



IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 2303 OF 2023

Chandan Mohan Mathrani

...Petitioner

Versus

Sheela Mohan Mathrani & Anr.

...Respondents

Mr. Yuvraj Narvankar for the Petitioner.

Mr. Jaydeep Deo for the Respondent No. 1.

CORAM : SHARMILA U. DESHMUKH, J.

RESERVED ON : AUGUST 04, 2023

PRONOUNCED ON : AUGUST 28, 2023

P. C. :

1. The Petition takes exception to the order dated 9th January, 2023 passed in Misc. Civil Appeal No. 125 of 2020 allowing the Appeal and reversing the finding of the Trial Court below Exhibit “5”, whereby the Petitioner has been restrained from disturbing ownership rights, possession, use occupation and enjoyment and from creating third party rights in the suit property.

2. Regular Civil Suit No. 223 of 2018 was instituted by the Respondent No. 1, who is the mother of the Petitioner, against the Petitioner and one Sind Co-operative Housing Society Ltd seeking *interalia* a declaration that the Power of Attorney dated 18th January, 2018

and the registered Gift Deed dated 19th January, 2018 executed fraudulently in respect of the suit premises is null and void and be cancelled, revoked and not binding on the Respondent No. 1. For the sake of convenience, the parties are preferred by their status before the Trial Court.

3. The suit property is described as plot of land bearing plot No. 547 admeasuring 673.08 sq. mtrs. along with construction i.e. bungalow standing thereon admeasuring about 3,500 sq. ft. in the Defendant No. 2 Society situated within the limits of Pune Municipal Corporation. The case of the Plaintiff is that the Plaintiff is the owner of the suit property holding leasehold rights in the plot of land with share certificate standing in her name. The Defendant No. 1-her son is owner of substantial properties and is residing separately since more than 25 years.

4. It is pleaded that taking advantage of the absence of her daughter, the Defendant No. 1 on 18th January, 2018 at about 4.00 p.m. came to the suit property and took the Plaintiff and her husband to the Registrar's office at Haveli on the pretext of executing certain documents of his some property. It is pleaded that there was no electricity supply in the Registrar's office and Defendant No. 1 presented certain papers for signature of both the Plaintiff as well as her husband. It is pleaded that as the Plaintiff and her husband were rushed by the Defendant No. 1, the

Plaintiff left the house without spectacles and thus the Plaintiff could not read the contents of the documents on which her son asked them to sign and the documents being in English, the contents could not be understood as the Plaintiff was not well conversant with English language. It is pleaded that the Defendant No. 1 was pressurizing and coercing by misrepresentation the Plaintiff to sign the document and not to create any scene before the officer and as such, the signature and thumb impression were obtained. It is pleaded that after execution of the documents no copies were given to the Plaintiff and on 20th January, 2018, the Plaintiff was informed by the Defendant No. 2 society that Defendant No. 1 had produced a Gift Deed of the suit property in his favour. The Plaintiff by her letter dated 23rd January, 2018 lodged a complaint with Chaturshringi Police Station, Pune and the suit was filed on 5th February, 2018.

5. On 5th February, 2018, an application was filed by the Plaintiff seeking injunction against Defendant No. 2 from effecting transfer of the suit property and against Defendant No. 1 from disturbing the Plaintiff's ownership and possession rights. On 1st March, 2018 an undertaking came to be filed by the Defendant No. 1 stating that he does not want his parents to leave the suit property and neither does he intend to disturb in any manner their stay/possession/enjoyment of the suit property for their life time and he does not wish to alienate the suit property.

6. The Trial Court by its order dated 25th April, 2018 rejected the application below Exhibit “5” as against which Misc. Civil Appeal No 125 of 2020 was filed which was allowed vide order dated 9th January, 2023 giving rise to the present Petition.

7. The contention of Defendant No. 1 in the written statement was that the Defendant No. 1 was declared as member of Defendant No. 2 Society by order dated 31st August, 2018 passed by Deputy Registrar of Co-operative Societies and the records were amended. The name of Defendant No. 1 has been mutated in the assessment records and MSEDCL. It was pleaded that the daughter of the Plaintiff was instigating his parents in view to grab the properties of his parents. It was contended that the photographs which are annexed to the Power of Attorney clearly shows that the document was executed electronically at 7.30 p.m. and the photo taken at that time was the latest one wherein the Plaintiff was wearing the glasses and that there is no fraud and coercion.

8. During the pendency of the appeal proceedings, the Plaintiff, on 23rd June, 2020, filed an application below Exhibit “43” contending that recently the Plaintiff and her husband started staying with their daughter at Mumbai and taking advantage of the position, the Defendant No. 1 forcibly entered upon the suit property by opening the compound gate and has deputed his own security guard and gardener at the gate of the

bungalow. It was contended that to their knowledge, the Defendant No. 1 has not yet entered into the said bungalow and as such, sought to restrain the Defendant No. 1 from disturbing the Plaintiff's possession and from entering into the suit property. Vide order dated 8th September, 2020, the Trial Court rejected the Application as against which there was no challenge.

9. Heard Mr. Yuvraj Narvankar, learned counsel appearing for the Petitioner and Mr. Jaydeep Deo, learned counsel appearing for the Respondent.

10. Mr. Narvankar, learned counsel for the Petitioner submits that in view of the undertaking dated 1st March, 2018, there was no necessity of passing an order of injunction. He would submit that based on the undertaking given by the Defendant No. 1, the Trial Court has considered that the Plaintiff will not be dispossessed, and as such, the only prayer remains is in respect of restraining order against the Defendant No. 2 from mutating the name of Defendant No. 1, which prayer does not survive in view of order of Deputy Registrar dated 31st August, 2018. He would contend that the aspect of possession is required to be considered and would point out the application filed by the Plaintiff on 28th March, 2022 wherein, the contention of the Plaintiff was that as the suit property is in possession of the Defendant No. 1 and is completely locked by him,

the experts of the Plaintiff cannot enter the suit property for the purpose of inspection. He would further submit that the Plaintiff has herself stated that presently, the Plaintiff is residing in Mumbai and would urge that as the Plaintiff is not in possession, no injunction can be granted. Pointing out to the operative part of the impugned order, he would contend that clause-iv of the operative part restrains the Defendant No. 2 society which indicates non application of mind. He would further submit that the Appellate Court could not have substituted its own findings in place of the findings of the Trial Court. He would point out the findings of the Trial Court that there are two registered documents in favour of the Defendant No. 1 and that there is doubt about the Plaintiff's case that she was not wearing spectacles as the photographs taken electronically shows that the Plaintiff was wearing her spectacles. He would further submit that the Plaintiff's case is weakened as no affidavit has been filed by her husband.

11. *Per contra*, Mr. Deo, learned counsel for the Respondent No. 1 - Plaintiff submits that since last 50 years, the Plaintiff is residing in the suit bungalow and it is only recently for the purpose of medical treatment, the Plaintiff had shifted to Mumbai temporarily to stay with her unmarried daughter. He has further pointed out the findings of the Appellate Court which sets out the chronology of the events and would submit that chronology rightly points out that the fraud had been committed upon

the Plaintiff. He has further invited the attention of this Court to the Power of Attorney which is annexed at page No. 43 of the Petition and would contend that the recitals therein erroneously nominates the Plaintiff herself as the true and lawful attorney and in undue haste without correcting the same, the Defendant No. 1 has executed a Gift deed on the basis of this Power of Attorney. He would further submit that in order to avoid a Court's order of injunction, the undertaking dated 1st March, 2018 was filed and in fact the undertaking should have been accepted and the injunction should have been passed. He would further submit that it is not disputed that the Plaintiff is residing in the said bungalow since last 50 years and in fact the undertaking would show that the Respondent No. 2 is residing at some other place. He would further submit that the application seeking a direction to the Defendant No. 1 to permit the Plaintiff's expert to inspect the property cannot be construed as the possession being handed over and the same was filed as the structural consultant was not permitted to enter the suit bungalow. He would further submit that the undertaking given by the Defendant No. 1 cannot suffice for the reason that her daughter would be restricted from entering into the premises as the undertaking is limited only to the Plaintiff and her husband. As regards the photographs showing the Plaintiff wearing glasses, he would submit that it needs to be seen whether the glasses were reading glasses or normal glasses. In support of his contention he has

placed reliance the decision in the case of *Rama Gowda Vs. M. Varadappa Naidu*, [(2004) 1 SCC 769].

12. In rejoinder Mr. Narvankar, learned counsel for the Petitioner would submit that the case of the Plaintiff is of fraud and there is no affidavit filed by the Plaintiff's husband who was present at the time of execution of the Power of Attorney. He would further contend that the provisions of Section 91 of the Evidence Act do not permit evidence to be given except the document itself. He would further submit that the Gift Deed could not be registered on the date of execution of the Power of Attorney due to non availability of the Stamp Duty of Rs. 6,10,000/-

13. Considered the submissions and perused the papers and proceedings with the assistance of the learned counsel appearing for the parties.

14. By way of interim relief, the Plaintiff seeks to restrain the Defendant No. 1 from disturbing her ownership rights and possession. As regards the relief of stay to the transfer in the records of Defendant No. 1, the factual position is that the same has already done during the pendency of the proceeding. It is trite that the aspects deserving consideration is whether the Plaintiff has made out *prima facie* of being in settled possession, the balance of convenience and irreparable loss. It cannot be disputed that Plaintiff held leasehold rights in respect of the suit property

which is described as plot of land admeasuring 673.08 sq. mtrs. along with the bungalow constructed thereon. The Lease deed has been executed in favour of the Plaintiff on 31st January, 1989 and that the Plaintiff has been residing in the said premises since the construction of the bungalow.

15. The Defendant No. 1 claims the ownership rights in the suit property on the basis of the Gift deed executed on the basis of the Power of Attorney of 18th January, 2018. The Plaintiff has challenged the Gift deed as well as the Power of Attorney on the ground that the same has been fraudulently executed by misrepresentation and coercion. At this stage, it is not necessary to go into the question as to whether those documents have been executed as a result of fraud and thus, null and void for the reason that the interim relief seeks protection of the Plaintiff's possession over the suit property, the undisputed position being that since the construction of the bungalow the Plaintiff had been residing in the suit property. The Defendant No. 1 claims that the Defendant No. 1 is in possession by relying on the averments made in the application below Exhibit "43" and the admission by the Plaintiff that she and her husband are residing at Bombay since 2018. If the averments made in Exhibit "43" application are perused, the stand of the Plaintiff while seeking restraining orders is that the Defendant No. 1 has forcibly entered into the suit property by opening the compound gate and has not yet entered the

bungalow. As regards the admission that the Plaintiff is residing with her daughter since the year 2018, in my view, for purpose of grant of injunction what is required to be considered is settled possession. At this stage useful reference can be made to the decision in the case of ***Rama Gowda Vs. M. Varadappa Naidu*** relied upon by the learned counsel appearing for the Plaintiff which squarely applies to the facts of the present case. The Apex court has held that it is settled possession or effective possession of a person even without title which entitles him to protect his possession against the true owner.

16. The question which begs determination is, whether the temporary stay at Mumbai by the Plaintiff can be construed as permanent parting of the possession of the suit property. In my opinion, the answer is in the negative. It is not the case of the Defendant No. 1 that upon execution of the alleged gift deed, the Plaintiff shifted to Mumbai with all her belongings with the intention of permanently parting with the possession of the suit property. On the contrary, immediately thereafter, the Plaintiff has taken steps to challenge the Gift deed and specific assertion is that the Plaintiff and her husband are residing in Mumbai for medical treatment and in view of Covid-19 pandemic. Learned counsel for the Defendant No. 1 has sought to construe the temporary shifting of the Plaintiff as losing possession over the suit property. I am afraid that the temporary residence for the purpose of medical treatment at Mumbai by the

Plaintiff, cannot obliterate the long standing possession of the suit property by the Plaintiff. The ownership rights of the Plaintiff at least till the year 2018 is undisputed. The dispute has arisen only upon the execution of the alleged gift deed and the issue will have to be resolved upon evidence being led. At this stage *prima facie* the Plaintiff has proved her possession over the suit property and there is no material produced by Defendant No. 1 to demonstrate that the Plaintiff has parted with her long standing possession. The Defendant No. 1 has sought to rely on the change in the records of Defendant No. 2 and the change in MSEDCL records to demonstrate possession, however, the same will only establish the change in the records in favour of Defendant No. 1 on basis of the Gift deed and does not assist the case of possession of Defendant No. 1. On the contrary, the undertaking filed on record would indicate that the address of the Defendant No. 1 is shown to be a different address from the suit property. By the undertaking of the Defendant No. 1 has himself stated that he does not wish to disturb the possession of the Plaintiff over the suit property. That being so, as rightly pointed out by the learned counsel for the Plaintiff, injunction ought to have followed.

17. The Trial Court by order dated 25th April, 2018 rejected the Plaintiff's prayer for interim relief by considering the undertaking and observing the grounds on which the Plaintiff alleged fraud and misrepresentation viz, firstly, the Plaintiff was not permitted to read the

Power of Attorney as she was not wearing her glasses and also there was power failure and documents was executed in a hurry. The Trial Court considered the photographs annexed the Power of Attorney which shows that the Plaintiff was wearing glasses and the absence of affidavit of the Plaintiff's husband. The Trial Court accepted the explanation that as the Court fees stamp was not available on 18th January, 2018 only Power of Attorney was executed and the next day the Gift deed, and as such, rejected the application. The Trial Court held that the allegation of the Plaintiff that the Defendant No. 1 had forcibly entered into the suit property is not substantiated as the affidavit of caretaker has not been filed.

18. To my mind, the question that arises is if, the Plaintiff out of her own free volition wanted to execute a Gift deed in favour of the Defendant No. 1 who is her son, there was no necessity to execute a Power of Attorney a day before and then execute a Gift deed on the basis of Power of Attorney the next day. If the Plaintiff could attend the Registrar's office for the purpose of execution of Power of Attorney on the very day i.e. 18th January, 2018 instead of executing a Power of Attorney the Gift deed would have been executed. Also even if the explanation of the Defendant No. 1 is accepted that the Gift deed could not be executed due to insufficient stamp duty, the Plaintiff could have attended the Registrar's office the next day to execute the Gift deed. The issue as to

whether the Power of Attorney and the Gift deed have been obtained by fraud and misrepresentation, is a matter which will be concluded after trial. *Prima facie*, from perusal of the Power of Attorney, it appears that in the place of the Defendant No. 1 as Constituted Attorney, the name of the Plaintiff is being typed which is apparently an error however, with undue haste and without correcting the name, the Gift deed has been executed on the very next date. Pertinent also to note that the suit had been filed on 5th February, 2018 and despite thereof, application was moved for membership of the society which was granted by the Deputy Registrar by order dated 31st August, 2018. Admittedly, the Plaintiff was not made a party to that application and the Defendant No. 1 was granted a membership of the society. The conduct of the Defendant No. 1 leaves much to be desired. In my opinion, the Trial Court failed to appreciate that at this stage, the issue requiring consideration is, whether the Plaintiff was in long standing possession of the suit property. It is now settled that even trespassers possession is required to be protected unless evicted by following due process of law. In the present case, even though there are registered documents alleged to have been executed in favour of the Defendant No. 1, the fact remains that the Plaintiff is the owner of the suit property at least till the year 2018. There is a serious challenge of fraud raised to the execution of the documents which results in gifting the suit property to the Defendant No. 1. The ownership of the suit property

not being disputed till the execution of the alleged gift deed and the absence of any material to demonstrate parting with possession leads to a *prima facie* case of possession being established in favour of the Plaintiff. The Defendant No. 1 is shown to be residing at a address which is different from the suit property and as such, the balance of convenience is in favour of the Plaintiff. The Plaintiff is not shown to have any other place of residence, and as such, if at the interim stage, the restraining order is not passed as sought for, irreparable loss will be caused to the Plaintiff.

19. The Appellate Court has rightly considered the manner in which the Power of Attorney and Gift deed were executed, the aspect of possession, the balance of convenience and issue of irreparable loss and has reversed the findings of the Trial Court. The grant of relief of restraining order against Defendant No. 2 cannot be the ground to infer non application of mind. At the most the said relief can be said to have been rendered redundant.

20. The reliance placed by the learned counsel appearing for the Petitioner in the case of *Wander Ltd. Vs. Antox India Pvt. Ltd. [(1990) SCC 727]* was in support of the proposition that the Appellate Court should not interfere with the exercise discretion of the Court of first instance and substitute its own discretion. There is no quarrel with the said proposition. The decision also holds that if the discretion has been

exercised by the trial court reasonably and in a judicial manner, the fact that the Appellate Court would have taken a different view may not justify interference. However, in the present case, the Appellate Court has considered that the discretion which has been exercised by the Trial Court is not proper, and as such, the decision relied upon by the learned counsel for the Petitioner does not assist the case of the Defendant No. 1.

21. Having regard to the discussion above, there is no cause for interference in the impugned order dated 9th January, 2023 passed in Misc. Civil Appeal No 125 of 2020. Petition fails and stands dismissed.

22. Needless to clarify that the observations made herein are *prima facie* observations and the Trial Court to adjudicate the proceedings on its own merits and uninfluenced by the observations made herein.

23. At this stage, a request is made by the learned counsel appearing for the Petitioner that considering the age of the plaintiff-respondent, the suit may be expedited. There is no objection by the learned counsel for the respondent-plaintiff. In fact, during the proceedings, the plaintiff had moved an application seeking expeditious hearing. In view thereof, the trial Court is requested to decide the Regular Civil Suit No.223 of 2018 expeditiously and in any event within a period of one year from the date of production of this Order before the trial Court.

(SHARMILA U. DESHMUKH, J.)