

(2008) 11 BOM CK 0040
In the Bombay High Court
Case No : Second Appeal No. 539 of 1989

Gangadhar Vithal Kale

APPELLANT

Vs

Shyamlal Bhikchand Rathod (Deceased, through LRs. Smt.
Kunwaridevi Rathod and Others)

RESPONDENT

Date of Decision : 26-11-2008

Acts Referred:

Specific Relief Act, 1963 — Section 16
Transfer of Property Act, 1882 — Section 53A

Citation : (2008) 111 BOMLR 168

Hon'ble Judges : V.R. Kingaonkar, J

Bench : Single Bench

Advocate : V.D. Patnoorkar, for the Appellant; Vinesh Solshe, h/f C.G. Solshe, for R-1 to 5, for the Respondent

Final Decision : Dismissed

Judgement

V.R. Kingaonkar, J.—Challenge in this appeal is to judgment rendered by learned Additional District Judge, Nanded, in an appeal (RCA No. 284/1983) whereby and whereunder judgment and decree rendered in a suit (RCS No.442/1982) came to be reversed.

2. Appellant is the original defendant and Respondents are legal representatives of deceased plaintiff. The dispute relates to an agricultural land bearing survey No. 76/Hissa No. 6, to the extent of 25 gunthas area, out of the total area of 75 gunthas, situated at village Vasarni under Tehsil and district Nanded. This parcel of the land will be referred, hereinafter, as "the suit land".

3. The deceased plaintiff filed suit (RCS No. 442/1982) for recovery of possession of the suit land on basis of title, which he derived from deceased Maneji @ Manika s/o Dattaram, who was admittedly original owner thereof, on basis of a registered sale deed (Exhibit-21) dated 5th November 1971, executed in his favour. He asserted that the defendant / appellant had no right or interest in the suit land. Still, however, the appellant unlawfully dispossessed him in or about

1975 and claimed certain rights on basis of an agreement of sale, which was allegedly executed by original owner Maneji @ Manika s/o Dattaram in his favour. He further asserted that said Maneji @ Manika never executed any agreement of sale in favour of the defendant / appellant and yet, illegally, the possession of the suit land was being enjoyed by the latter. Consequently, he sought recovery of possession along with compensation @ Rs.1000/- per year on account of unlawful enjoyment of the suit land by the defendant / appellant.

4. The appellant resisted the suit by filing written statement (Exhibit-14). His case before the trial court was that by virtue of an agreement dated 17th February 1968, Maneji @ Manika s/o Dattaram agreed to sale the suit land in his favour for consideration of Rs.1500/-. He paid Rs. 1000/- towards earnest amount in pursuance to the agreement of sale. He was inducted in possession of the suit land in pursuance to the agreement of sale. He denied that he dispossessed the deceased plaintiff-Shyamlal from the suit land. According to him, the deceased plaintiff-Shyamlal was never in possession of the suit land and made purchase of the same with knowledge about the previous agreement of sale, executed by deceased Maneji @ Manika. Consequently, he sought dismissal of the suit.

5. The parties went to trial over issues which were framed below Exhibit-15. The learned Civil Judge came to conclusion that the deceased plaintiff was never put in possession of the suit land on basis of sale deed dated 05.11.1971 (Exhibit-21). It was further held that the appellant was in possession of the suit land on basis of the agreement of sale (Exhibit-27) executed by Maneji @ Manika s/o Dattaram Kale in his favour. The learned Civil Judge, therefore, dismissed the suit. The first appellate court, however, held that the appellant could not plead and prove his readiness and willingness to perform his part of agreement to sale and as such protection u/s 53-A of the Transfer of Property Act was not available to him. The first appellate court held that the deceased plaintiff-Shyamlal became owner of the suit land on basis of the sale deed (Exhibit-21) and was, therefore, entitled to possession thereof.

6. This second appeal was admitted treating ground Nos. 3, 5, 7 and 8 of the appeal memo as substantial questions of law. Instead of reproducing the said grounds, I deem it proper to redraft the substantial question of law in the following manner: Whether in the facts and circumstances of the present case, the first appellate court committed patent error while granting decree in favour of the respondents, when it was proved that a major part of the consideration amount, agreed between appellant and his vendor - Maneji @ Manika, was paid in pursuance of the terms of the agreement and that there was no period stipulated for the performance of the remaining part and, therefore, he was entitled to seek protection u/s 53-A of the Transfer of Property Act?

7. Mr. Patnoorkar would submit that the agreement of sale (Exhibit-27) is not properly interpreted by the first appellate court. He would submit that the remaining amount of consideration was only 1/3rd portion of the total amount

and was to be paid at the time of registration of the sale deed. He would submit that the vendor did not issue any notice to the appellant about intention to execute the sale deed and, therefore, there was no failure of the appellant, in particular, to pay the balance amount. He would submit that inference about willingness of the appellant could be drawn from conduct of the vendor and the appellant. He contended that the first appellate court rejected the claim of the appellant on technical ground that the willingness to perform part of the agreement was not specifically stated by him. He contended that the sale deed of the deceased plaintiff should not have been considered as valid document inasmuch as the said purchase was effected with due notice about the earlier agreement of sale between the appellant and the vendor, namely, Maneji @ Manika. He urged, therefore, to allow the appeal and restore the judgment and decree of the trial court. Per contra, Mr. Solshe supports the impugned judgment.

8. Before I proceed to embark upon scrutiny of the evidence and consideration of merits in the rival contentions, it may be stated that the written statement (Exhibit-14) does not specifically show any plea of legal protection available u/s 53-A of the Transfer of Property Act. Obviously, no issue was framed in this context by the learned civil judge (JD). The appellant vaguely asserted that he came into possession of the suit land on basis of the agreement of sale dated 17.02.1968 and had not dispossessed the deceased plaintiff. He did not plead that in pursuance of the agreement of sale, he was always ready and willing to perform his part of the agreement. He did not issue any notice to said Maneji @ Manika. His stance before the trial court was that deceased plaintiff did not acquire ownership rights under the sale deed dated 05.11.1971 inasmuch as the agreement of sale (Exhibit-27) was within his knowledge. The pleadings of the appellant do not categorically show that he desired protection enumerated u/s 53-A of the Transfer of Property Act. It is, however, well settled that even in absence of specific pleadings, if such plea is made out on basis of the evidence tendered during the trial, the court may consider whether protection u/s 53-A of the Transfer of Property Act can be extended to a party. This is the reason as to why, for the first time, such plea was entertained by the first appellate court.

9. Coming to the evidence of the parties, it may be gathered that the deceased plaintiff duly proved execution of the sale deed (Exhibit-21). His version revealed that he purchased the suit land from Maneji @ Manika. He was dealing in money lending and plot business. He examined PW-2 Shrivansing in order to prove execution of the sale deed (Exhibit-21). The version of PW Shrivansing reveals that vendor Maneji @ Manika executed the sale deed in his presence. He is the attesting witness of the said sale deed. Nowhere it was the case of the appellant that the sale deed was nominally executed by Maneji @ Manika and there was no intention to act thereupon. Nor any such issue was framed by the trial court. Therefore, once it is found that Maneji @ Manika executed the sale deed (Exhibit-21) in respect of the suit land, then it follows that the title thereof did pass to the deceased plaintiff.

10. The appellant entered witness box and examined DW-2 Osmankhan in order to prove the agreement of sale (Exhibit-27). The version of the appellant reveals that Maneji @ Manika had 1/3rd share in the land survey No.76-E. He deposed that Maneji @ Manika agreed to sale the suit land in his favour in the year 1968 for consideration of Rs.1500/-. He had paid Rs.1000/- as an earnest amount at the time of agreement of sale. He asserted that he was inducted into possession of the suit land in pursuance to the agreement of sale. He narrated that the deceased plaintiff-Shyamlal was aware of the said agreement of sale between himself and the vendor-Maneji @ Manika. His version reveals that said Maneji @ Manika died issueless in or about 1973. His version further reveals that the agreement of sale (Exhibit-27) does not indicate that the sale deed was to be executed after mutation of his name in the revenue record.

11. It is pertinent to note that though the appellant alleged that the sale deed was to be executed after sanctioning of mutation entry and then he was required to pay balance amount of Rs.500/- to Maneji @ Manika, yet the document (Exhibit-27) is silent in this context. The version of DW Osmankhan reveals that whatever the conditions were agreed between the parties, have been mentioned in the agreement of sale (Exhibit-27). In other words, there was no separate oral agreement about the stipulation of the term regarding payment of the balance consideration amount. It is, unequivocally, admitted by the appellant that he did not issue any notice to the deceased plaintiff-Shyamlal though the latter was ready to purchase the suit land inspite of knowledge of the agreement of sale disclosed to him. In other words, the appellant did not take any step forward to comply with his part of the agreement of sale notwithstanding the knowledge that deceased plaintiff-Shyamlal was going to purchase the suit land and thereby his rights were likely to be eclipsed.

12. The appellant must plead and prove that he was ready and willing to perform his part of the agreement of sale in order to get equitable relief available u/s 53-A of the Transfer of Property Act. The plea of part performance is based on principles of equity. It would not inure to benefit of a dormant litigant, who did not express willingness to perform his part of the agreement of sale. The Apex Court in Ram Kumar Agrawal and Another Vs. Thawar Das (Dead) Through Lrs., observed:

Plea u/s 53-A of the Transfer of Property Act raises a mixed question of law and fact and therefore cannot be permitted to be urged for the first time at the stage of second appeal. That apart, performance or willingness to perform his part of the contract is one of the essential ingredients of the plea of part performance. Thawar Das having failed in proving such willingness, protection to his possession could not have been claimed by reference to Section 53-A of the Transfer of Property Act.

13. The term "willingness" as used in Section 53-A of the Transfer of Property Act does imply "readiness and willingness" as used in Section 16 of the Specific Relief Act. The Apex Court in Sardar Govindrao Mahadik and Another Vs. Devi

Sahai and Others, observed:

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.

14. It is conspicuous on basis of above observations that the term "willingness" as used in Section 53-A would mean "readiness and willingness" likewise the expression used in Section 16 of the Specific Relief Act. In this view of the legal position, the appellant is not entitled to invoke the doctrine of part performance. For, he did not prove the willingness and readiness to perform his part of the agreement of sale from the date of agreement till death of Maneji @ Manika i.e. between 1968 to 1973. The deceased plaintiff had stepped into the shoes of Maneji @ Manika due to the purchase transaction depicted in the sale deed (Exhibit-21). Once it is found that the appellant could not claim legal protection under the doctrine of part performance, it will have to be said that the deceased plaintiff was entitled to claim possession of the suit land on basis of his title.

15. For the reasons aforesaid, I am in general agreement with the reasoning of the first appellate court. Hence, I have no hesitation in holding that the appellant is not entitled to seek protection u/s 53-A of the Transfer of Property Act, which is based on doctrine of equity, for seeking of which he is not eligible. In this view of the matter, the appeal is dismissed. No costs.