

(1957) 01 BOM CK 0023
In the Bombay High Court
Case No : Second Appeal No. 397 of 1954

Nanasaheb Gujaba Bankar	Vs	APPELLANT
Appa Ganu Bankar and Others		RESPONDENT

Date of Decision : 22-01-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 35
Registration Act, 1908 — Section 49
Transfer of Property Act, 1882 — Section 53

Citation : AIR 1957 Bom 138 : (1957) 59 BOMLR 303

Hon'ble Judges : Vyas, J;Dixit, J

Bench : Division Bench

Advocate : V.M. Tarkunde, for the Appellant; K.J. Abhyankar, for the Respondent

Judgement

Dixit, J.—This second appeal has been referred for decision to a Division Bench by Mr. Justice Shah. The ground upon which the case was referred to this Bench was the ground that the case reported in Tribhovan Hargovan Vs. Shankar Desai, , does not seem to have been correctly decided.

2. The suit giving rise to the appeal was filed by the plaintiff Appa to recover, from the defendants, possession of the suit property which consists of two fields hearing S. No. 22/1-B and S. No. 22/12-B. It appears that the plaintiff left for Karachi in or about the year 1925 from where he returned in the year 1947. The plaintiff's case is that when he went to Karachi, he left defendant No. 1 in possession of the suit property as the agent of the plaintiff. On the 1st of July 1939, the plaintiff executed a sale-deed in relation to these lands in favour of defendant No. 2 who is defendant No. 1's cousin for the consideration of Rs. 99-15-0. At the date of the sale-deed, the fields were in the possession of the father of defendant No. 4 as a tenant. The plaintiff's case, however, is that defendant No. 1 obtained the signature of the plaintiff upon a blank paper and used that paper for the purpose of the sale-deed of 1st of July 1939. In other words, the plaintiff's case is that the sale-deed of the 1st July 1939 is not a

genuine transaction, but it was a fraudulent one. On the 1st of August 1947, defendant No. 2 sold the suit property to defendant No. 3 for Rs. 200 and the case of the plaintiff, again, is that this was a bogus transaction.

3. On 2nd March 1951, the plaintiff commenced this suit against the four defendants upon the allegation that the sale-deed of the 1st of July 1939 was a fabricated document and that neither defendant No. 2 nor defendant No. 3 got any interest in the suit property. Defendant No. 1 remained absent and the suit proceeded against him ex parts. Defendant No. 2 filed a written statement and disputed the plaintiff's claim. He denied that the sale-deed of the 1st of July 1939 was a fraudulent transaction. The contentions of defendant No. 3 were substantially the same as those of defendant No. 2. Defendant No. 4, who is the son of the original tenant, raised similar contentions and added that his father was a tenant of the suit lands since a long time and that his father continued on the suit lands as a tenant of defendant No. 2 and then as a tenant of defendant No. 3.

4. The learned trial Judge raised several issues and upon the principal issue, he held that the plaintiff did not prove his title to the suit lands and, holding as he did in that sense upon issue No. 1, he dismissed the plaintiff's suit. Feeling aggrieved by the decree, the plaintiff went in appeal before the District Court, Poona, and the learned District Judge, Poona, allowed the plaintiff's appeal and passed in favour of the plaintiff a decree for possession against defendants Nos. 2 and 3 upon the plaintiff paying defendant No. 3 a sum of Rs. 99-15-0 and granted a declaration that defendant No. 4 was in possession of the suit property as the plaintiff's tenant. From the appellate decree, the third defendant has come up in appeal.

5. At the outset, it may not be out of place to say that this case has gone through, as it were, vicissitudes of several contentions taken up by the parties. In the trial Court, the simple issue was whether the plaintiff's title was proved and the trial Court held that the plaintiff's title had not been proved. In the lower appellate Court, that Court came to the conclusion that the sale-deed of the 1st of July 1939 was a genuine sale-deed and not a fraudulent sale-deed as alleged by the plaintiff. The lower appellate Court also held that, although no actual possession was given to defendant No. 2 pursuant to the sale-deed of the 1st of July 1939, defendant 2 obtained constructive possession of the suit lands because of an attornment made by the tenant who was in actual possession. The position, therefore, is that the sale-deed of the 1st of July 1939 is, upon the finding of the Court below, a genuine sale-deed and that defendant No. 2 obtained constructive possession in respect of the suit lands. The lower appellate Court, however, came to the conclusion that, while the sale-deed disputed by the plaintiff was a genuine sale-deed, the plaintiff was entitled to recover possession and defendant No. 3 could not get the benefit of the doctrine of part performance as enacted in Section 53-A of the Transfer of Property Act. Now, in this case, the transaction of the 1st of July 1939 was for the consideration of Rs. 99-15-0 and

u/s 54 of the Transfer of Property Act, a transfer of Immovable property of the value of less than Rs. 100/- may be made either by a registered instrument or by delivery of the property. In the present instance, defendant No. 2 did not rely upon the transaction upon the basis of the delivery of the property. He relied upon the sale-deed executed in his favour on the 1st of July 1939. But the difficulty in the way of defendant No. 2 was that the sale-deed was not registered and it was under those circumstances that the lower appellate Court came to the conclusion that defendant No. 2 was not entitled to rely upon the doctrine of part performance. The lower appellate Court relied upon a decision of this Court reported in Tribhovan Hargovan Vs. Shankar Desai, and came to the conclusion that defendant No. 2 could not get the benefit of Section 53-A. The reasoning on which the lower appellate Court relied is to be found at p. 873 (of Bom LR): (at p. 435 of AIR) of the Report. It will be convenient to state the reasoning here :

"It has next been contended on behalf of the respondent that it is possible in this case to apply the doctrine of part-performance as enunciated in Section 53-A of the Transfer of Property Act. It is contended that this being a legal point, the fact that no issue regarding it has been framed or tried is not a serious objection, particularly as the defendant has been in possession since 1936; and the contention that the plaintiff is a bona fide purchaser for value without notice is hardly open to him. The application of the provisions of Section 53-A, however, depends on there having been a contract to transfer for consideration an immoveable property by writing; but, as I have already pointed out, u/s 49 of the Indian Registration Act Ext. 47 cannot be regarded as evidence of a contract for sale, nor does it appear possible to regard that document itself as a contract for sale; and that being so, and there being no other contract for sale in writing, it is clear that the first condition necessary for the application of Section 53-A is non-existent in this case."

With respect, this reasoning is open to objection for several reasons which we propose to mention presently.

6. Section 53-A of the Transfer of Property Act was inserted in 1929 in the Transfer of Property Act of 1882 and that section deals with the well-known doctrine of part performance. Section 53-A is composed of several paragraphs. Mr. Abhyankar appearing for the plaintiff does not dispute that paragraphs 1 and 2 of Section 53-A are complied with in this case. It is conceded that there has been, in this case, a contract to transfer for consideration Immovable property. It is also conceded that the transferee has, "in part performance of the contract, taken possession of the property. It is next conceded that the consideration for the transaction has been received by the plaintiff from defendant No. 2; and this concession is based upon the finding of the Court below that Rs. 99-15-0 were paid by defendant No. 2 to the plaintiff and there has been, in this case, no cross-objection against that finding. Mr. Justice Sen was inclined not to apply Section 53-A because he held that there was no contract in writing in Tribhovan Hargovan's case (A) and the learned Judge also held, following the aforesaid

case, that there was no contract in writing in the present case. But, with respect, Mr. Justice Sen ignored the fact that there was, in this case, a sale-deed which was incomplete in the sense that the sale-deed was not registered and paragraph 4 of Section 53-A would, therefore, apply even where there is no instrument of transfer such as is duly completed in the manner prescribed by law. In other words, the position u/s 53-A is that it may apply to a case where there is a contract in writing or it may equally apply to a case where there may be a transfer, but the transfer is not completed as required by law. Mr. Justice Sen overlooked paragraph. 4 of Section 53-A. In Tribhovan Hlargovan's case (A), although there was no contract, there was an instrument of transfer, but the instrument of transfer was not duly completed. Had this been brought to the notice of Mr. Justice Sen, the decision in Tribhovan Hlargovan's case (A) may well have gone the other way. The position, therefore, is that in this case there is an instrument of transfer, but that instrument is not duly completed by law and that instrument of transfer may be looked upon as a contract within the meaning of Section 53-A. If any authority is needed for this proposition, it would be found in a case decided by Sir Lawrence Jenkins, Chief Justice, in Puchha Lal v. Kunj Behari Lal 18 C WN 445 : AIR 1914 Cal 21.

7. The result, therefore, is that in this case there are all the requirements to satisfy Section 53-A. In this case, defendant No. 2, the predecessor-in-title of defendant No. 3, obtained constructive possession of the suit lands. One of the requirements of Section 53-A is satisfied. Further, on the finding of the lower appellate Court, consideration was paid by defendant No. 2 to the plaintiff. One other requirement of Section 53-A also is satisfied in this case. Although there is no contract in writing as such, the sale-deed can be looked upon as constituting a contract as contemplated by Section 53-A. In these circumstances, there is no difficulty in saying that Section 53-A would apply to the facts of this case and defendant No. 2, the predecessor-in-title of defendant No. 3, would be entitled to protect his possession u/s 53-A.

8. But Mr. Abhyankar appearing for the plaintiff contends that defendant No. 3 cannot rely upon Section 53-A because defendant No. 2 had a remedy to bring the suit for specific performance which he did not bring and if his suit for specific performance was barred by limitation, defendant No. 2, the predecessor-in-title of defendant No. 3, cannot invoke the doctrine as enacted in Section 53-A. In other words, the contention is that if the remedy of defendant No. 2 to enforce specific performance of the agreement was barred by limitation, it would not be open to defendant No. 2 nor to defendant No. 3 to rely upon Section 53-A of the Transfer of Property Act. There is no difficulty in approaching this question. Section 53-A seeks to protect the possession of a defendant against whom a suit in ejectment has been filed. It does not confer any right upon a person in possession. What it purports to do is to prevent a plaintiff from recovering possession of the property already transferred to the defendant. To make our meaning clear, it may be convenient to set forth paragraph 4 of Section 53-A. It is in the following terms:

"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 therefore 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."

It is clear that it imposes upon a plaintiff a disability, the disability being of enforcing against the transferee in possession any right which a plaintiff may have in respect of the property. There are a good many cases before the enactment of Section 53-A, of which the case in Venkatesh Damodar v. Mallappa Bhimappa ILR 40 Bom 722: AIR 1922 Bom 9 , is an illustration. In Venkatesh Damodar v. Mallappa Bhimappa (C), the facts were these: The plaintiff agreed to sell certain property to the defendants which was already in their possession. The defendants paid up the full purchase money to the plaintiff, but omitted to take from him a registered sale-deed. After their right to obtain specific performance of the agreement to sell had become time-barred, the plaintiff sued to recover possession of the property. It was held, dismissing the suit, that the defendants were entitled to remain, in possession against the plaintiff. It will be noticed that this case recognised the doctrine of part performance. It may also be relevant to note that, although a defendant's right to obtain specific performance had been barred by time, the defendant had still a right to remain in possession as against the plaintiff. But Mr. Abhyankar relies upon a decision of this Court reported in Nemtulla v. Safiababu 37 Bom LR 82: AIR 1935 Bom 208. The facts in that case were these: Defendant No. 7 had obtained letters of administration to the estate and went into possession of the estates inclusive of the share of defendant No. 3 as administratrix. At a time when relief of specific performance was barred by limitation, defendant No. 3 impeached the assignment, and defendant No. 7 resisted the claim by relying on the doctrine of part performance, as defendant No. 7 was already in possession of the property. It was held that the doctrine of part performance was not applicable even if defendant No. 7 was in possession of the property under the agreement. Mr. Abhyankar says that this case supports his contention and accordingly defendant No. 3 is not entitled to resist the plaintiff's suit.

Whatever the position was prior to 1929, the position after the enactment of Section 53-A is now clear. Even in respect of the legal position arising previously to 1929, the case in Venkatesh Damodar v. Mallappa Bhimappa (C), has taken the view that, even if the suit for specific performance is barred by lapse of time, the defendant is nevertheless entitled to resist the plaintiff's suit for ejectment and to defend his own possession. But Mr. Abhyankar contends that the case in Venkatesh Damodar v. Mallappa Bhimappa (C), is no longer good law in view of the decision in Nemtulla's case (D). There are certain observations in this case which go to support his contention. It may, however, be pointed out that we are

now concerned with the position as it arises after 1929. The doctrine of part performance has now obtained statutory recognition in Section 53-A of the Transfer of Property Act, and, according to the doctrine, the defendant has a right to protect his possession in a suit brought by the plaintiff to eject the defendant. If Mr. Abhyankar's argument was to prevail then the provisions of Section 53-A would be rendered nugatory. What Section 53-A seeks to do is to protect the possession of the defendant even where the defendant's right to obtain specific performance of the agreement has been barred by time. It may be that prior to 1929, the position was different, and that the position was different may be seen from the fact that the two decisions of this Court reported in *Venkatesh Damodar v. Mallappa Bhimappa (C)* and *Nemtulla v. Safiababu (D)* have taken opposite views. But we think that even if two opposing views are to be found in these two cases, the present case must be considered from the point of view of Section 53-A as enacted in the Transfer of Property Act in 1929 and in this connection we may refer to a decision of the Supreme Court reported in *Sheth Maneklal Mansukhbhai Vs. Hormusji Jamshedji Ginwalla and Sons*, . If it is true that in that case the present point was not; expressly raised; but the principle laid down in Section 53-A has been described by their Lordships of the Supreme Court in the following terms :

"Section 53-A of the Transfer of Property Act, 1832, is a partial importation into the statute law of India of the English doctrine of part performance. It furnishes a statutory defence to a person who has no registered title deed in his favour to maintain his possession if he can prove a written and signed contract in his favour and some action on his part in part performance of that contract."

It may be of interest to note that the agreement giving rise to the suit was of the year 1917 and the suit was commenced in the year 1933. It is clear that upon those dates, the defendant's suit to enforce specific performance of the agreement of 1917 would be barred by time. But their Lordships of the Supreme Court applied the principle enacted in S, 53-A to the ease of the defendant. Mr. Abhyankar says that this point was not expressly urged before the Supreme Court and was not decided by their Lordships. Mr. Abhyankar would seem to be right; but we may as well point out that if this was so obvious a point as Mr. Abhyankar seems to suggest, it is unthinkable that the learned Judges of the Supreme Court did not notice the importance of this point. Rather, the inference is that this point was not taken up because it is without substance.

9. For the above reasons, therefore, we must hold that the predecessor-in-title of defendant No. 3, i.e. defendant No. 2, is entitled to invoke the doctrine of part performance as enacted in Section 53-A of the Transfer of Property Act. If this is the legal position, the plaintiff's suit for possession must fail.

10. In our view, the case in *Tribhovan Har-govan v. Shankar Desai, (A)*, has, with respect, been wrongly decided and further, we must hold, consistent with that view, that in the present case the second defendant is entitled to invoke the doctrine of part performance.

11. The result, therefore, is that this appeal must succeed. The appeal will accordingly be allowed, the decree of the lower appellate Court will be set aside and that of the trial Court, dismissing the plaintiff's suit, will be restored.

12. As regards costs, Mr. Tarkunde argues that defendant No. 3 would be entitled to get the costs of the proceedings. He says that the plaintiff put forward a false claim. The plaintiff failed in the trial Court, but succeeded in appeal. Mr. Tarkunde is, in a sense, right. But, on the other hand, the defence which now prevails was not taken up in the pleadings of the third defendant. That, is a defence which it was open to defendant No. 3 to take and the defence was one which went to the root of the plaintiff's claim. On the other hand, therefore, the plaintiff did not put forward a justifiable claim; but, on the other hand, the third defendant did not put forward a contention which it was open to him to take. In the circumstances, we think that the fairest order to make would be that the parties should be left to bear their own costs. We, therefore, direct that the parties to the proceeding will bear their own costs throughout.

13. Appeal allowed.