

(2000) 01 BOM CK 0030
In the Bombay High Court
Case No : Second Appeal No. 5 of 1984

Balasaheb Manikrao Deshmukh and Another	APPELLANT
Vs	
Rama Lingoji Warthi	RESPONDENT

Date of Decision : 29-01-2000

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : AIR 2000 Bom 337 : (2000) 2 ALLMR 532 : (2000) 4 BomCR 438 : (2001) 1 MhLj 79

Hon'ble Judges : A.S. Bagga, J

Bench : Single Bench

Advocate : S.A. Deshmukh, for the Appellant; Anil Kasliwal, for the Respondent

Judgement

A.S. Bagga, J.—This Second Appeal raises an important point of law viz. the applicability of the doctrine of part performance enacted under the provisions of section 53A of the Transfer of Property Act. The facts giving rise to filing of this Second Appeal briefly stated are as follows :

2. The present appellants had brought a suit (which was registered as Civil Suit No. 187/73) for specific performance of the contract and for permanent injunction in respect of the suit property i.e. Survey No. 5/C /3 admeasuring 2 acres 22 gunthas situated at village Kiki, tahsil and district Nanded against the present respondent. The suit for specific performance was dismissed but decree of permanent injunction came to be passed in that suit in favour of the present appellants. The matter was taken upto this Court. This Court in Second Appeal confirmed the decree in favour of the present appellants as far as it related to permanent injunction against respondent. The relief of specific performance was not granted holding that the suit for specific performance was barred by law of limitation. The aforesaid Civil Suit No. 187/73 was decided by the Trial Court on 31.7.1975.

3. After the dismissal of the suit of the present appellants for specific performance of the contract by Trial Court, the present respondent Rama filed

the suit under appeal (Regular Civil Suit No. 173/77) for recovery of possession of the suit land. This suit of the respondent came to be dismissed by Trial Judge vide Judgment and decree dated 19th July. 1980. Against this judgment and decree, appeal came to be filed by the present respondents registered as Appeal No. 5 of 1984.

4. Regular Civil Appeal No. 124 of 1980 filed by present respondent came to be allowed by the Assistant Judge, Nanded vide Judgment and decree dated 29th September, 1983. The present appellants were directed to deliver the possession of the suit land to the present respondents. Aggrieved by the judgment and decree as passed by the First Appellate Court in favour of the present respondent, the present appellants have filed the Second Appeal.

5. The property, which is subject matter of all these cases is 2 acres 22 gunthas of land in Survey No. 5/C/3 situated at village Kiki, taluka and district Nanded. This property is admittedly in possession of the appellants. The appellants' Suit (No. 187/73) for specific performance of contract has been dismissed on the ground of limitation. There is, however, order of injunction against the present respondents directing them not to interfere with the possession of the plaintiffs.

6. Judgment which is under attack in the present Second Appeal is that of First Appellate Court in Appeal No. 5/1984 dated 29th September, 1983 whereby the present appellants have been directed to deliver possession of the property to the present respondent.

7. The only point which arises for consideration is whether the present appellants who are in possession of the suit property can avail of the doctrine of part performance and protect their possession.

8. Learned First Appellate Judge observed that the present appellants were not entitled to protect their possession under the doctrine of part performance as enacted by provisions of section 53-A of the Transfer of Property Act. The learned Judge observed that the present appellants have been found to be not ready and willing to perform their part of the contract. The appellants were required to establish among other things that they were ready and willing to perform their part of the contract. Since they failed to establish that they were ready and willing to perform their part of the contract, important prerequisite for claiming protection u/s 53-A was wanting. The learned Judge, therefore, declined to extend the protection to the present appellants and set aside the decree passed by the Trial Judge and dismissed suit of the plaintiff.

9. I have heard Shri S. A. Deshmukh, learned counsel for the appellants and Shri Kasliwal, learned Counsel for the respondent.

10. Shri Deshmukh, learned Counsel for the appellants has pointed out that Suit (No. 187/73) which was filed by the appellants has been finally decided by this Court in Appeal No. 71 /1979. Though their suit for specific performance of contract against the respondent was dismissed but it was dismissed on the

ground of limitation. Learned Counsel further pointed out that it has been specifically observed by this Court that the present appellants were found ready and willing to perform their part of the contract. Learned Counsel therefore, contended that the present appellants were entitled to protection under the equity of part performance. The appellants admittedly were in possession of the suit property under agreement for sale and they were found ready and willing to perform their part of the contract. First Appellate Court below refused to extend the benefits of doctrine of part performance on the ground that the appellants were found not ready and willing to perform their part of the contract. Since there is finding by this Court in Second Appeal No. 71/1979 which came to be filed by the present appellants that they were ready and willing to perform their part of the contract, it was not open for the learned Judge below to refuse to extend protection of possession of the appellants it was contended.

11. Shri Kasliwal, learned Counsel for the respondent, on perusal of the judgment of this Court in Second Appeal No. 71/1979, fairly conceded that there was finding in favour of the present appellant that they were found ready and willing to perform their part of the contract. He, however, argued that suit of the defendants was dismissed on the ground of limitation and the abovesaid suit has been finally decided by this Court in Second Appeal referred to above. His contention, therefore, is that protection of possession under the doctrine of part performance is not available to transferee whose suit for specific performance has been dismissed on the ground of limitation.

12. The question whether the protection under the doctrine of part performance is available to the purchaser, whose claim for specific performance of the contract has become time barred, has been decided by the Full Bench of this Court in the case between Mahadeo v. Surjabai, In this judgment, the earlier view taken by Bombay High Court in Nanasaheb Gujaba Bankar v. Appa Ganu Bankar and others,² is followed. In the meantime, there was another Judgment of Division Bench of this Court in Adinath Limbaji Navale and others v. Policeman Housing Society, Beed and others. This Judgment has been overruled by the Full Bench Judgment quoted supra. Though it was stated at the Bar that there is SLP pending in the Supreme Court against the Judgment of the Full Bench quoted supra, that in my opinion, would not come in the way of this Court to decide this matter. Law, as on today, is that the protection under the doctrine of part performance is available to the purchaser even if the suit for specific performance of contract has become time barred.

13. In the present case, the suit filed by present appellant for specific performance of the contract has been dismissed and it has been partly decreed to the extent that the respondents are restrained from disturbing his possession. The suit has been dismissed admittedly on the point of limitation. It has been specifically observed that the present appellants were ready and willing to perform their part of the contract.

14. To sum up, there was agreement between the appellants and the respondent

to sell and purchase the property. It was in pursuance of this agreement that the present appellants were put in possession of the property. There is finding that the present appellants were ready and willing to perform their part of the contract and that there remained nothing to be done by the plaintiffs. Under these circumstances, the protection u/s 53-A could not be refused only because their suit was time barred.

15. Shri Kasliwal has one more contention to be advanced. He tried to distinguish a case where the suit of the transferee in possession has time barred but no proceedings have been filed by him and where transferee in possession has filed a suit and it has been dismissed on the ground of limitation. I am afraid, there cannot be any distinction drawn between the two cases. The protection under the doctrine of part performance would be available in both the cases. Section 53-A does not confer any right upon a person in possession. What it purports to do is to prevent a plaintiff from recovering possession of the property already transferred to the defendant. It imposes upon the plaintiff a disability, the disability being of enforcing against the transferee in possession any right which a plaintiff may have in respect of the property. Even if the suit for specific performance by the defendant is barred by lapse of time, defendant is nevertheless entitled to resist the plaintiffs suit for ejectment and to defend his own possession. Further it has been made clear that what section 53-A seeks to do is to protect the possession of the defendant even where the defendant's right to obtain specific performance of the agreement has been barred by time. No such distinction can be made between a case where the purchaser has filed suit for specific performance and has failed on the point of limitation and a case where purchaser has not filed any case but. the suit has become time barred.

16. For the reasons hereinbefore stated, I hold that learned Judge erred in refusing to extend the protection under the equity of part performance u/s 53-A of the Transfer of Property Act to the appellants. In the result, the appeal is allowed. Decree passed by the First Appellate Court is hereby set aside. Suit filed by the present respondent is dismissed with no order as to costs.