

(2016) 08 BOM CK 0167
In the Bombay High Court
Case No : Second Appeal No. 160 of 2003

Smt. Manda Purushottam Zatte	Vs	APPELLANT
Chandrakumar Parasmalji Chordiya		RESPONDENT

Date of Decision : 05-08-2016

Acts Referred:

Specific Relief Act, 1963 — Section 41(h)
Transfer of Property Act, 1882 — Section 53A

Citation : (2017) 1 BCR 126

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

Bench : Single Bench

Advocate : Shri M.P. Khajanchi, Advocate, for the Respondent No. 1; Shri Abdul Subhan, Advocate, holding for Shri Firdos Mirza, Advocate, for the Appellant; Shri Anoop J. Gilda, Advocate as Amicus Curiae, for the Respondent

Final Decision : Allowed

Judgement

R.K. Deshpande, J.(Oral) - The respondent No.1 Chandrakumar Parasmalji Chordiya is the original plaintiff and he had filed Regular Civil Suit No.93 of 1995 claiming the reliefs as under :

"a) Defendant, his family members, his agents, his servants, or any other person on their behalf be restrained permanently from making any interference and obstruction to the enjoyment and cultivation over the field Survey No.16/3; Gat No.54; Area 2 Hec, 57 Are of village Nilapur, Tq. Wani, Distt. Yavatmal by way of permanent injunction.

b) Defendants his family members, their agents, their servants, or any other person on their behalf be restrained perpetually from making any interference and obstruction to the cultivation and enjoyment over the field Survey No.16/3; Gat No.54; Area 2 Hec. 57 Are of village Nilapur perpetual injunction. 4-8-2016:

c) Any other suitable relief for plaintiff is found entitled may be granted to him.

d) Cost of the suit be saddled on the defendant.

A decree be drawn accordingly."

In para 2 of the plaint, it is averred that the defendant agreed to sell the suit property to the plaintiff for a total consideration of Rs. 60,000/- on by executing the Isarchitthi and an earnest amount of Rs. 45,000/- was paid. The balance amount of Rs. 15,000/- was to be paid at the time of execution of the sale-deed on or before 31-3-1995. According to the averments made in para 3, the balance amount of Rs. 15,000/- was paid on and the sale-deed was executed on that date by the defendant No.1, which was registered on 14-11-1994 before the Sub-Registrar, Wani. The specific averment is that the possession of the suit property was delivered to the plaintiff on the date of execution of the earnest note on 2-9-1994, and since then the plaintiff is in continuous cultivating possession of the suit property. The plaintiff alleged that on 15-6-1995, the defendant No.2 tried to obstruct his possession and, therefore, he was constrained to file the suit on 17-6-1995 after lodging a police complaint, on 15-6-1995 vide Sana Entry No.28/95. It is also alleged that the defendant issued notice dated 13-6-1995 to challenge the sale-deed.

2. The defendant No.1 neither did file the written statement nor did enter the witness-box. The defendant No.2, who is the wife of the defendant No.1, opposed the claim and denied the agreement to sell as well as the execution of sale-deed and payment of consideration. The defendant No.2 specifically denied that the suit property was delivered to the plaintiff at any point of time and asserted that she has been in continuous cultivating possession of the suit property. She has urged that the defendant No.1, who is her husband, was addicted to vices and gambling and he was indebted to the Society-Wani Taluka Kharedi Vikri Samiti Ltd. for misappropriating the amount of the said Society. It is also the stand taken that the defendants have one son and two daughters and the property in question was the ancestral property in the hands of the defendant No.1, who was not competent to transfer it alone.

3. The plaintiff entered the witness-box and examined himself, whereas the defendant No.2 entered the witness-box and also examined DW 1 Mangal Arjun Bhagade, an attesting witness to the agreement/Isarchitthi dated 2-9-1994, and another witness DW 3 Anandrao Govindrao Matte, an employee in the said Society.

4. The Trial Court records the finding that the sale-deed is not filed on record and no evidence is led by the plaintiff to establish that the sale-deed was executed, the mutation entries in the name of the plaintiff are not on record, and in such a situation, the plaintiff should have filed the suit for declaration and the suit founded purely to claim the protection under Section 53A of the Transfer of Property Act, 1882 was not maintainable in view of the bar to grant injunction created under Section 41(h) of the Specific Relief Act, 1963. The Trial Court also noted the fact that out of two attesting witnesses to the Isarchitthi, only one attesting witness was examined by the defendant No.2, who has stated that only an amount of Rs. 20,000/- was paid in his presence to the defendant No.1 by the

plaintiff and he does not support the case of the plaintiff of payment of earnest money of Rs. 45,000/on the date of execution of Isarchitthi. The Court also takes note of the fact that another attesting witness-Ganpat Ramji Wankar was not examined by the plaintiff, and in the notice at Exhibit 65 dated 13-6-1995 issued by the defendant No.1 to the plaintiff, it is alleged that the transaction was a money-lending transaction and it was not to be acted upon. The Court records the finding that the possession of the land was never delivered to the plaintiff, nor it was ever intended to be delivered, and the interest note and sale-deed were to serve merely as a mask to hide real transaction of money lending.

5. The lower Appellate Court has reversed the findings recorded by the Trial Court. It holds that the certified copy of the sale-deed is produced on record. The application at Exhibit 66 filed on 29-7-2002 before the Trial Court, which was not objected, shows that the original sale-deed was not available in the office of Sub-Registrar, Wani. In such a situation, it was not necessary to follow the procedure prescribed under Section 65 of the Indian Evidence Act, 1872 to obtain a permission to lead secondary evidence, and obtaining the original was beyond the control of the party. The lower Appellate Court also notes that the executant, who is the defendant No.1, remained ex parte throughout the proceedings, and once the document is registered, there is a presumption of execution, and there is no need to prove the contents of the document. The Court noted that the defendant No.1 has admitted the execution of the sale-deed, but he has raised a plea that it was a nominal sale-deed arising out of the money lending transaction, as is apparent from the notice at Exhibit 65. The defendant No.1 did not step into the witness-box and, therefore, the adverse inference was drawn by the Appellate Court. The lower Appellate Court further proceeds to hold that the defendant No.2 had no locus to object to the transaction in question and it was not necessary for the plaintiff to have filed a suit for specific performance of contract, and the bar under Section 41(h) of the Specific Relief Act did not operate. The Court further holds that the property in question belonging to Dattu would devolve upon the defendant No.1 and thereby it would become the self-acquired property of the defendant No.1 and the succession would open only upon his death. It further holds that even if the property is to be treated as joint family property, the defendant No.1 being Karta, was entitled to alienate the same for legal necessity.

6. On 23-9-2005, this Court passed an order framing the substantial questions of law as under :

"(i) Whether the lower appellate Court was right in allowing the secondary evidence in respect of the sale-deed dated 1.11.1994?

(ii) Assuming that the secondary evidence was admissible, whether the lower appellate Court was right in holding that the sale-deed was proved in accordance with law?"

7. In the decision of the Apex Court in the case of Anathula Sudhakar v. P. Buchi

Reddy (Dead) by LRs. and others, reported in (2008) 4 SCC 594, the Apex Court has stated the questions, which arose for its determination in the appeal, in para 12 of the decision, which are reproduced below :

"(i) What is the scope of a suit for prohibitory injunction relating to immovable property?

(ii) Whether on the facts, the plaintiffs ought to have filed a suit for declaration of title and injunction?

(iii) Whether the High Court, in a second appeal under Section 100 CPC, could examine the factual question of title which was not the subject-matter of any issue and based on a finding thereon, reverse the decision of the first appellate court?

(iv) What is the appropriate decision?"

In para 13.3, the Apex Court has held as under :

"13.3. Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction. Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession and injunction."

In para 21 of the said decision, the Apex Court has summarized the position in regard to suits for prohibitory injunction relating to immovable property, and clauses (c) and (d) being relevant are reproduced below :

"(c) But a finding on title cannot be recorded in a suit for injunction, unless there are necessary pleadings and appropriate issue regarding title (either specific, or implied as notice in *Annaimuthu Thevar*). Where the averments regarding title are absent in a plaint and where there is no issue relating to title, the court will not investigate or examine or render a finding on a question of title, in a suit for injunction. Even where there are necessary pleadings and issue, if the matter involves complicated questions of fact and law relating to title, the court will relegate the parties to the remedy by way of comprehensive suits for declaration of title, instead of deciding the issue in a suit for mere injunction.

(d) Where there are necessary pleadings regarding title, and appropriate issue relating to title on which parties lead evidence, if the matter involved is simple and straightforward, the court may decide upon the issue regarding title, even in a suit for injunction. But such cases, are the exception to the normal rule that question of title will not be decided in suits for injunction. But persons having clear title and possession suing for injunction, should not be driven to the costlier and more cumbersome remedy of a suit for declaration, merely because some meddler vexatiously or wrongfully makes a claim or tries to encroach upon his

property. The court should use its discretion carefully to identify cases where it will enquire into title and cases where it will refer to the plaintiff to a more comprehensive declaratory suit, depending upon the facts of the case."

Keeping in view the aforesaid principles of law laid down by the Apex Court, the facts of the present case will have to be looked into.

8. The suit is simpliciter for grant of permanent injunction restraining the defendants from interfering with the possession of the suit property, filed on the basis of threat said to be received by the plaintiff on 15-6-1995 from the defendant No.2. It is not a suit for declaration of title of the plaintiff over the suit property. Perusal of the findings of the lower Appellate Court indicate that the property belonged to one Dattu and it was an ancestral property in the hands of the defendant No.1. The defendant No.2 is the wife of the defendant No.1, and on the date of execution of the Isarchitthi on 29-1-994, they had one son and two daughters. Having recorded such findings, the aspect of locus of the defendant No.2 to defend the title on behalf of minor son, loses its significance. There is no finding on the legal necessity. The original sale-deed said to have been executed by the defendant No.1 on 11-11-994 and registered on 14-11-1994, is not placed on the record of the Courts below. There, however, appears to be a certified copy of the sale-deed placed on record and marked as Article-C. The lower Appellate Court records the finding that the original sale-deed is not available in the office of Sub-Registrar, Wani, where it was registered. The plaintiff alleging to be the owner of the suit property is expected to be in possession of original sale-deed. Assuming that the execution of sale-deed is proved, the evidence on the basis of plea that it was a money lending transaction and not to be acted upon becomes admissible. There are several such aspects, which were required to be considered.

9. In view of the afore stated factual position, it was not a duly constituted suit to claim an order of permanent injunction against the defendants on the basis of title, which was not a matter of issue. The question as to whether it was a nominal sale-deed executed by way of security of the money lending transaction, and the question of authority of the defendant No.1 to execute the sale-deed in respect of the ancestral property, in which the other coparcener has a share, could be gone into in a suit for title. The issue regarding title, in the facts and circumstances of this case, involves adjudication of complicated facts and law and the parties were required to be relegated to the remedy of filing a comprehensive suit for declaration of title, instead of deciding the issue in a simpliciter suit for permanent injunction. In view of this, both the questions of law framed by this Court for adjudication in the present second appeal would not arise for consideration. However, this would not mean that the second appeal is required to be dismissed, and if this Court is satisfied on the existence of any other substantial question of law in the present appeal, the same can be framed and answered at the time of final hearing.

10. In view of the aforesaid findings recorded by this Court, the facts and

circumstances of the present case require this Court to frame the following substantial questions of law :

1. Whether the plaintiff was entitled to claim an order of permanent injunction restraining the defendants from interfering with his possession solely on the basis of the clause of possession contained in the earnest note dated 29-1-1994 at Exhibit 74?, and

2. Whether the plaintiff was entitled to permanent injunction in the facts and circumstances of this case?

11. Put up this matter tomorrow, i.e. 5-8-2016, for further hearing so as to afford the learned counsels an opportunity to address this Court on the aforesaid substantial questions of law along with the authorities in support of their rival submissions.

12. Heard the learned counsels on the aforesaid substantial questions of law at length.

13. Both the substantial questions of law framed can be decided together. Shri Khajanchi, the learned counsel appearing for the respondent No.1/plaintiff, has placed heavy reliance upon the Full Bench decision of this Court in the case of *Sadashiv Chander Bhamgare v. Eknath Pandharinath Nangude*, reported in 2004(3) Mh.L.J. 1131, 5-8-2016. The reference to the Full Bench was for the decision of the question as to whether a suit simpliciter for injunction which is filed seeking protection under Section 53A of the Transfer of Property Act is maintainable. The Court has answered the said issue holding that a proposed transferee in possession can institute a suit for protection of his possession, which is threatened. However, while deciding the question, the Court holds in para 7 of the decision that it proceeds on the footing that the conditions specified under Section 53A of the Transfer of Property Act have been fulfilled or complied with, viz. that (i) there must be a contract for transfer for consideration of any immovable property; (ii) the contract must be in writing, signed by the transferor, or by someone on his behalf; (iii) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained; (iv) the transferee must in part-performance of the contract take possession of the property, or of any part thereof; (v) the transferee must have done some act in furtherance of the contract; and (vi) the transferee must have performed or be willing to perform his part of the contract. It is only if such conditions are fulfilled or complied with, that would make the plaintiff entitled to claim an order of permanent injunction in a simpliciter suit filed to seek protection of his possession obtained under Section 53A of the Transfer of Property Act, is the ratio of the decision. Hence, the substantial question of law at serial No.(i) is answered in the affirmative subject to the evidence on record regarding fulfilment of the aforesaid conditions in the facts and circumstances of the case.

14. Except the document, i.e. the earnest note dated 2-9-1994 at Exhibit 74, there is no other documentary evidence available on record to establish the

possession of the plaintiff over the suit property. The suit property consists of agricultural field, and it is not the case that the fencing was erected to protect the possession. Even if it is accepted that such a document is proved, there is nothing on record to show that the plaintiff was in cultivating possession of the suit property and his name was entered in the 7/12 extract, evidencing the fact. It is not the claim of the plaintiff for specific performance of contract or for protection of possession with a plea that he is ready and willing to perform his part of contract. Hence, two conditions under Section 53A of the Transfer of Property Act, have not been fulfilled in the present case. Merely because the possession of the plaintiff is established, that by itself is not enough to grant protection.

15. In the decision of the Apex Court in the case of Nanjegowda and another v. Gangamma and others, reported in (2011) 3 SCC 232, it has been held that the satisfaction of conditions under Section 53A of the Transfer of Property Act is cumulative and additive to invoke the said provision, and non-satisfaction of even one condition would deny the protection under Section 53A of the said Act. It is, therefore, held that the plaintiff is not entitled to protection of possession in the facts and circumstances of this case. The substantial question of law at serial No.(i) is answered accordingly.

16. Thus, on both the counts, viz. (i) that all the conditions specified under Section 53A of the Transfer of Property Act have not been fulfilled by the plaintiff with necessary pleadings and proof; and (ii) that the adjudication of issue regarding title in the present case involves complicated questions of fact and law, the lower Appellate Court, therefore, could not have decreed the suit simpliciter for grant of permanent injunction by disturbing the findings of fact recorded by the Trial Court. The substantial question of law at serial No.(ii) is answered holding that the plaintiff was not entitled to grant of permanent injunction in the facts and circumstances of the case.

17. In the result, the second appeal is allowed. The judgment and order dated 20-1-2003 passed by the lower Appellate Court in Regular Civil Appeal No.224 of 2002, is hereby quashed and set aside. The decree passed by the Trial Court in Regular Civil Suit No.93 of 2005 regarding dismissal of suit on 31-10-2002, is hereby restored. No order as to costs.

18. It is made clear that the parties shall be at liberty to work out their rights over the suit property, including the title, by filing independent proceedings, and none of the findings recorded by the Trial Court on merits of the matter shall come in their way.