

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

WRIT PETITION NO.13830 OF 2022

Vajir Ghudan Mahabri	 Petitioner
Vs.	
Mansing @ Suresh Shankarao Mane	 Respondent

Mr. Nikhil N. Pawar for the Petitioner.
Mr. P. D. Dalvi for Respondent.

CORAM : SHARMILA U. DESHMUKH, J.

DATE : 30th JUNE 2023.

P. C.

1. Heard Mr. Nikhil N. Pawar for the petitioner and Mr. P. D. Dalvi for respondent.

2. The petitioner questions the order dated 21/9/2022 passed by learned Ad-hoc District Judge-I in Misc. Civil Suit No.121/2021 whereby the appeal of respondent-plaintiff is allowed and the application at Exhibit 5 in Special Civil Suit No.388/2018 came to be allowed in its entirety.

3. Special Civil Suit No.388/2018 was filed by respondent-plaintiff for specific performance of agreement to Sale dated

19/1/2007 executed between the petitioner-defendant and the respondent-plaintiff. Relief was claimed in respect of 11 R land out of Gat No. 849/A ad-measuring 1H 52R. The case of the plaintiff in the plaint is that due to error, the boundaries at east are mentioned as western boundary and western is mentioned as eastern boundary. However, there is no difficulty in identifying the suit properties. It was the case of plaintiff that property was exclusively owned by defendant and there was no concept of joint family. It is further his case that as per market price consideration was fixed and paid and it was agreed that due to fragmentation, registered sale deed cannot be executed and sale deed be executed subsequently. Respondent-plaintiff stated in the plaint that the possession of 11R land and the possession of earlier area of 6R was taken so also wall was constructed to protect the property. Suit was filed for specific performance of the agreement to sale.

4. The suit came to be resisted by the petitioner-defendant by raising defence that the defendant was addicted to liquor and under the influence of liquor the said Deed and various other documents were executed. In Exhibit 5 application relief of

injunction and to restrain defendants from creating third party rights was sought. However, trial Court only granted the relief not to create third party right and relief for injunction not to disturb the possession was not granted resulting into M.C.A. No.121/2021 giving rise to the impugned order.

5. Learned counsel appearing for the petitioner submits that it is specific defence of the petitioner-defendant that under influence of liquor documents have been executed. He would further submit that there is no registered Sale Deed and no possession was handed over. He would further urge that the appellate Court had allowed appeal by relying upon the affidavit of co-parcener. There is no material on record to demonstrate the possession of respondent-plaintiff over the suit property.

6. *Per contra* learned counsel appearing for the respondent-plaintiff submits that the execution of the agreement was not denied. He would further urge that it is evident from the order of the Appellate Court that ample material was produced on record in the form of 7/12 extract which shows the name of the plaintiff-

respondent in respect of the area ad-measuring 11R. He would further submit that 7/12 extract of the petitioner-defendant show reduction in the area after execution of the agreement to sale. He would further allege that this aspect has been strengthened by the affidavit of co-parceners. He has pointed out the finding of appellate Court that photographs reveals the factual position that the whole area of 6 R originally owned by respondent as well as 11R which were subject matter of the agreement to sale was covered by fencing. He has also pointed out that other sale Deeds executed by petitioner-defendant to respondent-plaintiff also mentions Gat No.849/A .

7. Considered the submission of learned counsel for the parties.

8. The suit in question is instituted for specific performance of the agreement dated 19/1/2007. Execution of the agreement is not denied by the defendant. Defence is being raised that under influence of liquor, said agreement was executed. Pertinently, it is not the submission of learned counsel for the petitioner that no

consideration passed from the plaintiff to the defendant. As such *prima facie* respondent-plaintiff has shown the execution of the agreement in respect of the subject matter of the suit. The findings of the appellate Court indicates that sufficient material is produced on record by the respondent-plaintiff to show his possession of the suit premises. It is pertinent to note that after execution of agreement in the year 2007, no proceedings have been instituted by the petitioner for cancellation of the agreement to sale. The findings of the appellate Court shows that the appellate Court has taken into consideration the revenue record which indicates the name of the petitioner in the area ad-measuring 6R as also the evidence of co-sharers particularly the affidavit of Namdev Kumbhar, witness to the agreement to sale and his affidavit states that defendant-petitioner had accepted consideration and possession was given on the same day of the agreement. It is not disputed before the Court that there is fencing to the entire area of 6R and 11R land forming part of the agreement by concrete wall. The appellate Court has relied upon the photographs and conveyance. As contended by the plaintiff in view of the material which has come on record the appellate Court has come to a

finding that respondent-plaintiff is in possession of the property and as such allowed the application Exhibit 5 in its entirety. At this stage, position of status quo ante is required to be protected. Apart from the *prima facie* case, balance of convenience as well as irreparable loss is required to be taken into consideration. As indicated above, the material on record *prima facie* shows the possession of respondent-plaintiff. It is also undisputed that the entire area has been fenced by building a concrete wall and as such at this stage, if possession of the plaintiff is not protected, irreparable loss will be caused to the plaintiff. In light of above, particularly when there is no dispute of execution of sale, in my view respondent-plaintiff has made out a *prima facie* case. As a result, there is no infirmity in the order dated 21/9/2022.

9. The writ petition stands dismissed.

SHARMILA U. DESHMUKH, J.