
(2002) 01 BOM CK 0080
In the Bombay High Court
Case No : First Appeal No. 1162 of 1998

Hamid Khwaji Saheb Sayyed

APPELLANT

Vs

Kashilda Edward Fonseca

RESPONDENT

Date of Decision : 11-01-2002

Acts Referred:

Specific Relief Act, 1963 — Section 5, 6
Transfer of Property Act, 1882 — Section 53A

Citation : (2002) 3 BomCR 611

Hon'ble Judges : R.J. Kochar, J

Bench : Single Bench

Advocate : K.S. Patil, for the Appellant; Y.S. Jahagirdar and M.G. Kulkarni, for the Respondent

Final Decision : Dismissed

Judgement

R.J. Kochar, J.—The original plaintiff, presently 85 years old lady approached the Bombay City Civil Court at Bombay by way of a suit for declaration that the agreement dated 7th December, 1981 and the power of attorney dated 21st December, 1981 stood terminated and/or revoked as per the termination letter dated 23rd August, 1989. She also prayed for an alternative relief that the defendant may be ordered and decreed to hand over possession of the suit land to her along with mesne profit from the date of wrongful possession of the suit land by the defendant. In addition to the aforesaid main reliefs, the plaintiff had also prayed for other consequential and incidental reliefs in the suit. It was the case of the plaintiff that she was the owner of the suit land and was in possession thereof. By an agreement dated 7th December 1981, she had agreed to sell and transfer the suit land to the defendant for the price of Rs. 1000/- and on the terms and conditions contained in the said agreement. She had also handed over to the defendant, the original documents of title for investigation of the title of the suit land. It is further averred by her that she had also executed in good faith a power of attorney on 21st December, 1981 appointing and nominating him for the purpose of looking after two properties including the suit

land. The defendant was also conferred with a right to attend Court and legal proceedings and to do the needful in such matters. It is the case of the plaintiff that the defendant had not made payment of the balance amount of Rs. 4,000/- towards the sale price of the suit land under the agreement dated 7th December, 1981 despite several reminders. Finally when the plaintiff got tired of reminding the defendant to comply with the said agreement she terminated the said agreement and revoked the power of attorney by her letters dated 23rd August, 1989, 5th February, 1989 and 2nd October, 1989. As, even after the termination/ revocation of the agreement and power of attorney by the aforesaid three letters, the defendant did not hand over the possession of the suit land to the plaintiff she was compelled to approach the trial Court for reliefs as stated hereinabove. According to the plaintiff, the defendant was put in possession of the suit land not under the agreement for sale dated 7th December, 1981 but it was under the power of attorney dated 21st December, 1981 for the purpose of looking after the properties of the plaintiff including the suit land. The defendant was in possession of the suit land under the said power of attorney and he had no other independent right to continue to remain in possession of the suit land. It was the case of the plaintiff that the defendant was not in possession of the suit land under the agreement as he had not complied with the terms and conditions of the said agreement including the making payment of the balance purchase price. Under the said agreement, according to the plaintiff, no right of any nature was created in favour of the defendant. The defendant was given the power of attorney with a view to protect the properties from being encroached upon by one Shri Sutrale in the locality. Since the said Shri Sutrale had been threatening to encroach upon the properties of the plaintiff including the suit land. As the plaintiff being a very old lady could not meet such threats, she had given the power of attorney to the defendant to protect her properties against the encroachment.

2. On receipt of writ of summons, the defendant appeared before the Court and filed his written statement denying the case of the plaintiff that the defendant was put in possession of the suit land under the power of attorney dated 21st December, 1981 and not under the agreement for sale of the suit land dated 7th December, 1981. According to him, he was put in possession of the suit land on and from the date of the agreement i.e. 7th December, 1981 and since then he was carrying on his business of sale and supply of building material from the suit land. It was the case of the defendant that he was always ready and willing to perform his part of the contract i.e. to make payment of the balance amount of Rs. 4,000/- under the agreement but it was the plaintiff who refused to accept the offer on 6 to 7 occasions. It was also the case of the defendant that under the said agreement, the plaintiff was liable to convey to the defendant a clear and marketable title of the suit land but she having failed to comply with the conditions prescribed in the said agreement and in particular to comply with the Clauses 4 and 6 thereof, the plaintiff had no right to cancel the said agreement. The defendant has also specifically pleaded that the plaintiff had never

demanded the balance consideration and that she had straight away cancelled the agreement and called upon the defendant to hand over the possession of the suit land by her notice dated 23rd August, 1989 which was replied by him on 5th September, 1989. According to the defendant, the agreement for sale did not stipulate forfeiture or cancellation of the agreement and, therefore, the plaintiff had no right under the said agreement to cancel the agreement. According to the defendant, even the power of attorney could not be revoked as it was irrevocable general power of attorney in favour of the defendant. According to the defendant he was put in possession on and from 7th December, 1981 after making part payment of the purchase price to the plaintiff. The defendant has further averred that from the said date he was carrying on the business of sale of building material and that he was in possession of documentary evidence such as bills, receipts, papers, vouchers etc. for the purpose of his business and that he also had photographs showing that he was carrying on the business on the suit land. According to him, he had developed the business and that the step taken by the plaintiff would ruin his business for no fault of his. The other part of the written statement generally contained denials of the averments contained in the plaint. Both the parties produced a number of documents including the agreement and the power of attorney. Both the parties adduced oral evidence in support of their respective contentions.

3. The trial Court framed as many as seven issues on the basis of the pleadings of the parties and answered the same after recording and accepting evidence adduced by both the sides. The learned trial Judge by her judgment and order dated 26th February, 1998, decreed the suit in terms of the prayer Clauses (a), (aa) and (b) and (c). A declaration was granted to the plaintiff that the agreement dated 7th December, 1981 and the power of attorney dated 21st December, 1981 stood terminated and revoked as per the termination letter dated 23rd August, 1989. The learned Judge also directed the defendant to hand over possession of the suit land to the plaintiff and to pay a sum of Rs. 500/- per month from the date of institution of the suit till handing over of the possession to the plaintiff. The defendant was permanently restrained by injunction order from acting as per the agreement and the power of attorney and that he was restrained from entering upon the suit land and or constructing any structure thereon.

4. The original defendant is aggrieved by the said judgment and order of the trial Court and has, therefore, filed the present first appeal to challenge the legality and validity of the said order on various grounds pleaded in the appeal. I have heard both the learned Counsel who have taken me through the entire proceedings including oral evidence recorded by the trial Court.

5. Shri Patil, the learned Counsel for the appellant has canvassed the following points in support of his appeal:---

i) the appellant (the defendant) was put in possession of the suit land under the agreement for sale dated 7th December, 1991. The appellant had made a part

payment of Rs. 1000/- to the respondent (the plaintiff) towards the purchase price of the suit land. The appellant was required to make payment of the balance amount of Rs. 4000/- on the respondent complying with the terms of the said agreement under Clauses 4 and 6 viz., handing over of the title deeds pertaining to the suit land and getting the clear marketable title by the respondent. Since the respondent had not complied with these mandatory conditions, the appellant cannot be blamed for non-completion of the transaction and, therefore, he cannot be deprived of the possession of the suit land which was validly given to him under the agreement.

ii) The fact that the respondent/plaintiff herself had filed another suit before the City Civil Court complaining about the threat of encroachment on the suit land by one Shri Sutrale goes to prove that the title of the suit land was not cleared.

iii) In a Notice of Motion in the said suit filed against Shri Sutrale and others an order of status quo in respect of the suit land was passed by the City Civil Court and, therefore, no steps in respect of the suit land could be taken; otherwise the said order of status quo would have been violated.

iv) The fact that the appellant/defendant was in possession of the suit land, is not in much dispute irrespective of the contentions whether such possession was under the agreement dated 7th December, 1981 or under the power of attorney dated 21st December, 1981. According to Shri Patil, the appellant was put in possession of the suit land under the agreement and not under the power of attorney. In any case, u/s 53-A of the Transfer of Property Act, 1882 the possession must be protected. Shri Patil has placed reliance on a judgment of Full Bench of this Court in the case of Mahadeo Nathuji Patil v. Surjabai Khushalchand Lakkad & others, reported in 1994 Mh.L.J. 1145 on the point that the appellant is granted statutory protection u/s 53-A of the Act and that such protection is not lost by lapse of time to file suit for specific performance.

According to the learned Counsel for the appellant, the trial Court has erroneously decided the issue in respect of the possession of the suit land and has not considered the aforesaid contentions raised before the trial Court. Shri Patil has taken me through the entire proceedings in support of his contentions.

6. Shri Jahagirdar, the learned Senior Counsel for the respondent has briefly submitted in support of the trial Court judgment that the appellant was in possession to the suit land not under the agreement and was not given possession on and from date of the agreement dated 7th December, 1981 but it was under the power of attorney dated 21st December, 1981 solely with a view to get help from the appellant to look after the property as the respondent/plaintiff had grown very old and was unable to resist the threat of encroachment coming from Shri Sutrale. The appellant was to look after the property and was also allowed to look after the litigation in respect of the suit land as and when need would arise. Soon after the said power of attorney, the respondent/plaintiff filed a suit before the City Civil Court against Shri Sutrale to thwart his

threatened encroachment. The appellant was authorised to attend the Court proceedings and do the needful therein. In these circumstances, the appellant came in possession of the suit land and not under the agreement as alleged. Shri Jahagirdar has pointed out that the learned trial Court has correctly appreciated the oral and documentary evidence on this issue and has come to a right conclusion on the basis of such evidence and, therefore, there is no necessity to interfere with such reasoned conclusion of the trial Court. Shri Jahagirdar has further submitted that since the possession of the appellant was only for the purpose of looking after the property under the power of attorney for a specific purpose of litigation and the same was not under the agreement, section 53-A of the Transfer of Property Act, is not attracted as the possession was not under any contract or agreement which is the basic precondition and postulate of section 53-A i.e. there must be a written contract signed by parties to transfers for consideration any immovable property. The learned Counsel has pointed out that the trial Court has specifically held on the basis of the evidence that the appellant was not in possession of the suit land pursuant to the said agreement for sale and, therefore, no right of any nature could be said to have been created in favour of the appellant. The appellant was given a power of attorney to look after the land to protect the same against the threat of encroachment. Shri Jahagirdar has also submitted that even in the power of attorney, the fact is not mentioned that the appellant was given possession of the suit land under the agreement and as such he was required to protect the property.

7. Shri Jahagirdar has also submitted that even in the suit filed by the appellant on behalf of the plaintiff against Shri Sutrale, it is not mentioned by the appellant that he was in possession of the suit land under the agreement. Secondly according to the learned Counsel, if he were to be in possession of the suit land on and from 7th December, 1981, he himself could have filed such a suit against Shri Sutrale complaining against him of encroachment on the suit land which was in possession of the appellant on and from 7th December, 1981. The suit was filed on 24th December, 1981 against Shri Sutrale and others. i.e. after the power of attorney dated 21st December, 1981. The said suit was not filed by the appellant in his own name but was in the name of the plaintiff herself and from these facts it becomes crystal clear that the appellant was not put in possession of the suit land on and from 7th December, 1981 under the agreement and that he was only in occupation of the suit land after the power of attorney to look after the suit and protect it from getting encroached by Sutrale. Shri Jahagirdar has emphasised that the possession of the suit land was always with the plaintiff and she had never parted with the possession of the suit land. The appellant had failed and neglected to perform his part of the agreement for sale dated 7th December, 1981 as he had not made payment of the balance amount of Rs. 4000/-. According to Shri Jahagirdar, if the appellant had performed his part of the contract and if the plaintiff had neglected to perform her part of the contract in that case, the appellant could have and would have filed a suit for specific performance against the plaintiff-respondent seeking direction of the Court that

the plaintiff should hand over the possession of the suit land and that he was ready and willing to pay the balance amount of the sale price. The appellant has not filed any such suit knowing that he had never performed and had never expressed his readiness and willingness to perform his part of the agreement.

8. According to Shri Jahagirdar, the appellant has put forward as a mere ruse that the plaintiff had not satisfied the Clauses 4 and 6 of the agreement dated 7th December, 1981 i.e. title of the suit land was to be made marketable. According to the learned Counsel the appellant was handed over the documents in respect of the title of the suit land and that he was satisfied about the title and had specifically averred in the suit against Sutrale that the plaintiff was the lawful owner of the suit land and that Shri Sutrale was trying to encroach upon the said land.

9. Shri Jahagirdar has further pointed out that the suit filed by the appellant in the name of the plaintiff against Shri Sutrale was not in respect of the title but was to stop Shri Sutrale from encroaching upon the suit land which was lawfully owned by the plaintiff. In that suit, there was no question of creating any doubt about the title of the suit land, the plea of the appellant in that respect, therefore, is totally false to his knowledge. Shri Jahagirdar has supported the judgment of the trial Court in every respect and has prayed for dismissal of the appeal.

10. I have also independently considered the oral and documentary evidence on record. I have also carefully gone through the agreement dated 7th December, 1981 and the power of attorney dated 21st December, 1981. As stated earlier by me, I have gone through the entire record with the assistance of both the learned Counsel.

11. The learned trial Court has referred to extensively the pleadings and evidence of both the parties in the judgment. The trial Court while deciding the crucial issue of the nature of possession of the suit land by the appellant, has analysed the terms of the agreement and also the power of attorney. I am in agreement with the specific finding of the learned trial Judge that there was nothing in the agreement to show that the possession of the suit land was handed over to the appellant on and from 7th December, 1981 or at any time thereafter acting under the said agreement. The trial Court has found that the possession of the suit land was to be delivered to the appellant as per the Clause 6 on payment of full price of Rs. 5,000/ and not at any time earlier to that. It is an admitted position that the appellant had not complied with the conditions of payment of the balance amount under the agreement. It was, therefore, clear from the record that the appellant having not fulfilled his part of the contract he was not entitled to claim any right under the said agreement, except by filing a separate suit for specific performance of the said agreement for sale, alleging failure on the part of the plaintiff to perform her part of the contract and showing readiness and willingness to complete his part of the contract. In the present suit what the plaintiff has prayed is that the appellant had failed to comply with the

terms of the agreement and that he was in unlawful possession and that the plaintiff had cancelled the agreement and had revoked the power of attorney and, therefore, she sought direction against the appellant to handover the possession of the suit land. The appellant has in this suit taken a plea of failure on the part of the plaintiff that she had not given clear marketable title under Clauses 4 and 6 of the agreement and that he had offered the balance payment to her at least 6 to 7 times but she refused to accept the same. The trial Court has rightly not believed the story of the appellant that he had offered to the plaintiff the balance amount of on 6 to 7 occasions and that she had refused to accept the same. If the plaintiff had refused to accept the said payment, in that case, the appellant would have certainly written at least one letter to her complaining that he had offered the balance amount not only once or twice but 6 to 7 times under the agreement and that she had refused to accept the same. He would not have failed to point out to the plaintiff that he had always offered to comply his part of the obligation under the agreement and that it was for the plaintiff to comply with her part of the agreement. He also could have definitely complained to her that under the agreement he was not satisfied with the clear marketable title and that the suit against Shri Sutrale had created doubt in the title of the plaintiff. If the plaintiff were to fail even after such notice sent by the appellant, the only alternative for the appellant was to file a suit for specific performance of the agreement for sale dated 7th December, 1981. He could have immediately or within a reasonable time filed such a suit for specific performance. He did nothing. His plea in respect of his offer to comply with the agreement, therefore, is totally false and bogus and cannot be accepted. The trial Court has rightly rejected the same on the basis of evidence on record. I do not find any infirmity in such conclusion drawn by the learned trial Court.

12. In respect of the appellant having been put in possession on and from 7th December, 1981 under the agreement the trial Court has rightly found that there was absolutely no evidence to show that he was put in possession on and from 7th December, 1981 and that he had started his business from that date on the suit land. There is not even one piece of evidence to show that he had started his business on the suit land on and from 7th December, 1981. The least the appellant could produce was some bills, vouchers or some such miscellaneous documents in the business to show that he had started his business from the suit land on and from 7th December, 1981 as he was put in possession of the suit land from that date. More pertinently, he has not examined any of the signatories of the said agreement for sale who had signed as witnesses in the agreement. There were two persons who had signed as witnesses in the said agreement. If the appellant was put in possession on the date of the signing of the agreement, the appellant would not have failed to examine at least one of the said witnesses in support of his contention that he was put in possession of the suit land from that date itself, i.e. the date on which the witnesses had put their signatures on the said agreement.

13. The third factor which militates his plea of being in possession from 7th

December, 1981 is that there is no mention of this crucial fact either in the subsequent power of attorney dated 21st December, 1981 in which it could have been mentioned or found that under the agreement dated 7th December, 1981 he was put in possession of the suit land and that he was looking after the suit land until the said agreement was completed in every respect. The said power of attorney is absolutely silent on this crucial fact of handing over possession of the suit land to the appellant. It would have been most natural on the part of the plaintiff to have referred to the fact of the agreement and to the fact of the appellant being put in possession of the suit land and that the said power of attorney was given to meet the threat of encroachment by Sutrale and to attend the required litigation in that respect. Further when the appellant had filed the suit against Shri Sutrale in the name of the plaintiff, while exercising his authority under the power of attorney, he would have mentioned this factual development that he had agreed to purchase the said suit land from the plaintiff and that he was given a power of attorney to look after the said land and that factually he was in possession of the suit land. Such averment in the plaint would have been most natural had it been true. As there is no such averment of this factual aspect, it is clear that there was no such event of possession having been given to the appellant on and from 7th December, 1981, otherwise the appellant would never have failed to disclose his interest in the said property as he himself was prosecuting the said suit against Sutrale as power of attorney holder of the plaintiff. It is worth nothing that a specific case to that effect was also put to him in cross-examination, but he gave evasive replies by way of denials. Another crucial aspect which we cannot lose sight of is that, if in fact, the appellant were put in possession of the suit land from 7th December, 1981 and if he were to find the threat of encroachment on the land which was in his possession under the agreement in that case even he would have independently approached against Shri Sutrale claiming protection from the Court. The trial Court has rightly adverted to all these aspects and has come to a right conclusion. The inference from the aforesaid facts on record is inescapable that the appellant was not in possession under the aforesaid agreement and that his possession was under the power of attorney only to look after the suit property and to protect the same against the threat of encroachment by Sutrale.

14. It is further pertinent to note that if he were to be in possession under the agreement he would not have accepted the power of attorney as he would have certainly told the plaintiff that under the agreement he had agreed to purchase the said land and that he had made part payment and that he is already in possession of the suit land and that he would certainly look after and protect the said property against the threat of encroachment as otherwise his rights will be impaired.

15. The trial Court has also dealt with an important point, that is, lack of evidence in respect of the alleged construction of a small structure by the appellant to enable him to carry on his business of the building material. There is absolutely no evidence on that point as rightly observed by the trial Court. In the

aforesaid circumstances, it must be stated that there is absolutely no illegality or infirmity in the conclusion drawn by the trial Court on the point of the possession of the appellant being not under the agreement dated 7th December, 1981.

16. The trial Court has further considered the question of the nature of the possession or the appellant. The trial Court has concluded that his possession was under the power of attorney as an agent and, therefore, he had no right of any nature in the suit property. The trial Court has found as false the submission that the appellant had offered the balance amount of Rs. 4000/- under the agreement. Considering all the facts on the record the trial Court has disbelieved in his story and in my opinion rightly so. In view of the terms of the agreement, the plaintiff had every right to terminate the agreement as the appellant had failed and neglected to comply with the terms of the agreement. Secondly, the plaintiff had also every right to revoke the power of attorney under which the appellant was put in possession of the suit land. The agent cannot continue to hold such possession contrary to the wishes of his principal. The purpose of the power of attorney was also more or less satisfied as the suit was filed by the appellant on behalf of the plaintiff in her name against Sutrale to meet the threat of encroachment and favourable orders in her favour were obtained.

17. Though Shri Patil has vehemently submitted that the possession of the appellant was under the agreement and, therefore, his client is protected by section 53-A of the Transfer of Property Act, since I have factually held that the possession of the appellant was not under the agreement but was under the power of attorney for a specific purpose to look after the suit land, the provisions of section 53-A of the Act will not apply as it is not under the contract or agreement the appellant was put in possession but the same was under the power of attorney for specific purpose. The Full Bench judgment cited by Shri Patil will not, therefore, help the appellant.

18. I have considered all the submissions made by both the learned Counsel extensively and I have also gone through the evidence on record and the impugned judgment minutely. I do not find any illegality or infirmity in the impugned judgment and order of the trial Court. The trial Court has drawn conclusion based on evidence on record and has given cogent reasons for such conclusions. Even I have disbelieved the case of the appellant. I am informed by Shri Jahagirdar that the plaintiff has already taken possession of the suit land as the appellant was not granted stay of the decree by this Court. In the aforesaid circumstances, there is no substance in the appeal and the same is dismissed with no costs.