

Vidya Amin

IN THE HIGH COURT OF JUDICATURE AT BOMBAY  
CIVIL APPELLATE JURISDICTION

**WRIT PETITION NO. 7957 OF 2015**

Sou. Shakuntala Sampatrao Matekar ... Petitioner  
Vs.  
Sanjay @ Pramod Pandurang Jadhav & Anr. ... Respondents  
Mr. Bhushan Walimbe, Advocate for the petitioner.  
Mr. Uday Warunjikar, Advocate for respondent no. 2.

CORAM: **MRS.MRIDULA BHATKAR, J.**  
DATE: **28<sup>th</sup> June, 2017.**

**P.C.:**

Rule. Rule made returnable forthwith. By consent, the Petition is heard finally and disposed of at the stage of admission.

2. This Writ Petition is directed against the order dated 14<sup>th</sup> July, 2015 passed by learned District Judge-2, Islampur in Miscellaneous Civil Appeal No. 77 of 2014 thereby confirming the judgment and order dated 1<sup>st</sup> October, 2014 passed by learned Civil Judge Senior Division, Islampur on Application below Exhibit 6 in Special Civil Suit No. 22 of 2013. The respondent no. 2/plaintiff have filed the suit for specific performance against respondent no. 1, who is defendant no.1/original vendor of the suit land. The matter in brief is as follows:

The respondent no. 1 and petitioner had entered into a notarized Agreement of Sale on 1<sup>st</sup> February, 2011 in respect of land bearing Survey No. 475-2. It was purchased for Rs.5,61,000/- and

the petitioner/original defendant no. 2 and respondent no. 2/plaintiff has paid bank loan of respondent no.1, who is original landlord of the suit land. On 30<sup>th</sup> December, 2011 respondent no. 1 executed Registered Agreement of Sale for Rs.5,00,000/- with the plaintiff/respondent no. 2. Thereafter on 14<sup>th</sup> February, 2013 the petitioner has executed registered sale deed with respondent no. 1/vendor. A rectification deed for boundaries was thereafter executed between original landlord/defendant no. 1 and plaintiff on 13<sup>th</sup> June, 2013. Thereafter on 28<sup>th</sup> June, 2013 plaintiff/respondent no. 2 filed Special Civil Suit No. 22 of 2013 for specific performance demanding the conveyance of the suit land against respondent no. 1/original landlord and seeking relief of declaration that the registered sale deed executed between the petitioner and respondent no. 1 dated 14<sup>th</sup> February, 2013 be declared null and void. He also sought the conveyance as per the Deed of Rectification which was executed between the plaintiff and defendant no. 1/original vendor. The trial Court granted injunction in favour of the plaintiff/respondent no. 2 that the petitioner shall not disturb his peaceful possession in respect of Survey No. 475-2 on 15<sup>th</sup> October, 2014 and it was confirmed by the District Court.

3. The learned counsel for the petitioner has submitted that the

plaintiff/respondent no. 2 has filed the suit for possession, declaration and specific performance. In the said suit, Application Exhibit 5 was moved. The learned trial Court and District Court have committed error in not properly appreciating the fact of possession. He submitted that no proof is produced by the plaintiff to show that he is in possession of the suit land. Under such circumstances, the petitioner/defendant no.2 cannot be asked to establish a fact of possession. He further submitted that the trial Court and District Court have failed to appreciate the documents produced by the petitioner in the trial Court and district Court showing that he was in possession at the time of filing of the suit and is in possession of the suit land as on today. The learned counsel relied on the affidavit of possession executed by the vendor/respondent no. 1 in his favour wherein the vendor has specifically mentioned that he has handed over the possession of the suit land on 1<sup>st</sup> February, 2011 when first Agreement of Sale Deed was executed. The learned counsel has argued that the receipts of the sugarcane factory disclosing the cultivation of sugarcane crop in the suit land in the year 2011, 2012 are not taken into account by the trial Court. He submitted that as on today, factually defendant no.2, i.e., petitioner is in possession of the suit land and Suit No. 22 of 2013 is a collusive suit to deprive of the

plaintiff from his right, title and possession of the suit property. He submitted that as the plaintiff has failed to prove the fact of possession, the learned Judges ought not to have passed the order of prohibitory injunction against the petitioner and respondent no. 1. He submitted that plaintiff/respondent no. 2 is trying to get the possession under the garb of prohibitory injunction. Both the Courts have not dealt with or discussed the three documents produced by the petitioner. The learned counsel has further submitted that this present suit was filed on 28<sup>th</sup> June, 2013 and on the same day, the wife of defendant no.1/original vendor has filed another Special Civil Suit No. 23 of 2013 and the same advocate who appeared for the plaintiff in the present suit had appeared in Suit No. 23 of 2013 for the wife of defendant no. 1, who has pleaded that the possession of the land is still with defendant no. 1/vendor. Thus, it shows contradictions in the stand taken by the vendor, who affirms in this suit, that the possession of the suit land is with the plaintiff, i.e., respondent no. 2.

4. Per contra, the learned counsel Mr. Warunjikar while opposing the Petition has submitted that the orders of the learned trial Judge and learned District Judge are to be upheld. A concurrent finding is

given by both the Judges and there is no perversity to set aside these orders. Mr. Warunjikar has argued that though the documents, i.e., receipts of sugarcane crop factory are produced. They are of year 2011 and not of the year when the suit was filed. Moreover, the 7/12 extract falsifies the claim of the petitioner that he was cultivating the land, as the land is shown as barren (Pad). Thus, the trial Court even if would have been taken into account these bogus documents, *prima facie* they cannot show that the petitioner is in possession of the land. In the course of his arguments, the learned counsel relied on the possession clause in his Registered Agreement of Sale, which states that the possession was handed over to him on 28<sup>th</sup> February, 2011 and in the notarized Agreement of Sale of the petitioner, there is specific clause that the possession will be handed over at the time of execution of the Deed of Conveyance. Thus, the document contradicts and falsifies the claim of the petitioner that he was in possession of the suit premises from 1<sup>st</sup> February, 2011. No value can be attached to affidavit of possession executed by defendant no.1 in favour of the petitioner. He further argued that defendant no.1/owner has filed written statement in the suit and has confirmed that he had handed over the possession of the suit land to the respondents on 28<sup>th</sup> February, 2011. This was given weightage by

the learned Judges of both the Courts. He has argued that the respondents are in possession of the suit premises and the order of injunction is in operation against the present petitioners since last 2½ years and now the suit can be taken for evidence and the said order is not to be disturbed.

5. In reply, the learned counsel for the petitioner has submitted that respondent no.1, the original owner of the land, is not a necessary party because the relief which is challenged by the petitioner was granted by the learned District Judge in favour of respondent no. 2 and respondent no. 2 has filed the suit and thus, he is the main contesting party. Therefore, for the purpose of this petition, he is not pressing that respondent no. 1 is a necessary party. The submission of the learned counsel is accepted.

6. The submissions of learned counsel for the respondent no. 2 were quite impressive, however, as pointed out by the learned counsel for the petitioner that in the case of interim order of injunction, the Court has to first find out whether the plaintiff is in possession of the suit land, is the most important fact. The notarized Agreement of Sale which was executed between the petitioner and

land owner/defendant no. 1 initially was a Deed of Mortgage wherein the petitioner has paid the amount of Rs. 2 lakhs by cheque. Respondent no. 2 also has paid the amount of consideration by cheque. When there is Agreement of Sale registered, notarized Agreement of Sale or Registered Sale Deed executed by the land owner with the different parties, then the party who seeks interim relief claiming possession has to show his or her possession. By way of initial burden, the plaintiff is always called upon to show the proof of possession. When the plaintiff prays that other party should not disturb his possession, then it cannot be presumed that the plaintiff is in possession. In many cases, the plaintiff attempts to acquire possession of the property under the garb of order of prohibitory injunction passed by the Court against the defendant who is actually in possession. This is the abuse of process of law which is to be checked. When the plaintiff asserts his possession, he has to show his possession *prima facie* to get interim order. Unless he discharges his initial burden, no interim order can be passed in his favour.

7. In the present case, no *prima facie* reliable evidence is produced by the plaintiff/respondent no. 2 to show that he is in

possession. The claim of possession is made on the basis of registered sale deed and on the basis of contradictions of handing over the possession in the case of defendant. Reliance is placed on the statement of defendant no. 1/original owner of the land that he had handed over the possession of the land to the plaintiff/respondent no. 2. Defendant no. 1 is the original owner is an admitted fact by both the contesting parties. Similarly, it is also a fact that this original land owner has illegally sold the same land to two persons to earn more money by adopting illegal means. The statement of such person cannot be believed ex-facie. Therefore, it is necessary to see what evidence the respondent no. 2/plaintiff has produced to show his possession. The answer is "No". On the other side, defendant no. 2/petitioner have atleast produced two receipts of 2011 and 2012 of cultivation of sugarcane crop on the suit land. It shows the possession of the suit land with the petitioner. The learned counsel for the petitioner has pointed out that along with the present suit, another suit was filed by the wife of original landowner, i.e., defendant no. 1 against the present petitioner for the suit land and other adjacent land where she has claimed that the possession of the suit land is with respondent no. 1/owner. He has also pointed out that both the suits were filed by the same advocate. This fact has

some bearing on the point of collusion. Injunction is a discretionary relief and while granting injunction, it is necessary for the Court to consider equity and the person who prays relief of injunction should come with the clean hands. Considering this, I am of the view that the learned Judges of the Courts below have committed gross error in closing eyes towards prima facie proof of possession of the plaintiff/respondent no. 2. Hence, the orders of the trial Court and District Court are hereby vacated. The trial Court to expedite the suit.

8. Rule made absolute accordingly.

9. Writ Petition is allowed.

**(MRIDULA BHATKAR, J.)**