
(2019) 10 BOM CK 0065
In the Bombay High Court
Case No : Second Appeal No. 145 Of 2016

Ghanshyam Deoram Gaikwad

APPELLANT

Vs

Samshon John Gaikwad And Anr

RESPONDENT

Date of Decision : 10-10-2019

Acts Referred:

Bombay Stamp Act, 1958 — Section 34, 35
Registration Act, 1908 — Section 17, 49
Transfer Of Property Act, 1882 — Section 53A, 54, 55
Code Of Civil Procedure, 1908 — Section 100

Citation : (2019) 10 BOM CK 0065

Hon'ble Judges : Vibha Kankanwadi, J

Bench : Single Bench

Advocate : P.P. Shinde, D.R. Adhav

Final Decision : Allowed

Judgement

1. Present appeal has been filed by original plaintiff No.1 challenging the concurrent Judgment and decree passed in Regular Civil Appeal No.127 of 2012, by learned District Judge -1, Shrirampur Dist. Ahmednagar, dated 27-06-2014, thereby confirming the dismissal of his suit bearing Regular Civil Suit No.14 of 2011, by Joint Civil Judge, Junior Division, Shrirampur, dated 29-10-2012.

2. The present appellant with present respondent No.2 had filed the said suit for declaration that, the documents executed in respect of suit property in 2008 are illegal, null and void, and for recovery of possession of the suit property which was allegedly taken by defendant forcibly from them. They had also claimed for mesne profits. Plaintiffs are the owners of 0 H 42 R land out of Gut No.9 and 0 H 34 R land out of the same gut number within the limits of village Naur Tq. Shrirampur Dist. Ahmednagar. It is stated that, the plaintiffs were in need of money in the year 2008 and they had requested the defendant to extend loan amount of Rs.30,000/-. Defendant agreed to the same, however put a condition that, the plaintiffs should execute a receipt. Accordingly, defendant obtained their

signatures on three blank stamp papers and gave them amount of Rs.30,000/-. Thereafter, in the year 2009, the defendant had forcibly obtained possession of the suit property. Plaintiffs later on came to know that, the defendant has misused the three blank stamp papers having signatures of the plaintiffs and brought into existence an agreement to sell and a possession receipt. Hence, they filed suit with the above said prayers.

3. The defendant resisted the claim of the plaintiffs by filing written statement. He denied that, any forged document or documents have been got executed by him. It is admitted that, plaintiffs were in need of financial assistance but he says that they wanted to sell the suit property, and therefore, approached him. The transaction took place and consideration of the suit property was fixed at Rs.1,60,000/-. Agreement to sell was executed on 22-04-2008 by accepting earnest amount of Rs.60,000/-. On the same day possession receipt was executed, he was put in possession of the suit property. Thereafter by another document which was executed after a few days, plaintiff No.2 had obtained amount of Rs.20,000/- from him and executed document to that effect. Now he is in possession of the suit property and has spent huge amount on its development. The plaintiffs have filed false suit in order to grab the property.

4. Taking into consideration the rival contentions, issues came to be framed. Both the parties have led oral as well as documentary evidence. Taking into consideration the evidence on record, the learned Trial Court held that, plaintiffs failed to prove that, they were in need of financial assistant to the extent of Rs.30,000/-, and after it was extended, the defendant has got executed forged and fabricated document of agreement to sell and possession receipt. It is held that, the agreement to sell and possession receipt is not void ab initio or illegal. Plaintiff failed to prove that, defendant forcibly obtained the possession of suit property, hence the suit was dismissed, and as aforesaid the appeal filed by the present appellant was also dismissed. Both these concurrent decrees are under challenge in this second appeal.

5. Heard learned advocate Mr. P. P. Shinde for the appellants and learned advocate Mr. D. R. Adhav for respondent No.1. Respondent No.2 though served, remained absent.

6. It has been argued on behalf of the appellants that, both the Courts below have not considered the evidence properly, so also the law points involved in the matter have not been considered properly. It is not in dispute that, the original plaintiffs were the owners of the suit property. They had specifically come with a case that, their signatures have been obtained on blank papers when they went to defendant for loan. The perusal of the document which has been styled as agreement to sell and possession receipt, would show that, the agreement to sell has nomenclature, "बिना कब्जाचे साठेखत". That means, possession was not handed over by that document. But then it is stated that, on the same day another document has been executed which shows that, by that document possession was handed over. If the possession was handed over on the day

of the agreement to sell, which is stated to have come into effect on 22-04-2008, then it ought to have been registered and it was not on sufficiently stamped paper. Therefore, the provision of Section 34 of the Bombay Stamp Act, was not at all considered by both the Courts. On the basis of such document it cannot be said that, any right was created in favour of defendant. He relied on the decision in, Parashram s/o Kashiram Sakhare Vs. Vatsalabai w/o Harshay Sharma and Anr., reported in 2004 (1) All MR 755, wherein it has been held that,

"Kararnama (agreement to sell) which is not registered then it cannot be admitted in evidence even for collateral purpose as per Section 49 of the Registration Act."

Further reliance has been placed on the decision in, Suraj Lamp And Industries Private Limited (2) Through Director Versus State of Haryana and Another, reported in, 2012 (1) Supreme Court Cases 656, wherein it has been held that,

"A transfer of immovable property by way of sale can only be by a deed of conveyance (sale deed). In the absence of a deed of conveyance (duly stamped and registered as required by law), no right, title or interest in an immovable property can be transferred."

"Any contract of sale (agreement to sell) which is not a registered deed of conveyance (deed of sale) would fall short of the requirements of Sections 54 and 55 of TP Act and will not confer any title nor transfer any interest in an immovable property (except to the limited right granted under Section 53A of the TP Act). According to TP Act, an agreement of sale, whether with possession or without possession, is not a conveyance."

Further reliance has been placed on the decision in, Rambhau Namdeo Gajre Versus Narayan Bapuji Dhotra (Dead) Through LRs., reported in (2004) 8 Supreme Court Cases 614. It has been held in this case that,

"Protection provided under Section 53-A of the Transfer of Property Act is a shield only against the transferor. But it disentitles the transferor from disturbing the possession of the proposed transferee who is put in possession in pursuance of such an agreement. However, it has nothing to do with the ownership of the transferor who remains full owner of the property till it is legally conveyed by executing a registered sale deed in favour of the transferee."

The learned advocate appearing for the appellants submitted that, substantial questions of law are therefore arising in this case. Further, when defendant has not shown readiness and willingness to perform his part of the contract, he can not continue his possession over the suit land, though as per his contention he had obtained it under a document. Defendant had raised specific defence of protecting his possession over the suit land under Section 53 A of Transfer of Property Act. Plaintiffs do not want to continue the transaction further and therefore, being owner they have sought possession of the suit property. The suit ought to have been decreed by learned Trial Court.

7. Per contra, the learned advocate appearing for the respondent - original defendant submits that, since there are concurrent findings, they cannot be disturbed unless the appellants show substantial questions of law. Both the Courts below have come to the conclusion that, the plaintiffs have executed agreement to sell and in pursuant to the same, the possession of the suit property was handed over to the defendant. Though it was tried to be contended by the plaintiff No.1 that, his signatures were obtained on blank papers, yet in the cross-examination he has given so many admissions showing that, with full knowledge, he as well as plaintiff No.2 had signed those documents. Therefore, definitely when defendant was legally put in possession of the suit property, it cannot be taken away. Defendant has shown that, he was always ready and willing to perform his part of the contract.

8. The learned advocate appearing for the respondent No.1 relied on the decision of this Court in, *Equbalbegum Sk. Ahmed and Ors. Versus Abdul Rahim Fateh Mohammad*, reported in 2009 (1) Bom.C.R. 612, wherein it has been held that,

"The fact finding process of the First Appellate Court cannot be questioned in the Second Appeal and it is moreso when no substantial question of law was framed while admitting the appeal. The second appeal, therefore, falls outside the pale of section 100 of the Code of Civil Procedure."

Further reliance has been placed on the decision in, *Bondar Singh Versus Nihal Singh*, reported in 2003 AIR (SC) 1905, wherein it has been held that,

"A sale deed is required to be properly stamped and registered before it can convey title to the vendee. However, unstamped and unregistered sale deed though not admissible in evidence, can be looked into for collateral purposes."

Further reliance has been placed on the decision in, *Shrimant Shamrao Suryawanshi and Another Versus Pralhad Bhairoba Suryawanshi and Another*, reported in 2002 (Supp.2) Bom.C.R. 848, wherein it has been held that,

"If conditions enumerated in Section 54 of the Transfer of Property Act are complied with, the law of limitation does not come in the way of appellant taking plea to protect his possession. It is not disputed that the transferee has taken possession over the property in part performance of the contract. It is also not disputed that the transferee was ready and willing to perform his part of the contract, hence the appeal was allowed."

9. It is to be noted that, prior to 18-02-2019, the appeal was not admitted, and therefore on 18-02-2019 this Court had, after hearing respondent No.1, put the parties to the notice that the matter would be decided finally at the stage of admission, and opportunity was given to both sides to submit their submissions on view of the fact that the appeal is proposed to be decided finally at the admission stage. Therefore, in such situation, the view taken in *Equbalbegum Sk. Ahmed and Ors. (Supra)*, will not be helpful to the respondent No.1. However, when the matter at the stage of admission can be decided, taking note of this

decision, it can be seen whether substantial questions of law are arising and then further discussion can be made in pursuant to the same. The paper book of the First Appellate Court was made available which was comprising of the evidence that was adduced by both the parties, and therefore, on the basis of that evidence, the matter can proceed.

10. Plaintiffs had come with a case that, they were in need of financial assistance, and therefore requested defendant, but then defendant put condition for execution of the document, and therefore, they had signed on the blank documents. It is their say that, those documents have been then misused by the defendant. The defendant, per contra, comes with a case that, those documents are genuine and by those documents the plaintiffs had agreed to sell the suit property for consideration of Rs.1,60,000/-. From the evidence of P.W.1 Ghansham Gaikwad, it can be seen that, he has not denied the signature of himself as well as plaintiff No.2 on Exhibits 30 and 31. Exhibit 30 is styled as agreement to sell, but the contents show that, possession of the suit properties was not handed over to the defendant, and therefore, it is stated as, "बिन कब्जाचे साठेखतण्"

The amount of consideration is shown as Rs.1,60,000/-. It is executed on stamp of Rs.100/-. It is only a notarized document. It has been stated in the said document that, prior permission of the competent authority is required for execution of the sale deed, and therefore, the executents undertook to bring such permission. It was stated that, after the said permission is brought, the sale deed would be executed. Another document known as "कब्जे पावती" (possession receipt) has also been produced on record which shows that, it has been executed on the same day between same parties and it states that, possession of the suit property was handed over by the said document by the plaintiffs to the defendant.

11. Perusal of the evidence adduced by the defendant would show that, there is absolutely no explanation given by him as to why two documents were executed. Possession receipt has also been executed on stamp paper of Rs.100/- and it is also not registered. He has not given any explanation as to why the said document was on a insufficiently stamp paper as well as was not registered. The hurdle to execute only one document having recitals about handing over of possession are missing. However, it is to be noted from the evidence of defendant as well as his witness D.W.2 Popat Dhiwar, who is signatory to the said documents that, in fact on the date of agreement to sell, defendant had handed over Rs.60,000/- to the plaintiffs. In his cross-examination, P.W.1 Ghansham Gaikwad has stated that, the signatures of the plaintiffs, defendant and witnesses were made on the document on 22-04-2008 in presence of each other. In clear terms he say that, on that day of agreement to sell, he received Rs.60,000/- and it was divided by him between him and plaintiff No.2 half of the said amount. That means, there is no corroboration to his statement that, he as well as plaintiff No.2 were in need of amount of Rs.30,000/- only. If they were in need of the said amount, they would not have received in all Rs.60,000/- on the day of agreement to sell.

12. Plaintiffs have examined one Balasaheb Devram Gaikwad, who is the brother of plaintiff No.1. He claims that, he was present at the time of the transaction as per the plaintiff, but in his cross-examination he claimed ignorance of the contents of the document. He was not aware about the contents of the suit also. Therefore, it can be stated that, his testimony is in any way helpful to the plaintiffs. Per contra, the evidence led by the defendant is in the form of examining himself as well as one of the attesting witness. Though the document was not compulsorily attestable document, yet parties had opted for having signatures of the witnesses, and therefore, when D.W.2 Popat Dhiwar has supported the evidence of the defendant, his evidence carries more importance. When two documents were got executed by defendant, in the cross-examination the plaintiff could have asked, as to why two documents were got executed. The cross is very much silent on the point, however the point is therefore required to be considered taking into consideration all these aspects that, the said agreement to sell though taken as executed by plaintiffs, so also the possession receipt, whether the defendant could have taken defence under Section 53A of the Transfer of Property Act to protect his possession. Admittedly, no sale-deed has been got executed by defendant in his favour from plaintiffs in respect of suit property in pursuant to said agreement to sell. Unfortunately no specific issue is framed to that effect by the learned Trial Court so also by the First Appellate Court. When the evidence has been adduced by both the parties is before this Court, it is not necessary for to remand the matter for adjudicating the point in respect of Section 53A of the Transfer of Property Act. The said point can be considered in this appeal also accordingly, that is the only substantial question of law which is arising in this case.

13. Further it can be seen that, as regards the other aspects i.e. the execution of the document is concerned, the first fact finding Court as well as the last fact finding Court have come to the conclusion that the plaintiffs had executed those documents and the defendant has proved that, plaintiffs agreed to sell suit properties for a consideration of Rs.1,60,000/-, and in pursuant to the same, had accepted initially amount of Rs.60,000/-, and then the plaintiff No.2 had accepted amount of Rs.20,000/- more. Another fact, when PW 1 says that only Rs.30,000/- was given by the defendant, in his chief; yet, in the cross it has come on record that, he had received Rs.60,000/- and then it was divided between him and Krushna half of the amount. When he says that, the signatures were obtained on blank stamp paper yet along with the suit he has produced photo copies of Exhibits 30 and 31. From where he had fetched those photocopies, has not been explained by him. So also he is not explaining since when he is possessing those photocopies. When he has produced those documents along with his suit, it will have to be inferred that, since the date of the execution of the said documents, he is having possession of those documents. Therefore, the question arises how he can come up with a plea that, later on the blank stamp papers have been misused by the defendant and forcible possession has been taken in the year 2009. If the possession was

forcibly taken in the year 2009 yet the suit has been filed on 15-01-2011. An agriculturist, whose land has been forcibly taken, in possession by any other person then he will not keep quiet for such a long period. On this count also the conduct of the plaintiffs is not that of a prudent man. This Court cannot go much into that factual aspect again in the second appeal, hence following substantial question of law is framed ;

"Whether the defendant can protect his possession under Section 53A of the Transfer of Property Act in view of the fact that Exhibits 30 and 31 are on insufficiently stamped paper and are not registered ?"

14. The plaintiffs have come with a case that, possession of the suit land was forcibly taken by the defendant in the year 2009. In the pleadings as well as in the examination in chief of P.W.1 Ghansham, he has not given the exact date of dispossession. Merely by saying that, they were dispossessed in the year 2009, it will not be a sufficient pleading. For an agriculturist when he is dispossessed, definitely that date, he would remember, but the conduct of the plaintiffs in this case is not that of a prudent man.

15. The natural corollary of the finding that, plaintiffs had executed documents Exhibit 30 and 31 would make it clear that, plaintiffs had entered into an agreement to sell the suit property to defendant and then handed over the possession of the suit land to him by a separate document. It can be seen from the written statement filed by the defendant that, he has not specifically taken a contention that, he is entitled to protect the possession under Section 53A of the Transfer of Property Act. Plaintiffs might have failed to prove that, their signatures were obtained on three blank stamp papers and possession was forcibly taken by the defendant in 2009, yet the question remains as to whether now defendant can protect his possession by invoking Section 53A of the Transfer of Property Act. It can also be considered that, even if it is taken that, plaintiffs had handed over voluntarily the possession of the suit land to defendant, yet when they have filed the suit seeking possession of the property, defendant can only take legal defences to protect his possession. In order to take that defence, as per the ratio laid down in, Nanjegowda And Another Versus Gangamma And Others, reported in (2011) 13 Supreme Court Cases 232, the defendant will have to prove following conditions :

"(1) The contract should have been in writing signed by or on behalf of the transferor;

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

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

(4) The transferee has either performed his part of the contract or is willing to perform his part of the contract."

It has been observed in the above said case that,

"A party can take advantage of this provision only when it satisfies all the conditions aforesaid. All the postulate are sine qua non and a party cannot derive benefit by fulfilling one or more conditions."

Section 53A of Transfer of Property Act was amended on 24-09-2001 and thereby a further condition has been imposed that, such agreement to sell should be a registered one. The documents in present case are admittedly on insufficiently stamped paper and the document is not registered. As regards point of insufficiency of stamp is concerned, it appears that, when the documents were exhibited, no objection was raised on behalf of the present plaintiffs, and therefore, in view of Section 35 of the Bombay Stamp Act, plaintiffs cannot now, in appeal, take a plea that, the documents are on insufficiently stamped paper. When no such objection was taken at the trial stage in the process of the documents being exhibited, and the law contemplates that, such objection will have to be raised at the particular point of time then it was not open for the plaintiffs to agitate the point of insufficiency of stamp at the stage of second appeal. Reliance can be placed on the decision in, R.V.E. Venkatachala Gounder Versus Arulmigu Viswesaraswami and V.P. Temple and another, reported in AIR 2003 Supreme Court 4548, wherein it has been held that,

"Ordinarily an objection to the admissibility of evidence of the document should be raised before such endorsement is made and the court is obliged to form its opinion on the question of admissibility and express the same on which opinion would depend the document being endorsed as 'admitted' or 'not admitted' in evidence..... The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence : and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit,' an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any subsequent stage."

Here by law itself, i.e. by Section 35 of the Bombay Stamp Act, the party challenging the document is estopped from taking plea that, it is on an insufficiently stamped paper if it does not objects to the act of exhibiting the document at trial stage. Now the only question is in respect of the fact that, it was not registered also. By way of the said amendment with effect from 24-09-2001 words "the contract, though required to be registered, has not been registered, or," have been omitted. The effect of the omission of these words and at the same time making amendment in Section 17 of the Indian Registration Act

on the same day regarding compulsory registration of the agreement to sell where it is coupled with possession; the intention of the legislature was that, unless the agreement to sell wherein possession has been handed over is registered then only the protection under Section 53A of the Transfer of Property Act would be available to the person who intends to invoke the same. In this case, both these documents i.e. Exhibits 30 and 31 have come into existence after the said amendment to the Transfer of Property Act Section 53A and Section 17 of the Indian Registration Act had come into force. Therefore, when by the said separate document, on the same day possession is stated to have been handed over to the defendant, it was mandatory to register the said document Ex. 30 and 31. As aforesaid, no explanation has been given by the defendant, as to why it was not registered also and why two separate documents were required to be executed. Therefore, the main condition of the said protection to be available under Section 53A of the Transfer of Property Act, has not been fulfilled by the defendant.

16. The defendant has not explained as to why he had not filed suit for specific performance against the plaintiffs. Contents of the written statement especially later part of para 10 would show that, defendant contended that by filing suit the plaintiffs have in a way refused to perform their part of the contract, and therefore, the defendant has expressed that he would file suit for specific performance. In fact he could have filed counter claim in the suit itself for specific performance of the contract, but he did not do that. In his cross-examination specific question was put to him as to whether he has filed suit for specific performance because his cross-examination was taken on 11-04-2012, the answer was in the negative. It was also asked that, since he is in possession, he has no intention to lodge any suit for specific performance of the contract, he has answered it in the negative. It appears that, there was no dispute on a fact when agreement to sell was executed that, prior to the execution of the sale deed, it was necessary for the party executing the document, to bring the permission from the requisite authority. In Exhibit 30 there are specific recitals to that effect. Plaintiffs had undertaken to bring the said permission, but further stipulation was also made that, if permission is not obtained, it could have been got done by the defendant by expending on the same. In other words it was stated that, the present defendant would incur the expenditure for bringing permission and then a right was given to him to recover the amount, which he would have spent on bringing the said permission. The testimony of defendant is totally silent as to what steps he had taken after a months period from the date of the execution of the agreement to sell. Unless he shows readiness and willingness to perform his part of the contract, he could not have got the protection under Section 53A of the Transfer of Property Act. The conduct of the defendant is not up to that mark. Therefore, from any angle if we consider the facts of the case then though there is concurrent finding of both the Courts below, yet it can be said that, the defendant had failed to prove that, his possession over the suit land can be protected under Section 53A of the transfer

of Property Act. He can not be allowed to remain in possession of the suit land without paying balance amount of consideration and without getting sale-deed executed in his favour. No doubt, a person can protect his possession over a land by taking defence under Section 53 A of Transfer of Property Act, even though his suit for specific performance of contract would have been barred by limitation; but in this case one of the main ingredient of seeking such protection i.e. compulsory registration of the document is not fulfilled.

17. There is no dispute regarding the ratio laid down in, Shrimant Shamrao Suryawanshi and another Versus Pralhad Bhairoba Suryawanshi and another (Supra), and Bondar Singh Versus Nihal Singh (Supra), however in order to protect the possession on the basis of said agreement to sell, defendant will have to prove the conditions required under Section 53A of the Transfer of Property Act. In both these cases, the agreement to sell or the transaction was of prior to 2001 Amendment to the Transfer of Property Act. As per the decision in, Rambhau Namdeo Garje Versus Narayan Bapuji Dhotra (Supra) those conditions will have to be proved by the defendant. However it can further be added that, since the matter before the Hon'ble Apex Court, the agreement to sell dated 16-06-1961 was under consideration, the last point that is compulsory requirement of registration, was not before the Apex Court.

18. At the cost of repetition, it can be said that, when entire evidence was before this Court, it was not necessary for this Court to refer the above said point to the Trial Court or First Appellate Court by remanding the matter. After perusal of entire facts of the case, evidence and also the submissions made on behalf of both the parties it can be concluded that, the defendant was not entitled to receive benefit under Section 53A of the Transfer of Property Act, when the impugned agreement to sell Exhibit 30 was not on a sufficiently stamped paper and Exhibit 31 possession receipt were not duly registered with the appropriate authority. Both the Courts have failed in not considering this point and it appears that, went on a basic facts only. Hence, the second appeal deserves to be allowed. Substantial question of law is answered accordingly. Both the impugned decrees are hereby set aside. Regular Civil Suit No.14 of 2011 before Joint Civil Judge, Junior Division, Shrirampur, dated 29-10-2012 is hereby decreed. Defendant to hand over the possession of the suit property to the plaintiffs No.1 and 2 within a period of eight (08) weeks. No order as to costs.