

Ajay

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 13531 OF 2022

Divyesh Construction Pvt. Ltd.

.. Petitioner

Versus

State of Maharashtra and Ors.

.. Respondents

.....

- Mr. Vinit Naik, Senior Advocate a/w. Mr. Aadil Parsurampuria, Aalam Parsurampuria i/by Mr. Prashant Parsurampuria, Advocate for Petitioner.
- Mrs. V.S. Nimbalkar, AGP for State – Respondent No.1.
- Malcolm Siganporia i/by Mr. Milan Desai, Advocate for Respondent Nos.2 to 5.

.....

CORAM : MILIND N. JADHAV, J.

DATE : DECEMBER 22, 2022.

P.C.:

1. Heard Mr. Naik, learned Senior Advocate for the Petitioner and Mr. Singanporia for Respondent Nos.2 to 5 at length. None appears for Respondent Nos.6 and 7 though served and represented by Advocates.

2. It is seen that Respondent Nos.6 and 7 are represented by Advocate and specific directions were given to them on 23.11.2022 to file their Affidavit-in-Reply/objections, if any, on or before the next date.

3. The matter thereafter appeared on board on 15.12.2022.

On 15.12.2022, this Court passed the following order:-

“1. On 23.11.2022, this Court passed the following order:-

“ Heard Mr. Madon, learned Senior Advocate appearing for the Petitioner; Mr. Mali, learned AGP appearing for Respondent No.1; Mr. Tamboly, learned Advocate appearing for Respondent Nos.2 to 5 and Mr. Jani Advocate for Respondent Nos.6 and 7.

2. Issue notice to the Respondents. In addition to service of notice through Court, Petitioner shall serve a copy of the Petition on Respondents and inform them about the next date of hearing by any permissible mode of service and file affidavit of service with tangible proof thereof before the returnable date.

3. Parties are directed to complete their pleadings. Respondents are directed to file their affidavit within two weeks from today. Rejoinder, if any to be filed within one week thereafter.

*4. List the matter for final hearing board on **15th December, 2022.***

5. The present Petition requires to be disposed of finally at the stage of admission.”

2. Today Respondent Nos. 6 and 7 are not present before this Court nor represented by their Advocate who was present on 23.11.2022.

3. Heard Mr. Madon, learned Senior Advocate for the Petitioner; Mr. Tamboly, learned Advocate for Respondent Nos. 2 to 5 and Mrs. Nimbalkar, learned AGP appearing for Respondent No.1. Respondent Nos. 2 to 5 are supporting the Petitioner.

4. Perused the impugned order dated 14.10.2022 passed by the learned Civil Judge Senior Division at Kalyan in Suit No. 450 of 2011. Respondent Nos. 6 and 7 are admittedly Defendant Nos. 2 and 3 therein. The parties before the Trial Court especially the Plaintiff (Petitioner herein) desired to withdraw the suit against Defendant Nos. 2 and 3 (Respondent Nos. 6 and 7 herein). The learned Trial Court has returned the finding stating that even though the parties desired to compromise the suit after deleting the names of Defendant Nos. 2 and 3, the say and consent of the said Defendants would be required. Hence, directions were given on 23.11.2022 to the parties. Respondents were directed to file their affidavits. Respondent Nos. 6 and 7 are the contesting Respondents. They have not complied with the order dated 23.11.2022 and filed their reply affidavit / objections, if any. Hence, it is directed that in the event if the said order is not complied with by the Respondents till the next date, this Court shall be constrained to pass appropriate orders in the petition.

5. *Stand over to 22nd December, 2022.”*

4. Today, once again none appears for Respondent Nos.6 and 7.

5. In compliance of the above order, Affidavit of service dated 21.12.2022 has been filed by Petitioner. Perusal of Affidavit of service and intimation of the order dated 15.12.2022 to Respondent Nos.6 and 7 clearly reveals that attempt was made by the Petitioner to serve Respondent Nos.6 and 7, however both Respondent Nos.6 and 7 refused to accept the service. That apart, Petitioner has also served Respondents by Registered Post AD. However, record indicates that the said item is on hold. Record further indicates that the Advocate who appeared before me on 23.11.2022 has been served through Email.

6. Refusal of service amounts to good service. That apart, Respondent Nos.6 and 7 are represented by Advocates.

7. Petitioner submitted that vide Exhibit-138, Application for permission to withdraw Special Civil Suit No.450 of 2011 was filed before the Trial Court on 03.10.2022. It was stated in the Application that Petitioner (Plaintiff) and Defendant No.1 amicably settled and compromised the suit and Petitioner did not want to proceed with the suit against Defendant Nos.2 and 3 (Respondent Nos.6 and 7 herein). On the same date, Petitioner filed Exhibit-139 being Application for

permission to compromise the suit by filing Consent Terms between Petitioner and Defendant No.1 and to obtain consent decree. Both these Applications were heard by the learned Trial Court and the impugned order below Exhibit-140 came to be passed on 14.10.2022. Learned Trial Court has looked into the Consent Terms executed between Petitioner and Defendant No.1 with respect to the compromise and observed that the Power of Attorney dated 20.12.2007 purportedly executed by Petitioner in favour of Defendant Nos.2 and 3 has been declared null and void and further the registered sale deed of the suit property of the year 2011 executed by Defendant Nos.2 and 3 in favour of Defendant No. 1 has been treated to be null and void without executing any document to that effect.

8. *Prima facie* it is seen that Petitioner being Plaintiff before the learned Trial Court is in position of *dominus litis* i.e. person who owns the suit proceedings. In that view of the matter, Petitioner has decided to delete and withdraw any claim whatsoever against Defendant Nos.2 and 3 and hence, the pursis i.e Exhibit-138 came to be filed which states that Petitioner wanted to withdraw the suit filed against Defendant Nos.2 and 3 by filing withdrawal pursis. Petitioner specifically sought permission to withdraw the Special Suit filed against Defendant Nos.2 and 3 (Respondent Nos.6 and 7 herein).

9. Hence, if the Petitioner desired to withdraw the suit filed by

it against Defendant Nos.2 and 3, there is no reason for the learned Trial Court to opine that the said suit cannot be withdrawn in absence of execution of a cancellation document or in the absence of Defendant Nos.2 and 3 to the compromise / settlement terms between Petitioner and Defendant No.1.

10. According to Petitioner, it is the owner of the suit lands which are subject matter of Special Civil Suit No.450 of 2011. That Respondent No.6 had purportedly as Power of Attorney Holder of the Petitioner executed a bogus and illegal sale deed bearing registration No.540 of 2011 on 21.01.2011 in respect of some portion of the suit lands in favour of Respondent Nos.2 to 5. It is urged by the Petitioner that the aforesaid sale deed was executed by Respondent No.6 on the basis of a bogus, illegal and fabricated Power of Attorney dated 20.12.2007. Petitioner contended that another similar sale deed dated 01.09.2009 in respect of the balance suit lands was executed by Respondent No.6 in the name and on behalf of Petitioner on the basis of the above mentioned Power of Attorney. According to Petitioner, it had never executed any Power of Attorney in favour of Respondent No.6 and it was a forged and fabricated document. Hence, Special Civil Suit No.450 of 2011 was filed for declaration that the Power of Attorney was illegal, the sale deed was illegal and for setting aside of the said documents. Another Special Civil Suit bearing No.502 of 2011

was filed by Petitioner for similar reliefs in respect of the second set of transaction. It is seen that the present Petition pertains to the suit lands in Special Civil Suit No.450 of 2011 since the impugned order has been passed therein.

11. It is seen that in the meanwhile, Respondent Nos.2 to 5 held discussions with Petitioner (Plaintiff in the above suits) and decided to settle their differences. Accordingly two sets of Consent Terms were entered into between Petitioner on the one hand and Respondent Nos.2 to 5 on the other hand both dated 03.10.2022 (one in each suit) before the learned Trial Court. The impugned order as seen above is passed in one of the suits namely Special Civil Suit No.450 of 2011. In the above background, it is clear that the filing of the two suits itself meant that Petitioner had given no authority whatsoever to the Respondent Nos.6 or 7. It is Petitioner's case that there is no onerous condition whatsoever against Respondent Nos.6 and 7 in the Consent Terms who had infact acted surreptitiously and fraudulently on behalf of Petitioner. The alleged Power of Attorney did not create any interest in favour of Respondent Nos.6 and 7. Hence, assuming for the sake of argument that the Power of Attorney was indeed issued, even in that case the Petitioner as principal is not required to consult his agent or attorney before arriving at a compromise. Merely on the basis of the Power of Attorney no independent right whatsoever can be created in

the attorney. It is pertinent to note that the compromise arrived at by Petitioner is with the same person / entity (Respondent Nos.2 to 5) to whom the suit lands were sold. Thus, it is seen that even if it is considered that Respondent Nos.6 and 7 acted on behalf of Petitioner on the basis of the purported Power of Attorney and the suit lands were sold to Respondent Nos.2 to 5, the compromise of Petitioner is with Respondent Nos.2 to 5 only. It needs to be mentioned that Respondent Nos.2 to 5 represent the Defendant No.1.

12. On perusal of the facts of the case, it is seen that on the basis of power of attorney executed by Petitioner in favour of Defendant Nos.2 and 3, the property was sold by Defendant Nos.2 and 3 to Defendant No.1.

13. Perusal of record of the case indicates that Defendant Nos.2 and 3 (Respondent Nos.6 and 7 herein) are thus the agents of Defendant No.1. Hence, whatever right that would emanate in favour of Defendant Nos.2 and 3 would be through Petitioner only.

14. Accordingly compromise pursis was filed between Petitioner and Defendant No.1 before the learned Trial Court. The compromise pursis and documents filed by Petitioner and Defendant No.1 were placed before the Trial Court under Exhibit-140.

15. Respondent Nos.6 and 7 i.e. Defendant Nos.2 and 3 are not present before the Court nor have they filed their objections, despite

specific order of this Court.

16. In the above background, I am therefore required to consider the present Writ Petition and the impugned order. Perusal of the impugned order in the present Writ Petition rejects the compromise pursis under Exhibit-140 on the ground that reliefs in the Suit were sought by the Petitioner against all Defendants and in that view of the matter, since Defendant Nos.2 and 3 were not parties to the compromise, the Court has come to the conclusion that the said compromise cannot be accepted.

17. Perusal of the impugned order clearly reveals that since the Power of Attorney was executed in favour of Defendant Nos.2 and 3 and they were not parties to the compromise, they were required to be a proper and necessary party. However, Mr. Naik would submit that the Power of Attorney which was in favour of Respondent Nos.6 and 7 i.e. Defendant Nos.2 and 3 was purportedly never issued by the Petitioner (Plaintiff). That apart, one of the other grievance raised by the learned Trial Court for rejecting Exhibit-140 is the right of Defendant Nos.2 and 3 that would be affected if the execution of the sale deed was cancelled.

18. Mr. Naik, has referred to and relied upon the Supreme Court decision in the case of *Deb Ratan Biswas and Ors. Vs. Most. Anand*

Moyi Devi and Ors.¹ and more particularly paragraph Nos.9 and 10 of the said judgment. Paragraph No.9 is relevant and is reproduced below:-

“9. In his order dated 7.6.2002, the learned Subordinate Judge-V Bhagalpur has held that Dr. Sanjeev Kumar Mishra was only an attorney and he cannot claim any independent capacity in the proceedings. We agree with this view. The principal Pushpa Biswas and Apurva Kumar Biswas have signed the compromise for partition of the property, which in our opinion in law amounts to implied revocation of power of attorney in favour of Dr. Sanjeev Kumar Mishra vide Illustration to Section 207 of the Indian Contract Act. Pushpa Biswas and Apurva Kumar Biswas cannot be allowed to say that their own act of signing the compromise petition was collusive and fraudulent.”

19. In the present case, it is seen that in the event if the Plaintiff desires to compromise the Suit, he would not be bound to his attorney for signing the compromise Petition. However, in the absence of the right of Defendant Nos.2 and 3 having been placed on record before the learned Trial Court as also this Court despite granting several opportunities, this Court cannot restrict the right of the Plaintiff to enter into the compromise decree. It was incumbent upon Respondent Nos.6 and 7 i.e. Defendant Nos.2 and 3 before the learned Trial Court to place their objections on record before me. They have chosen not to do so. Further in order to allow Exhibit-140, it cannot be held that Exhibit-138 can be decided by the learned Trial Court.

20. The decision of the learned Trial Court in rejecting the Application below Exhibit-40 denying the permission to the Petitioner

¹ 2011 SCC Online SC 633

to compromise the suit with Defendant No.1 especially in view of the transaction between the parties as alluded to herein above is therefore not sustainable. It is seen that the two principal parties to the compromise i.e. Petitioner and Defendant No.1 are the parties concerned with the suit property. The transaction which has taken place between the parties is a transaction wherein Defendant Nos.2 and 3 have merely acted as an agent of the Petitioner on the basis of the alleged purported Power of Attorney which was challenged in the suit.

21. On the basis of the above facts it is derivated that no right whatsoever was conveyed to Respondent Nos.6 and 7 in respect of the suit lands (though it is the Petitioner's case that the Power of Attorney was fabricated). Hence, the finding returned by the learned Trial Court that the compromise cannot be lawful in the absence of Respondent Nos.6 and 7 is an incorrect finding in law and deserves to be set aside.

22. Since I have come to the conclusion that Exhibit-140 needs to be allowed it goes without saying that Exhibit-138 stands allowed.

23. In view of the above, Writ Petition stands allowed in terms of prayer clauses 'a' and 'b' which reads thus:-

“(a) This Hon’ble Court be pleased to issue a writ of Certiorari or a Writ in the nature of Certiorari or any other writ, order or direction under Article 227 of the Constitution of

India calling for the records and proceedings of Suit No. 450 / 2011 pending before the Court of the Ld. Civil Judge, Senior Division at Kalyan and after considering the legality, correctness and propriety of the Impugned Order dated 14th October 2022 passed therein, be pleased to quash and set aside the same;

- (b) *This Hon'ble Court be pleased to issue a writ of Certiorari or a Writ in the nature of Certiorari or any other writ, order or direction under Article 227 of the Constitution of India allowing the Application dated 3rd October 2022 at Exhibit 140 in Suit No.450 / 2011 and direct the Court of the Ld. Civil Judge, Senior Division at Kalyan to take the Consent Terms dated 3rd October 2022 on record and pass a decree in terms thereof."*

[MILIND N. JADHAV, J.]

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Digitally signed by
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Date: 2022.12.24
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