

SA Pathan

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

WRIT PETITION NO.11658 OF 2023

**WITH
WRIT PETITION NO.11659 OF 2023**

Unmesh Vinayak Nikam

... Petitioner

V/s.

Ashok Hari Salve

... Respondent

SHABNOOR
AYUB
PATHAN

Digitally signed
by SHABNOOR
AYUB PATHAN
Date: 2023.09.21
17:54:31 +0530

Mr. Rameshwar Gite, for petitioner.

CORAM : AMIT BORKAR, J.

DATED : SEPTEMBER 21, 2023

P.C.:

1. The petitioner is the original plaintiff who filed suit for injunction restraining defendant from disturbing his possession over the suit property. The suit property is an agricultural land.
2. According to the plaintiff, on 8 October 2018 defendant executed registered agreement to sale in his favour along with Power of Attorney as per recital in the agreement to sale, in case of failure of defendant to execute sale deed, plaintiff was authorized to execute sale deed in his own favour.
3. In exercise of power conferred by such clause, plaintiff got executed sale deed of suit property in his own favour on 22 January 2021.

4. According to the plaintiff, on the date of execution of sale deed, in furtherance of clause under agreement to sale which entitles the plaintiff to get possession, the plaintiff got possession of the suit property.
5. According to the plaintiff, on 1 August 2021 and 15 August 2021, the defendant disturbed possession of plaintiff over the suit property.
6. He, therefore, filed Regular Civil Suit No.122 of 2021 along with application for temporary injunction.
7. The defendant filed a counter claim seeking perpetual injunction against the plaintiff. According to the defendant, possession of the suit property was never delivered to the plaintiff.
8. The Trial Court allowed application for temporary injunction filed by the plaintiff and partly allowed temporary injunction filed by the defendant restraining plaintiff from creating third party rights over the suit property. The Trial Court granted injunction based on following documents: (i) entry of plaintiff's name in revenue record; (ii) photographs showing that the plaintiff cultivating soybeans crops; (iii) mutation entry in the name of plaintiff.
9. The Appellate Court held that till the execution of sale deed, the defendant was in possession of the suit property. Since, sale deed is executed by plaintiff as Power of Attorney Holder of defendant in his own favour, the factum of delivery of possession in favour of plaintiff creates serious doubt. The Appellate Court holds that mutation in respect disputed sale deed is doubtful and

considering the facts of the case revenue record loses its presumptive value. Since, the plaintiff has failed to prove delivery of possession by defendant, the plaintiff is not entitled to injunction.

10. Having considered the impugned judgment, in my opinion though the lower Appellate Court was not justified in casting doubt on the genuineness of sale deed on the point of payment of part consideration, but the lower Appellate Court was justified in recording the finding that the plaintiff has failed to prove factum of delivery of possession. It is well settled that though consideration for sale deed is partly paid and partly promised, the sale deed is valid as per Section 54 of the Transfer of Property Act, 1882. However, Courts below were called upon to adjudicate upon factum of lawful possession of the plaintiff over the suit property. The date of sale deed is 22 January 2021. Prima facie, it is not in dispute that till 22 January 2021, the defendant was in possession.

11. According to the petitioner, in furtherance of clause under agreement to sale, the plaintiff took possession of the suit property; however, in the absence of signature of original defendant on the sale deed, recital of delivery of possession, if any, the sale deed loses its significance as such recital is not binding on the defendant who have not signed the sale deed. Therefore, the lower Appellate Court is justified in allowing the appeal by recording a finding that the plaintiff failed to prove delivery of possession by the defendant.

12. Resultantly, the lower Appellate Court allowed temporary

injunction application of the defendant holding that since the defendant was in possession undisputedly till 22 January 2021, *prima facie*, the plaintiff has failed to prove delivery of possession on 22 January 2021, the defendant continues to be in possession of the suit property; therefore granted injunction against the plaintiff.

13. The exercise of discretion by the lower Appellate Court, therefore, cannot be faulted. Hence, there is no any perversity in the impugned order, no interference, is called under Article 227 of the Constitution of India.

14. It is made clear that the observations made in the present order, are only for the purpose of adjudicating application for temporary injunction, the Trial Court shall not influence while deciding the suit on merit.

(AMIT BORKAR, J.)