
(2017) 04 KAR CK 0112
In the Karnataka High Court
Case No : 1142 of 2005

Basappa Gachchi & Ors.

APPELLANT

Vs

Rabkavi Banahatti City Municipal Council

RESPONDENT

Date of Decision : 26-04-2017

Acts Referred:

[Code of Civil Procedure, 1908](#), [Order 22 Rule 9](#) -

[Transfer of Property Act, 1882](#), [Section 53A](#) - Part performance

Citation : (2017) 04 KAR CK 0112

Hon'ble Judges : A.N.Venugopala Gowda

Bench : SINGLE BENCH

Advocate : M.G. Naganuri, A.R. Holla

Judgement

1. This is a plaintiffs' second appeal. Suit filed to pass a decree for possession was contested. The written statement and an additional written statement was filed. 8 issues and 4 additional issues were raised. PWs.1 and 2 deposed in support of the plaintiffs' case and marked Exs.P1 to P5. For the defendant, DWs.1 and 2 deposed and marked Exs.D1 to D11. Learned Trial Judge entered findings "in the negative" on issue Nos.1, 3 and 5 and additional issue Nos. 1, 2 and 4. He entered "affirmative" findings on issue Nos. 2, 4 and 6 and additional issue No.3. A finding was entered, that the defendant is entitled to protect its possession over the suit schedule property by way of part performance of the contract under S.53A of the Transfer of Property Act, 1882 (for short "the Act"). As a result, the suit was dismissed.

2. Feeling aggrieved, an appeal having been filed by the plaintiffs, learned Appellate Judge raised the following point for determination: "Whether the findings of the trial-court in dismissing the suit of the plaintiffs in O.S.No.97/1980 dated 9.6.2000 with observations that the defendant is entitled to protract its possession over the suit schedule properties by way of part performance of contract under Sec.53-A of T.P. Act and the said findings of the

Court below is illegal, perverse, capricious and not based on the sound reasonings in accordance with the pleadings and the evidence of the respective parties and the same is not sustainable and liable to be set aside by interfering in this appeal?"

3. The defendant had instituted O.S.No.321/1972 for specific performance of contract against Sri Rachappa Gachchi (father of plaintiff Nos.1 to 3), on the basis of an agreement of sale dated 22.07.1963. The sole defendant died and the suit abated. Despite entering the finding that Rabkavi-Banahatti City Municipal Council is debarred from bringing a fresh suit as per the proviso to Order XXII Rule 9 CPC, placing reliance on the decision in the case of SHRIMANT SHAMRAO SURYAVANSHI AND ANOTHER Vs. PRALHAD BHAIROBA SURYAVANSHI (DEAD) BY L.Rs. AND OTHERS, ILR 2003 KAR 503 (SC), held that the defendant being an agreement holder is entitled to protect the possession of the property in part performance of the contract as per S.53A of the Act. As a result, the appeal was dismissed.

4. Sri M.G.Naganuri, learned advocate mainly contended as follows: (a) That the Courts below have not considered the material fact that O.S.No.321/1972 filed by the respondent for passing a decree of specific performance stood abated, with which the claim for specific performance of the agreement of sale dated 22.07.1963 ended and thus, there is no chance for specific performance of the contract.

(b) The Courts below have not considered the undisputed fact of abatement of O.S.No.321/1972 and no further proceeding for specific performance of the contract being permissible, the attraction of bar for the respondent to invoke the benefit of S.53A of the Act.

(c) On wrong application of S.53A of the Act, Courts below have illegally dismissed the suit and the appeal respectively.

(d) Record of the suit was not considered in the correct perspective and the findings entered are perverse.

(e) Several binding precedents not taken note of and the judgments passed being vitiated, the impugned decrees as unsustainable.

(f) Not analysing the record of the case by placing the burden of proof on the respondent.

(g) The conditions appearing in S.53A of the Act being mandatory and the need that all of them must be fulfilled simultaneously and also to be read conjunctively and not disjunctively and that even if one of the conditions is not fulfilled, the benefit of S.53A as not extendable. (h) That the respondent in the written statement having not pleaded that it has been ever ready and willing to perform its part of the contract and no evidence in that regard having been tendered and only `875/- and `1,500/- having allegedly been paid on 22.07.1963 and 24.02.1966 to the deceased Rachappa Gachchi and the balance consideration

amount having not been paid to him or to the lineal descendents of Rachappa Gachchi and the lis in O.S.No.321/1972 having abated, the ratio of law laid down by the Apex Court in the case of MOHAN LAL (DECEASED) THROUGH HIS L.Rs. KACHRU AND OTHERS Vs. MIRZA ABDUL GAFFAR AND ANOTHER, (1996) 1 SCC 639, being applicable, the respondent cannot resist the suit for possession. Though many points were urged, the main argument of Sri M.G.Naganuri is, that both Courts below have not applied the mind to various pleas / grounds urged and thus, the impugned judgments to be perverse.

5. Sri A.R.Holla, learned advocate on the other hand by placing reliance on the decisions in the cases of (i) NARASIMHASETTY VS. PADMASETTY, ILR 1998 KAR 3230, (ii) SHRIMANT SHAMRAO SURYAVANSHI AND ANOTHER Vs. PRALHAD BHAIROBA SURYAVANSHI (DEAD) BY L.Rs. AND OTHERS, (2002) 3 SCC 676, submitted that the concurrent findings entered by the Courts below do not call for interference. He made submission in support of the impugned Judgments.

6. This appeal was admitted to consider the following substantial question of law: "Whether the Courts below are justified in dismissing the suit of the appellant by invoking S.53A of the Transfer of Property Act, even though the suit filed by the respondentdefendant for enforcement of the agreement had been dismissed and when respondent - defendant had failed to fulfil the ingredients of S.53A of the Transfer of Property Act?"

7. Perused the record and considered the rival contentions. The point for consideration is, whether there is failure on the part of the Court below in the matter of consideration of suit record, as to the fulfilment or otherwise of the conditions appearing in S.53A of the Act by the respondent?

8. Respondent had filed O.S.No.321/1972 against the father of the appellant Nos.1 and 2 for passing a decree for specific performance of the contract entered into on 22.07.1963. The possession of the suit property is stated to have been delivered under the said agreement by Rachappa Gachchi. Sole defendant in O.S.No.321/1972 died on 02.06.1974 and the suit abated. I.A.No.2 filed under Order XXII Rule 9 CPC read with S.5 of the Limitation Act was dismissed on 19.09.1977. M.A.No.67/1977 filed against the said order was dismissed on 20.04.1978 by the Civil Judge at Bijapur. CRP No.1873/1978 filed assailing the said order and the judgment respectively was dismissed for non-prosecution on 21.06.1983. I.A.No.1 filed to recall the said order was dismissed on 28.07.1983. I.A.No.2 filed seeking the relief of recalling of the order of dismissal passed on 21.06.1983 was dismissed on 02.09.1983. Thus, the order holding O.S.No.321/1972 as abated attained finality.

9. Learned Appellate Court Judge has entered the finding "Under the circumstances, by virtue of abatement of suit for specific performance of contract filed by the defendant, the plaintiff is debarred from bringing a fresh suit for the said reliefs as per the provisions of Order XXII Rule 9 CPC". Despite holding so, being of the view that statutory right is given under S.53A of the Act has

dismissed the appeal by referring to the two decisions, noticed in para 5 supra.

10. Both Courts below have not noticed the ratio of law laid down in the case of MOHAN LAL (supra). In the said case, the appellant had come into possession of suit land pursuant to an agreement of sale. He paid consideration and obtained possession of the suit lands. Subsequently, the respondent purchased the suit lands by a sale deed. In the meanwhile, the appellant's suit for specific performance of agreement of sale was dismissed and became final. The respondent filed suit for possession. The Trial Court decreed the suit and on appeal, it was reversed and suit dismissed. In the second appeal, High Court set aside the decree of the First Appellate Court and restored the decree of Trial Court. Thus, Apex Court was approached for relief and the question considered is, "whether the appellant is entitled to retain possession of the suit property, on account of the ground raised that the appellant is entitled to retain his possession by operation of Section 53A of the Transfer of Property Act, 1882?". The question has been answered as follows: "5. The question then is whether he is entitled to retain possession under Section 53-A. It is an admitted fact that suit for specific performance had been dismissed and became final. Then the question is whether he is entitled to retain possession under the agreement. Once he lost his right under the agreement by dismissal of the suit, it would be inconsistent and incompatible with his right to remain in possession under the agreement. Even otherwise, a transferee can avail of Section 53-A only as a shield but not as a sword. It contemplates that where any person contracts to transfer for consideration any immovable property by writing, signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty and the transferee has performed or is willing to perform his part of the contract, he would be entitled to retain possession and to continue in possession which he has already received from the transferor so long as he is willing to perform his part of contract. Agreement does not create title or interest in the property. Since the agreement had met with dismissal of the suit his willingness to perform his part of the contract does not arise.

6. Even otherwise, in a suit for possession filed by the respondent, successor-in-interest of the transferor as a subsequent purchaser, the earlier transferee must plead and prove that he is ready and willing to perform his part of the contract so as to enable him to retain his possession of the immovable property held under the agreement. The High Court has pointed out that he has not expressly pleaded this in the written statement. We have gone through the written statement. The High Court is right in its conclusion. Except vaguely denying that he is not ready and willing to perform his part, he did not specifically plead it. Under Section 16 (c) of Specific Relief Act, 1963, the plaintiff must plead in the plaint, his readiness and willingness from the date of the contract till date of the decree. The plaintiff who seeks enforcement of the agreement is enjoined to establish the same. Equally, when transferee seeks to avail of Section 53-A to retain possession of the property which he had under the contract, it would also

be incumbent upon the transferee to plead and prove his readiness and willingness to perform his part of the contract. He who comes to equity must do equity. The doctrine of readiness and willingness is an emphatic way of expression to establish that the transferee always abides by the terms of the agreement and is willing to perform his part of the contract. Part performance, as statutory right, is conditioned upon the transferee's continuous willingness to perform his part of the contract in terms covenanted thereunder."

(underlined for emphasis)

11. In SARDAR GOVINDRAO MAHADIK AND ANOTHER Vs. DEVI SAHAI AND OTEHRS, (1982) 1 SCC 237, to qualify for protection of the doctrine of part performance, Apex Court has held as follows: "41. Section 53-A requires that the person claiming the benefit of part performance must always be shown to be ready and willing to perform his part of the contract. And if it is shown that he was not ready and willing to perform his part of the contract he will not qualify for the protection of the doctrine of part performance....."

(emphasis supplied)

12. In the case of SRI VENKATESH AND OTHERS Vs. D.A.C. VENKOOSA, ILR 2007 KAR 4623, it was held that S.53A of the Act protects possession of an agreement holder, who is put in possession in part performance of contract, "subject to showing that he has performed or he is willing to perform his part of the contract and readiness and willingness is not only a requirement contemplated under S.16 (1)(c) of the Specific Relief Act, but it is also a requirement under S.53A of the Act".

13. In the case of SHIVAYYA Vs. PRAVEENA AND ANOTHER, ILR 2008 KAR 2747, it was held that "the transferee who has obtained possession of property in part performance of the contract cannot resist suit for possession filed by the owner, if his right to obtain specific performance is barred by limitation".

14. In the case of A.LEWIS AND ANOTHER Vs. M.T.RAMAMURTHY AND OTHERS, (2007) 14 SCC 87, Apex Court has held as follows: "11. As rightly pointed out by the High Court, the existence of right to claim protection under Section 53-A of the Transfer of Property Act, 1882 would not be available if the transferee just kept quiet and remained passive without taking effective steps. Further, he must also perform his part of the contract and convey his willingness....."

(emphasis supplied)

15. In the case of NANJEGOWDA & ANR. Vs. GANGAMMA AND ORS., (2011) 13 SCC 232, Apex Court, while considering the scope of Section 53A of the Act has held as follows: "8.....From a plain reading of the aforesaid provision, it is evident that a party can take shelter behind this provision only when the following conditions are fulfilled. They are:

(i) The contract should have been in writing signed by or on behalf of the

transferor;

(ii) The transferee should have got possession of the immovable property covered by the contract;

(iii) The transferee should have done some act in furtherance of the contract; and

(iv) The transferee has either performed his part of the contract or is willing to perform his part of the contract. A party can take advantage of this provision only when it satisfies all the conditions aforesaid. All the postulates are sine qua non and a party cannot derive benefit by fulfilling one or more conditions".

(emphasis supplied)

16. In the case of SMT. PADMINI RAGHAVAN Vs. H.A. SONNAPPA, 2014 (1) AKR 706, the Division Bench has held that readiness and willingness to perform the contract in terms of S.16(1)(c) of the Specific Relief Act, is purely a question of fact.

17. Various pleas having been raised in the appeal, First Appellate Court ought to have analysed the factual position in the background of the principles of law involved and then decided the appeal, instead of mechanically placing reliance on the decision in SHRIMANT SHAMRAO SURYAVANSHI's case, wherein, with reference to the factual matrix involved held "that merely because the suit for specific performance at the instance of the vendee has become barred by limitation, that itself is not enough to deny the benefit of the plea of part performance of agreement of sale to the person in possession. The distinguishing features of the case has not been noticed and considered. Thus, the appeal has been decided perfunctorily.

18. Lower Appellate court has failed to examine the factual aspects as to whether the respondent has done some act in furtherance of the contract and has either performed its part of the contract or is willing to perform its part of the contract to take advantage of S.53A of the Act. It has not examined whether the respondent has satisfied all the conditions contemplated under S.53A of the Act for taking the shelter behind the provision, despite the abatement of aforesaid suit filed for passing decree of specific performance.

19. As the Court below has not bestowed its attention to the relevant aspects and failed to record findings on material aspects, there is abdication of duty cast on it. Plea under S.53A of the Act rises a mixed question of law and fact. The performance or willingness to perform the contract is one of the essential ingredients of the plea of part performance. Being a final Court on facts, First Appellate Court is required to record findings on all the issues. That is not forthcoming in the impugned Judgment, which is unsound. For the foregoing reasons, the appeal is allowed in part. Judgment and Decree dated 17.02.2005 passed in R.A. No.54/2000 by the learned Presiding Officer, Fast Track Court, Jamakhandi is set aside. Without expressing any opinion on the merit, the case is remitted for consideration afresh, keeping in view the observations made supra.

Both parties shall appear before the Court of Senior Civil Judge, Banahatti, Bagalkot District on 02.06.2017 and receive orders. The case being quite old, shall be decided on or before 31st August, 2017. The Registry is directed to return forthwith the LCRs, to the Court of Senior Civil Judge, Banhatti, Bagalkot District.