of Wander Ltd (supra). As noted earlier, the learned trial Judge did not even refer to the recitals of the sale deed which clearly recorded that the plaintiffs have handed over actual physical possession of the suit property to the defendant. In view thereof, the learned District Judge was justified in interfering with the trial Court's order as the learned trial Judge did not apply the settled principles regulating grant or refusal of injunction. In paragraph 14, the Apex Court has observed thus:

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, 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. 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 the 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"

In my opinion, the learned District Judge was justified in interfering with the order of the trial Court as the learned trial Judge has exercised the discretion arbitrary, capriciously or perversely. Hence, Petition fails and the same is dismissed.

12. In paragraph 12, the learned District Judge has referred to application Exhibit-29 filed by the defendant before the trial Court and Exh.12 before the Appellate Court showing his willingness to deposit the amount of Rs. 7 lakhs in the Court. In view thereof, the defendant is directed to deposit Rs. 7 lakhs in the trial court under intimation in writing to the plaintiff's Advocate, if not application Exhibit-29/12 is disposed of by the Courts below and amount not already deposited by the defendant. In that case, the learned trial Judge shall call upon the defendant to deposit the amount within two weeks. This shall be without prejudice to the rights and contentions of the parties. In addition, without prejudice to the rights and contentions of the plaintiffs, they are permitted to withdraw amount, so deposited by the defendant in the trial Court unconditionally and if so

advised. Let that exercise be done within two weeks from production of the authenticated copy of this order. If within two weeks from depositing the amount by the defendant under intimation in writing to the plaintiffs' Advocate in the trial Court, the plaintiffs do not withdraw the amount, the learned trial Judge will invest the amount in any nationalized Bank for a period of one year and shall renew the deposit during pendency of the suit. Order accordingly.

13. Needless to observe that the observations made herein are prima facie and tentative only for the purpose of finding out correctness of the impugned order. The learned trial Judge will decide the suit on the basis of evidence on record on its own merits and in accordance with law, uninfluenced by the observations made therein. Liberty is reserved to the plaintiffs to apply for expeditious disposal of the case. If such application is made, the learned trial Judge will pass appropriate orders thereon.

(R.G.KETKAR, J.)