

Nikita

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

WRIT PETITION NO.11346 OF 2023

Saras Gopi Alias K. Saraswathi Amma ... Petitioner

V/s.

Bina Deegan and Anr. ... Respondents

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Mr. Vishal Kanade a/w Mr. Vishal Maheshwari a/w Ms. Kamini Pansare i/b V. M. Legal for the Petitioner.

Mr. Ameya Gokhale a/w Ms. Kirti Kalyani and Mr. Siddhant Marathe i/b Shardul Amarchand Mangaldas and Co. for the Respondent No.1.

Mr. Vikramaditya Deshmukh a/w Ms. Shreni Shetty i/b ANB Legal, for the Intervener.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 13, 2023

P.C.:

1. Challenge in this petition is to the orders dated 7th July 2023, and 10th July 2023 in SC. Suit No.1233 of 2017, passed by Additional Session Judge, 62nd Court and City Civil Court, Bombay, thereby refusing to fix fresh date for having video conference call with defendant No.1 to ascertain voluntariness of execution of the consent terms. The petitioner is also challenging order passed by the City Civil Court directing the petitioner to hand over copy of the application at Exhibit-27 to the power of attorney of defendant No.1 and to the erstwhile advocate of defendant No.1.

2. The petitioner is original defendant No.1 in a suit filed by

respondent No.1/plaintiff, seeking a declaration of title with regard to property described in paragraph No.4 of the plaint. It appears that the defendant No.1 was represented by power of attorney holder (son). The power of attorney dated 20th July 2021 conferred right to perform and execute acts and dates mentioned in clauses 1 to 8 of the said power of attorney. On perusal of the power of attorney it is evident that no interest or title in the property was transferred to the power of attorney holder but he was appointed to act for on behalf of defendant No.1 to defend all proceedings against defendant No.1. By deed of revocation dated 21 April 2023, defendant No.1 revoked the power of attorney.

3. It appears that the plaintiff had placed on record of City Civil Court settlement agreement purportedly executed on 21st April 2023. By the said settlement agreement, City Civil Court was requested to pass decree in terms of settlement agreement.

4. In furtherance of settlement agreement, the City Civil Court on 2nd May 2023, marked the said settlement agreement along with the pursis as Exhibit-24. On 5th July 2023, City Civil Court recorded a finding that the consent terms are voluntarily signed by the plaintiffs. However, to ensure that defendant No.1, executed the consent terms voluntarily, the matter was adjourned to 7th July 2023.

5. It appears that on 7th July 2023, the Trial Court made endeavour to ascertain voluntariness of defendant No.1 about terms of agreement dated 21st April 2023. The attempt to ascertain voluntariness was through video call. The Trial Court observed that

the defendant No.1, could not answer clearly and appears too old, infirm and bed ridden. It is also observed that she was responding very rarely and was closing her eyes quiet often. She did not make clear statement about amicable settlement. The Trial Court, therefore, recorded a finding that based on communication through video conferencing, that there is no possibility of improving the condition with regard to mental and physical state of defendant No.1. The Trial Court, therefore, declined petitioner's request to fix fresh date of video conferencing.

6. On perusal of the record, in my opinion, only question relevant for City Civil Court was to ascertain as to whether on 21st April 2023, defendant No.1, voluntarily executed the settlement agreement placed on record by the parties.

7. The attempt of the Trial Court on 7th July 2023, to ascertain through video call a question of fact whether on 21st April 2023 defendant No.1, voluntarily signed settlement agreement or not, voluntariness of defendant No.1 was uncalled for. It was necessary for the Trial Court to ascertain based on material placed on record by the parties that on 21st April 2023 defendant No.1 voluntarily entered into settlement agreement or not. The observation made by the Trial Court that there is no possibility of improving the situation with regard to physical and mental state of defendant was uncalled for as Court cannot act as medical expert. In my considered opinion, based on video conferencing held on 7th July 2023, the Trial Court could not have ascertained voluntariness of agreement executed on 21st April 2023, hence, the finding to that effect needs to be quashed and set aside and the same is quashed

and set aside.

8. In the facts of the case, the scope of inquiry which the Trial Court was called upon was only to the extent of ascertaining voluntariness of defendant No.1 on the date of execution of consent terms. Therefore, it was necessary for the Trial Court to grant opportunity to the parties to place on record material to indicate that the consent terms/settlement agreement dated 21st April 2023 was voluntarily entered into by the defendant No.1. It is for the Trial Court to decide quality and degree of material to arrive at such conclusion that the agreement that the settlement agreement dated 21st April 2023 was voluntary.

9. It appears that the Trial Court on 10th July 2023, directed parties to provide copy of the application, Exhibit-27 to previous counsel of defendant No.1, and power of attorney of defendant No.1. The fact in issue which the Court was called upon to adjudicate was limited to the extent of adjudicating voluntariness of defendant No.1. Such adjudication needs to be made after hearing parties to the suit. Once the power of attorney is revoked by defendant No.1 in absence of independent right and in absence of being party to the suit, the Trial Court could not have directed parties to the suit to supply copy of application below Exhibit-27 to the power of attorney holder. The advocate representing defendant No.1 had no personal right in the subject matter of the suit. If the power of attorney holder has filed any independent application for making him party to the suit, on being satisfied about ingredients of order 1 Rule 10, it shall be open for the Trial Court to pass appropriate order on such application in accordance with law,

however, till either the power of attorney being party to the suit, copy of such application could not have been directed to be supplied to them. Hence I pass following order:

- a) The orders dated 7th July 2023 and 10th July 2023, to the extent of rejecting request of defendant No.1 to fix further date for video conferencing is quashed and set aside.
 - b) The direction to supply copy to power of attorney holder and erstwhile advocate of defendant No.1, is also quashed and set aside.
 - c) The Trial Court shall decide the issue of voluntariness of defendant No.1 to settlement agreement dated 21st April 2023, after granting parties to the suit, opportunity to produce material in support of their contentions.
10. With this clarification the writ petition stands disposed of.

(AMIT BORKAR, J.)