

(1999) 10 BOM CK 0088

In the Bombay High Court

Case No : Second Appeal No. 205 of 1984

Narayan Bapuji Dhotre deceased through legal
representatives and others

APPELLANT

Vs

Rambhau Namdeo Gajre

RESPONDENT

Date of Decision : 07-10-1999

Acts Referred:

Transfer of Property Act, 1882 — Section 53

Citation : (2000) 1 ALLMR 385 : (2000) 2 BomCR 133 : (2000) 1 BOMLR 483 :
(2000) 1 MhLj 495

Hon'ble Judges : J.A. Patil, J

Bench : Single Bench

Advocate : B.G. Deshpande, for the Appellant; Naresh Patil for S.N. Loya, for
the Respondent

Judgement

J.A. Patil, J.—This appeal arises out of the judgment and decree dated 8-8-1984 passed in Civil Appeal No. 71 of 1981 by the District Judge, Jalna reversing the judgment and decree dated 31-7-1979 passed in Regular Civil Suit No. 184 of 1974 by the Joint Civil Judge, Junior Division, Jalna. The appellant is the original plaintiff and the respondent is the original defendant.

2. The property in dispute is an agricultural land bearing Sy. No. 94 admeasuring 18 acres and 23 gunthas situated at village Jambwadi Taluka Jalna. According to the plaintiff he is the owner of the suit-land which is his self-acquired property. The plaintiff averred that his brother had filed Special Civil Suit No. 20 of 1962 for partition and possession of the ancestral land of the family and in that suit the suit-land along with other lands were left out to the share of the plaintiff. According to the plaintiff, he was in possession of the suit land. However, the defendant having absolutely no right wrongfully dispossessed him of the suit land in April 1965. The plaintiff, therefore, filed a suit for possession in forma pauperism on 5-1-1973.

3. The defendant resisted the suit contending, inter-alia, that under an

agreement of sale dated 16-6-1961 the plaintiff and his brother Manohar agreed to sell the suit land to one Pishorilal Punjabi and put him in possession on the same day. The defendant further averred that the said Pishorilal executed an agreement of sale in favour of the defendant on 1-9-1961 and agreed to sell the suit land and other lands. The defendant claims to have come in possession of the suit land on the basis of the agreement of sale dated 1-9-1961. The defendant contended that his possession of the suit land, therefore, deserves to be protected as per the doctrine of part performance.

4. The learned Civil Judge, who tried the suit, upon consideration of the evidence on record, came to the conclusion that a mere contract of sale is incapable of creating any right or title in favour of the transferee. Therefore, according to him, no right or interest was created in favour of Pishorilal by virtue of the agreement of sale dated 16-6-1961. The learned Civil Judge held that the plaintiff's title to the suit land was subsisting and that the suit was filed within the period of limitation with the result that there was no question of any extinguishment of the plaintiff's title. The learned Civil Judge further pointed out that it was highly improbable that the defendant had no knowledge about the pendency of the suit between the plaintiff and his brother and Pishorilal. He held that the defendant had failed to exercise proper care before entering into an agreement of sale with Pishorilal. The learned Judge further held that it was not open to the defendant to take defence u/s 53-A of the Transfer of Property Act. In this view of the matter, the learned Judge proceeded to pass a decree of possession in favour of the plaintiff.

5. The defendant carried an appeal to the District Court and the learned District Judge differing with the learned trial Judge came to the conclusion that the defendant had acquired an equitable or possessory title to the suit land on the basis of an agreement of sale executed in his favour by Pishorilal and that, therefore, the defendant was entitled to have protection of the provisions of section 53-A of the Transfer of Property Act. In this view of the matter, the learned District Judge allowed the defendant's appeal and dismissed the plaintiff's suit with costs. It is against this order that the plaintiff has filed the present appeal.

6. The present appeal was admitted on 21-11-1984 as Grounds No. 7, 11 and 19 stated in the appeal memo were found to involve substantial questions of law. I have gone through the said grounds mentioned in the appeal memo and I find that they are not precise since they also contain statements of some facts. However, on consideration of the said 3 grounds, the only substantial question of law which arises in this appeal for determination is whether the defendant, who is in possession of the suit land on the basis of an agreement of sale dated 1-9-1961 executed by Pishorilal Punjabi, who himself, in turn, had come in possession of the suit land on the basis of a similar agreement dated 16-6-1961 executed by the plaintiff, can claim benefit of the equitable doctrine of part performance as stated in section 53-A of the Transfer of Property Act to protect

his possession. I have heard Shri B.G. Deshpande, learned advocate for the appellant-plaintiff and Shri Naresh Patil, learned advocate for the respondent-defendant. Shri Deshpande submitted before me that Pishorilal had no title to the suit land which he could transfer to the defendant. He further submitted that the equitable doctrine of part performance cannot be availed of by the defendant who is not the plaintiff's transferee. Shri Naresh Patil, learned advocate for the respondent-defendant, supported the judgment and decree passed by the District Court and submitted that the defendant came in possession of the suit land long back in September 1961 but even then the plaintiff kept quiet for 11 years. According to Shri Patil, the defendant is a person claiming under the transferee Pishorilal and, therefore, he is entitled to protect his possession u/s 53-A of the Transfer of Property Act.

7. It may be noted that the doctrine of part performance as stated in section 53-A of the Transfer of Property Act is an equitable doctrine which create a bar of estoppel in favour of the transferee against the transferor. It so happens many a times that the transferee in part performance of the contract takes possession of the property and he is willing to perform his part to the contract. However, the transfer or for some reason or the other does not complete the transaction by executing a registered deed in favour of the transferee which is required under the law. On the contrary, he tries to get back possession of the property. In such a case, it would be unfair to allow the transferor to take advantage of his own fault and thereby evict the transferee from the property. The doctrine of part performance aims at protecting the possession of such transferee provided certain conditions contemplated by section 53-A are fulfilled. These conditions are : i) that the transfer must be for consideration of an Immovable property ; ii) that such contract must be signed by the transferor or any persons on his behalf ; iii) that the terms of such contract can be with reasonable certainty ascertained to constitute the transfer ; iv) that the transferee in part performance has taken possession of the property or any part thereof or being already in possession continues in possession in part performance of the contract and has done some act in furtherance of the contract. The further condition, which is required to be fulfilled, is that the transferee has performed or is willing to perform his part of contract. If these conditions are fulfilled then in a given case there is an equity in favour of the transferee who can protect his possession against the transferor even though the contract of transfer, though required to be registered has not been registered. In such a situation section 53-A states, -

"The transferor or any person claiming under him shall be debarred from enforcing against 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."

8. The question, which requires to be considered, is whether this doctrine of part performance can be availed of by the defendant with whom the plaintiff never made any agreement of sale. As held by both the courts below the agreement of

sale made by the plaintiff is with Pishorilal. Although Pishorilal appears to have paid to the plaintiff the entire amount of consideration still a registered sale deed was never executed in his favour by the plaintiff. Pishorilal also did not take any action against the plaintiff for specific performance of contract to obtain a registered sale deed in respect of the suit land. As already pointed out, the agreement of sale in favour of Pishorilal was executed by the plaintiff on 16-6-1961. Both the courts below have held that Pishorilal took possession of the suit land on the basis of the said agreement of sale. Thereafter, within a period of 2. 1/2 months Pishorilal executed a similar agreement of sale dated 1-9-1961 in favour of the defendant and put him in possession of the suit land. What right did Pishorilal have to agree to sell the suit land to the defendant when he was not owner thereof? What care and precaution were taken by the defendant to ascertain the title of Pishorilal to the suit land before entering into transaction with him? There is no answer to these questions by the defendant. Any way the defendant has been in possession of the suit land for about 11 years prior to the filing of the suit by the plaintiff.

9. There was no agreement between the plaintiff and the defendant in connection with the suit land. The doctrine of part performance stated in section 53-A could have been availed of by Pishorilal against the plaintiff subject of course to the fulfilment of the conditions mentioned above. However, in my opinion, the same cannot be availed of by the defendant against the plaintiff with whom he had no privity of contract. The defendant is a third party and he has come in possession of the suit land on the basis of an agreement of sale executed not by the plaintiff but by Pishorilal. Therefore, the privity of contract is between Pishorilal and the defendant but not between the plaintiff and the defendant. The doctrine of part performance as contemplated by section 53-A can be availed of by the transferee and any person claiming under him, against the transferor or any person claiming under him. The defendant is not a transferee within the meaning of section 53-A. Therefore, he does not have the equitable right to protect his possession as against the transferor i.e. the plaintiff. In this connection my view is fortified by the decision in *Vazir v. Mathura* AIR 1927 Audh 482, wherein it was held that the doctrine of part performance is one of equitable estoppel and the third party not being privity to the transaction on which estoppel rests can take no advantage of it. The learned District Judge has ignored this material aspect of the case and erred in holding that the defendant having possessory or equitable title to the suit land through Pishorilal is entitled to have benefit of section 53-A. It is not possible to accept this view in view of the legal position stated above.

10. The plaintiff being the owner of the suit land, is entitled to recover possession thereof. His title to the suit land is very much subsisting and his right to recover possession is not barred by any provision of law. In view of this position, the appeal will have to be allowed.

11. In the result, the appeal is allowed with costs. The judgment and decree passed by the District Judge, Jalna in Civil Appeal No. 71 of 1981 is hereby set

aside and the judgment and decree dated 31-7-1979 passed by the Joint Civil Judge, Junior Division, Jalna in Regular Civil Suit No. 184 of 1974 is hereby restored.

12. Appeal allowed.