

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

**WRIT PETITION 1851 OF 2021**

Mr. Subhash Revadmal Gupta & Anr. ... Petitioners.

*Versus*

Mr. Rajendra Ramprasad Dusad ... Respondent.

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Mr. S. N. Chandrachood, Advocate for the Petitioners.

Mr. Prabhakar M. Jadhav, Advocate for the Respondent.

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**CORAM : ROHIT B. DEO, J.**

**DATE : JULY 15, 2022**

(Order Reserved on : 29.06.2022)

(Order Pronounced on : 15.07.2022)

**P.C. :-**

1. This Petition is preferred by the Defendants in Special Civil Suit 1253 of 2015 which was instituted by the Respondent-Plaintiff for declaration and permanent injunction; being aggrieved by the order dated 21.01.2020 rendered by the learned trial court Judge, whereby the application preferred by the Defendant 1 (Exh. 60) under Order 6 Rule 17 of the Code of Civil Procedure, 1908 (Code), is rejected.

2. Special Civil Suit 1253 of 2015 seeks declaration that the Power of Attorney (POA) dated 17.08.2006 is cancelled and revoked and that the Defendant 1 is not entitled to exercise

any right under the said POA. The further declaration sought is that the POA dated 24.06.2014, executed by Defendant 1 in favour of Defendant 2 in respect of the suit property, is null and void and not binding on the Plaintiff. Consequential injunctive relief is further sought.

3. The suit property is land, admeasuring 88 Ares, assigned Survey 125, Hissa 4 situated at village Kunenama, Tal. Maval, Dist. Pune. The Plaintiff claims to be the owner of the suit property, having purchased the same from Mr. Ramchandra Bhiva Ambure and others by registered sale deed dated 04.02.1988. The Plaintiff avers that pursuant to the sale deed his name is duly mutated in the 7/12 extract and he is in physical possession of the suit property since the date of the execution of the sale deed.

4. The Plaintiff avers that in 2006 Defendant 1, who is the elder brother of Plaintiff's brother-in-law, approached the Plaintiff and induced him to execute the POA to maintain and manage the suit property. The next relevant averment is that the POA was cancelled and the original is returned to the

Plaintiff by the Defendant 1. The Plaintiff contends that when the original POA was returned, he was not aware that the photocopy was retained by the Defendant 1. The Plaintiff then contends that the relationship between the Plaintiff and Defendant 1 turned sour for certain reasons and with malafide intention, the Defendant 1 executed an agreement for sale dated 24.06.2015 in favour of the Defendant 2. The Plaintiff asserts that the said agreement for sale is null and void inasmuch as the Defendant 1 did not have authority to enter into the said agreement on the basis of the cancelled POA. The Plaintiff further avers that the Defendant 1 falsely incorporated a recital in the agreement for sale that certain amount is paid to the Plaintiff.

5. I have noted the broad outline of the case of the Plaintiff. The rest of the averments seek to demonstrate the cause of action and for the purpose of deciding the issue involved, elaborate reference thereto is not necessary.

6. Defendant 1 filed written statement, generally denying the averments in the suit plaint. The Defendant 1 claims that the POA was executed voluntarily and was in force when the

Defendant 1 entered into the agreement for sale in favour of Defendant 2. The Defendant 1 specifically contended that it was he who paid the entire consideration for purchasing the suit property vide sale deed dated 04.02.1988. The Defendant 1 claims that in view of the provisions of section 202 of the Contract Act, 1872, the POA creates right and interest in the suit property and, therefore, the Plaintiff could not have terminated the agency. In essence, the Defendant 1 claims to be the owner of the suit property on the premise that it was he who paid the entire consideration, although the sale deed was executed in the name of the Plaintiff.

7 Defendant 2 also filed written statement. However, since the application under Order 6 Rule 17 of the Code is preferred only by Defendant 1, it would not be necessary to consider the averments in the said written statement.

8. The learned trial court Judge framed issues (Exh. 51) on 09.06.2017 which read thus :

*1) Whether the plaintiff proves that the power of attorney of 17.08.2006 is already cancelled ?.*

*2) Whether the plaintiff proves that the agreement*

*to sell and power of attorney of 24.06.2015 are ab-initio ?.*

*3) Whether the plaintiff proves that he is in possession over the suit property ?.*

*4) Whether the plaintiff proves that the defendant have obstructed his possession over the suit property ?.*

*5) Is the plaintiff entitled to get reliefs, as sought?.*

*6) What order and decree ?.*

9. After framing of the issues, Defendant 1 preferred an application under Order 6 Rule 17 of the Code. Defendant 1 contended that when written statement was filed, he did not have a copy of a declaration letter of disclosure dated 15.05.1994 executed by the Plaintiff and, therefore, Defendant 1 was not in a position to elaborate this defence on the basis of such declaration.

10. By the proposed amendment, Defendant 1 sought to incorporate the pleadings to the effect that the Plaintiff executed declaration dated 15.05.1994, acknowledging and admitting that he has not contributed any amount for purchasing the suit property and that he would not claim or assert any share or interest therein. Defendant 1 sought to incorporate a specific plea that the Plaintiff agreed that the entire consideration was paid by Mr. Manohar Gupta and Mr.

Subhash Revadmal Gupta – Defendant 1. Notably the proposed amendment refers to two properties. The Defendant 1 further sought to incorporate the pleadings that the Plaintiff and Mr. Manohar Gupta fraudulently sold the property situated at Mauze Walwan, Tal. Maval, Dist. Pune for Rs. 9.75 crores vide registered sale deed 01.07.2015 [this property is not the subject matter of the suit]. On such premise, by amending the plaint, the Defendant 1 lodged counter claim to recover the amount of Rs. 9.75 crores from the Plaintiff.

11. The learned trial court Judge was pleased to reject the Application under Order 7 Rule 11 and the reasons recorded by the learned trial Judge may be briefly noted. The learned trial Judge noted that the counter claim which is proposed to be incorporated, has no nexus with the suit property. The counter claim is lodged on the premise that some other property was illegally sold by the Plaintiff and the amount of Rs. 9.75 crores which the Plaintiff received, as consideration, is recoverable.

12. Having heard the learned counsel for the parties, I am inclined to agree with the view taken by the learned trial court

Judge that the counter claim cannot be permitted. Apart from the fact that the counter claim pertains to an entirely different transaction and the property which has no nexus whatsoever with the suit property and the suit claim, in view of the authoritative pronouncement of the Hon'ble Apex Court in **Ashok Kumar Kalra vs. Wingh CDR, Surendra Agnihotri & Ors.** (2020) 2 Supreme Court Cases 394, which pegs the outer limit for lodging the counter claim, as the stage of framing of issues and not beyond, the proposed amendment incorporating the counter claim could not have been allowed. The learned trial court Judge committed no error in declining the counter claim.

13. The application under Order 6, Rule 17 is a composite Application in the sense that apart from the averments in support of the counter claim, the Defendant 1 sought to incorporate pleadings to the effect that in the year 1994, the Plaintiff executed declaration, acknowledging that he did not contribute any amount towards the purchase of the suit property. Significantly, the written statement is filed on 12.01.2016 and the issues are framed on 09.06.2017. Apart

from the fact that the defence is, prima facie, not available in view of the provisions of Benami Transaction (Prohibition) Act, 1988; there is no explanation for inability or failure of the Defendant 1 to incorporate appropriate averments in the original written statement. A bald statement that the said declaration was not available when the written statement is filed, is not sufficient particularly since the issues are framed and the Plaintiff has filed affidavit in-lieu of oral examination in-chief and the suit is at the stage of the cross-examination of the Plaintiff. In this view of the matter, the Defendant 1 cannot be permitted to incorporate the averments pertaining to the purported declaration dated 15.05.1994 at a belated stage, particularly since, as observed supra, there is absolutely no justification for the failure to bring on record the averments at an earlier stage.

14. I find no error in the order impugned as would warrant interference in writ jurisdiction.

15. Petition is dismissed.

16. No order as to costs.

**(ROHIT B. DEO, J.)**