

Ghuge

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

WRIT PETITION NO.4425 OF 2022

Suryakant Bhaghusa Gathadi ... Petitioner
V/s.
Amrut Shirish Pathak and Ors ... Respondents

**WITH
WRIT PETITION NO.4370 OF 2022**

Suryakant Bhaghusa Gathadi ... Petitioner
V/s.
Amrut Shirish Pathak and Ors ... Respondents

Mr. Sugandh B. Deshmukh with Mr. Irvin D'Souza for
the petitioner.

Mr. A.R. Patil APP for the State.

Mr. J.M. Khajotia a/w Prashant Kale for the respondent
No.1 and 2.

CORAM : AMIT BORKAR, J.

DATED : MARCH 8, 2023

P.C.:

1. Both these writ petitions have been filed by accused No.2 arising out of an application under Section 145(4) of the Code of Criminal Procedure, 1973. The Executive Magistrate by order dated 27th December, 2019 allowed the application directing accused No.2 to part with possession of property in dispute. Against the order dated 27th December, 2019 the applicant filed Revision Application No.50 of 2020 being aggrieved by that part of the order which does not direct accused No.2 to deliver the

possession to the applicants. Accused No.2 had filed Criminal Revision Application No.36 of 2020, being aggrieved by order dated 27th December, 2019 directing him to vacate property in dispute. The learned District Judge by the impugned order allowed the Revision of the applicants and dismissed Revision of the accused No.2 directing accused No.2 to forthwith delivery of possession of property in dispute to the Applicant and further directed that the applicant shall remain in possession of the property in dispute till the outcome of Special Civil Suit No.46 of 2020 or till they are evicted by due process of law.

2. The applicants claimed ownership right over the property in dispute which is a residential Row House, ad-measuring 1320 square meters bearing Villa No.2 at in Megnoliya co-operative Society, Village Belatgavhan Tq & Dist. Nashik more particularly described in paragraph 1 of the application.

3. According to the applicants accused No.1 i.e. wife of accused No.2 executed registered sale-deed in favour of applicants on 28th June, 2019 by accepting consideration of Rs.48,00,000/- (Rupees Forty Eight Lakh Only) by cheques. The registered document of sale-deed contains averment of delivery of possession in favour of the applicant. However, according to the applicant the accused No.2, without following due process of law, broke open the lock of property in dispute and entered the property. Accordingly on 30th July, 2019 offence under Section 451 and 427 of the Indian Penal Code, 1860 was registered against the accused. The said act of dispossession without following due process of law prompted applicant to file application under Section 145(4) of the Code of

Criminal Procedure, 1973.

4. First authority sought a report from Senior Inspector of concerned police station. Based on the said report and clause 5 of the sale-deed, the Executive Magistrate recorded a finding that the applicants were dispossessed without following due process. The learned Revisional Court considered proviso to sub-section 4 of Section 145 which empowers the Magistrate to deliver possession back to the person who has been forcibly and unlawfully dispossessed within Two months prior to the date of filing of such application. Based on averments in sale-deed the learned District Judge recorded a finding that the applicant were put in possession of property in dispute on the date of sale-deed and they were dispossessed either on 17th July, 2019 or 29th July, 2019.

5. Learned advocate for the applicant submitted that without there being finding of breach of peace as required under Section 145(1) of Code of Criminal Procedure, 1973, no relief could have been granted in favour of the applicants. Learned advocate for the respondent No.2 *per contra*, placed reliance on the judgment of Apex Court in the Case of **R.H. Bhutani Vs. Mani J. Desai** reported in AIR 1968 SCC 1444.

6. On perusal of the judgment of Apex Court, in my opinion paragraph 12 is complete answer to the submission raised on behalf of the applicant. The Apex Court considering the fact of filing the First Information Report and the fact that the possession was taken without following due process of law, held that the person in *defacto* possession is found to have obtained possession

by forcibly and wrongfully dispossessing the other party within two months next preceding the date of his order, the Magistrate can treat the dispossessed party as if he was in possession on such date, restore possession to him and prohibit the dispossessor from interfering with that possession until eviction of that person in due course of law. The relevant paragraph 13 read as under :-

13. The next ground for the High Court's interference was that assuming that the appellant was forcibly and wrongfully dispossessed and the said Salim was assaulted, the said dispossession was completed, a complaint of assault was lodged and the police had already taken action before the preliminary order was passed on June 20. 1996. Therefore, it was said, there was no longer any dispute on the date of the order likely to lead to breach of peace and consequently the order did not comply with the requirements of Sec. 145(1) and was without jurisdiction. This reasoning would mean that if a party takes the law into hands and deprives forcibly and wrongfully the other party of his possession and completes his act of dispossession, the party so dispossessed cannot have the benefit of Section 145, as by the time he files his application and the Magistrate passes his order the dispossession would be complete and, therefore, there would be no existing dispute likely to cause breach of peace. Such, a construction of Section 145, in our view, is not correct for it does not take into consideration the second proviso to sub section (4) which was introduced precisely to meet such cases. The Magistrate has first to decide who is in actual possession at the date of his preliminary order. If, however, the party in defacto possession is found to have obtained possession by forcibly and wrongfully dispossessing the other party within two months next proceeding the date of his order, the Magistrate can treat the dispossessed party as if he was in possession on such date, restore possession to him and prohibit the dispossessor from

interfering with that possession until eviction of that person in due course of law. The proviso is founded on the principle that forcible and wrongful dispossession is not to be recognised under the criminal law. So that it is not possible to say that such an act of dispossession was completed before the date of order. To say otherwise would mean that if a party who is forcibly and wrongfully dispossessed does not in retaliation take the law into his hands he should be at disadvantage and cannot have the benefit of Section 145.

7. The fact of delivery of possession in favour of the plaintiff is evidenced by averments in the registered sale-deed which indicates that the possession of property in dispute was delivered in favour of applicant under clause 5 of the document of title. The authority under Section 145 of the Code of Criminal Procedure, 1973 is bound by the averments in the registered sale-deed which contains averments of delivery of possession. The proceeding being in summary nature, such registered document needs to be given due weight for recording finding of possession. Ultimately, validity of such registered sale-deed needs to be adjudicated in substantive proceedings filed by the parties in the form of Special Civil Suit No.46 of 2020. However, impugned order passed by the Court below based on averment of delivery of possession in the registered document and First Information Report are in my opinion sufficient to sustain the validity of the impugned order. The order passed by the District Judge is well reasoned order, calls for no interference under the writ jurisdiction of this Court.

8. The Writ Petitions are therefore dismissed. No costs.

(AMIT BORKAR, J.)