



IN THE HIGH COURT OF JUDICATURE OF BOMBAY
BENCH AT AURANGABAD

SECOND APPEAL NO. 238 OF 1994

Shri Arjun Nana Wagh
Deceased through LRs

1. Saraswati Arjun Wagh
age 52 years,
2. Kailash Arjun Wagh
age 26 years,
3. Pratap Arjun Wagh
age 22 years
4. Renuka Arjun Wagh
age 28 years,
5. Nanda Arjun Wagh
age 24 years.

All r/o Nalegaon
District Ahmednagar.

.. Appellants

VERSUS

Smt. Laxmibai Ganpat Wagh
Deceased through LRs.

- 1-A Krushnaji Ganpatrao Wagh
age 32 years, occ. Service
r/o 5540, Wagh Lane
Nalegaon, Ahmednagar.
- 1-B Rajaram Ganpat Wagh
age 30 years, occ. Service
r/o 5540, Wagh lane, Nalegaon
Dist. Ahmednagar.
- 1-C Smt. Padmawati Sudhakar Sapre

age 31 years, occ. Household
r/o Bagadpati, Tabadewada,
Ahmednagar.

1-D Smt. Chhaya Ashokrao Kale
age 28 years, occ. Household
r/o Pune.
C/o Ashokrao Ramkrushna Kale
house No. 1309, Survey No. 74
Mahamadwadi Road, Sayyed Nagar
Hadapsar, Pune 411028 .. Respondents

Mr. V. R. Dhorde, Advocate for the appellants.
Mr. V. S. Bedre, Advocate for the Respondents.

CORAM : R. M. JOSHI, J.

RESERVED ON : 12th FEBRUARY, 2025.

PRONOUNCED ON : 17th FEBRUARY, 2025.

JUDGMENT :

1. This appeal under Section 100 of Code of Civil Procedure is filed by original Plaintiff taking exception to the judgment and decree dated 13.01.1994, passed by the First Appellate Court in Regular Civil Appeal No. 515/1989 dismissing Regular Civil Suit No. 692/1977 which was decreed by the Trial Court by judgment and decree dated 22.08.1989.

2. Parties are referred to as Plaintiff and Defendant for the sake of convenience.

3. This Court admitted the appeal by order dated 08.11.1994 on following grounds :

i) Whether the appellate Court has misread and misconstrued the document Exh 27 to the effect that though it is not a registered sale-deed still it confers right on the respondents-original defendants to remain in possession since the year 1955 till the date of filing of suit i.e. till 1977 for more than 22 years ?

ii) Whether the respondent was entitled to defend her possession on the basis of alleged sale-deed which is not even a registered document and ascertained right ?

4. In order to appreciate rival contentions, it would be necessary to take note of case sought to be made out by both sides before Trial Court. The relevant facts are recorded in nutshell as under :-

Plaintiff claims to be the owner of half portion of eastern side of Survey No. 6101-A/1 bearing House No. 6168 of Nagar city. Out of the said portion, half portion i.e. 1/4th of the said house, is the suit property. This property was ancestral property and in partition it came to the share of Nana. Nana died on 23.11.1968. Plaintiff is heir of Nana. It is the case of plaintiff that on 29.03.1966,

Nana had taken an amount of Rs. 801/- from Defendant and executed a document and also delivered possession of the suit property to the Defendant. It is the claim of Plaintiff that it is not a document of sale nor is registered as required by law and hence, no right, title and interest in the suit property has been transferred in favour of the Defendant. Plaintiff claims the said transaction to be a transaction of mortgage and that it was agreed between the parties that the suit property would be reconveyed to the Plaintiff after a period of five years. On the basis of these averments, a suit is filed for seeking possession of the suit property, damages and also enquiry of mesne profit.

5. Defendant, by filing written statement, opposed the contention of Plaintiff and it is specifically claimed that the transaction between Nana and Defendant is a sale transaction and pursuant to payment of entire consideration, possession of the suit property is delivered to the Defendant.

6. Though in the original written statement no defence was raised of seeking direction under Section 53A of Transfer of Property Act (for short 'the Act'), however, an application came to be filed at

Exhibit 34 taking such plea. It is necessary to note that in the first round of litigation, suit was partly decreed on 28.02.1990. Against this decree, first appeal came to be filed being Regular Civil Appeal No. 220/1980. This appeal came to be allowed on 31.08.1981 with a direction to the Trial Court to decide Exhibit 34 and to frame appropriate issue if the application is allowed. Pursuant to the said direction, Trial Court decided application Exhibit 34 on 13.02.1980 allowing the application and also framed additional issue.

7. After remand, parties were permitted to lead evidence. Trial Court once again partly decreed the suit by judgment and decree dated 22.08.1989. This judgment was taken exception in Regular Civil Appeal No. 515/1989 successfully by the Defendant and hence, this second appeal by Plaintiff.

8. Learned counsel for Plaintiff submits that the First Appellate Court has committed error in dismissing the suit and the said Court has not properly considered the document Exhibit 27 executed between the parties. It is his submission that there was an oral agreement between the parties that the Defendant would hand over possession of suit property after 5 years. In this regard, it is his

further submission that notice dated 19.08.1971 was issued to the Defendant raising such specific plea, but Defendant has failed to place on record reply given to the said notice. It is his contention that Defendant has initially raised claim of adverse possession which however, came to be withdrawn before the Trial Court by filing pursis Exhibit 33. With regard to the plea raised under Section 53A of the Act, it is his contention that for the purpose of filing additional written statement, there ought to have been leave of the Court which is absent in this case. It is argued that even otherwise, in view of failure on the part of the Defendant to plead readiness and willingness to perform her part of the contract, the Defendant is not entitled for protection under the said provision. Thus, it is his contention that the issue of interpretation of the document Exhibit 27 so also the issue as to whether Defendant is entitled to retain possession of the suit property on the basis of unregistered sale-deed are the substantial questions of law involved in this appeal which are required to be answered in favour of the Plaintiff.

9. Learned counsel for the Defendant on the other hand contended that document Exhibit 27 is admittedly executed between the parties and contents thereof would clearly indicate that it is not a

transaction of mortgage but of outright sale of suit property. It is his submission that since the document is not a registered one, it is to be treated as an agreement to sale and since the same is coupled with possession of the suit property, Defendant is entitled to seek protection under Section 53A of the Act. It is his submission that the Trial Court had committed error in observing that the Defendant has failed to plead and prove readiness and willingness to perform her part of the contract, since it was not necessary to plead so in view of the fact that the entire consideration was already paid by the Defendant to Nana. It is his submission that in view of Section 55(1) (d) of the Act, the obligation to execute sale-deed is on the vendor. He drew attention of the Court to Exhibit 27 to argue that there was no obligation on the part of the Defendant to take steps with regard to the execution of sale document and registration thereof. Thus, it is his contention that the First Appellate Court has rightly taken into consideration the facts on record so also relevant provisions of the Act.

10. Interpretation of document is a substantial question of law. In order to ascertain whether the First Appellate Court has correctly interpreted the said document, it would be necessary to

appreciate the text of the said document. There is no dispute about the fact that document Exhibit 27 came to be executed between the parties, recitals of which read thus :

खरीदीखत लिहून देणार :- श्री. नाना महादू वाघ पाटील

रा.नगर नालेगांव वाघगल्ली

खरेदीखत लिहून घेणार :- श्रीमती लक्ष्मीबाई मर्द गणपतराव शंकरराव वाघ पाटील
रा. नगर ठि. नालेगांव वाघाची गल्ली या हद्दीतील सि.सर्वे नं. ६१०१/१ अ
दक्षीणबाजूस श्री. नाना महादू वाघ मी आज रोजी माझ्या राजीखुशीने व अक्कल
हुशारीने घ.नं. सि.नं. ६१०१/१ ची माझ्या वाटणीस असलेली जागा १/२ अर्धी भाग
दक्षिणेकडील असलेली खुली जागा आज रोजी माझी सुन श्रीमती लक्ष्मीबाई गणपतराव
शंकरराव वाघ (लग्नाकरीता) यांना रोख रूपये ८०१ अक्षरी आठशे एक रूपयास
स्वखुशीने विकली आहे. माझा त्या जागेवर यापुढे कुठल्याही प्रकारचा हक्क व ताबा
राहणार नाही हे खरेदीखत मी आज रोजी हजर असलेले दोन साक्षीदार देखत केलेले
आहे.

तरी मी यापुढे कोणत्याही प्रकारची तक्रार सांगणार नाही. मी आज रोजी एकूण रूपये
(८०१) रोख घेतले.

11. Recitals of the said document in no uncertain terms indicate that it is a transaction of sale and not of mortgage. There is absolutely no reference with regard to the intention of the parties to treat this document as a transaction of mortgage. The contents of the document clearly indicate that vendor Nana was in need of money for the marriage of his daughter and hence after accepting cash of Rs.801/-, the suit property as sold to the Defendant and she was put

in the possession thereof. The said document therefor unequivocally indicates that the execution thereof was sale of suit property to Defendant, who is daughter-in-law of Nana.

12. On behalf of Plaintiff, Arjun Nana Wgh was examined at Exhibit 19. Though in his chief examination he sought to depose in accordance with the plaint, however, in the cross-examination, he has admitted that he is not residing in the suit property. He further admits that there is no documentary evidence to show that it was a transaction of reconveyance.

13. On the other hand, cross-examination of Defendant's witness Ganpat shows that he admits that the suit property was partitioned between Nana and his brother and both were in exclusive possession thereof. He further states that for a month there was discussion about the transaction and that transaction had taken place in the house of Plaintiff. He claims that Nana received Rs. 801/- from Defendant. He further claims that since the transaction was done within the family members, registration thereof was not effected.

14. Defendant also examined Ananda Chitale to depose about having attested the document. He claims that he was present at the time of the transaction and the amount of consideration of Rs. 801/- was paid by Defendant. Even in the cross-examination it has come on record that after the sale-deed the suit property is in possession of Defendant. Though he states that there was a talk between the parties about recoveyance. However, he does not claim that it was agreed between the parties to do so at the time of transaction in question and it was condition precedent for the transaction.

15. The aforestated evidence more than sufficiently demonstrates that it is a case of sale of suit property and not mortgage as sought to be claimed by the Plaintiff. Once Plaintiff has admitted execution of said document by his father Nana, initial burden is on the Plaintiff to prove that the transaction is not of sale but is of mortgage. There is no evidence to hold so. Thus, on the basis of material evidence on record, no error is committed by the Trial Court as well as First Appellate Court in interpreting the said document to be a document of sale and not mortgage.

16. Though it is sought to be argued on behalf of the Plaintiff that additional written statement ought not to have been taken into consideration by the First Appellate Court, however, record indicates that pursuant to order of remand of the suit in the previous round of litigation, order has been passed by the Trial Court dated 13.02.1980 allowing the application and as such, the said objection sought to be raised sans merit.

17. For the purpose of appreciating submissions made on Section 53A of the Act and its application to the present case, it would be fruitful to make reference of judgment of Hon'ble Supreme Court in case of Giriyappa and others vs. Kamalamma and others passed in Special Leave Petition (Civil) No. 30804/2024. Relevant paragraph Nos. 10 to 14 are reproduced herein below :-

“10. Section 53-A of the TP Act and Section 16 of the Specific Relief Act, 1964 (for short, hereinafter to be referred as “the 1963 Act”), being of significant relevance are extracted hereunder :-

53-A Part performance. Where any person contracts to transfer for consideration any immovable property by writing signed by him or on his behalf from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty, and the transferee

has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract and has done some act in furtherance of the contract, and the transferee has performed or is willing to perform his part of the contract, then, notwithstanding that, where there is an instrument of transfer, that the transfer has not been completed in the manner prescribed therefor 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 :

Provided that nothing in this Section shall affect the rights of a transferee for consideration who has no notice of the contract or of the part-performance thereof.

(emphasis supplied)

16. Personal bars to relief. Specific performance of a contract cannot be enforced in favour of a person

(a) who would not be entitled to recover compensation for its breach; or

(b) who has become incapable of performing, or violates any essential term of, the contract that on his part remains to be performed, or acts in fraud of the contract,

or wilfully acts at variance with, or in subversion of, the relation intended to be established by the contract; or

(c) who fails to aver and prove that he has performed or has always been ready and willing to perform the essential terms of the contract which are to be performed by him, other than terms the performance of which has been prevented or waived by the Defendant.

Explanation For the purpose of Clause (c)

(i) where a contract involves the payment of money, it is not essential for the Plaintiff to actually tender to the Defendant or to deposit in court any money except when so directed by the court;

(ii) the Plaintiff must aver performance of, or readiness and willingness to perform, the contract according to its true construction.

(emphasis supplied)

11. From the aforesaid, it is evident that the protection of a prospective purchaser/transferee of his possession of the property involved, is available subject to the following prerequisites :

(a) There is a contract in writing by the transferor for transfer for consideration of any immovable property signed by him or on his behalf, from which the terms necessary to constitute the transfer can be ascertained with reasonable certainty;

(b) The transferee has, in part-performance of the contract, taken possession of the property or any part thereof, or the transferee, being already in possession, continues in possession in part-performance of the contract;

(c) The transferee has done some act in furtherance of the contract and has performed or is willing to perform his part of the contract.

12. In terms of this provision, if the above preconditions stand complied with, the transferor or any person claiming under him shall be debarred from enforcing against the transferee and person(s) claiming under him, any right in respect of the property of which the transferee has taken or continue in possession, other than a right expressly provided by the terms of the contract, notwithstanding the fact, that the transfer, as contemplated, had not been completed in the manner prescribed therefor by the la for the time being in force. Noticeably, an exception to this restraint is carved out qua a transferee for consideration, who has no notice of the contract or of the part-performance thereof.

13. Section 53-A of the Transfer of Property Act was inserted partly to set at rest the conflict of views in this country, but principally for the protection of ignorant transferees who take possession or spend money in improvements relying on documents which are ineffective

as transfers or on contracts which cannot be proved for want of registration. The effect of this section, is to relax the strict provisions of the Transfer of Property Act and the Registration Act in favour of transferees in order to allow the defence of part performance to be established.

14. Section 53-A is an exception to the provisions which require a contract to be in writing and registered and which bar proof of such contract by any other evidence. Consequently, the exception must be strictly construed.

18. Thus, protection of a prospective purchaser or transferee of his possession of the property involved is available subject to pre-requisites mentioned in Paragraph No. 11 above. In the instant case, there is a contract in writing (Exhibit 27) for transfer for consideration of suit property (which is immovable property) signed by owner, Nana. As observed above, the said intention of transfer can be ascertained with reasonable certainty from document (Exhibit 27). Admittedly, Defendant had paid entire consideration of Rs.801/- to Nana and she is put in possession of the suit property. Nothing was due or payable by Defendant to the owner.

19. A question therefore arises here in this case is as to whether any other obligation remained to have been performed by the

Defendant. It was held by the Trial Court that it was necessary for Defendant to purchase stamp paper and issue notice to call upon Plaintiff to execute sale-deed. Trial Court also decreed the suit for the reason that Defendant has failed to plead and prove readiness and willingness to perform her part of contract.

20. Section 55(1)(d) of the Act casts duty on the seller to execute the sale-deed. The sale document (Exhibit 27) does not show any agreement contrary putting any obligation on the purchaser to take any steps in this regard. In absence of any such agreement, duty is cast upon Nana/Plaintiff to execute registered deed. First Appellate Court has rightly taken into consideration the said position of law and held that there was no obligation which was required to be discharged by the Defendant. Since entire consideration was already paid, there was no question of Defendant having pleaded readiness and willingness to perform her part of the contract. The First Appellate Court relied upon judgment of this Court in case of Trimbak Shankar vs. Nivratti Shankar, **AIR 1985 Bombay 128**, wherein it is held that when full consideration is paid by the purchaser nothing remains to be performed by him and hence question of making any averment with regard to readiness and

willingness does not arise. The said judgment squarely applies to the present case and is being rightly applied by learned First Appellate Court.

21. In view of above discussion, this Court finds no reason/justification to cause interference in the findings recorded by Trial Court and First Appellate Court on point of interpretation of the document (Exhibit 27) and also findings recorded by First Appellate Court while reversing judgment decree passed by Trial Court. The substantial questions of law therefore stand answered in negative. Appeal stands dismissed.

22. Pending application, if any, does not survive and stands disposed of.

(R. M. JOSHI)
Judge

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