
(2018) 09 BOM CK 0057

In the Bombay High Court

Case No : Second Appeal No. 311, 318 Of 2006

Khandu Dajiba Kavar & Ors.

APPELLANT

Vs

Leela W/O Ranganath Padghan

RESPONDENT

Date of Decision : 21-09-2018

Acts Referred:

Transfer of Property Act, 1882 — Section 53A

Citation : (2018) 09 BOM CK 0057

Hon'ble Judges : A.S. Chandurkar, J

Bench : Single Bench

Advocate : P.M. Chandekar, T.R. Darda

Final Decision : Dismissed

Judgement

1. Since both these appeals raise a challenge to the common judgment of the appellate Court dated 07.01.2005, they are being decided together by this common judgment.

2. The facts giving rise to the appeals are that the suit property which is field Gat No.127 admeasuring 1 Hectare 45 R with half share in the well

situated therein was owned by one Khandu defendant no.1. According to the plaintiff, said Khandu in February 1987 agreed to sell the aforesaid

field to the plaintiff for a consideration of Rs.25,000/-. On 19.02.1987, amount of Rs.24,000/- was paid after which a document was duly executed

and the plaintiff was put in possession. The sale deed was to be executed by 01.12.1987. Since the suit field came within the Koradi Project, it

was necessary to obtain the permission of the Competent

Authority for its transfer. On 02.04.1988, balance amount of Rs.1,000/- was paid and a fresh document came to be executed. Though the plaintiff

had performed her part of the contract, the defendant no.1 did not obtain the necessary permission.Â As the saleÂdeed was not executed, the plaintiff made request to the defendant no.1.Â However, the defendant no.1 along with his wife and son made false revenue entries and his family members filed Regular Civil Suit No.408 of 1990 for perpetual injunction.Â That suit came to be dismissed.Â Thereafter the plaintiff filed suit for specific performance based on the aforesaid agreement.

3. In the written statement filed by the defendants, it was pleaded that the defendant no.1 had obtained an amount of Rs.300/from the plaintiff and had signed on a blank stamp paper.Â Though the amount borrowed was returned, the plaintiff did not return the stamp paper and converted it into an agreement of sale.Â It was denied that the plaintiff was in possession.

4. The trial Court after considering the evidence led by the parties held that the agreement was not duly proved.Â It however held that the plaintiff was in possession of the suit property.Â It therefore partly decreed the suit and while refusing the relief of specific performance and the alternate relief of refund of earnest amount granted permanent injunction so as to restrain the defendants from dispossessing the plaintiff except by due process of law.Â Being aggrieved by that decree, the plaintiff filed Regular Civil Appeal No.123 of 2002 seeking the relief of specific performance while the defendants filed Regular Civil Appeal No.125 of 2002 challenging the decree for permanent injunction.Â The appellate Court by its common judgment held the agreement dated 02.04.1988 to be duly proved.Â The defence as regards money lending transaction was not proved.Â While refusing the relief of specific performance on the ground that there was no permission from the Competent Authority for transferring the said land, the plaintiff was held entitled to protect her possession under Section 53ÂA of the Transfer of Property Act, 1882 (for short, â??the said Actâ??).Â The appeal of the plaintiff was thus partly allowed and the appeal filed by the defendants came to be dismissed.

5. While admitting Second Appeal No.318 of 2006, the following substantial questions of law were framed.

(i) Whether the first appellate Court could have granted the benefit of the provisions of Section 53A of the Transfer of Property Act to the plaintiff so as to grant permanent injunction restraining the defendants from obstructing his

possession, by modifying the decree of permanent injunction granted in favour of the plaintiff against his dispossession, except by due process of law ?

(ii) Whether the benefit of the provisions of Section 53A of the Transfer of Property Act could be available to a plaintiff in a suit filed by him for grant of decree for specific performance of contract ?

(iii) Whether the permanent injunction as granted by the first appellate Court could be granted when the performance of the contract depends on the action of a third party and the defendant could not have been said to be liable for not performing his part of the contract ?

The same substantial questions of law were also directed to be considered in Second Appeal No.311 of 2008.

6. Smt. P.M. Chandekar, learned counsel for the appellants' defendants, submitted that the appellate Court committed an error in granting protection

to the plaintiff under provisions of Section 53A of the said Act. The necessary conditions that were required to be fulfilled by the plaintiff for

seeking such protection were not duly fulfilled and hence no relief in that regard could have been granted. It was submitted that the defendants

were in possession of the suit property and the entire suit filed by the plaintiff for specific performance was liable to be dismissed. The learned counsel

by placing reliance upon the decision in *Revanasiddayya Versus Gangamma @ Shashikala & Another* [2018 (3) Mh.L.J. 655] submitted that if it

is found that the plaintiff was in possession, she could be directed to restore back possession of the suit field to the defendants inasmuch as the relief

of specific performance stands refused. The learned counsel also referred to the decision in *Dharmaji alias Baban Bajirao Shinde Versus*

Jagannath Shankar Jadhav, since deceased by his heirs *Bhanudas Jagannath Jadhav*, etc. [AIR 1994 Bombay 254] in support of her contentions.

7. Shri T.R. Darda, learned counsel for the respondent's original plaintiff, at the outset submitted that the relief of specific performance that has been

refused by both the Courts has not been challenged by the plaintiff. According to him, the plaintiff was satisfied with the protection as granted by

the appellate Court by relying upon provisions of Section 53A of the said Act. He submitted that all necessary requisites on the basis of which

such protection could be granted were complied with by the plaintiff and hence the decree as passed by the appellate Court did not call for any

interference. By placing reliance on the judgment of the Hon'ble Supreme Court in Shrimant Shamrao Suryawanshi & Another Versus

Pralhad Bhairoba Suryawanshi & Another [2002 (2) Mh.L.J. 1], it was submitted that considering the findings of fact recorded by the appellate Court,

the plaintiff was entitled to protect her possession. The learned counsel also relied on the decision in Dharmaji alias Baban Bajirao Shinde (supra) to

urge that even the plaintiff as a transferee could seek to protect her possession under Section 53A of the said Act. It was thus submitted that

there was no reason to interfere with the judgment of the appellate Court.

8. I have heard the learned counsel for the parties at length and with their assistance I have perused the records of the case. I have also given due

consideration to their respective submissions. The facts on record indicate that initially in February 1987 there was an agreement between the

parties under which the plaintiff agreed to purchase the suit field from the defendant no.1 for a consideration of Rs.25,000. Amount of

Rs.24,000 was immediately paid and possession was handed over to the plaintiff on 19.02.1987. The balance amount of Rs.1,000 was paid on

02.04.1988 by executing a fresh document which is at Exhibit 75 of the record. The defence as raised by the defendants of the execution of the

said document being towards security by way of loan transaction has not been accepted by the appellate Court. The same being a finding of fact, it

would not be permissible to go into that aspect. Another finding of fact recorded by both the Courts is that the plaintiff was in possession of the suit

property since February 1987. It is in the backdrop of these facts that the question that is required to be considered is whether the plaintiff is

entitled to seek the benefit of the provisions of Section 53A of the said Act.

9. In Shrimant Shamrao Suryawanshi & Another (supra), the conditions that are required to be fulfilled by a transferee who seeks to protect his

possession under Section 53A of the said Act have been enumerated. The same read thus:

16.The necessary conditions are

(1) there must be a contract to transfer for a consideration any immovable property;

(2) the contract must be in writing, signed by the transferor, or by someone on his behalf;

- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract.â??

To consider whether the aforesaid conditions have been fulfilled, it can be seen that there was a contract to transfer the suit field for consideration of

Rs.25,000/â as per agreement at Exhibit 75.â That agreement was in writing and duly signed by the defendant no.1.â The agreement is also found

to be worded so as to indicate the terms of transfer.â The plaintiff as a transferee in part performance of the contract was put in possession of the

suit property which finding has been recorded by both the Courts.â The plaintiff as a transferee had paid the entire agreed consideration of

Rs.25,000/â.â It can thus be seen that all requisite conditions that are required to be complied with for seeking benefit of the provisions of Section

53âA of the said Act have been satisfied by the plaintiff.â In Dharmaji @ Baban Bajirao Shinde (supra), it has been held that even a transferee by

relying upon provisions of Section 53âA of the said Act as a plaintiff can seek to protect his possession.â The Full Bench of this Court in Sadashiv

Chander Bhamgareâ Versusâ Eknath Pandharinath Nangude [2004 (3) Mh.L.J. 1131] has held that the proposed transferee in possession can avail

the benefits of Section 53âA as a shield to retain his possession.â Another Full Bench of this Court in Mahadeo Nathuji Patilâ Versusâ Surjabai

Khushalchand Lakkad & Others [1994 (2) Mh.L.J. 1145] has held that the statutory protection granted under Section 53âA of the said Act to a

transferee to continue in possession is not lost by lapse of time in filing suit for specific performance of contract.â As noted above, the relief of

specific performance stands refused to the plaintiff which part of the decree has attained finality.â It is thus clear on consideration of the aforesaid

law and by applying the same to the facts of the present case that the plaintiff has complied with all necessary ingredients to enable to seek protection

of her possession under Section 53âA of the said Act.

10. On behalf of the defendants it was urged that the plaintiff could be directed

to restore back their possession by relying upon the decision in Revansiddayya (supra).¹¹ The facts of that case indicate that on 06.11.1986, an agreement to sell the suit property therein was entered into for a consideration of Rs.1,75,000.¹² The proposed purchasers paid an amount of Rs.1,00,000¹³ as earnest amount and were put in possession.¹⁴ In the meanwhile, the original owner expired after which his legal heirs inherited the suit land.¹⁵ The said legal heirs filed a suit for declaration and possession of the suit land.¹⁶ According to them, the title over the suit property vested with the original owner and they were entitled for possession.¹⁷ The trial Court held the said plaintiffs to be owners of the suit land and refused the relief of specific performance. Thereafter the proposed purchasers sought specific performance of the agreement by filing a suit.¹⁸ The same was dismissed and that decree was confirmed in appeal.¹⁹ Those proceedings were not further pursued.²⁰ The legal heirs of the owner filed an appeal being aggrieved by the decree passed in their suit.²¹ The High Court allowed that appeal and passed a decree for possession.²² In that context, it was observed that after the dismissal of the suit for specific performance, the possession of the prospective purchaser became illegal thereby giving a right to the original owners to claim back the same.²³ Though the purchaser was entitled to defend his possession by taking recourse to the provisions of Section 53A of the said Act, after dismissal of his suit that protection was not available.²⁴ It was thus held that since the original owners had proved their ownership they were entitled for a decree of possession.

The aforesaid facts indicate that the original owners had filed a suit seeking the relief of possession.²⁵ In the present case, in the suit for specific performance filed by the plaintiff there is no counter claim by the defendants seeking possession.²⁶ Neither is there any separate suit filed for seeking the relief of possession.²⁷ Thus in absence of any such relief being sought by the original owners, the plaintiff who has satisfied the legal requirements of provisions of Section 53A of the said Act cannot be directed to handover possession of the suit property to the defendants.²⁸

11. Accordingly, the substantial questions of law as framed are answered by holding that the appellate Court was justified in granting the benefit of the provisions of Section 53A of the said Act to the plaintiff by modifying the

decree for permanent injunction.Â Similarly, such benefit could be granted to a plaintiff in a suit filed by her for grant of decree of specific performance.Â The plaintiff having performed her part of the contract, she was entitled to protect her possession.Â In view of aforesaid answers to the substantial questions of law, there is no reason to interfere with the judgment of the appellate Court.

12. Second Appeal Nos.318 of 2006 and 311 of 2008 consequently stand dismissed with no order as to costs.

13. The appellants at this stage request for continuation of the interim relief that was continuing during pendency of the appeal.Â That request is opposed by learned counsel for the respondent.Â The interim relief operating shall continue to operate for a period of eight weeks only from today and shall cease to operate thereafter.