

(1977) 12 BOM CK 0007
In the Bombay High Court
Case No : Second Appeal No. 234 of 1974

Bhima Savalaram Shinde and Others	Vs	APPELLANT
Bhaguji Annaji Unde and another		RESPONDENT

Date of Decision : 03-12-1977

Acts Referred:

Bombay Tenancy and Agricultural Lands Act, 1948 — Section 29, 30, 37
Transfer of Property Act, 1882 — Section 53A

Citation : (1978) MhLj 442

Hon'ble Judges : N.B. Naik, J

Bench : Single Bench

Advocate : K.J. Abhyankar, for the Appellant; M.S. Nargolkar, For respondent
No. 1, B.P. Apte, for the Respondent

Final Decision : Dismissed

Judgement

N.B. Naik, J.—By this second appeal the original defendant Nos. 1, 2 and 4 challenge the judgment and decree of the learned Extra Assistant Judge, Poona, in Civil Appeal No. 654 of 1971 confirming the decree of the learned Civil Judge, Junior Division, Junnar, in regular Civil Suit No. 183 of 1965.

2. The facts giving rise to this second appeal as found by both the Courts below and which are binding on this Court in second appeal are briefly these: It appears that survey Nos. 29 and 30 of village Balegaon taluka Junnar, district Poona, belonged to one Waman Shridhar Sathe. They were leased to Bhima Sawalaram Shinde, the 1st defendant for several years. On 14th December 1956, Waman Sathe gave a notice to the 1st defendant terminating his tenancy on the ground that he wanted to cultivate the lands personally. He, thereafter started proceedings for recovering possession u/s 29 read with section 30 of the Bombay Tenancy and Agricultural Lands Act, 1948. On 29th March 1957, Bhima Sawalaram Shinde also started proceedings to surrender the tenancy as he wanted to surrender his interest in part of the lands. It is enough to state that these tenancy proceedings were taken to the High Court and on 16th March

1961, and the special civil application concerning these proceedings in the High Court was disposed of with the consent of the parties. By the consent terms the 1st defendant agreed to deliver possession of 5 acres and 2 gunthas of the western portion of survey No. 29 viz. the suit land to Waman Sathe. Sometime thereafter on 25th September 1964, Waman Sathe actually took possession of the suit land viz. 5 acres and 2 gunthas of western portion of survey No. 29. Waman Sathe thereafter entered into an agreement to sell this land to the plaintiff on 17-11-1965 for Rs. 8,000. On that day after executing the agreement of sale Waman Sathe actually received an earnest amount of Rs.-1,000 and he delivered possession of the land to the plaintiff. When the plaintiff was thus in peaceful possession and enjoyment of the land under the agreement of sale from Waman Sathe, Bhima Sawalaram Shinde?defendant No. 1 and his sons the other three defendants having tried to disturb the possession of the plaintiff, the plaintiff filed the suit giving rise to this appeal on 30th November 1965 for an injunction restraining the defendants from interfering with his peaceful possession over the suit land.

3. The suit was resisted by the defendants. By the written statement Ex. 26 of the 1st defendant which was adopted by the other defendants, it was contended that the plaintiff has no right to sue inasmuch as he claims only under an agreement of sale and, therefore, he has no title to the suit property. It was also contended that since Waman Saihe has delivered back the possession to the defendant on 10th November 1965 after taking possession from them on 25th September 1964, he was not and could not be in possession of the land on the 17th November 1965 when the suit agreement was executed by Waman Sathe in favour of the plaintiff and when the plaintiff is alleged to have got possession of the property from Waman Sathe in part performance of the agreement of sale.

4. On the issues settled for decision, both the Courts have held that Waman Sathe did get possession of the land from the 1st defendant on 25th September 1964 and they have also held that the defendants had failed to prove that Waman Sathe delivered back the possession of the land to the defendants on 10th November 1965 as alleged by them. Consistently with that finding, both the Courts have further held, that Waman Sathe was in fact in possession of the land, on 10th November 1965 and he has in fact put the plaintiff in possession of the suit land on that date being the date on which the agreement of sale was entered into and the earnest money was also received by Waman Sathe. Both the Courts have also held relying on the judgment of this Court reported in *Maruti Gurappa v. Krishna Bala* 1966 Mh. L J 24 : 67 Bom. L R 767, that although the plaintiff is in possession of the land only under an agreement of sale, he could maintain the action for injunction as it is an action of a defensive nature as contemplated u/s 53A of the Transfer of Property Act. Consistently with that view the suit has been decreed by both the Courts.

5. The correctness of the said judgments and decrees is challenged by the original defendant Nos. 1, 2 and 4 by filing this appeal.

6. Mr. Abhyankar, learned counsel for the appellants has assailed the judgments of the Courts below by contending, that having regard to the provisions of section 53A of the Transfer of Property Act, the rights of the plaintiff, based only on an agreement of sale in his favour, are only of a defensive nature and, therefore, the suit filed by him for an injunction against the defendants is not maintainable. I find no force in this submission of Mr. Abhyankar.

7. In support of his submission Mr. Abhyankar has drawn my attention to the provisions of section 53A of the Transfer of Property Act, the ratio of some of the decided cases under the section as set out in the Transfer of Property Act by Mulla and the decisions of the Privy Council, the Supreme Court and other Courts which shall be just referred to.

8. Section 53A of the Transfer of Property Act reads as under : ?

"Where any person contracts to transfer for consideration any immoveable 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, in part performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the Contract, then, notwithstanding that the contract, though required to be registered, has not been registered, or, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor by the law for the time being in force, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession, other than a right expressly provided by the terms of the contract;

Provided that nothing in this section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part performance thereof."

9. It would appear reading the section that in essence and in substance the section deals with the rights and liabilities of the transferee or any person claiming under him and the rights and liabilities of transferor and persons claiming under him any right in respect of the property of which the transferee has taken or continued in possession. In other words the limit and the limitation of the section is restricted to the rights of the transferor or any person claiming under him and the rights and liabilities of the transferee or any person claiming under him. The section nowhere speaks about the right of a transferee in possession as against the person other than the transferor or persons claiming through him.

10. The ratio of decided cases as set out in Mulla's Transfer of Property Act under the heading "Nature of right: available only as a defence", on which

reliance is placed by Mr Abhyankar are to this effect:

"The right conferred by this section is a right only available to a defendant to protect his possession. This section does not create a title on the defendant. It merely operates as a bar to the plaintiff asserting his title. It is limited to cases where the transferee had taken possession, and against whom the transferor is debarred from enforcing any right other than that expressly provided by the contract. The section imposes a bar on the transferor. When the conditions mentioned in the section are fulfilled, it debars him from enforcing against the transferee any right or interest expressly provided by the contract. So far as the transferee is concerned, the section confers a right on him to the extent it imposes a bar on the transferor. But that is only a right to protect his possession against any challenge to it by the latter contrary to the terms of the contract."

"The section does not confer title on the defendant in possession, and he cannot maintain a suit on title "

11. Here again it would appear that the ratio of decided cases deals only with the rights and liabilities of the transferor and transferee and none of the ratios mentioned above has any reference to the right of a transferee in possession to protect his-possession against threatened disturbance by a third party other than the transferor or persons claiming through him.

12. The leading authority about the scope of section 53A of the Transfer of Property Act, is the case reported in Probodh Kumar Das v. The Dantmara Tea Co, Ltd. 42 Bom. L R 199. That was a case where the plaintiffs had no title to the estate of which they were at least partly in possession but wanted to rely on the contract of sale while the defendants, had a duly completed title to the estate but were not in possession of it. In other words that was a case where the plaintiffs who were in possession of the property under an agreement of sale were trying to enforce their rights against the persons who were claiming through the transferors. Their Lordships of the Privy Council have observed as under at page 202 :

"The position of the law under the Transfer of Property Act, 1882, before the addition to it of section 53A has on more than one occasion been expounded by their Lordships and reference may be made to the case of Pit Bakhsh v. Mahomad Tuhar 36 Bom. L R 1195 where the subject was fully discussed. It is clear that the appellants were well advised in conceding that if they could not invoke section 53A they were out of Court.

In their Lordships opinion the amendment of the law effected by the enactment of section 53A conferred no right of action on a transferee in possession under an unregistered contract of sale. Their Lordships agree with the view expressed by Mr. Justice Mitter in the High Court that "the right conferred by section 53A is a right available only to the defendant to protect his possession." They note that this was also the view of their late distinguished colleague. Sir Dinshah Mulla, as stated in the second edition of his treatise on the Transfer of Property Act at page

262. The section is so framed as to impose a statutory bar on the transferor; it confers no active title on the transferee. Indeed, any other reading of it would make a serious inroad on the whole scheme of the Transfer of Property Act."

13. Read in the context of the facts of the case, therefore, it would appear that as laid down by Their Lordships in this case, section 53A has a reference to a right of a transferee as against a transferor or persons admittedly claiming through a transferor. That case has no reference to the rights of such transferee as against third persons who are interested in threatening the possession of the transferee.

14. The observations of the Privy Council in *Probodh Kumar Das*'s case have been followed by this Court in *Ramrao Nilkanth Nadkarni v. Shrimant Purnanand Saraswati Swami* 42 Bom. LR 501, *Maruti Gurappa v. Krishna Bala*; by the Andhra Pradesh High Court in *Hari Prasad v. Abdul Haq* A I R 1951 A P 160 and also by the Supreme Court in *Delhi Motor Co. v. Pasrurkar* A I R 1958 S C 794.

15 It is enough to state that in all these cases except in the case of *Maruti v. Krishna* the Courts were concerned with the rights of a transferee against the transferor and/or persons claiming through the transferor and, therefore, all these cases were squarely and clearly covered by the provisions of section 53A of the Transfer of Property Act. It is enough to refer to the observations of the Supreme Court in *Delhi Motor Co.*'s case. The relevant observations in para 6 are as under:?

"In these circumstances, an argument was put forward on behalf of the firm that, though this contract to lease had not been registered, the firm could claim possession under it in view of the provisions of section 53A of the Transfer of Property Act, because, in this case the Company would be debarred from enforcing against the firm any right in respect of that property of which the firm had already taken possession, viz., part of the show-room and a portion of the balcony. In our opinion, this argument proceeds on an incorrect interpretation of section 53A, because that section is only meant to bring about a bar against enforcements of rights by a lessor in respect of property of which the lessee had already taken possession, but does not give any right to the lessee to claim possession or to claim any other rights on the basis of an unregistered lease. Section 53A of the Transfer of Property Act is only available as a defence to a lessee and not as conferring a right on the basis of which the lessee can claim rights against the lessor. This interpretation of section 53A was clearly laid down by their Lordships of the Privy Council in *Prabodh Kumar Das v. Dantmata Tea Co.*"

16. It would thus appear that a perusal of the provisions of section 53A of the Transfer of Property Act and the ratio of decided cases set out under that section in *Mulla*'s Transfer of Property Act and the decisions of the Privy Council, Supreme Court and other Courts relied upon by Mr. Abhyankar and just referred to, are all in respect of only the right of the transferee or persons claiming

through him as against the transferor or persons claiming through him and vice versa. There is absolutely no provision or mention in section 53A of the Transfer of Property Act about the rights of a transferee as against third persons who are entirely unconnected with the transferors or persons claiming through them. Therefore, reliance by Mr. Abhyankar on the said provision and authorities is of no assistance to support his submission that the plaintiff's action for injunction is not maintainable.

17. Having realised the force of the view I am taking Mr. Abhyankar submitted that after all it is the defendants' contention that after they had delivered possession of the land to Waman Sathe on 25th September 1964 as per the consent terms and the orders passed in Special Civil Application by the High Court on 16th March 1961, Waman Sathe had delivered back the possession to them on 10th November 1965 and that therefore Waman Sathe was not in possession of the land on 17th November 1965 when he purported to execute the agreement of sale in favour of the plaintiff and is alleged to have delivered possession of the land to the plaintiff, the defendants are in substance claiming through Waman Sathe and, therefore, the provisions of section 53A of the Transfer of Property Act are attracted. Now this submission cannot be sustained for the simple reason, that the submission which is based on a question of fact being found against the defendants in both the Courts below and that finding is a finding of fact which is binding on this Court in second appeal, there is no escape from the position that the defendants had in fact put Waman Sathe in possession of the land as admitted by them on 25th September 1964 and that they have failed to prove that Waman Sathe had put them back into possession on 10th November 1965. That being a finding of fact and a concurrent one at that as found by both the Courts below, and the same being binding on this Court, it is no longer open for Mr. Abhyankar to found any submission on the assumption that the defendants are persons claiming through the transferor so that section 53A, may be pressed into their service.

18. In effect finding that the said submission could hardly be made having regard to the concurrent finding of fact, Mr. Abhyankar submitted that in view of the case made out by the defendants in their written statement it would appear that the defendants are persons claiming through the transferor and, therefore, section 53A of the Transfer of Property Act would be attracted. In support of that submission Mr. Abhyankar took me to the contentions of the defendants in para 7 of the written statement Ex. 26. Although it is rather unusual to go to the pleadings in the second appeal since a question of law was being urged, I conceded to the request of Mr. Abhyankar to take me through the said allegation. That allegation in para. 7 of the written statement is as follows:?

19. When liberally translated in English it reads as under: Waman Sathe, executant of the suit agreement of sale was not the sole owner of the suit property. Defendant Nos. 1 and 2 have purchased the shares of some of the co sharers of Waman Sathe under the Tenancy Act after the defendants took

possession of the land from Waman Sathe u/s 37 of the Bombay Tenancy and Agricultural Lands Act, as stated above. Even if (he Court comes to the conclusion that the executant of the suit agreement of sale has a right to execute the sale-deed since Waman Sathe was not the sole owner of the suit property, at the most the purchaser under such a sale-deed from Waman Sathe would get the interest of Waman Sathe, but even Waman Sathe has no right to sell the property to anybody other than the defendants under the Bombay Tenancy and Agricultural Lands Act. Hence neither the plaintiff nor anybody claiming through Waman Sathe would get a legal title to the property under such a sale-deed and such sale-deed would not be binding on the defendants.

20. Relying on the above paragraph Mr. Abhyankar who was evidently fighting a losing battle submitted that these are contentions which could be read as meaning that the defendants have contended that they are claiming through Waman Sathe, the transferor of the plaintiff. As I read the allegations in paragraph 7 of which I have also made an effort to translate in my own way in English for the benefit of those who may not be knowing Marathi, it would appear that far from that contention being a contention to the effect that the defendants are claiming through Waman Sathe, in essence and in clear and unambiguous terms the allegation is, that they are claiming through persons other than Waman Sathe albeit they might be the alleged co-sharers of Waman Sathe. I am, therefore, of the view that that allegation in para 7 of the written statement nowhere raises a plea that the defendants are claiming through Waman Sathe; far from that they have pointed out that the plaintiff might get the share of Waman Sathe. There is, therefore, no manner of doubt that there is no contention that the defendants are claiming through Waman Sathe, the transferor of the plaintiff. I am, therefore, left with the conclusion that it is nowhere the case of the defendants that they are claiming through Waman Sathe and factually their allegation that they had taken back possession from Waman Sathe on 10th November 1965 having failed in both the Courts below, it must be held as a fact, that they are not at all claiming through Waman Sathe who has agreed to sell the property to the plaintiff and has put him in possession of the same on 17th November 1965 after receiving an earnest amount of Rs. 1000. It would thus appear that section 53A of the Transfer of Property Act is not at all attracted so far as the parties to this dispute are concerned, inasmuch as the defendants are neither the transferors nor the persons claiming through the transferors.

21. Since undoubtedly the plaintiff is in possession of the lands as held by both the Courts below, since 17th November 1965, through Waman Sathe who was admittedly put in possession by the defendants on 25th September 1964 pursuant to the consent terms of the Special Civil Application in this Court which was decided on 30th March 1961, the plaintiff as found by the Courts below is in lawful possession of the lands and since the defendants are evidently interested in disturbing that possession and though the title of the plaintiff is not perfected by the registered sale-deed executed by the vendor Waman Sathe, since the

possession of the plaintiff is good against the entire world except the real owner and since this is not a dispute between the plaintiff and the real owner but the defendants who are third persons who are interested in disturbing the plaintiff's possession, the plaintiff is certainly entitled to move the Court for the relief of an injunction which he has done.

22. In the result, there is no substance in the only submission which is made by Mr. Abhyankar and the appeal is, therefore, dismissed with costs.