

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

**APPEAL FROM ORDER NO. 377 OF 2016  
WITH  
CIVIL APPLICATION NO. 491 OF 2016**

Nilini Bhaskar Patil @ Neeta Chandrakant Patil ... Appellant  
Vs.  
Parvatibai Rajaram Patil & Ors. ... Respondents

....  
Mr. Kunjan M. Thakur for the Appellant.  
Mr. M.S. Lagu for the Respondent No. 35.  
Mr. R.D. Suryawanshi for the Respondent No. 31.

...  
**CORAM : A.A. SAYED, J.**  
**DATE : 20 MARCH 2017**

**P.C.:**

1 This Appeal challenges the order dated 18 January 2016 whereby the Application (Exhibit 5) of the Appellant/original Plaintiff came to be rejected by the Joint Civil Judge, Senior Division, Thane.

2 This suit is filed for partition and declaration and other reliefs. In Paras 14, 15, 16 17, 20 and 21 of the impugned order, it is observed by the trial Court as under:

“14 The plaintiff admits her signature on the document but says that it is without her consent. But the first document is signed by the plaintiff in the year 1992 and she contests this case for the first time in the year 2013. Hence, it cannot be prima facie believe particularly when there is no pleading to support her case of invalid consent to contract. The entire case of the plaintiff is based on principle that if free consent is not there, the contract is not valid.

15. The deed of conveyance dated 13.04.2009 is a registered document. Bhaskar Sitaram Patil, father of the plaintiff has signed the supplementary agreement dated 26.09.1994 at Sr. No. 18 (of the said document). The plaintiff has signed this supplementary agreement dated 26.09.1994 at Sr. No. 20. This supplementary agreement dated 26.09.1994 is registered document. This fact of plaintiff signing the supplementary agreements takes away her stand of defect in passing of title due to executing the document on the basis of unregistered Power of Attorney of the plaintiff. The Power of Attorney is of the year 1992. The sale transaction is a transaction prior to amendment to the Hindu Succession Act, 1956. In this background, the signature of this plaintiff on this documents and her consent is matter of abundant caution. Hence, this can be put in simple words. The plaintiff is challenging the transfer by her father. The case of the plaintiff is otherwise a very weak case that she has given unregistered power of attorney to sale this property. She is also a party to the agreement on 10.08.1992 and registered supplementary agreement dated 26.09.1994. This shows that plaintiff is a consenting party to the conveyance deed dated 13.04.2009. So even if she claims to have some share in the suit property her alleged share is transferred.

16. The case of the plaintiff is based on the transfer on the basis of an unregistered power of attorney. The conveyance in respect of the suit property is dated 03.04.2009. Prior to 25.05.2012, the transfer on the basis of unregistered Power of Attorney was permissible only after amendment to Section 17 (h) introduced by the Registration

(Maharashtra Amendment) Act, 2010 (with effect from 25.05.2012 of publication of official Gazette) made the Power of Attorney as compulsorily registrable document.

In the case of **ECE Industries Limited Vs. S.P. Real Estate Developers Pvt. Ltd. & Anr. Reported in [2009 ALL SCR 2120]**, in this case, it appears from photographs filed by the defendant that, huge multi storied buildings are constructed on the suit properties. Hence , this ratio is applicable to the case in hand.

17. The second point is about doctrine part performance. The transfer of property is coupled with delivery of possession. It appears from the documents filed on record that consideration amount is paid to the plaintiff as well as all original owners of the suit properties. It further appears that plaintiff has filed this case with inordinate delay.

**AS TO POINT NOS. 2 AND 3:**

20. The plaintiff is seeking an injunction against the defendant developer from carrying out further construction in the suit properties and creating third party interest in the same. The plaintiff has also prayed injunction against defendant No. 35 for restraining them from allotting or granting TDR or benefits in respect of the reserved portion of the suit property and for revocation or suspension for construction permission granted to defendant No. 3 in respect of the suit properties. The documents on record shows that the construction of buildings are constructed on the suit properties. At this stage, the interest of potential flat purchasers are created and it is obligatory on the developer to give the possession of the respective flats to them. In this background, if such an order as to injunction is passed in

the plaintiff's favour, it would cause great prejudice to the defendants. The plaintiff has filed this suit after inordinate delay. Even plaintiff's right in the property of birth is not established as she is a girl married on the date before the amendment to section 6 of the Hindu Succession Act, 1956. She is not a co-parcener. She is made equally entitled on opening a partition. In this background, balance of convenience is not in favour of the plaintiff.

21. If defendants are restrained by an order of temporary injunction they will suffer irreparable loss. On the other hand, if the injunction is not granted it would not cause any loss to the plaintiff which would be compensated in terms of plaintiff. The genealogy of plaintiff's family is annexed with the plaint. Sitaram, grand father of the plaintiff had eight children. Father of the plaintiff has five children. Even if the case of the plaintiff is accepted as it is in that case her father becomes entitled to 1/8th share notionally. This 1/8th share is divided into five shares. Thus the suit of the plaintiff for partition is principally for 1/40th share i.e. 2.5% in the entire suit property. It would be unfair on the part of all the defendants to halt development of 100% of the suit property for claim of 2.5% share which is also sold out to the defendants by registered sale-deed.

3 Having heard the learned Counsel for the parties & on perusal of the material on record, in my view, the trial Court has rightly held that there was inordinate delay in filing the suit by the Appellant and that buildings have been constructed on the suit property and third party

rights have been created and balance of convenience was not in favour of the Appellant and that the Respondents would suffer irreparable loss if injunction is granted.

4 In the case of **Wander Ltd. And Another vs. Antox India P. Ltd., 1990 (Supp) Supreme Court Cases 727**, it has been held by the Supreme Court in para 13 and 14 as under:

*“13. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on two important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order. The second pertains to the infirmities in the ratiocinations as to the quality of Antox's alleged user of the trademark on which the passing-off action is founded. We shall deal with these two separately.*

*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 possibly 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. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Josheph*:*

*"... These principles are well established, but as has been observed by Viscount Simon in **Charles Osenton & Co. v. Jhanaton** '... the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in a individual case'."*

*The appellate judgment does not seem to defer to this principle."*

5 Having regard to the facts and circumstances of the case, I do not find that the discretion exercised by the learned Trial Judge in passing the impugned order refusing to grant interim relief warrants any interference by this Court. The trial Court has decided the injunction Application Exhibit 5 within the framework of law and the

discretion exercised by the trial Court cannot be said to be arbitrary or perverse or against settled principles of law.

6 The Appeal is dismissed. No order as to costs.

7 The Civil Application does not survive and to stand disposed of.

**( A.A. SAYED, J.)**