

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

WRIT PETITION NO.590 OF 2022

**MANISHA ALIAS BEBI DADASAHEB KADAM
VERSUS
PRALHAD BABARAO SHINDE THROUGH NEXT FRIEND PRASAD
BHAGWANTRAO SHINDE AND OTHERS**

...
Advocate for Petitioner : Mr. S.G. Chapalgaonkar
Advocate for Respondent No.1: Mr. P.S. Dighe
Advocate for Respondent Nos.3(1) and 3(2) : Mr. Amol Gaikwad

...
CORAM : MANGESH S. PATIL, J.

DATE : 18.07.2022

PER COURT :

Heard.

2. Issue notice to the respondents, learned advocate Mr. Dighe waives service for the respondent No.1 who is the original plaintiff. At the joint request of the parties, the matter is heard finally at the stage of admission.

3. The respondent No.1 through a next friend has filed the suit seeking a declaration about the gift deed purportedly executed by him in favour of the petitioner who has been arrayed as defendant No.1 is null and void having been obtained fraudulently. The trial court refused to grant any temporary injunction but the lower appellate court by the order under challenge has allowed his appeal and also issued temporary injunction restraining the petitioner and other respondents who are the co-defendants from obstructing his possession.

4. After hearing both the sides extensively, it transpires that the petitioner happens to be the daughter of the respondent No.1. Admittedly, a registered gift deed has been executed by him in her favour gifting the suit property. Though the suit has been stated to have been filed by the respondent No.1, in fact his nephew claiming himself to be the next friend has instituted the suit further making a declaration that the plaintiff respondent no.1 being a deaf and dumb is incapable of filing the suit and the nephew does not have any personal interest and is intending to protect the interest of the respondent No.1.

5. One cannot comprehend as to how, without there being any specific statement in the plaint asserting that the respondent No.1 is incapable of taking a conscious decision, a suit could have been filed through a nephew. Merely because he is deaf and dumb that would not necessarily be sufficient to assert that the respondent No.1 is also incapable of taking a conscious decision as contemplated under Order XXXII of the Code of Civil Procedure so that a suit to protect his interest could have been filed by his next friend nephew.

6. It is to be borne in mind that it is not that the nephew is claiming to be the power of attorney holder.

7. If such is the state of affairs, the error or the defect *prima facie* goes to the root of the maintainability of the suit. I am making these observations only because neither of the lower courts seem to have addressed this major defect.

8. Again, though the nephew of the respondent No.1 who claims to be the next friend has in the earlier portion of the plaint declared that he does not have any interest and is intending to protect the interest of the ward, in paragraph No.10, it has been averred that the respondent No.1 has executed some writing in favour of the nephew giving him powers to deal with the suit property. It is, therefore, inconsistent with the earlier averment in paragraph No.1.

9. Be that as it may, as the matter now stands, there is absolutely no challenge by the respondent No.1 either to the gift deed or possession over the suit property. The entire battle is being fought by his nephew. Ignoring this the lower appellate court has replaced his own discretion in place of the one refused to be exercised by the trial court.

10. The trial court had specifically observed that it was a registered gift deed. The challenge about it having been obtained fraudulently could be established only after a full-fledged hearing. The possession follows title being the principle, it was sufficient to *prima facie* dislodge the assertion of the respondent No.1 of being in possession. If such was the reasoning given by the trial court, one cannot comprehend as to how the observations and the conclusions could be perverse, arbitrary or capricious so that the lower appellate court in an appeal under Section 104 read with Order XLIII of the Code of Civil Procedure could have caused any interference.

11. The observations and the conclusions drawn by the lower appellate court seeking to invoke such a power in the peculiar facts and

circumstances of the case are not sustainable in law.

12. The Writ Petition is allowed. The order of the lower appellate court is quashed and set aside.

13. The observations made herein above are confined to the decision of the Writ Petition.

(MANGESH S. PATIL, J.)

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