

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

WRIT PETITION NO. 11519 OF 2015

Dilip Hanumandas Dhoot. ... Petitioner.
Versus
Prakash Gopal Markale & anr. ... Respondents.

Mr. Bhushan Walimbe i/b. Mr. Shashank P. Borade, advocate for petitioner.

Mr. Deepak K. Puranik, advocate for respondents.

**CORAM : SMT.SADHANA S. JADHAV,J
DATE : OCTOBER 3, 2017**

P.C.:

1 Heard the learned Counsel for the Petitioner and the learned Counsel for the respondent.

2 Rule. Rule made returnable forthwith with the consent of the parties.

3 The present petitioner was defendant No.2 in Special Civil Suit No. 333 of 2004 filed by one Nitin Sinha. The Respondent No.1 herein happened to be the original defendant No. 1 in the Special Civil Suit. It appears from the record that the subject suit property was a flat situated at second floor at Basera Cooperative Housing Society Ltd., Survey No. 19/1+8B, Plot No. 25/10 and admeasuring 850 sq. ft with open terrace of 900 ft. situated at Munje Hingane Budruk, Taluka Haveli, District Pune.

4 The Plaintiff therein had specifically contended that the plaintiff had purchased the suit flat from the defendant No. 2 and that he was put into possession by the Defendant No. 1. The defendant No. 2 claims to have ownership over the said flat since the defendant No. 2 had purchased the suit flat from the defendant No. 1 by virtue of a registered sale deed. According to the Petitioner(defendant No. 2) he was put into possession by the defendant No. 1. The plaintiff had filed an application under order 39 Rule 1 below Exh. 5. The same was rejected by the trial Court. The plaintiff i.e. the present

respondent No. 2 being aggrieved by the rejection of the said order had filed appeal from order under order 40 Rule (1).

5 It is pertinent to note that in the said suit the present respondent No. 1 i.e. defendant No. 1 had filed his written statement. It was specifically contended that the plaintiff had no documentary evidence to show that he was put into possession. Preliminary objection was raised by the defendant No. 1 that the name of the plaintiff appears only in the nomenclature of the suit. Since the suit was filed through the power of attorney, it was the case of the respondent No. 1 that the suit itself should be dismissed as the power of attorney has no locus to file the said suit. It was specifically denied that the defendant No. 1 had executed a sale deed in favour of the plaintiff in the office of the Sub-Registrar for consideration of Rs. 11.45 Lakhs.

6 According to the defendant No. 1, the defendant No. 1 had authorised one Shri Sangewar to receive the sale price in respect

of the transfer of the same and that power of attorney was signed and executed by the defendant No. 1. It appears that the basic contention of the defendant No. 1 was that the power of attorney holder Shri Sangewar had misused the powers entrusted with him. It is pertinent to note that Shri Sangewar was not impleaded as a party to the suit nor the defendant No. 1 filed any proceedings against Shri Sangewar. It appears that according to the defendant No.1, he had received the said amount of Rs. 11.45 Lakhs from Shri Sangewar and therefore, the deed of transfer was not enforceable against the defendant No. 1. The contention of the defendant No. 1 that the defendant No. 1 had filed criminal complaint against the plaintiff and Shri Sangewar. It is submitted by the learned Counsel for the respondent No. 1 that the said proceedings are put to an end. It is pertinent to note that the defendant No. 1 had not denied in the written statement that he had executed a sale deed with the defendant No. 2. It is also further pertinent to note that the defendant No. 1 had not claimed that he continued to remain in possession of the said flat even after the

conveyance was executed in favour of the plaintiff through Shri Sangewar.

7 The present Petitioner had filed his written say in the said suit contending therein that Shri Sangewar had no authority to execute any agreement and therefore, had specifically denied that the conveyance executed in favour of the plaintiff would not by itself show that the plaintiff was put in possession of the said suit flat. In paragraph-6 of the said written statement, the present petitioner has specifically contended that the defendant No. 1 executed a sale deed in favour of the defendant No. 2 on 13/4/2000. The suit flat was sold, transferred and conveyed in favour of the defendant No. 2 for total consideration of Rs. 5 Lakhs and the defendant No. 2 i.e. the present petitioner was put into possession of the said flat. According to the Petitioner, he remained in possession of the said flat since the date of execution of the sale deed.

8 It is pertinent to note that the defendant No. 1 had not controverted the contents of the written statement filed by the defendant No. 2. It therefore appears that the defendant No. 1 had impliedly supported the defendant No. 2 in the said suit against the present respondent No. 1.

9 The plaintiff had then approached this Court by filing Appeal from Order No. 421 of 2004 under Order 43. The said Appeal from Order was disposed of by an order dated 6/6/2005. This Hon'ble Court had observed that the real dispute is between the plaintiff and the defendant No. 2 as they both claim to have acquired title through the defendant No. 1 to the suit property and it was specifically observed that the defendant No. 1 while supporting the defendant No. 2 had not denied the transaction with the plaintiff. It was specifically observed that the defendant No. 1 had contended that the consideration for the said flat was not received from the Plaintiff and therefore, he could not have claimed the title or possession. The Court had observed that there was no documentary evidence on

record to show that the plaintiff was physically put into possession of the suit flat on 17/3/2004. And that the trial court had recorded the finding that the defendant No. 2 was put in possession of the suit flat was not supported by any documents.

10 At this stage, it would be relevant to note that the sale deed between the defendant No. 1 and defendant No. 2 is prior to the conveyance between original plaintiff Nitin Sinha and defendant No. 1. Taking into consideration the controversy between parties, this Hon'ble Court had appointed Court Receiver till the pending suit is decided and that the trial Court was directed to expedite the suit. Pursuant to the order passed by this Court in the appeal from order the, court receiver was appointed. The court receiver had sealed the property. The plaintiff had withdrawn the suit on 20/1/2012. In the application filed by the plaintiff for withdrawal of the suit, the learned Court had not called for say either from the defendant No. 1 or from the defendant No. 2. The suit was withdrawn. Hence, lis between the parties have come to an end.

11 Thereafter, the petitioner herein had filed an application seeking return of the property. The learned Court had allowed the said application and inventory was prepared and immovable articles were handed over to the present petitioner. The property was then desealed since the dispute between the parties had come to an end. The defendant No.2 had also filed an application seeking vacant possession of the said suit property. It is the specific contention of the Petitioner that at the time of desealing the property and handing over the keys to the defendant No. 2 i.e. present petitioner the present respondent No. 1 was present throughout the said proceedings and it is so recorded in the panchanama also.

12 On 6/4/2013 the defendant No. 1 filed an application requesting the court to direct the defendant No. 2 to vacate the said flat and also prayed that the defendant No. 1 be entrusted with the possession of the said flat. The learned 6th Joint Civil Judge, Senior Division, Pune by its order dated 19/10/2015 had appointed Mrs.

Bhoi as court receiver and the defendant No. 2 is directed to hand over possession of the suit flat to the court receiver within 15 days. The court receiver was further directed to take possession of the suit flat and on inventory put receipt and report to the Court immediately. The court receiver was directed to keep the keys of the suit property in safe custody. It was further directed that the defendant Nos. 1 and 2 shall get their rights determined with respect to the suit flat and till then the court receiver was directed to remain in possession of the said flat i.e. to maintain status quo. Hence, this Writ Petition.

13 It is pertinent to note that in fact the said application filed by the defendant No. 1 was not maintainable in Special Civil Suit No. 333/2004 after the suit was withdrawn by the original plaintiff. In fact the proceedings had come to an end and therefore, no application would be maintainable in Special Civil suit. The defendant No. 1 had no cause of action to file an application seeking possession of the said flat.

14 In any case ,it is pertinent to note that the defendant No. 1 had admitted transaction between the defendant No. 1 and defendant No. 2 and had opposed the claim of the plaintiff while supporting defendant No. 2. It is further pertinent to note that in the order dated 6/6/2005, this Court had specifically observed that- “the trial Court shall appoint the Court Receiver for the suit flat until the pending suit is decided.” In view of this specific direction by the High Court, it was not proper on the part of the trial Court to reappoint the court receiver after whole dispute had come to an end. In fact, the application filed by the defendant No. 1 under Order 40(1) would not be maintainable.

15 Order 40 Rule (1)(d) reads thus :

“1. Appointment of receivers.- (1) Where it appears to the court to be just and convenient, the court may by order—

(a)

(b)

(c)

(d) confer upon the receiver all such powers, as to bringing and defending suits and for the realization, management, protection, preservation and improvement of the property, the collection of the rents and profits thereof, the application and

disposal of such rents and profits, and the execution of documents as the owner himself has, or such of those powers as the court thinks fit.

16 In fact, the Court had become functus officio after the suit was disposed of by virtue of the consent between the parties. The Court could not have proceeded with the application filed by the defendant No. 1 after the closure of the proceedings by appointing fresh court receiver. There was no question of vacating the said flat. It is an admitted position that the movable properties in the said flat belong to the Petitioner and the same were returned to the Petitioner by preparing inventory.

17 In view of this, the Petition is allowed. Rule is made absolute in the above terms.

(SMT. SADHANA S. JADHAV,J)