

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.286 OF 2019**

Mr. Anil Vasudeo Agashe

.. Petitioner

Versus

Dr. Avdhut Vasudeo Agashe & Ors.

.. Respondents

Mr. Nitin Deshpande for petitioner.

Mr. Mahendra Agavelar for respondent Nos. 1 and 2.

CORAM : K.K. TATED, J.

DATE : 28 JANUARY 2019.

P.C:-

. Heard learned Counsel for the parties.

2. By consent of both the parties matter is taken on board for final hearing at the stage of admission.

3. By this writ petition under Article 227 of the Constitution of India, petitioner/original defendant No.2 is challenging the order dated 12.09.2018 passed by 11th Joint Civil Judge, Senior Division, Pune below Exhibit-122 in Regular Civil Suit No. 1924 of 2004 allowing respondent/original plaintiff's application to discard the petitioner/original defendant No.2's evidence dated 06.01.2018.

4. Learned Counsel appearing on behalf of petitioner/original defendant No.2 submits that in the present proceedings, the respondent/original plaintiff filed Regular Civil

Suit No.1924 of 2004 in the Court of Civil Judge, Junior Division, Pune for declaration and ad-interim injunction with following reliefs :

“a) it be declared that the Defendants have no right to keep in possession the title deeds of the suit property.

b)The Defendants by mandatory injunction be directed to handover the title deeds to the Plaintiffs.

c)The Defendants be permanently restrained from entering into any transaction of the suit property or to alienate the suit property to the parties on the basis of the title deeds.

d) Any other order in the interest of justice be kindly passed.”

5. Learned Counsel for petitioner submits that defendant No.2 has filed the written statement dated 04.03.2005. He submits that on the basis of pleadings, defendant No.2 filed their affidavit of evidence dated 06.01.2018. Thereafter, the respondent/original plaintiff filed application below Exhibit-122 on 09.02.2018 for discarding some of the portion of the defendants evidence. He submits that the trial Court has allowed the respondent/original plaintiff's application below Exhibit-122 and discarded paragraph Nos. 1, 2, 7 and 11 of the defendant's affidavit of evidence. Hence, he has preferred the present writ petition.

6. The learned Counsel for the petitioner submits that in paragraph Nos. 1, 2, and 7 of affidavit of evidence, defendant No.2 wanted to rely on the Will dated 25.12.1996 and certain facts about the Will. He submits that on the basis of the Will, defendant

No.2 can claim the ownership of the suit property. Therefore the order passed by the trial Court discarding the paragraph Nos. 1, 2 and 7 of their affidavit of evidence is required to be set aside.

7. On the other hand learned Counsel appearing on behalf of respondent/original plaintiff vehemently opposed the present writ petition. He submits that initially defendant No.2 has filed application for carrying out amendment in their written statement and to place on record the copy of the said Will. That application was rejected. That rejection was confirmed up to the Supreme Court. In support of this contention, he relies on paragraph 5 of the impugned order. On the basis of these submissions, the learned Counsel for plaintiff submits that the trial Court has passed order discarding the defendant No.2's evidence in paragraph 1, 2 and 7 was on the basis of the earlier order passed by the Court and it was confirmed up to the Apex Court. Therefore, there is no question of interfering in the well reasoned order passed by the trial Court.

8. Learned Counsel appearing on behalf of respondent/defendant No.2 submits that the defendant No.2 in their affidavit of evidence in paragraph 11 wanted to rely on the proceedings in DRT O.A. No. 467-P/2001. He submits that in paragraph 11 of their affidavit defendant No.2 specifically stated that what happened in O.A. No. 467-P/2001 and thereafter in Misc. Appeal No.302 of 2003. He submits that the paragraph 11 of affidavit of evidence reads thus :

“11. The plaintiff acted upon the judgment given by DRT in O.A. No.467-P/2001

dated 20 Dec 2002. According to the judgment my mother was entitled to receive the title-deeds of her property from DRT. After getting a settlement certificate from the bank, Plaintiff filed a separate Miscellaneous Appeal No.302/2003 along with Mis. Application No.254 of 2003 for condonation of delay in DRAT, Mumbai. DRAT ordered him to pay a cost of Rs. 10,000 for delay. Instead of paying the cost, he knocked the door of the High Court Bombay against the cost charged to him by DRAT; by way of filing a Civil Writ Petition No. 2514 of 2004. However, High Court dismissed the Writ Petition on 16 April 2004 and extended the date of payment the late fee till 30 April 2004. After paying the cost, DRAT ordered him to pay the appropriate court fee for the Misc. Appeal 302/2003. However, he did not care to pay even the court fee in DRAT, where his application was pending from 09/09/2003 till application was dismissed on 06/07/2004. Thereafter, Advocate Shri. Londhe representing my mother Smt. Sindhu Agashe collected the documents of her title on her behalf on 15.07.2004, and there is nothing wrong in it. I have produced on record the certified copies of the above mentioned documents. These are certified copies of public documents within the meaning of Section 74 of Evidence Act, and therefore, they are directly admissible in evidence. The same be held as duly proved by me, and be ordered to be exhibited.

I therefore, pray that the suit may kindly be dismissed with costs. In order to record the aforesaid facts on oath, I am swearing this Affidavit."

9. Learned Counsel for defendant No.2 submits that the plaintiffs in paragraph 9 of the plaint, relied documents of DRT at Pune. Therefore, the defendants in paragraph 11 of their affidavit

of evidence relied on the same. These facts were not considered by the trial Court at the time of passing the impugned order dated 12.09.2018 below Exhibit-122. Hence, the order passed by the trial Court is required to be set aside.

10. On the other hand learned Counsel appearing on behalf of respondent/ original plaintiff submits that those facts were in the knowledge of defendant No.2 at the time of filing the written statement, defendant No.2 has not made any reference in the written statement. Therefore, there is no question of allowing the defendant No.2 to rely on paragraph 11 of the affidavit of evidence filed by him. Therefore there is no question of interfering in the order passed by the trial Court.

11. I heard both the sides at length. It is to be noted that in respect of paragraph 1, 2 and 7 of affidavit of evidence filed by defendant No. 2, defendant No.2 wanted to rely on the Will dated 25.12.1996. Earlier the defendant No.2 has filed application for carrying out amendment in the written statement. That was rejected by the trial Court and same was confirmed up to the Apex Court. Those facts were recorded by the trial Court in paragraph 5 of the impugned order. Considering these facts there is no question of interfering in the impugned order dated 12.09.2018 passed by the trial Court in respect of paragraph 1, 2 and 7 of affidavit of evidence filed by defendant No.2.

12. Paragraph 11 of the affidavit of evidence filed by the defendant No.2 clearly shows that by this paragraph, defendant No.2 wanted to reply paragraph 9 of the plaint. Not only that defendant No.2 wanted to place on record the copies of order

passed by DRT. Considering the paragraph 9 of the plaint, I am of the opinion that the impugned order passed by the trial Court is required to be set aside to that extent. Hence, writ petition is allowed partly as under :

:: ORDER ::

- a) Order dated 12.09.2018 passed by 11th Joint Civil Judge, Senior Division, Pune below Exhibit-122 in Regular Civil Suit No.1920 of 2014 is confirmed except in respect of paragraph 11 of the defendants affidavit of evidence.
- b) Defendants can rely on paragraph 11 of the affidavit of evidence in Regular Civil Suit No.1924 of 2014.
- c) Writ petition stands disposed of accordingly.
- d) No order as to costs.

(K.K.TATED, J.)