

(1986) 01 BOM CK 0031
In the Bombay High Court
Case No : First Appeal No. 810 of 1980

Yeshwantrao Martandrao Mukane since deceased through his legal representatives and Another APPELLANT

Vs

Khushal K. Bhatia RESPONDENT

Date of Decision : 09-01-1986

Acts Referred:

Specific Relief Act, 1963 — Section 14, 36, 37, 38, 41
Transfer of Property Act, 1882 — Section 53(A)

Citation : (1986) 1 BomCR 533

Hon'ble Judges : R.R. Jahagirdar, J;B.A. Masodkar, J

Bench : Division Bench

Advocate : K.J. Abhyankar and A.Y. Sakhare, No. 1 and M.A. Rane, No. 2, for the Appellant; M.G. Kikla, for the Respondent

Final Decision : Allowed

Judgement

B.A. Masodkar, J.—This appeal by original defendant No. 1 (since deceased and represented by his heirs) and original defendant No. 2 questions the decree made for permanent injunction restraining them from disturbing the possession of the plaintiff as far as the property "Sadanand Palace", outhouses and the land surrounding the said Palace otherwise than by due process of law.

2. Certain positions are not in dispute. The present suit was filed by the respondent-original plaintiff seeking the relief of injunction with regard to the said Palace as well as the agricultural lands numbering about eight, all situated at Ashagad, Mouje Aswe, Taluka Dahanu, District Thane. Although at the hearing of the appeal, the learned Counsel for the respondent-plaintiff submitted that the plaintiff pleaded any other type of legal possession, it is obvious from the plaint allegations that the plaintiff came to the Court alleging that there was an agreement for sale between the plaintiff and original defendant No. 1 (the original owner of the property), which was recorded on April 25, 1967. Under that agreement, it was the case of the plaintiff, the total considerations was Rs.

80,000/- and he paid earnest amount of Rs. 10,000/-. Pursuant to it and in part performance thereof, he was put in possession and thus has an equitable title u/s 53-A of the Transfer of Property Act, 1882. As, however, original defendant No. 1 backed out of the said agreement and threatened to dispossess the plaintiff, the suit was filed. The plaintiff did not seek any relief to enforce that agreement of sale although by the time the suit was filed ten years had gone-by. The defence has been one of denial of the said agreement as well as the character of the possession and an assertion, in that the plaintiff was allowed permissively to occupy the premises and particularly for management of the properties under a Power of Attorney and on the date of the suit was not in possession. As even that Power of Attorney was duly, terminated, the original defendant No. 1, being the rightful owner on whose behalf the plaintiff was in possession, the defendant remains in possession and no relief of injunction could be decreed. It was also pleaded by original defendant No. 1 that he was a member of the Scheduled Tribe and thus the agreement, even if there be any, was not enforceable.

3. The last aspect of the pleading of original defendant No. 1 is a part of Issue No. 9 and the trial Court has answered the said issue in the negative by giving reasons in paragraph 13 of the judgment. Strictly speaking and as a matter of law, it must be observed that the issue did not arise nor could the same be answered in the manner as is done, because the plaintiff has admitted in his evidence that original defendant No. 1 belonged to the Scheduled Tribe.

4. Coming to the rest of the controversy, the trial Court held that the possession of the properties for which injunction is granted was referable to the completed agreement for sale and that the plaintiff should be protected by extending the relief of permanent injunction.

5. In this Court, the debate surrounds that decree passed for injunction.

6. Before we appreciate the debated question, we will set out the chronology till the suit was filed which has a bearing on the eventual decision in that behalf. It is not in dispute that the property known as "Sadanand Palace" and the surrounding area as well as the agricultural properties, which were mentioned in the suit, are the properties owned and as such possessed by original defendant No. 1. The plaintiff is not the titleholder of any of the properties. Original defendant No. 1 styles himself to be the erstwhile Maharaja. On April 10, 1967 (Exh. 40), the plaintiff purported to propose to original defendant No. 1 that all those properties be sold to him for a consideration of Rs. 80,000/-. The letter states that the sale be completed as soon as possible and that upon completion of the sale the total consideration would be payable. There is no mention in the letter, with regard to the possession of the properties. The original defendant No. 1 wrote back on April 25, 1967 (Exh. 41), stating that after consultation with Advocate Karandikar, he was sending some terms for the purpose of eventually preparing the agreement for sale through Advocate Karandikar. The letters sets out those terms, inter alia, obliging the parties to approach the Assistant Collector, Dahanu Prant, and fixing the time for completion of the sale after

obtaining the due permission of the Assistant Collector. It further requires both the parties to agree that the matter should be dealt with by Advocate Karandikar, who will prepare the agreement, etc. and his fees will be met equally by both the parties. It further provides that the earnest money of Rs. 10,000/- be paid to the seller. It does show that the total consideration was accepted to be Rs 80,000/- and the demand was for Rs. 10,000/- as the earnest money. It is significant that the letter is silent with regard to possession of the properties. There is at Exhibit 42 a receipt of May 10, 1967, showing that Rs. 10,000/- were paid by the plaintiff to original defendant No. 1, who acknowledged the said receipt of the amount of earnest money with regard to the agreement for sale of the properties at Ashagad on the terms mentioned in his letter which is at Exhibit 41. Thus, the communications between the plaintiff and original defendant No. 1 go to show that the parties were at ad idem with regard to the agreement for sale of the properties at Ashagad belonging to original defendant No. 1 and that those properties were agreed to be sold for a sum of Rs. 80,000/- and original defendant No. 1 received Rs. 10,000/- as the earnest money. A detailed agreement was agreed, as is evident from Exhibit 42, to be drafted by Advocate Karandikar. That detailed agreement obviously was not drawn, nor were any steps taken to get it prepared as is set out in Exhibit 41. In none of these documents, there is any reference as to the state of possession pursuant to this agreement, and inferentially, the title-holder will be deemed to be in possession and will continue to be in possession unless it is satisfactorily shown that pursuant to and under the agreement the plaintiff was put in possession of these properties.

7. For this purpose, the plaintiff has relied on the events that occurred and are evidenced by the communications at Exhibits 43 and 44, the first of which is from the plaintiff to defendant No. 1 containing a request to permit him to occupy the bungalow at Ashagad pending completion of sale. The letter further mentions that this will stop further deterioration of the building and would give sufficient time to the plaintiff to carry out urgent repairs before the monsoon sets in. Exhibit 44 conveys that the Maharaja has no objection if the plaintiff were to occupy the Ashagad Palace pending completion of sale. The letter makes a reference to the earlier communication from the plaintiff. At Exhibit 45, there is another letter by the plaintiff to the Maharaja, which is of June 7, 1967. That letter expressly thanks the Maharaja for permitting the plaintiff to occupy the Ashagad Palace, for the purpose of immediate and urgent repairs, pending completion of sale. It further states that he has taken the charge of the building and necessary repairs were being carried out as from May 28, 1967 and that roofing, plastering, etc. would be completed before the monsoon. It further explains that this would be sufficient for the time being safeguard against the possible damage due to heavy rains and besides it would discourage pilferage of the property. It request His Highness the Maharaja to hasten the procedure since a lot of work still remained to be done. Immediately after the letter dated June 7, 1967, the original defendant No. 1 executed a Power of Attorney in favour of the

plaintiff dated July 4, 1967 (Exh. 46). That Power of Attorney authorised and appointed the plaintiff for the purposes of managing the Sadanand Palace as well as the other agricultural and non-agricultural properties at Ashagad and further rendering true and correct accounts with regard to the income of those properties from time to time. The attorney was further authorised to take such action, as he may be advised, to removed or get removed any illegal or unauthorised encroachments on the properties at the cost of the Maharaja and whatever could be legally done by the attorney would be binding on the principal (the Maharaja). The Maharaja had undertaken to ratify the same and absolve the plaintiff from all consequences arising from his management of the properties at Ashagad belonging to the principal. There is no dispute that such a Power of Attorney was duly executed and accepted by the plaintiff. This Power of Attorney, after the relations between the parties appear to have become strained, was duly cancelled and further original defendant No. 2 (appellant No. 2 herein) was appointed Manager by the owner of the properties. Thereafter, original defendant No. 1, on January 30, 1977 (Exh. 48), served a notice on the plaintiff making it express that the alleged agreement for sale was not binding nor was the same enforceable and asking for accounts of the properties. It is after this notice and without giving any reply, the plaintiff rushed to the Court by filing the suit on March 10, 1977 seeking relief only of injunction.

8. What the plaintiff stated in the evidence during the trail as his witness No. 1 may at this stage be noticed. According to him, after the agreement, he took possession of the properties by sending a letter to original defendant No. 1, which is at Exhibit 45. According to him, he effected repairs to the bungalow which was vacant, spent a sum of Rs. 10,000/- for repairs and he shifted along with his family and occupied the bungalow and started residing therein. There was no electricity in the bungalow when he occupied it. He approached the Maharashtra State Electricity Board and got electric connection. According to him he was ready and willing to perform his part of the agreement, but original defendant No. 1 was not ready and willing to execute the same. According to him further, he is ready and willing to pay the remaining amount, but the defendants are not ready to execute the sale-deed as the prices of immovable properties have gone up. In the entire examination-in-chief, the plaintiff does not assert specifically that he entered into possession of the properties under the agreement for sale or in part performance thereof. In the cross-examination, the position is made further clear that he sent the further clear that he got possession of the bungalow after May 23, 1967, that is to say after he sent the letter (Exh. 43) and got possession of the suit properties after the Power of Attorney (Exh. 46) was executed. The words "management of Sadanand Palace" in the Power of Attorney (Exh. 46) refer to the repairs of the Sadanand Palace and the fencing and the measurements of the lands around the Palace. He denied the liability to maintain the accounts of the management, although it is mentioned in the Power of Attorney. He has admitted that he did not reply the notice of original defendants No. 1. He feigned failure of the memory about non-

payment of the taxes to the Grampanchayat from 1974 onwards. He has further stated that he did not give reply to the notice of original defendant No. 1 because original defendant No. 1 refused to see him and Advocate Karandikar assured him that he would do something for him. He came to know in 1977 that original defendant No. 1 had separately filed a suit for accounts against him in the Court at Dahanu.

9. The evidence, as it stands, nowhere suggests that in part performance of the agreement for sale, the plaintiff entered upon the properties and took possession thereof. Much reliance is placed on the letters and the words in the letters, namely, "pending the completion of sale", Mr. Kikla, the learned Counsel appearing for the respondent-plaintiff also relied on the fact that original defendant No. 1 himself has not entered the witness-box so as to traverse the case of the plaintiff referable to the equitable title u/s 53-A of the Transfer of Property Act.

10. It is true that the intention has to be gathered by reading the doctrine as a whole and in the context of the events preceding and succeeding and that would be more appropriate when documents are in the form of letters or communications. Even applying this broad test, we are unable to find, in the three communications at Exhibits 43, 44 and 45, any intention to hand over possession to the plaintiff in part performance of a completed agreement for sale. In the context of the vents, Exhibit 43 seeks a permission to occupy the bungalow and that permission is given by expressing no objection which is available in Exhibit 44 and Exhibit 45 acknowledges and thanks the original defendant No. 1 for granting that permission. The oral testimony of the plaintiff is inadequate with regard to any possession being taken in part performance of the agreement for sale and the letters are all equivocal. In the context of the earlier communications to which we have made a reference and which are at Exhibits 40, 41 and 42 and which do not mention any term with regard to any such part performance, it is indeed difficult to infer that the parties intended to part possession of the properties and the possession was handed over to the plaintiff in satisfaction thereof. Had that been the intention, there was nothing which would prohibit the parties to say in any of the communications, namely, Exhibits 40, 41, 42, 43, 44 and 45, or the plaintiff could have asserted so on oath. Therefore, even if there was an agreement for sale evidenced by these documents, particularly Exhibits 41 and 42, to sell the properties for a sum of Rs. 80,000/-, it is indeed, difficult to hold that the plaintiff was placed in possession of the properties in part performance of that agreement.

11. Now, the doctrine of part performance by handing over possession is a recognised doctrine that subscribes to an equitable title statutorily enacted by section 53-A of the Transfer of Property Act. What constitutes a part performance would depend on the facts and circumstances available in each case and particularly upon the intention of the parties. Broadly speaking, the act of part performances must be an act done in performance of the contract as distinct

from those acts which are introductory or ancillary to such performance or merely accommodation and as such referable to some other agreement. Well-settled it is that the act to be in part performance of a contract must be unequivocally referable to such contract and conversely must not be referable to any other contract or any other understanding. See Mulla's Commentary on the Transfer of Property Act, 1882. Sixth Edition, page 287 and particularly reference to the English cases, being *Maddison v. Alderson*, (1883) App Cas 467 and *Kingswood Estate Co. Ltd. v. Anderson*, (1963) 2 Q.B. 169 : (1963) 3 All.E.R. 593 . This principle applies even when properties are taken charge of only for the purposes of repairs or improvements and such handing over of possession for such specific purposes would not, in the very nature of things, be the possession given in part performance of the contract. The position of possession of such type when obtained subsequent to the agreement and which is not possibly referable to part performance of the agreement cannot by re agreement pre-existing, be treated to be in part performance of such an agreement so as to give rise to equitable entitlement to it. See *Manjural Haque Vs. Sm. Mewajan Bibi and Others*, .

12. In the present case, the position is crystal clear, in that the parties never intended either to make possession as the part of the context or that pursuant to such agreement for sale the original defendant No. 1 purported to permit the plaintiff to enter upon the possession of the properties. The intention spelt out is just the otherwise. The letter at Exhibit 43 is a letter of request that is inconsistent with any such intent. Only because the words "pending completion of sale" are there, it does not follow that the prospective purchaser was seeking part performance by asking for possession. Read in its entirety, and in the light of the deposition of the plaintiff himself, the letter shows that it was a request to occupy the bungalow and that request was acceded to, as is evidenced by Exhibit 44, although the words "pending completion of sale" are used therein for specific purpose and the matter is put beyond if Exhibit 45 is taken into account. There are plaintiff himself refers to the occupation as permissive for the purposes of immediate and urgent repairs, pending completion of sale. We are unable to agree with Mr. Kikla that these letters show that possession was referable to any part performance of agreement for sale. On the other hand, if meaning has to be given, Exhibit 45 shows that possession was always intended to be permissive and for the purposes of immediate and urgent repairs. If that be the purpose, then possession is not referable to the agreement for sale at all and it is only for the purposes of protecting the properties and accommodating the request of the prospective purchaser that possession was being handed over.

13. There is yet another aspect which fortifies this conclusion and that is the Power of Attorney which is at Exhibit 46. In terms of that Power of Attorney, the plaintiff has undertaken the management of the Palace and other properties and also the liability to render accounts. If in part performance of the agreement for sale possession was taken, there was no question of such undertaking. The very fact that the Power of Attorney makes a mention of this liability, which is

accepted by the plaintiff, clearly goes to show that his possession was merely permissive occupation which is sought under Exhibit 43 and handed over for the purposes of management and so taken by an agent from his principal. Such a possession of an agent or power of attorney-holder would not entitle him, when his authority itself is put an end, to seek any preventive relief against the owner, who in such a case is never out of possession. The plaintiffs' main case having reference to section 53-A of the Transfer of Property Act, must, thereof, fail.

14. Even if we were to assume that the plaintiff is entitled to invoke the protection of section 53-A of the Transfer of Property Act, apart from the fact that he has to establish the completed written agreement for sale under which he has entered upon the possession of the properties in part performance thereof, he has further to establish his readiness and willingness to perform his part under the said agreement for sale. Now, no doubt, the provision of section 53-A of the Transfer of Property Act are intended to be an equitable shield for a party who has been placed in possession in part performance of an agreement for sale so as to protect that possession and it comes to be juridically recognised elevating mere possession to equitable title to property liable to be protected as such. However, before such equitable entitlement is available, all of its conditions as set out in section 53-A of the Transfer of Property Act are required to be satisfied. One of them is that the person claiming its benefit must always be ready and willing to perform his part of the agreement. And if it is shown that he was not so ready and willing, he will not qualify for the protection by reason of the doctrine of part performance. See *Sardar Govindrao Mahadik and Another Vs. Devi Sahai and Others*, .

15. Now, in the present case, although the plaintiff has stated on oath that he was ready and willing to perform his part of the contract, except this ipse dixit of the plaintiff, there is nothing on record to show that he was and is so ready and willing. A careful consideration of the plaintiffs' testimony and his present suit shows otherwise. We have no evidence to show that the plaintiff has approached Advocate Karandikar or that he had initiated any proceedings before the Assistant Collector or that he had taken any steps to get a proper agreement for sale drawn by Advocate Karandikar or that he was possessed of the means so as to pay the remaining amount of Rs. 70,000/-. He entered upon the properties in 1967 and though by the time he filed the suit in 1977 after the agreement for sale was repudiated specifically by originally defendant No. 1's notice at Exhibit 48, as his evidence shows, even orally before that he did not seek the enforcement of the said agreement for sale. Even in the suit, he restricted his claim for injunction and did not seek the relief of enforcement of the agreement for sale. This position taken by the plaintiff clearly reflects on his assertion that he was ready and willing to perform his part of contract. When law required proof of any fact, the mere ipse dixit of the party is not enough. When the plaintiff is required to prove his readiness and willingness, he is required to produce positive material that will satisfy the Court that the plaintiff is and was so ready and willing. We have hardly any material in the present case. We cannot but

observe that when the plaintiff is entitled to seek the relief of enforcement of the agreement for sale by filing the suit and omits to do it and merely seeks the alternative relief like the one of protection of possession, it will be open to the Court to infer that the plaintiff is not ready and willing to stand by and as such enforce the agreement for sale under which he seeks to protect his possession. This position should be emphatically available, particularly when the plaintiff remains in possession even after, to his knowledge, the other party has repudiated the contract for over a long period before he files the suit. No doubt, on the basis of the equitable title recognised by section 53-A of the Transfer of Property Act, the plaintiff is entitled to claim the specific relief and injunction, but such a relief is in the discretion of the Court and is not granted as of right or as of course.

16. The provisions of sections 36, 37 and 38 of the Specific Relief Act clearly confer a discretion on the Court in this regard so as to extend preventive reliefs. Particularly, section 36 of the Specific Relief Act declares that preventive relief of such a kind is granted at the discretion of the Court. It is well-settled that such a relief will not be extended which would lead to inconvenient and unjust result. The provisions of section 38 of the Specific Relief Act further lay down the conditions under which perpetual injunctions may be granted. Section 41 of the Specific Relief Act enacts categories of cases as to when such a relief of injunction should be refused. These are by themselves not exhaustive. Clauses (e) and (h) respectively of section 41 of the Specific Relief Act lay down that injunction cannot be granted to prevent the breach of a contract, the performance of which would not be specifically enforced or when equally efficacious relief can certainly be obtained by any other usual mode of proceedings except in cases of breach of trust.

17. Clause (e) of section 41 of the Specific Relief Act is relevant to the extent and in the context of the provisions of section 53-A of the Transfer of Property Act, which requires the plaintiff to satisfy that he was ready and willing to perform his part of the contract. It is only when such readiness and willingness is there that the contract of agreement for sale can be specifically enforced. If this basic readiness and willingness is not established, then the performance could not be specifically enforced. It follows, therefore, that by reason of the principle underlying section 41(e) of the Specific Relief Act, when the plaintiff seeks injunction so as to prevent breach of a contract whose performance cannot be specifically enforced, such an injunction has to be refused. Similarly, when a suitor of such a type would have equally efficacious relief available so as to enforce the contracts by taking appropriate remedy, without recourse to it, it would be indeed difficult to extend the discretionary relief of permanent injunction. Clause (h) of section 41 of the Specific Relief Act would require the Court to refuse such a type of prayer for injunction. It is not as if that in a suit to enforce the agreement itself, such a relief is sought. On the other hand, although the plaintiff came to the Court with the allegation that the other party has repudiated the agreement for sale, he has omitted without seeking its

enforcement and is trying to hold the property obviously without seeking to complete his title by enforcing the agreement for sale. To such a case, the principles underlying Clause (h) of section 41 of the Specific Relief Act can be extended so as to refuse such an ancillary relief.

18. Even though it may appear that the provisions of section 41(e) or (h) of the Specific Relief Act are not strictly attracted by reason of the agreement for sale being otherwise enforceable, the principles underlying those provisions would very well be available to the Court with all their applicative efficacy. Section 41 of the Specific Relief Act does not lay down an exhaustive categorisation of cases when relief is refused. On the other hand, the categories mentioned by the sub-clauses are those which existing the preventive relief has to be refused. The principles underlying that categorisation can well be treated as available for refusing such discretionary relief. A suitor, who claims to possess the property under an agreement for sale, is surely not a title holder nor can be in all events defeat the entitlement to possession of the real owner. Until it is shown that he is ready and willing to perform his part of the agreement, his possession can not even be protected, nor would the provisions of sections 53-A of the Transfer of Property Act be a shield for such a possession. Equally, unless such a possessor of the property is shown to be ready and willing, the agreement for sale under which he claims would not be enforced. By reason of want of proof in this regard pertaining to the readiness and willingness, protection sought by securing preventive relief can well be refused.

19. For the same reason, the principles underlying Clause (h) of section 41 of the Specific Relief Act would also be available, for such a suitor who claims to be in possession by reason of the agreement for sale would have efficacious remedy to enforce such an agreement particularly when the period of possession has been quite extensive and long. Hardly, In equity, it can be conceived that a person standing by the agreement for sale would not be bound to enforce the same, but would only seek the preventive assistance of the Court so as to protect mere possession even against the true owner and title-holder. If such a position were to be conceived, then in all such types of cases it will be the other party who will be forced to file a suit for enforcement of agreement or for re-possessioning the property. The result would be anomalous, unfair and inequitable. For without seeking the equally efficacious remedy of the enforcement of the agreement for sale, such a suitor would continue to enjoy the fruits of the property relying merely on the preventive injunction although the reversionary rights of ownership of title and to re-take possession remain with the owner-vendor of the property. Therefore, the principle underlying Clause (h) of section 41 of the Specific Relief Act could be invoked so as to refuse the preventive relief in favour of such a suitor who does not even after repudiation of the agreement for sale by the other party seeks the specific relief of enforcement of the agreement for sale and merely seeks the discretionary relief of preventive injunction from the Court. The position would be different if, having asked for such a relief, such a suitor seeks the preventive injunction of a temporary nature during the pendency of the

adjudication. By very reason, that relief would be temporary and not perpetual or permanent. It is, thus, not possible to uphold the entitlement of such a suitor who has omitted to claim the real and as such efficacious relief which was available for the purpose of perpetual or permanent injunction so as to protect mere possession, alleged and claimed, under the agreement of sale. It would be wise exercise of discretion not to further the inequity and unfairness that would arise under such situation.

20. Even if we were to come to the conclusion that the possession of the plaintiff was referable to the part performance of the completed agreement for sale, as the facts stand, the plaintiff would not be entitled to such a relief.

21. Mr. Kikla then argued that the possession of the plaintiff is, at any rate, lawful and the defendants have no right to disturb that possession by use of force and , to that extent, the possession should be protected by issue of injunction.

22. We are unable to accede to this submission. As we have indicated earlier, the plaintiff moved the Court on the basis that he was in possession in part performance of the agreement for sale, which has not been shown to be so. At the most, the possession is referable to the permission granted by the owner of the property for the purposes of effecting repairs and keeping the property in good condition. If we were to go by the recitals of the Power of Attorney taken by the plaintiff (Exh. 46), it is evident that was for the management of the properties and that possession in such cases would always be for and on behalf of the principal title-holder. Surely, a Manager or a holder of such a permission or Power of Attorney would not be entitled to seek relief of injunction against the real owner who in law continues and remains in possession. Otherwise, that will amount to merely putting a premium on an unlawful act or an act of a person who no more is authorised to hold or to manage the property and, consequently, would be unfair and unequitable. Furthermore, we have no evidence worth the name to show that the plaintiff has been threatened by any force being used by either original defendant No. 1 or defendant No. 2. Under the circumstances, this alternative submission of Mr. Kikla too must fail.

23. In the result, the decree made by the trial Court is unsustainable. Accordingly, the appeal is allowed, the decree of the trial Court is set aside and the suit filed by the plaintiff is dismissed. The plaintiff to bear his own costs and to pay the costs of the defendants.