

(1998) 03 BOM CK 0040

In the Bombay High Court

Case No : Second Appeal No. 21 of 1994

Shri Shaikh Chiraguiddin

APPELLANT

Vs

Shri Krishna Bablo Gaonkar and others

RESPONDENT

Date of Decision : 12-03-1998

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 9
Specific Relief Act, 1963 — Section 37
Transfer of Property Act, 1882 — Section 53, 7

Citation : (1998) 5 BomCR 707

Hon'ble Judges : R.K. Batta, J

Bench : Single Bench

Advocate : V. Menezes, for the Appellant; R.G. Ramani, for the Respondent

Judgement

R.K. Batta, J.—The appellant (plaintiff in the suit and hereinafter referred as plaintiff) had filed a suit for permanent injunction seeking to restrain the defendants/respondents (defendants in the suit and hereinafter referred as defendants) from interfering in the possession of the plaintiff in respect of the suit paddy fields surveyed under Nos. 15/7, 17/1 and 14/5 situated at Ambelim, Sattari, Goa. The case of the plaintiff, in brief, is that the said paddy fields were granted to one Arjun Yesso Gaonkar on or about 2-10-1899 by Alvara No, 199 as a provisional grant of aforementioned by the then erstwhile Portuguese Government and upon his death the said Arjun Yesso Gaonkar had transferred the said grant in favour of his daughter Kashi Mahadev Siddhikarin and that thereafter, the said Kashi Mahadev Siddhikarin and her son Shankar Mahadev Siddikar by agreement of sale dated 8-8-1962 transferred all their rights and possession in the suit paddy fields in favour of the plaintiff for the sum of Rs. 3,000/-, out of which Rs. 2500/- was paid at the time of execution of the said agreement and the balance was agreed to be paid at the time of execution of the sale deed. The said Kashi and her son did not execute the sale deed on account of the fact that they had not acquired final title. In the survey records the name of the Government figured as co-occupant in respect of the said paddy fields as

also that of Smt. Kashi Mahadev Siddhikarin as well as the name of the plaintiff who is said to be in actual possession of the said paddy fields from the year 1962. In the year 1971 one Govind Gaudo tried to disturb the possession of the plaintiff and the plaintiff filed a suit before the Mamlatdar, Sattari who restrained the said Govind Gaudo by his Order dated 19-4-1971 from disturbing the possession of the plaintiff. The plaintiff claims to be in continuous possession of the said paddy fields from the year 1962 and it is alleged that on 4-11-1985 defendants No. 1 to 4 interfered in Survey No. 14/5 with the possession of the plaintiff. The said defendants also attempted to disturb the possession of the plaintiff of the paddy fields under Survey Nos. 15/7 and 17/1. On these averments the plaintiff filed a suit for permanent injunction.

2. The case of the defendants No. 1, 2 and 5 who contested the suit is that Arjun Yesso Gaonkar in whose favour the grant was made was the head of Hindu undivided family and that defendants No. 1 and 2 are successors in interest of the original members of the said family as a result of which they are co-owners of the paddy fields which were always enjoyed in common by all the co-owners. They also took the plea that the agreement between Kashi and the plaintiff is null and void since the said Kashi and her son Shankar could not have agreed to sell and transfer the paddy fields which were belonging to the joint family. It was also urged that the said agreement was null and void because no private sale of the lands granted under Alvara by the erstwhile Portuguese Government was permissible in law. The defendants had also filed counter claim seeking declaration that the said agreement of sale dated 8-8-62 was illegal, null and void and that the plaintiff be directed to deliver peaceful possession of the suit paddy fields to the defendants.

3. The trial Court after assessing the evidence produced by the parties, dismissed the plaintiff's suit and counter claim of the defendants was allowed declaring that the agreement dated 8-8-62 executed by Kashi and her son Shankar in favour of the plaintiff is null and void and not binding on the said defendants. This order of the Trial Court was challenged before the District Court, Panaji, Goa. The District Court dismissed the appeal filed by the plaintiff as well as rejected the counter claim of the defendants.

4. The plaintiff has come in Second Appeal before this Court which was admitted on the following substantial questions of law :-

a) Whether the First Appellate Court misconstrued the provisions of section 53-A of the Transfer of Property Act, 1882.

b) Whether the First Appellate Court was justified in dismissing the suit despite the facts that :

(i) there was an agreement of sale in writing to transfer for consideration the suit property.

(ii) a major part of the consideration was paid by the transferee.

- (iii) possession of the suit property was taken by the transferee;
 - (iv) the transferee continued to be in possession of the suit property and
 - (v) the transferee was willing to perform his part of the contract.
- c) Whether the First Appellate Court was justified in dismissing the suit for injunction on the ground that the appellant had no title in respect of the suit property as no sale deed was executed.
- d) Whether the First Appellate Court was justified in dismissing the suit holding that the appellant ought to have instituted a suit for specific performance of the agreement;
- e) Whether the First Appellate Court misconstrued the agreement for sale dated August 8, 1962.

No Appeal or Cross Objections has been filed by the defendants/respondents against the rejection of the counter claim by the District Court. The District Court was of the view that the plaintiff had not filed suit for specific performance of the agreement probably because such a suit if filed would be clearly time barred and the plaintiff could not come to the Court to protect his possession u/s 53-A of the Transfer of Property Act, 1882. It was also found that the plaintiff had failed to prove that he has performed or he is willing to perform his part of the contract by paying the balance amount and that the plaintiff had not yet acquired title to the suit paddy fields and they could get title to the suit property only if he obtained the sale deed and that the said agreement had lapsed after the period of two years from the date of its execution.

5. Learned Advocate Shri V. Menezes, appearing on behalf of the plaintiff, has urged before me, that in view of the Full Bench judgment of this Court in Mahadeo Nathuji Patil v. Surjabai Khushalchand Lakkad and others, Bom.1994(2) Mah. L.R. 230 there was no need to file a suit for specific performance and a suit for permanent injunction to protect the possession of the plaintiff could be filed by the transferee in possession in view of section 53-A of the Transfer of Property Act provided the essential requirements of section 53-A of the Act were complied. It was further pointed out that the plaintiff had been paying land tax, ground rent and that he was always prepared to perform his part of the contract and, as such, the courts below have erred in dismissing the plaintiff's suit. In support of this argument, on the question of readiness and willingness to perform the terms under the sale agreement, reliance is placed on a judgment of learned Single Judge of this Court in Dattu Sakham Khairnar @ Sutar and Another Vs. Punja Laxman Shinde, since deceased by his heirs, .

6. Learned Advocate Shri Ramani, on the other hand, urged before me that in transactions covered u/s 53-A of the Transfer of Property Act, it is necessary to find out whether the original transferor was competent to enter into such agreement; that section 7 of the Transfer of Property Act deals with persons competent to transfer and that the suit in question suffered from non-joinder of

necessary parties under Order 1, Rule 9 C.P.C. I have already pointed out that the defendants had, in fact, sought declaration by way of counter claim that the said sale agreement was knoll and void as Kashi and her son alone were not competent to enter into the said agreement and the defendants had also sought recovery of possession. The counter claim was granted by the trial Court but it was rejected by the Appellate Court against which no cross appeal or cross objections have been filed and, as such, the arguments which are advanced by learned Advocate Shri Ramani cannot be looked into.

7. In so far as the question of filing suit for specific performance is concerned, the controversy has been set at arrest by the Full Bench judgment of the Bombay High Court in Mahadeo Nathuji Patil v. Surjabai Lakkad (supra). There was difference of opinion between the two Benches of this Court reported in Nanasaheb Gujaba Bankar Vs. Appa Ganu Bankar and Others, and Adinath v. Policeman Housing Society 1991 Mh.L.J. 256. In Nanasaheb's case (supra) the view taken was that the vendee is entitled to resist the claim of eviction of a vendor even if vendee's claim for specific performance is barred by limitation. However, the view taken in Adinath's case (supra) was that once the remedy of acquiring title by a suit for specific performance of agreement of sale is lost to the defendants by lapse of time, equitable relief for protection of his possession of the suit property under the agreement of sale incorporated u/s 53-A of the Transfer of Property Act comes to an end. The question which was referred by the learned Single Judge who noticed the two view points in the said cases, is :

"Whether once the remedy of acquiring title by a suit for specific performance is lost to the vendee by lapse of time, right to protect his possession upon satisfying the conditions contained in section 53-A of the Transfer of Property Act comes to an end, and whether to protect his possession it is incumbent upon the vendee to take recourse to a suit for specific performance within the period of limitation prescribed for such a suit."

The Full Bench noticed that section 53-A of the Act partially incorporates the English Doctrine of part performance of contract and it is enacted to protect the possession of a transferee by debarring the transferor from enforcing against him and the persons claiming under him any right in respect of such property other than a right expressly provided by the terms of the contract, provided the transferee fulfils the essential requirements of the said section 53-A of the Act. If the above requirements are satisfied, section 53-A allows such protection of the transferee, notwithstanding the fact that the said contract is not registered although required to be registered or that when there is an instrument of transfer, the transfer has not been completed in the manner prescribed therefore by the law for time being in force. The Full Bench after relying upon a judgment of the Privy Council and judgment of the Apex Court, ruled that it is undisputed proposition that section 53-A of the Act provides for a defence to a transferee to protect his possession, if he satisfies the requirements of the said section. It confers no active title or right upon a transferee in possession under an

unregistered contract or instrument of transfer because such possession is protected not by creating any right of possession upon him as such but by creating disabilities in the transferor i.e., by debarring him from enforcing any right against such a transferee in possession except the right expressly conferred upon him under the contract. It was pointed out that the doctrine of part performance incorporated in section 53-A of the Act, thus provides for a defence to a transferee in possession it is described as a shield and not a sword. Section 53-A as it was introduced in the Act had provided greater measure of protection to transferees in India as against protection available to transferees in England taking into consideration ignorance of transferees in India. Thus the report of the Special Committee intended to grant special protection to the transferee in possession under an unregistered document, even after the expiry of the period of limitation for a suit for specific performance of contract to get a registered document of title in his favour upon the equitable consideration that the longer was the possession in part performance, higher were the equities in his favour and for the limited purpose of defending his possession in accordance with section 53-A of the Act the unregistered document affecting immovable property is made admissible in evidence. The Full Bench thus answered the reference as under :-

"For all the above foregoing reasons, our view is that the Statutory protection granted u/s 53-A of the Act to a transferee in possession to continue his possession under an unregistered contract or instrument of transfer is not lost by lapse of time to file the suit for specific performance of contract for acquiring title, if he satisfies the essential requirements of the said section 53-A of the Act, it is not incumbent upon to file such a suit within time to protect his possession after the lapse of time. The law is therefore, correctly laid down in Nana Saheb's case and not in Adinath's case."

8. In view of the proposition of law laid down by the Full Bench, there was no need or necessity for the plaintiff who is transferee in the case before me to have filed a suit for specific performance and the suit for protection of possession could be maintained by the plaintiff provided the conditions in section 53 of the Act had been complied with. The Appellate Court was, therefore, clearly in error in rejecting the claim of the plaintiff on this ground.

9. The other ground on which the Appellate Court had rejected the plaintiff's case is that the plaintiff had failed to prove that he has performed or is willing to perform his part of the contract by paying the balance amount of Rs. 500/-. In this respect, it has been pointed out by learned Advocate for the plaintiff that the plaintiff has been paying land tax and ground rent in relation to the suit paddy fields and that it was clearly averred in para 24 of the plaint that the plaintiff has performed and is willing to perform his part of the contract/agreement dated 8-8-1962 and that the execution of final sale deed had been kept in abeyance only due to the fault of the vendors and their successors who had not yet obtained final grant from the Government, due to which the sale deed could not

be executed. There is no dispute that the vendors and their successors have not been able to obtain any final grant, as a result of which the sale deed in question could not be executed until and unless the same had been obtained. The question of execution of the sale deed would thus not arise and if that is so, the question of balance payment of Rs. 500/- would also not arise since the same was to be paid at the time of execution of the sale deed. Moreover, as has been pointed by the learned Single Judge in *Dattu Sakharam Khairnar @ Sutar v. Punja Laxman Shinde* (supra) that the pleading of readiness and willingness as contemplated in section 16(c) of the Specific Relief Act cannot be construed hyper-technically overlooking the entirety of facts and circumstances relevant to the intention and conduct of the party concerned. The same principle, of course, obviously applies u/s 53-A in respect of the transferee having performed or willing to perform his part of the contract.

10. Taking an overall view of the evidence on record as well as the facts and circumstances of the case it has to be concluded that the plaintiff had performed his part of the contract and was ready and willing to perform his part of the contract and it was primarily on account of default of the vendors and their successors that the sale deed in question could not be executed. In these circumstances, when the possession of the plaintiff was interfered with by the successors of the vendors, the plaintiff was very much entitled to protect his possession by filing a suit for permanent injunction. In the facts and circumstances of the case, the plaintiff is entitled to the relief sought by him in the suit and the courts below had erred in refusing the said relief to the plaintiff. In view of the same, I hold that the First Appellate Court was not justified in dismissing the appeal and substantial questions of law (a) and (e) framed in the suit are answered in the affirmative and questions (b), (c) and (d) are answered in the negative.

11. For the aforesaid reasons, the appeal is allowed. The judgment of the trial Court as well as the Appellate Court insofar as it relates to the reliefs sought by the plaintiff are required to be set aside. No interference was sought for in respect of the rejection of the counter claim as no cross appeal or cross objections were filed. The plaintiff's suit is thus decreed and the defendants, their agents, representatives, labourers namely members and any person acting on their behalf are restrained by way of permanent injunction from interfering with the possession of the plaintiff in the said paddy fields surveyed under Nos. 15/7, 17/1 and 14/5 situated at Ambelim, Sattari, Goa.

12. The appeal is accordingly allowed with no order as to costs.

13. Appeal allowed.