

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.11053 OF 2019

Harshadrai P. Parekh & Ors.

...Petitioners

Versus

Kanaiyalal M. Thakkar & Ors.

...Respondents

Mr. Amit Shroff i/b Mr. Kalpesh Nansi for the Petitioners.

Mr. Virendra V. Tulzapurkar i/b Mr. Kishore D. Shah for Respondent No. 1.

Ms. Ashna Shah i/b Mr. Harish Shroff & Co. for Respondent No.4.

Coram : Sharmila U. Deshmukh, J.

Date : July 31, 2023.

P. C. :

1. Heard.
2. The challenge in the Petition is to the order dated 24th April 2019 allowing the Notice of Motion No. 3320 of 2015 preferred by the original Respondent No. 1 seeking recall of the order dated 15th July, 2015.
3. Heard Mr. Amit Shroff, learned counsel appearing for the Petitioners, Dr. Virendra V. Tulzapurkar, learned senior counsel appearing for Respondent No. 1 and Ms. Ashna Shah, learned counsel appearing for Respondent No.4.

4. Mr. Shroff, Learned counsel appearing for the Petitioners submit that the Petitioners are one of the unit holders of first floor of the property known as Parekh Market and would submit that in view of termination of the Power of Attorney by Respondent No. 2 on 7th February, 2000 the Respondent No. 1 does not acquire any right to continue with the proceeding. He would further submit that the termination was challenged by the Respondent No. 1 which was taken right up to Apex Court in an application filed by Respondent No. 2 under Order 7 Rule 11 of the CPC and has been held to be time barred. He has taken to this Court to the order 24th November, 2006 passed by the Single Judge of this Court holding that the counter claim which was filed on 9th August, 2004 will not be maintainable in terms of the provisions of the Limitation Act. He would further submit that the Power of Attorney was in respect of the tenants who were occupying part of the property admeasuring 2455 sq. ft. and has nothing to do with the Respondent No. 4 society in which the Petitioners are one of the Unit holders.

5. He has invited the attention of this Court to the Power of Attorney dated 8th June, 1990 which is at page No. 204 of the Petition and would submit that the proceedings in question have been instituted on the basis of this Power of Attorney. He would submit that the power

which was given under the Power of Attorney was to file against the occupants of the structures which forms part of the portion of land admeasuring 2455 sq. ft. He would further submit that the said Power of Attorney having been terminated which challenge has failed right up to Apex court, Respondent No. 1 does not acquire any right to act on behalf of Respondent No. 2. He would further contend that the agreement which was executed with the unit holders was on 6th February, 1987 which was prior to the execution of the Power of Attorney. He would further urge that the Trial Court while allowing the Notice of Motion has failed to take into consideration the orders of the Single Judge of this Court as well as the Apex Court which upheld that the counter claim filed was barred by limitation. He would urge that as the challenge to the termination of the Power of Attorney has failed, the Power of Attorney cannot be said to be subsisting. He would further assail the finding of the Trial Court on the ground that the Trial Court has erroneously recorded that the affidavits filed by Defendant Nos. 2 to 4, no ground has been taken that the Power of Attorney concerned only the tenants and not the Defendant Nos. 2 to 4. He would further submit that the Trial Court has given specific findings in respect of the Power of Attorney being an irrevocable Power of Attorney was given for consideration coupled with interest. He would

urge that by these findings, the challenge if any, to the Power of Attorney has been foreclosed by the Trial Court.

6. *Per contra*, Dr. Virendra Tuljapurkar, learned senior counsel appearing for the Respondent-Plaintiff submits that the Notice of Motion was taken out by the Respondent for setting aside the order dated 15th July, 2015 listing the matter for dismissal under Order 39 Rule 11 of the CPC. He would further contend that the entire issue which was for consideration before the Trial Court was the application of provisions of Order 39 Rule 11 of the CPC and it is in that context, that the Trial Court has examined the Power of Attorney and has held that the provisions of Order 39 Rule 11 is not attracted in the present case. He would further submit that the order dated 15th July, 2015 was passed as the Trial Court had directed the original Plaintiff to appear in the Court. He would submit that the original Plaintiff, if required, will appear before the Court and in the present case, the only inquiry is the impugned order permitting recall of order of dismissal. He would further urge that in exercise to the power under Article 227, this Court may not go into the merits of an interlocutory order.

7. Considered the submissions and perused the papers.

8. Learned counsel appearing for the Petitioner has made

submissions as regards the validity of the Power of Attorneys which have been executed by the Respondent No. 2 in favour of Respondent No. 1. Perusal of the impugned order dated 24th April, 2019 discloses that the application was moved seeking recall of the order dated 15th July, 2015 keeping the matter for dismissal for non compliance of the order directing presence of the original Plaintiff by invoking the powers under Order 39 Rule 11 of the CPC. The Affidavit in support of the Notice of Motion seeking recall of the order contends that there was a development agreement entered into in favour of the Respondent No. 1 and the possession was handed over for valuable consideration on a partly developed property and building was constructed thereon and various tenements were sold. The contention advanced was that Respondent No. 1 was granted irrevocable Power of Attorney as well as other Power of Attorney as required for development of the said properties and as such, considering the provisions of section 202 of the Indian Contract Act, 1872 the Power of Attorney is a power coupled with interest and hence, irrevocable.

9. Apart from the prayer of seeking recall of the order an alternate prayer was sought that the Applicant be substituted in place of the Plaintiff under Order 22 Rule 10 of the Code of Civil Procedure, 1908

which was not allowed and only the relief of recall of the order of dismissal was sought. It is in the context of the contentions taken up by the Respondent No. 1 for the purpose of assailing the order of dismissal that the Trial Court has gone into the issue as to whether the Power of Attorney is a power coupled with interest. After observing the provisions of section 202 of the Indian Contract Act, 1872 the Court has held that at this stage the Defendant No. 2 to 4 cannot challenge the validity of the power of Attorney which would otherwise be the matter in issue and can only be decided when both the parties will get an opportunity to lead evidence into that effect. The order of the Trial Court is clear in paragraph No. 10 that the issue which was being considered by the Trial Court was only the order dated 15th July, 2015 listing the matter for dismissal by invoking the provisions under Order 39 Rule 11 which according to the Trial Court was not applicable in the given circumstances. The Trial Court specifically observed that the documents placed on record by the parties are subject matter of the evidence and therefore, for continuation of the suit on merits, the order dated 15th July, 2015 needs to be recalled and the suit needs to be proceeded on merits.

10. In my view upon reading of the impugned order dated 24th April, 2019 it cannot be said that by the said order, the Trial Court has conclusively

held that the Power of Attorneys which have been pressed into service by the Respondent No. 1 are irrevocable Power of Attorney given for consideration coupled with interest. On the contrary it appears that the Trial Court has held that the documents which are placed are the subject matter of evidence and only for the purpose of continuation of the suit on merits, at that stage, the order dated 15th July, 2015 was recalled.

11. Considering that the impugned order only recalls the order of dismissal dated 15th July, 2015 no interference is warranted under Article 227 of the Constitution of India. Writ Petition being devoid of merits stand dismissed.

[Sharmila U. Deshmukh, J.]