

**(2007) 06 BOM CK 0026**

**In the Bombay High Court**

**Case No :** Notice of Motion No. of 2007 in Suit (Lodging) No. 1130 of 2007

Jang Bahadur Charitra Rai

APPELLANT

Vs

Durjore Ardeshir Mistry and Others

RESPONDENT

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**Date of Decision :** 05-06-2007

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Order 40 Rule 1  
Specific Relief Act, 1963 — Section 19  
Transfer of Property Act, 1882 — Section 41

**Citation :** (2007) 4 ALLMR 456 : (2007) 5 BomCR 767 : (2007) 6 MhLj 321

**Hon'ble Judges :** A.M. Khanwilkar, J

**Bench :** Single Bench

**Advocate :** D.D. Madan and Akhilesh Singh, for the Appellant; Rajesh Datar, for Respondent Nos. 1 and 2, Janak Dwarkadas and Uday Warunjikar for Respondent Nos. 5 and 6 and M.R. Yadav, for Respondent Nos. 7 to 10, for the Respondent

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## **Judgement**

A.M. Khanwilkar, J.—Plaintiff undertakes to remove office objections within two weeks from today. That undertaking is accepted.

2. The counsel appearing for the contesting defendants state that the defendants have no intention to file any further affidavit. The defendant Nos. 3 and 4, though served, have not chosen to appear before the Court or file any reply. The counsel for the plaintiff states, on instructions, that during the hearing of this Motion yesterday, the defendant Nos. 3 and 4 were personally present in Court. Be that as it may, the Motion is proceeded for final hearing by consent of the counsel for the plaintiff and the contesting defendants who have made appearance through Advocates.

3. The plaintiff has pressed interim relief in this Motion only in terms of prayer Clause (a) which reads thus:

(a) Pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to pass a temporary order of injunction restraining the defendants, their servants, agents or any persons claiming through or under them from assigning,

selling alienating, encumbering, mortgaging, transferring and/or creating any third party right, title or interest and/or carrying out any construction, development, erection, putting up any structure, removing any structure and/or disturbing the peaceful use, occupation, possession and enjoyment of the plaintiff in respect of the suit property viz. piece and parcel of land bearing C.T.S. No. 344, 344/1 to 8 S. No. 23A, Hissa No. 14, admeasuring 4100 sq. meter lying being and situated at Village Shankar Wadi, Jogeshwari (East), Mumbai-400060 in any manner whatsoever and/or to deal with the same in any manner whatsoever in pursuance to the said Deed of Conveyance dated 12-12-2006 and power of attorney dated 7-1-2005 and/or any other document in pursuance thereof.

Accordingly, this order will consider the rival claim in the context of the reliefs in terms of prayer Clause (a) reproduced above.

4. I shall first deal with the admitted facts. It is not in dispute that the suit land admeasuring 32 gunthas equivalent to 3872 sq. yards i.e. 4,232.2 sq. meters together with structures standing thereon bearing Survey No. 23A, hissa No. 14, C.T.S. Nos. 343, 344, 344/1 to 8, situated at Shankar Wadi, Jogeshwari (East), Mumbai-400 060, was owned and possessed by the defendant No. 1 and one Mr. Hoshi Ardeshir Mistry. The defendant No. 1 and the said Mr. Hoshi Ardeshir Mistry created tenancy in respect of the said suit property in favour of the younger brother of the plaintiff Veer Bahadur Singh alias Veer Bahadur Charitra Rai. Pursuant to the agreement of tenancy dated 20-1-1966, the said Veer Bahadur Rai was put in possession of the suit property on terms and conditions referred to in the agreement. Amongst others, Clause 5 of the agreement stipulates as follows:

5) It is agreed by the parties that at any time during the pendency of this tenancy agreement the tenant offers to pay the landlords the price of the piece of land in his occupation at the rate of Rs. 5/- per square yard then in that case the landlord shall execute a conveyance of this piece of land in favour of the tenant.

It is not in dispute that Hoshi Ardeshir Mistry died after which the defendant No. 1 succeeded to his share as his heir. In other words, the defendant No. 1 became the absolute owner of the suit property. The defendant No. 1 later on executed Conveyance Deed in favour of the said Veer Bahadur Rai on 15-4- 1988 conveying the suit property for a consideration of Rs. 18,000/-, The defendant No. 1 has acknowledged the receipt of the consideration amount in the Conveyance Deed. It is not in dispute that the Conveyance Deed was lodged for registration on 22-4-1988, but the same is yet to be registered. Said Veer Bahadur Rai died in the year 1991 leaving behind the defendant Nos. 7 to 10 as his heirs who succeeded to his share.

5. Having referred to the admitted facts, I shall now turn to the case of the respective party. According to the plaintiff, when the property was to be

purchased, the plaintiff offered to pay the agreed price as referred to in the Tenancy Agreement. It is the case of the plaintiff that he contributed to the consideration amount along with his younger brother Veer Bahadur whereupon the property was purchased from the defendant No. 1 vide Conveyance Deed dated 15-4-1988. It is the case of the plaintiff that for the sake of convenience, the property was purchased in the name of said Veer Bahadur. It is asserted by the plaintiff that the plaintiff and said Veer Bahadur constituted a Hindu Joint Family until 1988. The plaintiff asserts that besides contributing the consideration amount for purchase of the suit property, the plaintiff was also in possession of the suit property along with said Veer Bahadur and enjoyed the same equally. The plaintiff was engaged in business of milk dairy. To substantiate the fact that the plaintiff was in joint occupation along with Veer Bahadur and conducting the business of milk dairy, reliance is placed on the N.A. order passed by the Appropriate Authority dated 25-8-2006 which refers to the factum of possession of the plaintiff's son in the suit property and that the property was used for non-agricultural purpose. The plaintiff has also relied upon the licences dated 3-3-1989 and 16-8-1999 issued by the Appropriate Authority permitting the plaintiff's son to keep cattle in the suit property. In other words, the plaintiff has produced on record contemporaneous documents to support the stand that the plaintiff and his family members were jointly in possession of the suit property along with Veer Bahadur. On 21-6-1988, a family settlement was arrived at whereunder said Veer Bahadur agreed to give 50% share in the suit property to the plaintiff. In other words, the plaintiff was to be treated as joint owner of the property in terms of the said family settlement. According to the plaintiff, in any case, by virtue of the family settlement, the plaintiff has acquired equal right in respect of the suit property. Accordingly, the plaintiff claims right in the suit property, firstly, on the basis of the Conveyance Deed and in particular on the basis of the said agreement of family settlement. It is the case of the plaintiff that sometime in January, 2007, the plaintiff was shocked to find some persons asserting their right in respect of the suit property. When the unknown persons asserted their rights in respect of the suit property, the plaintiff, on deeper inquiry, was informed that the suit property has been transferred by the defendant No. 1 in favour of the defendant Nos. 5 and 6. According to the plaintiff, after the execution of the conveyance in favour of Veer Bahadur on 15-4-1988, the defendant No. 1 had no subsisting right to create third-party interest in the suit property as purported to be done in favour of the defendant Nos. 5 and 6. It is then stated that the plaintiff was also somehow able to get hold of the Conveyance Deed executed by the defendant No. 1 in favour of the defendant Nos. 5 and 6 dated 12-12-2006 and Power of Attorney dated 2-1-2005 in respect of the suit property. From the said documents, it was seen that the Conveyance Deed in favour of the defendant Nos. 5 and 6 was executed by the defendant Nos. 3 and 4 on the basis of Power of Attorney in their favour. However, the said Power of Attorney, in no way, authorises the said defendant Nos. 3 and 4 to transfer or convey the suit property, for which reason the conveyance in favour of the defendant Nos. 5 and 6 was of no avail. Accordingly,

the plaintiff has instituted the present suit alleging that the document executed by the defendant No. 1 himself or by his so-called attorneys in favour of the defendant Nos. 5 and 6 was by committing fraud and the document is non est and not binding upon the plaintiff. On the basis of these assertions, the plaintiff has claimed following reliefs in the suit:

(a) This Hon''ble Court be pleased to declare that the conveyance dated 12-12-2006 and Power of Attorney dated 7-1-2005 are forged, fabricated, non est, procured, got up, doctored, null, void ab initio, bad in law and not enforceable and not binding upon the plaintiff,

(b) This Hon''ble Court be pleased to direct the Registrar of Assurances to take the said document being Conveyance dated 12-12-2006 executed by the defendant No. 3 in favour of defendant Nos. 5 and 6 being proprietors of M/s Sunshine Builders, in its custody and de-register the same. Plaintiff has also become entitled for an order of this Hon''ble Court directing the Prothonotary and Senior Master of this Hon''ble Court to impound the Power of Attorney dated 7-1-2005 and to keep the same in the safe custody of this Hon''ble Court so as to prevent further misuse of the same,

(c) That this Hon''ble Court be pleased to pass a permanent order of injunction restraining the defendants, their servants, agents or any persons claiming through or under them from assigning, selling alienating, encumbering, mortgaging, transferring and/or creating any third party right, title or interest and/or carrying out any construction, development, erection, putting up any structure. removing any structure and/or disturbing the peaceful use, occupation, possession and enjoyment of the plaintiff in respect of the suit property viz. piece and parcel of land bearing C.T.S. No. 344, 344/1 to 8 S. No. 23A, Hissa No. 14, admeasuring 4100 sq, meter lying being and situated at Village Shankar Wadi, Jogeshwari (East), Mumbai-400060 in any manner whatsoever and/or to deal with the same in any manner whatsoever in pursuance to the said Deed of Conveyance dated 12-12-2006 and power of attorney dated 7-1-2005 and/or any other document in pursuance thereof.

(d) This Hon''ble Court be pleased to appoint the Court Receiver of this Hon''ble Court as Receiver in respect of the said property under Order 40 Rule 1 of the CPC to protect property from being wasted and damaged and appointing the plaintiff as an agent of the Court Receiver to administer and manage the suit property viz. piece and parcel of land bearing C.T.S. No. 344, 344/1 to 8 S. No. 23A, Hissa No. 14, admeasuring 4100 sq. meter lying being and situated at Village Shankar Wadi, Jogeshwari (East), Mumbai-400 060.

(e) Pending the hearing and final disposal of the suit, this Hon''ble Court be pleased to pass a temporary order of injunction restraining the defendants, their servants, agents or any persons claiming through or under them from assigning, selling alienating, encumbering, mortgaging, transferring and/or creating any third party right, title or interest and/or carrying out any construction,

development, erection, putting up any structure, removing any structure and/or disturbing the peaceful use, occupation, possession and enjoyment of the plaintiff in respect of the suit property viz. piece and parcel of land bearing C.T.S. No. 344, 344/1 to 8 S. No. 23A, Hissa No. 14, admeasuring 4100 sq. meter lying being and situated at Village Shankar Wadi, Jogeshwari (East), Mumbai-400 060 in any manner whatsoever and/or to deal with the same in any manner whatsoever in pursuance to the said Deed of Conveyance dated 12-12-2006 and power of attorney dated 7-1-2005 and/or any other document in pursuance thereof.

(f) Pending the hearing and final disposal of the suit, this Hon'ble Court be pleased to appoint the Court Receiver of this Hon'ble Court as Receiver in respect of the said property under Order 40 Rule 1 of the CPC to protect properly from being wasted and damaged and appointing the plaintiff as an agent of the Court Receiver to administer and manage the suit property viz. piece and parcel of land bearing C.T.S. No. 344, 344/1 to 8 S. No. 23A, Hissa No. 14, admeasuring 4100 sq. meter lying being and situated at Village Shankar Wadi, Jogeshwari (East), Mumbai-400060.

(g) Interim and ad-interim reliefs in terms of prayer (e) and (f) above be granted.

(h) Cost of the suit be provided for.

(i) Such other and further reliefs as the nature and circumstances of the case may require be granted.

6. During the pendency of the suit, the plaintiff has taken out the present Notice of Motion for interim reliefs. As mentioned earlier, the Notice of Motion has been pressed only for reliefs in terms of prayer Clause (a) of the Motion which is reproduced earlier.

7. The contesting defendants have filed their respective affidavits. Affidavit of Pola B. Mistry, Constituted Attorney of the defendant No. 1 has been filed. It needs to be mentioned that the Conveyance Deed executed by the defendant No. 1 in favour of Veer Bahadur Rai is admitted in this affidavit. The only reason why the defendant No. 1 still proceeded to enter into another conveyance with the defendant Nos. 5 and 6 mentioned in the affidavit is that the earlier conveyance in favour of Veer Bahadur was not registered for nonpayment of stamp duty. The defendant No. 1 verily believed that the transaction effected with Veer Bahadur was not complete and permitted the defendant No. 1 to deal with the property, notwithstanding the earlier Conveyance Deed. The defendant No. 1 also asserts that the name of Veer Bahadur was not entered in the records and the name of the defendant No. 1 continued to be shown as owner in the relevant records. Besides, the conveyance in favour of the defendant Nos. 5 and 6 was executed after giving public notice to which no objection was received either from the plaintiff or any other person. It is also mentioned in this affidavit that the defendant Nos. 5 and 6, who are the subsequent purchasers, have already settled all the claims of the defendant Nos. 7 to 10 who are the heirs of the

deceased Veer Bahadur and were absolute owner of the suit property.

8. Another affidavit is filed by the defendant Nos. 5 and 6, viz., Rakesh Seth and Tejindersingh Makkar to espouse their cause. As these defendants are claiming through the defendant No. 1, the substance of their stand is that they are purchasers of the suit property in good faith and for consideration. They have relied on the public notice issued preceding the execution of the conveyance of the suit property in their favour by the defendant No. 1.

9. Another affidavit is filed by Pramod Narayan Veerbahadur Rai, the defendant No. 10. According to the defendant Nos. 7 to 10, no relief has been claimed against the said defendants. It is their case that no relief can be granted to the plaintiff as the plaintiff has no concern with the suit property. These defendants have denied that there was a Joint Hindu Family of Veer Bahadur and that of the plaintiff. These defendants have also denied that the plaintiff gave or contributed any consideration amount for purchase of the suit property. These defendants have asserted that their predecessor (Veer Bahadur Singh) has paid the entire consideration amount to the defendant No. 1 which has been acknowledged in the Conveyance Deed. Interestingly, these defendant Nos. 7 to 10 have asserted that there was no right subsisting in favour of the defendant No. 1 to deal with the suit property or to transfer the same to the third-party. It is stated that the Deed of Conveyance dated 15-4-1988 in favour of Veer Bahadur, though lodged for registration, has not been registered due to some technical objections and they were making efforts to get the document duly registered. These defendants have then asserted that the so-called Deed of Family Settlement relied upon by the plaintiff is not a genuine document. No such family settlement was ever arrived at. Relying on the documents such as two cheques issued by Veer Bahadur and the letter dated 28-11-1983 on which signature of Veer Bahadur appears, it is contended that the signature on the purported Deed of Family Settlement is not genuine. The original cheques and the said letter dated 28-11-1983 have been produced before the Court at the time of hearing of the Motion and the same have been taken on record, to be kept in a sealed cover. In substance, it is the case of the defendant Nos. 7 to 10 that the signature on the Deed of Family Settlement relied upon by the plaintiff is a forged one. These defendants (defendant Nos. 7 to 10) would contend that, in any case, there is no question of granting any relief against them nor the plaintiff has claimed any relief against them, though they have been impleaded as defendants in the present suit.

10. The plaintiff has filed rejoinder affidavit to counter the assertions made by the respective defendants. The plaintiff fairly conceded that the plaintiff was not claiming any interim relief against the defendant Nos. 7 to 10 as such, though they have been impleaded to the suit being necessary and proper parties.

11. On considering the rival pleadings and the documents pressed into service as well as the arguments canvassed on behalf of the parties, the question is whether the plaintiff has any right in respect of the suit property. Insofar as the

claim of the plaintiff that he is in possession of the suit property, that, prima facie, appears to be correct. That assertion, though disputed by the defendant Nos. 7 to 10, are their bare words. Whereas, the plaintiff has relied upon contemporaneous documents such as N.A. permission dated 25-8-2006 and licences for keeping cattle dated 3-3-1989 and 16-8-1999 which clearly indicate that the plaintiff and his family members, in particular his son, were doing milk dairy business from the suit property. Interestingly, the defendant Nos. 7 to 10 in their affidavit have not challenged these official documents which are contemporaneous record. In other words, the claim of the plaintiff that he is in possession of the suit property deserves to be accepted.

12. The next question is : whether the plaintiff is in possession as joint owner of the suit property. Although the plaintiff has asserted in paragraph 3 of the plaint that he had contributed for purchase of the suit property, which was taken in the name of Veer Bahadur, as a matter of convenience, such plea, as is rightly contended, will run contrary to the mandatory provisions of the Benami Transactions (Prohibition) Act, 1988, which came into force with effect from 5-9-1988. Realising this position, the plaintiff would assert that at any rate, by virtue of the Deed of Family Settlement, the plaintiff is entitled for equal share in the suit property, being a joint owner thereof. The genuineness of this family settlement, however, is disputed by the defendant Nos. 7 to 10. According to them, there was no Joint Hindu Family of Veer Bahadur and the plaintiff, at any point of time. That aspect, however, will have to be proved at the trial. Suffice it to observe that from the finding recorded earlier relating to possession of the plaintiff, it would follow that the two families were staying and doing business together in the suit property. For, the licence Exh. "E-I" dated 3-3-1989 is issued in favour of Bhagwat Veerbahadur Rai (defendant No. 8) - son of Veer Bahadur - and Premnarayan, son of the plaintiff.

13. The defendant Nos. 7 to 10 would then assert that the signature of Veer Bahadur appearing on the Deed of Family Settlement is a forged one. To buttress this position, reliance was placed on the two cheques of 1989 purportedly issued by Veer Bahadur as well as copy of the original letter dated 28-11-1983 on which signatures of Veer Bahadur Singh is seen. However, on comparison of the signatures appearing on the said documents with the signature appearing on the Deed of Family Settlement, prima facie, I am of the view that there is no difference between the two sets of signatures of said Veer Bahadur Singh. If so, there is no substance even in this claim of the defendant Nos. 7 to 10. In my view, there is similarity in the signature occurring on the said documents as well as the Deed of Family Settlement relied upon by the plaintiff of Veer Bahadur Charitra Rai. Be that as it may, the factum of the disputed signature being forged will have to be proved at the trial. For the present, suffice it to observe that the Deed of Family Settlement appears to be a genuine document. If so, the plaintiff has got equal share along with Veer Bahadur in respect of the suit property. The plaintiff would, therefore, be right in asserting that he is the joint owner in respect of the suit property.

14. The next question is : whether the defendant No. 1 continues to possess any right to deal with the suit property, notwithstanding the Conveyance Deed executed in favour of Veer Bahadur dated 15-4-1988 which has been lodged for registration. I have no difficulty in accepting the submission advanced on behalf of the plaintiff that after the execution of the Conveyance Deed dated 15-4-1988. the defendant No. 1 could not have dealt with the suit property, since he had no subsisting right whatsoever. The fact that the entire consideration amount referred to in the Conveyance Deed has been paid to the defendant No. 1 is conceded by the defendant No. 1. The fact that the said Conveyance Deed has been lodged for registration on 22-4-1988 is also not disputed by the defendant No. 1. All that the defendant No. 1 claims is that the document has not been registered because of non-payment of stamp duty. The fact that the document is yet registered does not give any right to the defendant No. 1 to deal with the property. In other words, if the plaintiff had no subsisting right to deal with the property, for that reason, the defendant Nos. 5 and 6 cannot claim higher right than that of the defendant No. 1. They are claiming through the defendant No. 1.

15. The counsel for the defendant Nos. 5 and 6, however, would contend that the said defendants are purchasers of the suit property in good faith and for consideration. That the said defendants took all necessary steps to investigate the title of the suit property and since were satisfied that there was no claim of any other person, proceeded to purchase the property. That will be of no avail. For, if the defendant No. 1 had no right of any nature to deal with the suit property after the execution of the Conveyance Deed in favour of Veer Bahadur dated 15-4-1988, in terms of section 19 of the Specific Relief Act, the defendant Nos. 5 and 6 cannot claim any higher right. To get over this position, the counsel for the defendant Nos. 5 and 6 would rely on section 41 of the Transfer of Property Act. 1882, which reads thus:

41. Transfer by ostensible owner.- Where, with the consent, express or implied, of the persons interested in Immovable property, a person is the ostensible owner of such property and transfers the same for consideration, the transfer shall not be voidable on the ground that the transferor was not authorised to make it : provided that the transferee, after taking reasonable care to ascertain that the transferor had power to make the transfer, has acted in good faith.

It is argued that insofar as these defendant Nos. 5 and 6 are concerned, they had purchased the property from the defendant No. 1 who was the ostensible owner of the suit property. For, the name of the defendant No. 1 continues to appear in the Record of Rights as well as other relevant revenue records. In the first place, the defendant Nos. 5 and 6 will succeed only if they were to plead and prove that the transfer of property in their favour was with the express or implied consent of the persons interested therein. In other words, this doctrine is attracted in case of voluntary transfer and not involuntary transfer by an unauthorised person. See Hardev Singh Vs. Gurmail Singh (Dead) by LRs., . These aspects will have to be considered at the trial. At this stage, it is not

possible to assume those facts and especially when no such case is made out in the reply affidavits.

16. As mentioned earlier, the defendant No. 1 had no authority to enter into any transaction in respect of the suit property after execution of the Conveyance Deed in favour of Veer Bahadur on 15-4-1988. It is not the case of the defendant No. 1 that he was not aware of such Conveyance Deed. In fact, he admits that such Conveyance Deed was executed in favour of Veer Bahadur Singh. In spite of knowledge of that Conveyance Deed, the defendant No. 1 proceeded to enter into Conveyance Deed in favour of the defendant Nos. 5 and 6. It is well established that upon registration of the Conveyance Deed, the doctrine of "relation back" will come into play. There is no dispute that the Conveyance Deed in favour of Veer Bahadur Singh has already been lodged in time. Significantly, the case of the plaintiff is that the transaction in favour of the defendant Nos. 5 and 6 is the product of fraud and forgery committed by the defendant No. 1. At this stage, therefore, prima facie, the claim of the plaintiff will have to be accepted, though the factum of fraud will have to be proved at the trial.

17. Besides, there is substance in the argument of the plaintiff that the Conveyance Deed dated 12-12-2006 has been executed in favour of the defendant Nos. 5 and 6 by the Power of Attorney of the defendant No. 1 i.e. the defendant Nos. 3 and 4. That fact is not disputed at all. The power of attorney executed by the defendant No. 1 dated 7-1-2005 in favour of the defendant Nos. 3 and 4, who are practising Advocates, in no way, authorise them to convey or transfer the property. Clause 29 of the Power of Attorney clearly limits the authority of the defendant Nos. 3 and 4 to transact in matters referred to in the foregoing paragraphs of the said Power of Attorney. Paragraphs 1 to 28 of the Power of Attorney make no reference to the authority to convey or transfer the property. Thus understood, the conveyance deed executed by the defendant No. 3 and 4 on behalf of the defendant No. 1 in relation to the suit property will be of no avail. In other words, the transaction in favour of the defendant Nos. 5 and 6 is questionable also on this count.

18. Insofar as the issue of balance of convenience and irreparable loss is concerned, in the fact situation of the present case, the same will have to be answered in favour of the plaintiff and against the defendant Nos. 1 to 6. It is established from the record that the plaintiff is in possession of the suit property as joint owner.

19. For the aforesaid reasons, I have no hesitation in taking the view that the plaintiff has made out a formidable case for the reliefs claimed in the suit and, for that reason, is entitled for protection during the pendency of the suit.

20. The plaintiff through counsel has made it clear that the plaintiff is not seeking any relief against the defendant Nos. 7 to 10. The grievance of the plaintiff is against the defendant Nos. 1 to 6 only who have had the impugned dealings in respect of the suit property, in spite of the fact that the plaintiff is

joint owner thereof and is found to be in possession.

21. Accordingly, the Motion is made absolute in terms of prayer Clause (a). The Notice of Motion is disposed of in the above terms, with costs.