

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

SECOND APPEAL NO.474/1991

Reubai w/o Tulsiram

.. APPELLANT
[ORIG.PLAINTIFF]

Versus

Babalal s/o Husenbhai

.. RESPONDENT
[ORIG.DEFENDANT]

....

Shri M.G.Kolse Patil, Advocate for appellant
Shri Y.M.Khan, Adv. for respondent.

....

**CORAM : T.V.NALAWADE,J.
DATED : 20TH AUGUST, 2015**

ORAL JUDGMENT :-

The appeal is filed against judgment and order of Regular Civil Appeal No.166/1981 which was pending in District Court, Beed. The appeal was filed by present appellant to challenge judgment and decree of Regular Civil Suit No.124/1978. This Suit was filed by present appellant for relief of injunction against respondents and the Suit is dismissed by the trial Court. Heard learned counsel for the appellant.

2] This Court had admitted the Appeal on following substantial question of law :

Whether the plaintiff is entitled to protection of Section 53-A of Transfer of Property Act, in view of the pleading in the plaint and the material produced by him.

3] It is the case of plaintiff that the defendant put him in possession of $\frac{1}{4}$ portion of Gat No.63 situated in village Umri, Tq. Beed under agreement of sale on 14/12/1974. It is contended that defendant had agreed to sell property for consideration of Rs.5000/- and out of that amount, an amount of Rs.3000/- was paid to defendant on the date of the agreement and the remaining amount was to be paid on the date of execution of sale deed. It is the case of plaintiff that her name is entered in possession column of revenue record as she got possession of the suit property. It is her case that defendant then tried to disturb her possession. She has given the instances to make out cause of action and she had prayed for the relief of permanent injunction.

4] The defendant contested the suit by filing written statement. The defendant denied that he had agreed to sell the suit property. He contended that there was one loan transaction between plaintiff and defendant and defendant had taken the loan of Rs.2000/- though the amount of Rs.3000/- is mentioned in the document. It is contended that the defendant was to pay interest of Rs.1000/- and that is why more amount was mentioned in the agreement. It is the case of defendant that he had not given possession of the suit property to plaintiff and he had returned loan amount with interest. It is contended that the original agreement remained with the plaintiff and plaintiff is misusing that document.

5] The trial Court held that there was agreement of sale and the

plaintiff was put in possession under the agreement of sale. The trial Court held that the part consideration was paid to the defendant but trial Court refused the relief by holding that plaintiff failed to prove the readiness and willingness to perform her part of the contract. The appellate Court referred provision of Section 53-A of Transfer of Property Act and Section 41 (h) of Specific Relief Act and by making similar observations, the appeal is dismissed by the first appellate court.

6] From the pleadings, it can be said that plaintiff had not taken any steps before the date of Suit for completion of the transaction. The agreement was made on 14/12/1974 but instead of taking steps for making payment of remaining consideration and for getting executed the sale deed, she approached the revenue authority, got her name entered in cultivation column and then she filed Suit in 1978 only for relief of permanent injunction. Though the defendant denied that it was an agreement of sale, it was necessary for the plaintiff to plead and prove that she was ready and willing to perform her part of the contract but the defendant refused to execute the sale deed and so she was required to come to the Court.

7] Learned counsel for the appellant placed reliance on the observations made by Full Bench of this Court in the case reported in **2004 (3) Mh.L.J. 1131 in the case of Sadashiv Chander Bhamgare V/s Ekanth Pandharinath Nangude**. The facts of this reported case show that following was the point for consideration and decision :

“Whether a suit simplicitor for injunction which is filed seeking protection under section 53-A of the Transfer of Property Act is maintainable?”

This point is answered in affirmative by Full Bench. There cannot be any dispute over this proposition.

8] The provision of Section 53-A of Transfer of Property Act runs as under :

“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 effect the rights of a transferee for consideration who has no notice of the contract or of the part performance

thereof.”

9] The aforesaid provision shows that conditions mentioned in Section 53-A need to be satisfied for getting the protection of this Section. The provision of Section 41 of Specific Relief Act also needs to be seen in such a case. Though provision of Section 41 shows that the Court has discretion, at the time of taking decision on the point of use of discretion, that the Court is expected to see the conduct of the parties. The provision of Section 41 of Specific Relief Act may not come in the way of plaintiff for filing suit for injunction simplicitor but the fact remains that the Court had discretion to grant relief or refuse to grant relief. In addition to that the Court is expected to see as to whether the plaintiff is complying the conditions mentioned in Section 53-A of Transfer of Property Act for getting protection. In the present matter, there was no pleading for satisfying the conditions laid in Section 53-A of Transfer of Property Act. There is no material given to show that plaintiff was ready and willing to perform the part of the contract from the date of agreement and on the date of the suit. This material is considered by both Courts below and it is finding on question of fact. In view of such finding, this Court holds that interference is not possible in the decision given by Courts below. The point is answered accordingly and the Appeal is dismissed.

(T.V.NALAWADE,J.)

umg/