

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO. 8341 OF 2016**

Annappa Maruti Zalke,
Aged 55 years, Occupation Agriculture,
R/o Yenechivandi, Taluka Gadhinglaj,
District Kolhapur

..Petitioner (Ori
Plaintiff)

Versus

Ramu Balappa Bogarnal,
Aged 40 years, Occupation
Agriculture, R/o. Nandanwad,
Taluka Gadhinglaj, District Kolhapur.

...Respondent
(Ori Defendant)

Mr. Kumar Babu Redekar, for the Petitioner.

Mr. Chetan Patil, with Vishwesh Gadage, for the Respondent.

CORAM: N. J. JAMADAR, J.

RESERVED ON: 21st JANUARY 2025

PRONOUNCED ON: 13th MARCH 2025

JUDGMENT.:

1. This Petition under Article 227 of the Constitution of India assails the legality, propriety and correctness of the judgment and order dated 24th June 2016 passed by the learned District Judge, Gadhinglaj, in MCA No. 19 of 2016, whereby the Appeal preferred by the respondent-defendant came to be allowed setting aside the order on the Application for temporary injunction (Exhibit "5") passed by the learned Civil Judge, Junior Division, Gadhinglaj, restraining the defendant from

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causing obstruction to the possession of, and cultivation by, the plaintiff of the suit land till the final disposal of the suit.

2. Briefly stated the background facts are as under:

2.1 The petitioner instituted a suit being RCS No. 96 of 2015 for specific performance of an Agreement for Sale dated 11th May 2002 and to restrain the defendant from causing obstruction to the possession of the plaintiff over the suit land. The plaintiff asserts that Balu Rama Bogarnal, the father of the defendant was the original holder of the suit land. It was of restricted tenure. Balu Bogarnal had initially mortgaged the said land under a Deed of Mortgage dated 27th June 2000 and accepted mortgage money of Rs.17,000/-. Under the said deed the plaintiff was put in possession of the mortgaged property. Before the five year term of the mortgage expired, Balu Bogarnal executed an Agreement, dated 11th May 2002, to sale the said land for a consideration of Rs.55,000/-. The defendant had executed the said Agreement as a consenting party as Balu Bogarnal claimed that he had effected the partition and the suit property was allotted to the share of the defendant. The possession of the plaintiff as a mortgagee was continued as a transferee under the said Agreement. Balu Bogarnal passed away. The defendant refused to obtain permission of the competent authority to sale the said land and execute a registered

instrument to convey title to the plaintiff and threatened to dispossess the plaintiff. Hence, the suit.

2.2 In the said Suit, the plaintiff filed an Application for temporary injunction. By an order dated 28th October 2015, the learned Civil Judge, Gadhinglaj, restrained the defendant from causing obstruction to the possession of the plaintiff opining, inter alia, *prima facie* the plaintiff was in possession of the Suit property, the defendant had admitted the execution of the Mortgage Deed and the Agreement for Sale, and, therefore, the possession of the plaintiff was required to be protected.

2.3 In the Appeal, preferred by the defendant, the learned District Judge interfered with the order passed by the Trial Court, principally for the reason that the Agreement for Sale was not registered and, therefore, the claim of possession based on such unregistered Agreement for Sale, cannot be sustained as a lawful possession. Since the said possession was not referable to a valid title, according to the learned District Judge, the Trial Court was in error in granting temporary injunction. To draw support to the aforesaid view the learned District Judge heavily banked upon the decision of the Supreme Court in the case of **Suraj Lamp And Industries Private Limited Through Director Vs State of Haryana And Anr.**¹

1 (2009) 7 SCC 363.

3. Mr. Redekar, the learned Counsel for the petitioner strenuously urged that the learned District Judge was not at all justified in interfering with a reasoned discretionary order passed by the Trial Court, in exercise of limited appellate jurisdiction. The learned District Judge completely misconstrued the scope of the provisions contained in Section 49 of the Indian Registration Act 1908 (“the Registration Act”). An Agreement for Sale is not required to be compulsorily registered. The decision of the Supreme Court, in the case of **Suraj Lamp and Industries (Supra)** was in respect of unregistered documents whereunder the title was conveyed. In the case at hand, the plaintiff was seeking specific performance of the Agreement for Sale. Thus, the learned District Judge committed a gross error in applying the ratio in the case of **Suraj Lamp and Industries (Supra)** to the facts of the case at hand.

4. Mr. Redekar further submitted that even unregistered Deed of Mortgage cannot be said to be devoid of any utility. An unregistered Deed of Mortgage can be received as evidence of collateral transaction, not required to be effected by a registered instrument and to show the nature of the possession of the plaintiff. To lend support to this submission Mr. Redekar placed strong reliance on the decisions of the Supreme Court in the cases of **S. Kaladevi Vs V.R. Somasundaram**² and **R Hemalatha Vs Kashthuri**.³

2 (2010) 4 SCR 515.

3 (2023) 2 SCR 834.

5. Mr Redekar further urged that, in any event, at the stage of grant of temporary injunction the Court was required to examine *prima facie* possession over the suit land. In the face of overwhelming material to show the possession of the plaintiff over the suit land, the learned District Judge could not have reversed the finding of the Trial Court on the premise that the possession was not lawful. Even a rank trespasser, who is in settled possession, is entitled to protect his possession, urged Mr. Redekar.

6. In opposition to this Mr. Chetan Patil, the learned Counsel for the respondent-defend, supported the impugned order. Mr. Patil would submit that the claim of the plaintiff that the plaintiff was put in possession of the suit land under the Agreement for Sale is not borne out by the material on record. Sine the Mortgage Deed is not registered, the learned District Judge was fully justified in discarding the said instrument. The Agreement for Sale explicitly records that the three sons of Balu Bogarnal, including the defendant, were cultivating the three portions of the land bearing Gat No. 520 independently. Thus, the claim of the plaintiff that he was put in possession of the suit land under the Mortgage Deed and the said possession was continued under the Agreement for Sale is negated by the very recitals in the Agreement for Sale. Mr Patil further submitted that once the partition was executed and three sons of Balu Bogarnal were put in possession of

their separate shares, deceased Balu Bogarnal could not have executed an Agreement for Sale in respect of the suit property. The defendant has categorically disputed the execution of the said Agreement as a consenting party thereto. Therefore, the impugned order does not warrant any interference by this Court.

7. To begin with, it is necessary to note that the petitioner has instituted the Suit for specific performance of the contract contained in the Agreement for Sale dated 11th May 2002. The plaintiff claimed that he was already put in possession of the suit property under the unregistered Mortgage Deed dated 27th June 2000 and the said possession was continued in the capacity of the transferee under the Agreement for Sale dated 11th May 2002. The fact that both the instruments were unregistered principally weighed with the learned District Judge in interfering with the order passed by the Trial Court. The learned District Judge went on to hold that though there was material to show that the plaintiff was in possession of the suit land, yet, such possession did not merit protection as it was not referable to a lawful title.

8. Before advertng to consider the correctness of the aforesaid view, it may be apposite to note the jurisdictional limits of the Appellate Court in an appeal against a discretionary order. The legal position is well recognized. Ordinarily, the appeal Court is not expected to interfere with the exercise of discretion in the matter of grant of injunction by the trial Court and

substitute its own discretion for the same, except where it can be demonstrated that the discretion has been exercised arbitrarily or perversely, or the impugned order is contrary to the settled principles of law. An arbitrariness in the exercise of discretion or perversity in the order passed by the trial Court can arise where the injunction has been granted sans material or the trial court has declined to grant temporary injunction, despite existence of justifiable material.

9. A profitable reference in this context can be made to a three Judge Bench decision of the Supreme Court in the case of Wander Ltd. and Anr. V/s. Antox India P. Ltd, 1990 (supp) SCC 727 wherein the following observations have been made :

“14. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The

appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. 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 with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in Printers (Mysore) Pvt. Ltd. V/s. Pothan Joseph (1960) 3 SCR 713 :

“... These principles are well established, but as has been observed by Viscount Simon in Charles Osenton & Co. v. Johnston the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.

The appellate judgment does not seem to defer to this principle.”

(emphasis supplied)

10. In the case of Seema Arshad Zaheer and Ors. V/s. Municipal Corporation of Greater Mumbai and Ors. (2006) 5 SCC 282, the Supreme Court expounded the principles which govern the interference by the appeal Court in the discretionary order passed by the trial Court. The observations in paragraph 32 are material, and,

hence, extracted below :

“32. Where the lower court acts arbitrarily, capriciously or perversely in the exercise of its discretion, the appellate court will interfere. Exercise of discretion by granting a temporary injunction when there is 'no material', or refusing to grant a temporary injunction by ignoring the relevant documents produced, are instances of action which are termed as arbitrary, capricious or perverse. When we refer to acting on 'no material' (similar to 'no evidence'), we refer not only to cases where there are total dearth of material, but also to cases where there is no relevant material or where the material, taken as a whole, is not reasonably capable of supporting the exercise of discretion. In this case, there was 'no material' to make out a prima facie case and therefore, the High Court in its appellate jurisdiction, was justified in interfering in the matter and vacating the temporary injunction granted by the trial court.”

(emphasis supplied)

11. Another three Judge Bench of the Supreme Court in the case of Skyline Education Institute (India) Pvt. Ltd. V/s. S.L.Vaswani and Anr, (2010) 2 SCC 142, after referring to the previous precedents, culled out the principles in the following words :

“22. The ratio of the abovenoted judgments in that once the Court of first instance exercises

its discretion to grant or refuse to grant relief of temporary injunction and the said exercise of discretion is based upon objective consideration of the material placed before the Court and is supported by cogent reasons, the appellate court will be loath to interfere simply because on a de novo consideration of the matter it is possible for the appellate Court to form a different opinion on the issues of prima facie case, balance of convenience, irreparable injury and equity.”

(emphasis supplied)

12. In the light of the aforesaid enunciation of law it has to be seen whether the learned District Judge was justified in interfering with the order passed by the Trial Court granting injunction in favour of the plaintiff. As noted above, the non-registration of the Mortgage Deed and the Agreement for Sale, for the specific performance of which the suit came to be instituted, was, according to the learned District Judge, the major flaw in the plaintiff's case.

13. On a careful consideration of the matter, this Court finds it difficult to appreciate the manner in which the learned District Judge approached the controversy. The learned District Judge placed heavy reliance on a two-Judge Bench Judgment of the Supreme Court in the case of **Suraj Lamp and Industries (Supra)**. In the said case, the Supreme Court was primarily confronted with

the issue of avoidance of execution and registration of Deeds of Conveyance as the mode of transfer of freehold immovable property by increasing tendency to adopt “power of attorney sales”, that is, execution of sale agreement/general power of attorney/will (for short “SA/GPA/Will transactions”) instead of execution of registration of regular deeds of conveyance, on receiving full consideration.

14. After highlighting the pernicious effects of such transaction, the Supreme Court enunciated that such transactions adversely affect the economy, civil society and law and order. The Supreme Court eventually framed few questions for larger considerations.

15. It is imperative to note that in **Suraj Lamp and Industries Private Limited (2) Through Director Vs State of Haryana And Anr.**⁴ a three Judge Bench of the Supreme Court enunciated that SA/GPA/Will transaction does not convey any title nor creates interest in an immovable property. An immovable property can be legally and lawfully transferred/conveyed only by a registered Deed of Conveyance. The transaction of the nature of “GPA sales” or “ SA/GPA/Will transactions” do not convey title and do not amount to transfer, nor can they be recognized as valid mode of transfer of immovable property. The Courts will not treat such

4 (2012) 1 SCC 656.

transaction as completed or concluded transfer or as conveyances as they neither convey title nor create any interest in an immovable property. They cannot be recognized as deeds of title, except to the limited extent of Section 53-A of the Transfer of Property Act.

16. What is of material significance, from the point of view of the facts of the case at hand, is that the Supreme Court made it abundantly clear that the aforesaid observations and directions of the Supreme Court were not intended to in any way affect the validity of the sale agreements and power of attorney executed in genuine transactions.

17. Therefore, the learned District Judge ought to have independently examined the question as to whether an Agreement for Sale required registration, and what consequence emanate if it is not registered. In view of the provisions contained in Section 54 of the Transfer of Property Act 1882 (“the TP Act”), a contract of sale does not, of itself, create any interest in or charge on the property. However, such an Agreement for Sale creates a personal obligation arising out of contract and annexed to the ownership of the property not amounting to an interest or easement therein, as provided under Section 40 of the TP Act.

18. On the aspect of the registration of an Agreement for Sale, the provisions of Registration Act 1908 are absolutely clear. An Agreement for Sale is not one of those instruments which is required to be compulsorily registered under the Section 17 of the Act. On the contrary, the Explanation to Section 17(2) provides that a document purporting or operating to effect a contract for sale of immovable property shall not be deemed to require or ever to have required registration by reason only of the fact that such document contains a recital of the payment of any earnest money or of the whole or any part of the purchase money.

19. Section 49 of the Registration Act 1908, which lends sanction to the mandate of compulsory registration of the instruments by providing that no document required by Section 17 of the Registration Act or by any provisions of the TP Act, to be registered shall affect any immovable property comprised therein or be received as evidence of any transaction affecting such property, unless it has been registered, also carves out an exception in relation to an Agreement for Sale.

“ 49. Effect of non-registration of documents required to be registered.—No document required by section 17 or by any provision of the Transfer of Property Act, 1882 (4 of 1882), to be registered shall—

(a) affect any immovable property comprised therein, or

- (b) confer any power to adopt, or
- (c) be received as evidence of any transaction affecting such property or conferring such power,

unless it has been registered:

Provided that an unregistered document affecting immovable property and required by this Act or the Transfer of Property Act, 1882 (4 of 1882), to be registered may be received as evidence of a contract in a suit for specific performance under Chapter II of the Specific Relief Act, 1877 (3 of 1877) or as evidence of any collateral transaction not required to be effected by registered instrument.”

20. From a bare perusal of the proviso, it becomes evident that an unregistered document may be received as evidence of a contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. It would be contextually relevant to note that before the Amendment by Act 48 of 2001 such an unregistered instrument could also be received as evidence of part performance of a contract for the purposes of Section 53-A of the TP Act.

21. A conjoint reading of Section 17, Explanation thereto, and Section 49 of the Registration Act 1908 makes it abundantly clear that an Agreement for Sale does not require registration. On the contrary, an unregistered Agreement for Sale can be lawfully

received as evidence of a contract in a suit for specific performance.

22. In the impugned order, the learned District Judge has committed an error in holding that since an Agreement for Sale which is not registered cannot be used as an evidence of part performance of a contract under Section 53-A of the TP Act, it cannot also be received as evidence of a contract in a Suit for specific performance or as evidence of any collateral transaction. Such an incorrect approach vitiated the findings of the learned District Judge.

23. In the case of **S. Kaladevi (Supra)**, on which reliance was placed by Mr. Redekar, the Supreme Court was confronted with the question of admissibility of an unregistered Sale Deed in a Suit for specific performance of the contract. After advertng to the previous pronouncement in the case of **K.B. Saha and Sons Private Limited Vs Development Consultant Limited**,⁵ the Supreme Court enunciated the law that an unregistered Sale Deed can be received in evidence making an endorsement that it is only received as evidence of an oral Agreement of Sale under proviso to Section 49 of the Registration Act. The observations of the Supreme Court in paras 11 and 12 are material and hence extracted below.

5 (2008) 8 SCC 564.

“11. The main provision in Section 49 provides that any document which is required to be registered, if not registered, shall not affect any immovable property comprised therein nor such document shall be received as evidence of any transaction affecting such property. Proviso, however, would show that an unregistered document affecting immovable property and required by 1908 Act or the Transfer of Property Act, 1882 to be registered may be received as an evidence to the contract in a suit for specific performance or as evidence of any collateral transaction not required to be effected by registered instrument. By virtue of proviso, therefore, an unregistered sale deed of an immovable property of the value of Rs. 100/- and more could be admitted in evidence as evidence of a contract in a suit for specific performance of the contract. Such an unregistered sale deed can also be admitted in evidence as an evidence of any collateral transaction not required to be effected by registered document. When an unregistered sale deed is tendered in evidence, not as evidence of a completed sale, but as proof of an oral agreement of sale, the deed can be received in evidence making an endorsement that it is received only as evidence of an oral agreement of sale under the proviso to Section 49 of 1908 Act.

12. Recently in the case of K. B. Saha and Sons Private Limited v Development Consultant Limited, this Court noticed the following statement of Mulla in his Indian Registration Act, 7th Edition, at page 189:-

".....The High Courts of Calcutta, Bombay, Allahabad, Madras, Patna, Lahore, Assam, Nagpur, Pepsu, Rajasthan, Orissa, Rangoon and Jammu & Kashmir; the

former Chief Court of Oudh; the Judicial Commissioner's Court at Peshawar, Ajmer and Himachal Pradesh and the Supreme Court have held that a document which requires registration under Section 17 and which is not admissible for want of registration to prove a gift or mortgage or sale or lease is nevertheless admissible to prove the character of the possession of the person who holds under it..."

This Court then culled out the following principles:-

- "1. A document required to be registered, if unregistered is not admissible into evidence under Section 49 of the Registration Act.
2. Such unregistered document can however be used as an evidence of collateral purpose as provided in the proviso to Section 49 of the Registration Act.
3. A collateral transaction must be independent of, or divisible from, the transaction to effect which the law required registration.
4. A collateral transaction must be a transaction not itself required to be effected by a registered document, that is, a transaction creating, etc. any right, title or interest in immovable property of the value of one hundred rupees and upwards.
5. If a document is inadmissible in evidence for want of registration, none of its terms can be admitted in evidence and that to use a document for the purpose of proving an important clause would not be using it as a collateral purpose."

To the aforesaid principles, one more principle may be added, namely, that a document required to be registered, if unregistered, can be admitted in evidence

as evidence of a contract in a suit for specific performance.”

(emphasis supplied)

24. In the case of **R Hemalatha (Supra)** the Agreement to Sale was required to be compulsorily registered in view of Section 17(1)(g) of the Registration Act, as applicable to the State of Tamil Nadu. In that context, a question arose before the Supreme Court whether such unregistered Agreement to sale immovable property can be received in evidence in a suit for specific performance. The Supreme Court held that, despite the insertion of Section 17(1)(g) and omission of Explanation to Section 17(2) of the Registration Act, by the Tamil Nadu Amendment Act 2012, the unregistered Agreement to Sale is admissible in evidence in a suit for specific performance as the proviso is an exception to the first part of the Section 49 of the Registration Act.

25. The aforesaid exposition of law also covers the unregistered Mortgage Deed. The Deed of Mortgage, though unregistered, can be looked into for the collateral purpose to ascertain the nature of possession. A reference can also be made to another three Judge Bench judgment of the Supreme Court in the case of **Bhaiya Ramanuj Pratap Deo Vs Lalu Maheshanuj Pratap Deo & Ors**⁶

6 (1981) 4 SCC 613.

26. In the said case, the admissibility of Khorposh (Maintenance Deed) was called in question as it was an unregistered instrument. The Supreme Court held that the maintenance deed can be looked into for collateral purpose of ascertaining the nature of the possession. The observations in para 22 read as under:

“22 As regards the second reason, the argument is based on Section 17 read with Section 49 of the Indian Registration Act. Section 17 of the Registration Act enumerates the documents requiring registration. Section 49 of the Registration Act provides that no document required by Section 17 or by any provision of the Transfer of Property Act, 1882 to be registered shall be (a) affect any immovable property comprised therein, (b) ***, (c) be received as evidence of any transaction affecting such property or conferring such power, unless it has been registered. Khorposh (maintenance) deed is a document which requires registration within the meaning of Section 17 of the Indian Registration Act and as the document was not registered it cannot be received as evidence of any transaction affecting such property. Proviso to section 49, however, permits the use of the document, even though unregistered, as evidence of any collateral transaction not required to be effected by registered instrument. In this view of the legal position the maintenance deed can be looked into for collateral

purpose of ascertaining the nature of possession.

(emphasis supplied)

27. The aforesaid exposition of law leads to an irresistible interference that the learned District Judge could not have discarded the Deed of Mortgage and, more particularly, the Agreement for Sale, on the ground that those documents were unregistered, especially at the stage of consideration of application for temporary injunction. It is imperative to note that the defendant had not contested the execution, as such, of the Deed of Mortgage and the Agreement for Sale. However, it was alleged that those documents were executed as a cover for a transaction of money lending on interest.

28. On the aspect of the possession of the plaintiff over the suit property, apart from the aforesaid documents, the plaintiff had placed on record material to show that he was cultivating the suit land. The receipts of the supply of sugarcane from the suit land to the sugar factories in the name of the plaintiff, were produced before the Trial Court. On the basis of the objective material, the trial Court had recorded a *prima facie* finding that the plaintiff was in possession of the suit land. The learned District Judge, therefore, could not have interfered with such finding of fact and the discretionary order passed by Trial Court, in exercise of limited appellate jurisdiction.

29. The conspectus of the aforesaid consideration is that the impugned order suffers from the vice of transgression of jurisdictional limit as well as wrong application of the provisions of law to the facts of the case. Resultantly, the impugned order deserves to be quashed and set aside.

30. Hence the following order:

: O R D E R :

- (i) The Petition stands allowed,
- (ii) The impugned order passed by the learned District Judge in MCA No. 19 of 2016 stands quashed and set aside
- (iii) The order dated 28th October 2015 passed by the Trial Court on the application for temporary injunction (Exhibit “5”) in RCS No.. 96 of 2015, stands restored.
- (iv) Rule made absolute in the aforesaid terms.
- (v) No costs.

[N. J. JAMADAR, J.]