
(1932) 04 BOM CK 0011
In the Bombay High Court
Case No : First Appeal No. 120 of 1929

Bhagwandas Vrijbhukandas Shariff	Vs	APPELLANT
Naran Kanji		RESPONDENT

Date of Decision : 14-04-1932

Acts Referred:

Transfer of Property Act, 1882 — Section 54

Citation : AIR 1932 Bom 595 : (1932) 34 BOMLR 1322 : 140 Ind. Cas. 730

Hon'ble Judges : Patkar, J; Barlee, J

Bench : Division Bench

Judgement

Patkar, J.—This was a suit brought by the plaintiffs to enforce specific performance of the agreement of sale, Exhibit 34, passed on July 31, 1926, by defendants Nos. 1 and 2. Defendant No. 3 is the minor son of defendant No. 2.

2. The learned Subordinate Judge ordered the defendants to execute a sale-deed to the plaintiffs in regard to the suit properties in terms of the agreement of sale, Exhibit 34, and get it registered.

3. The appeal is filed by the plaintiffs on the ground that they ought to have been awarded possession of the property.

4. In the lower Court the plaintiffs in the plaint asked for specific performance and also for possession of the property. The agreement, Exhibit 34, contains a covenant to pass a sale-deed and also to deliver over possession of the property. The plaintiffs are, therefore, entitled on the agreement to sue for specific performance of the agreement and also to recover possession of the property. See Nathu valad Pandu v. Budhu valad Bhika ILR (1893) Bom. 537 A person, in whose favour an agreement of sale which contains an agreement to deliver over possession is passed, has the right to demand possession on the agreement, and also on the title after the sale-deed is passed by the defendant and is registered. As observed in Krishnaji v. Sangappa (1924) 27 Bom. L.R. 42 though a claim for possession based on the agreement of sale might be made in the suit for specific

performance of the agreement, it is not obligatory upon the plaintiff to make a claim for possession in a suit for specific performance, and that u/s 54 of the Transfer of Property Act, a contract for sale of Immovable property of itself creates no interest or charge upon the Immovable property, and until the claim for specific performance is decreed in favour of the plaintiff it cannot be said that he is entitled to possession, though for the sake of convenience, and to avoid multiplicity of suits, it may be open to the plaintiff to make a claim for possession in the same suit. I may refer in this connection to the decision in the case of Krishnammal v. Soundararaja Aiyar ILR (1913) Mad. 698 The decision of the majority of the Judges in the case of Ran-gayya Reddy v. Subramania Ayyar ILR (1917) Mad. 365 F.B. can be distinguished on the ground that some of the defendants in possession other than those who passed the agreement for sale were strangers to the contracts. We think, therefore, that it was competent to the plaintiffs in the present suit not only to ask for specific performance of the agreement but also to recover possession of the property. The plaintiffs are, therefore, entitled to recover possession of the property in this suit based as it is on the covenant contained in the agreement of sale, Exhibit 34.

5. Respondent No. 1 Lala Hari is dead and his heirs are not brought on the record. His name must be struck off, Respondent No. 2 Kanjibhai Lalbhai has become an insolvent and a receiver of his estate has been appointed after adjudication on January 30, 1932, and the receiver has been made a party to the appeal on February 24, 1932. The property of the insolvent, therefore, vests in the receiver u/s 28 of the Provincial Insolvency Act, I may refer in this connection to the decision of the Privy Council in Kala Chand Banerjee v. Jagannath Marwari (1927) L.R. 64 IndAp 190 : 29 Bom L.R. 882 It is not necessary that respondent No. 2 should be on the record as his interest has now devolved under Order XXII, Rule 10, on the receiver who is made respondent No. 4. There is nothing to prevent the insolvent being continued in his appointment as guardian ad litem of his minor son, respondent No. 3.

6. We, therefore, direct that the receiver and Kanjibhai Lalbhai as the guardian of respondent No. 3 should execute a sale-deed in favour of the plaintiffs and get it registered. We also award possession of the property against the receiver and against Kanjibhai Lalbhai, the guardian of the minor respondent No. 3. The appellants will be entitled to their costs from; the receiver.

Barlee, J.

7. The agreement gives the appellant the right to a sale-deed and to possession, and he is entitled under Order II, Rule 4, to unite both causes of action in the same suit with the leave of the Court. See Krishnaji v. Sangappa (1924) 27 Bom. L.R 42 It has been objected that as he did not ask for leave there was a misjoinder of causes of action and that he cannot now be given a decree for possession, But Rule 7 of Order II provides that all objections on the ground of misjoinder of causes of action shall be taken at the earliest possible opportunity unless the ground of objection has subsequently arisen, and any such objection

not so taken shall be deemed to have been waived. So it is not permissible now for the respondent to raise the objection as to the misjoinder of causes of action.

8. There is no other point on the merits in this appeal and I agree With the decree proposed by my learned brother.