

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

SECOND APPEAL NO.304 OF 1991

1. Chandmal Nagraj Bafna
since deceased per L.Rs.:

- (a) Sumanbai w/o Chandmal Bafna,
- (b) Vijaykumar Chandmal Bafna,
- (c) Dilipkumar Chandmal Bafna,
- (d) Sanjaykumar Chandmal Bafna,
- (e) Nitinkumar Chandmal Bafna,

No.1 (E) minor under guardianship of
mother Sumanbai w/o Chandmal Bafna

2. Sumanbai w/o Chandmal Bafna

All Residents of Waghali,
Taluka Chalisgaon,
District Jalgaon

.. Appellants
(Original Plaintiffs)

Versus

- Uttamrao Fakirrao Deshmukh

.. Respondent
(Original Defendant)

Mr S.S.Bora, Advocate for appellants
Mr R.N.Dhorde, Senior Counsel for respondent

CORAM : N.W. SAMBRE, J.

**DATE OF RESERVING
THE JUDGMENT : 22nd January 2015**

**DATE OF PRONOUNCING
THE JUDGMENT : 10th June 2015**

JUDGMENT

1. Present appellants are original plaintiffs in Regular Civil Suit No.81 of 1976 which was preferred against the respondent - defendant for possession of the suit property. According to plaintiffs, the suit property consists of Gut No.92/2 ad-measuring 3 hectare 66-R

located at village Pimpalgaon Bhase, Taluka Chalisgaon, District Jalgaon. It is the case of the present appellants – plaintiffs that they have entered into agreement of sale Exh.24 in response to the above referred property on 11th May 1964 for a total consideration of Rs.16,000/- of which Rs.10,000/- was paid as an earnest money and balance amount of Rs.6,000/- was to be paid by 9th March 1965. It is claimed that in Exh.24 agreement of sale, there was stipulation that failure to pay the amount would result into forfeiture of the earnest amount. As the possession of the suit property was handed over to the defendant and as the contract could not be materialised, the same has resulted into issuance of notice to defendant to hand over the possession of the suit property on 29th March 1976. As the defendant did not pay the remaining amount of Rs.6,000/-, the amount of Rs.10,000/- paid by the defendant to the plaintiffs was forfeited and as such, the plaintiffs claim that in view of the forfeiture of the earnest money, they were entitled to have possession of the suit property. It is claimed by the plaintiffs that the defendant continued in illegal possession of the suit property after 9th March 1965 i.e. the period stipulated in agreement Exh.24 for payment of balance consideration and getting the sale-deed executed. The plaintiffs also claimed that the defendant borrowed some loan on the suit property by demonstrating that he was owner of the suit property and, therefore, the defendant is equally responsible for repayment of the loan amount.

2. The defendant objected to the claim put forth in the plaint by filing his written statement at Exh.17 and denied the entire claim. According to defendant - respondent, the document Exh.24 i.e. agreement of sale was admitted, however, the amount of Rs.10,000/- was not an earnest money but it was the price of the land. The defendant further claimed that after receipt of the notice dated 19th March 1976, he went to the plaintiffs and offered amount of Rs.6,000/- but the plaintiffs have refused to accept the same. As such, according to defendant, as he was always ready and willing to perform his part of contract, the plaintiffs have no right to claim the possession over the suit property. The defendant also showed his willingness to pay the balance amount of Rs.6,000/- to the plaintiffs. He further alleged that the plaintiffs were required to sign the document in the Bank, however, the plaintiffs remained absent to sign the mortgage in a loan case for purchase of suit property and as such, the amount was subsequently offered to plaintiffs after receipt of the notice.

3. The plaintiff No.1 expired during the pendency of the suit.

4. Having regard to the pleadings of the parties, the learned Civil Judge, Junior Division, Chalisgaon framed the issues at Exh.14 which read thus :

POINTS	FINDINGS
1. <i>Do plaintiffs prove their title to the suit land ?</i>	Yes
2. <i>Do plaintiffs prove that the defendant committed breach of contract dated 11th May 1964 ?</i>	Yes

3.	<i>Do defendant proves that plaintiffs committed breach of contract dated 11th May 1964 ?</i>	No
4.	<i>Do plaintiffs prove that amount of Rs.10,000 paid by the defendant at the time of contract stands forfeited ?</i>	Yes
5.	<i>Does defendant prove that he was ready and willing to perform his part of contract within the prescribed period ?</i>	No
6.	<i>Does defendant prove that plaintiffs failed to obtain the necessary permission as per law to execute the sale deed ?</i>	No
7.	<i>Does defendant prove that his possession of the suit land is protected under Article 53 of T.P. Act ?</i>	No
8.	<i>Are plaintiffs entitled to possession of suit land ?</i>	Yes
9.	<i>Is the claim of the plaintiffs in limitation ?</i>	Yes
10.	<i>What order and decree ?</i>	<i>Plaintiffs suit is decreed with costs.</i>

5. As the agreement of sale Exh.24 was not disputed and the fact that the suit property is owned by the plaintiffs is also not in dispute, the trial Court proceeded to decide the suit on that basis. Learned trial Court observed that the remaining amount of Rs.6,000/- was not paid by the defendant for which due date was 9th March 1965 and the same has prompted the plaintiffs to send notice on 29th March 1976 at Exh.68 for possession of the suit land. The defendant failed to deposit Rs.6,000/- on or before 9th March 1965 and also had not replied the notice Exh.68 and as such, the trial Court observed that the defendant

committed breach of the agreement Exh.24. Learned trial Court noted that as there was mark "A" in agreement-Exh.24, which provides for forfeiture of Rs.10,000/- and the defendant since failed to pay the amount of Rs.6,000/-, the readiness and willingness on the part of the defendant was answered against him, as he was bound by the conditions incorporated in the stipulation.

6. Learned trial Court has taken into account the evidence of the defendant's witness who has examined Bank Manager, PW-4.

7. Learned trial Court, having regard to the evidence of the parties, reached to a conclusion that the defendant was not ready and willing to perform his part of contract and as such, decreed the suit having answered the issue of limitation in favour of the plaintiffs.

8. The defendant, feeling aggrieved by the judgment and order passed by the trial Court, preferred appeal, bearing Regular Civil Appeal No.539 of 1983, in the Court of District Judge, Jalgaon. The learned lower appellate Court raised points for consideration and answered the same accordingly, which read thus :

POINTS	FINDINGS
<i>1. Do plaintiff prove that they are entitled for possession of the suit land field on the basis of their title ?</i>	No
<i>2. Do plaintiffs prove that defendant is in illegal possession of the suit land ?</i>	No

3. <i>Was the time an essence of contract as pleaded ?</i>	No
4. <i>Is possession of the defendant protected as per the provision of section 53-A of Transfer of Property Act ?</i>	Yes
5. <i>Is the suit field by the plaintiffs barred by limitation ?</i>	Yes
6. <i>Whether the decree passed by trial court becomes illegal for want of consent of the minor plaintiffs after attaining majority to prosecute the suit ?</i>	No

9. The lower appellate Court allowed the appeal and set aside the decree passed by learned trial Court, as such the present second appeal.

10. Mr Bora, learned Counsel for the appellants submits that the judgment delivered by learned lower appellate Court is not sustainable, as according to him same is contrary to the provisions of Section 53-A of the Transfer of Property Act. He further urged that having regard to the contents of Exh.24, the issue of possession, the issue of limitation ought to have been answered in favour of the plaintiffs – appellants. He further urged that once the execution of the agreement is admitted, the limitation begun from the date on which the defendant was put in possession i.e. 11th May 1964 and it should have been held that the suit was within limitation. In support of his contentions, he has relied upon the provisions of Article 65 of the

Limitation Act so as to support the said contention. He further submits that as the very requirement of Section 53-A of the Transfer of Property Act was not followed, the findings recorded by the learned trial Court are perverse, as according to him, in written statement, the readiness and willingness was not pleaded. He urged that no positive evidence was brought on record to show readiness and willingness of defendant to perform his part of contract. He further urged that once the agreement Exh.24 was admitted, it ought to have been inferred that time was essence of contract and he submits that in view of provisions of Sections 91 and 92 of the Evidence Act, it should have been held that the agreement Exh.24 provides for agreement to the contrary and not in accordance with the stipulation mentioned in Exh.24.

11. In support of his contentions, he has placed reliance upon the judgment of this Court so as to place reliance upon provisions of Sections 91 and 92 of the Evidence Act, in the matters of **Gangabai Vs. Chhabubai, reported in 1982 Mh.L.J. 1 and Niranjan Kumar Vs. Dhyan Singh, reported in 1976 AIR SC 2400**. In addition to above, so as to establish his case under the provisions of Section 53-A of the Transfer of Property Act, he has placed reliance upon the judgment of Apex Court in the matter of **FGP Ltd. Vs. Saleh Hooseini Doctor & Anr., reported in 2004 (8) SCC 614**.

12. Learned Senior Counsel for the respondent submits that in paragraph 2 of the written statement, the readiness and willingness of

his performance of part of contract was very much pleaded and there was appropriate satisfaction of Section 16(C) of the Specific Relief Act. He further submits that in the cross-examination of plaintiffs at Exh.17, there is an admission as regards part receipt of consideration and that he has not applied to the Collector in accordance with the provisions of Section 31 of the Bombay Prevention of Fragmentation & Consolidation of Holdings Act, 1947. seeking permission to dispose of the property in question. He submits that the lower appellate Court has rightly taken into account the said issue. He further urged that Rs.6,000/- was deposited in the trial Court on 25th March 1983 i.e. before pronouncement of judgment by the trial Court, in accordance with the provisions of Section 16 of the Specific Relief Act and as such, he has established his case for readiness and willingness to perform his part of contract. He further urged that the time was never essence of contract and the suit was barred by limitation. In support of his contention that a person in possession of immovable property in part performance of contract for sale, the requirement of Section 53-A of the Transfer of Property Act is satisfied, he placed reliance upon the judgment of Apex Court in the matter of **Ramesh Chand Ardawatiya Vs. Anil Panjwani**, reported in **2003 (4) Mh.L.J.579**. In addition to above, he has also placed reliance upon the judgment of the Apex Court in the matter of **Shrimant Shamrao Suryawanshi and anr. Vs. Pralhad Bhairoba Suryawanshi (dead) by L.Rs. and others**, reported in **AIR 2002 SC 960**. According to him, in view of provisions of Sections 31 and 55 of the Contract Act, it is a conditional agreement in relation to transfer of land, the statute prescribing prior

permission of the authority, It has to be determined that the agreement is subjected to such implied condition and sought to place reliance upon the judgment of the Apex Court in the matter of **Nathulal Vs. Phoolchand**, reported in **AIR 1970 SC 546 (1)**. He further submits that the stipulation for forfeiture of earnest money in the event of failure to execute the sale-deed indicates that the time was never intended by the parties to be essence but has to be determined from the stipulations. According to him, the reliance could be placed on the judgment of the Apex Court, in the matter of **Smt.Indira Kaur and ors., Vs. Shri Sheo Lal Kappor**, reported in **AIR 1988 SC 1074** and **Balasaheb Dayandeo Naik (Dead) through L.Rs. And ors. Vs. Appasaheb Dattatraya Pawar**, reported in **AIR 2008 SC 1205**. As such, according to him, the present second appeal is liable to be rejected.

13. Having given thoughtful consideration to the submissions made by respective parties, it is not in dispute that the agreement Exh.24 was executed on 11th May 1964, wherein amount of Rs.10,000/- was paid on the very day.

14. The claim of the appellants- plaintiffs for possession is based on their title. The learned trial Court decreed the suit of the appellants for possession on plain reading of the agreement Exh.24. The judgment of the learned trial Court does not reflect consideration of oral evidence led by the parties in its entirety as is expected of. The trial Court in a cryptic judgment has decreed the suit.

15. It is required to be noted that Exh.24, the agreement of sale, is dated 11th May, 1964 and the suit came to be initiated in 1976.

16. The trial Court framed issue of limitation and based on the provisions of Article 65 of the Limitation Act, 1963, declared that the suit was within limitation. While forming such opinion, the trial Court took into account the date of agreement 11th May, 1964 and filing of suit on 22nd April, 1976 and inferred that suit was filed within a period of 12 years and as such same is within limitation.

17. The findings recorded by the trial Court which were subject matter of appeal at the behest of the respondent- defendant in the wake of mandate of Order 41 Rule 31 of the Civil Procedure Code, the learned lower appellate Court re-appreciated the entire set of facts, pleadings and evidence and upon giving relook to the same, has proceeded to allow the appeal by setting aside the decree passed by the learned trial Court and dismissing the suit filed by the present appellants.

18. While doing so, the learned lower appellate Court while interpreting the document Exh.24 an agreement to sell, considered the claim put forth by the respondent in the written statement at Exh.17. The learned lower appellate Court having regard to the law settled by the Supreme Court particularly in the matter of time being an essence of contract, has inferred that the plaintiffs have failed to bring on record such circumstances which mandate the defendant to make the payment by the deadline established in the agreement Exh.24 or else the contract

was treated to be cancelled. The learned lower appellate Court also considered the aspect of filing of suit for possession after a period of almost 10 years from the date of execution of the agreement to sell as a circumstance against the present appellants. The appellate Court as such inferred that the plaintiffs have failed to prove that they are entitled for the possession of the suit property.

19. The lower appellate Court then has proceeded to analyse the possession of the present respondent- defendant is whether lawful. In the background of the doctrine of part performance as provided under Section 53A of the Transfer of Property Act, the lower appellate Court considered the initial payment of Rs.10,000/- to the present appellants, the aspect of non-securing permission required for the execution of the sale deed from the competent authority, admission given by the appellant of non-filing of an application to the Collector for obtaining permission to sell the suit field till 9th March, 1965, the efforts by the defendant to raise money by taking loan from the Land Development Bank, Pachora and non-cooperation of the appellants in the said event as a circumstance so as to infer the lawful possession of the respondent-defendant. The lower appellate Court has in detail analysed the applicability of provisions of the Bombay Prevention of Fragmentation & Consolidation of Holdings Act, 1947 to the present case and the requirement of permission under Section 31 of the said Act before transferring the property in question. The learned lower appellate Court has inferred that the embargo on a right of transferor in accordance with Section 31 of the said Act should have been discharged by the present appellants- plaintiffs by taking out appropriate proceedings before the

Collector seeking permission for transfer of the land which was not adhered to by the appellants. The evidence of the defendant and the cross-examination of the plaintiffs- appellants discloses the improvement to the land carried out by the defendant- respondent after execution of agreement Exh.24 at which point of time the respondent was put into possession of the property. The payment of balance consideration in the Court in 1983 with an intention to pay the same to the present appellants is also considered as a circumstance against the present appellants. Based on the same, the first appellate Court has inferred that the respondent- defendant in view of doctrine of part performance has proceeded to extend the protection under Section 53A of the Transfer of Property Act in favour of the respondent. The learned lower appellate Court then has proceeded to deal with the aspect of the limitation. The Court noticed the date of filing of the suit as 22nd April, 1976 whereas the agreement was dated 9th March, 1964, the date on which the defendant was put into possession of the property. The agreement in express terms contains a recital to the effect that the defendant was put into possession of the suit property. The learned lower appellate Court as such noticed that the suit was filed after a period of 12 years as the limitation has expired on 18th March, 1976 and is hit by the limitation.

20. The analysis of the pleadings, the documentary evidence and the oral evidence by the appellate Court reflects complete application of mind particularly having regard to the discussions and analysis of the facts, pleadings and evidence in its judgment.

21. Though the learned counsel for the appellants in his submissions has relied upon the judgment of the Apex Court in the matter of **FGP Ltd** cited supra, so as to canvass that the ingredients of Section 53A of the Transfer of Property Act are not satisfied by the respondent, however, the perusal of the judgment of the lower appellate Court reflects that the test for extending the benefit under Section 53A of the Transfer of Property Act particularly in para 26 of the said judgment is very much satisfied. The lower appellate Court has assimilated the entire gamut of the dispute in the present case and particularly having regard to the object of the doctrine under Section 53A, has ordered protection of possession of the respondent by invoking Section 53A. The reliance placed by the learned counsel for the appellants on the said judgment and on the judgments of the Apex Court in the matter of **Gangabai** and **Niranjan Kumar** (supra) are of hardly any assistance. In the matter of **Niranjan Kumar**, the appellant herein has tried to rely upon the provisions of Sections 91 and 92 of the Evidence Act to demonstrate that there exists an oral agreement contrary to the written agreement Exh.24. However, if the pleadings of the present appellants are analysed, particularly in the background of the evidence brought on record, it is noticed that no contrary oral agreement was either demonstrated or proved. Apart from above, the judgment in the matter of **Gangabai** cited supra which is on the same principle is of hardly any assistance to the present appellants.

22. As stated hereinabove, the law laid down by the Apex Court in the matter of **FGP Ltd.** (supra) particularly observations made in para 26 of the said judgment, which reads thus :

"26. Section 53-A of the Transfer of Property Act has certain ingredients and, in our judgment, those are:-

- (1) a contract to transfer immovable property;
- (2) the transfer should be for consideration;
- (3) the contract must be in writing;
- (4) it should be signed by or on behalf of the transferor;
- (5) the terms of the contract can be ascertained with reasonable certainty from the writing;
- (6) the transferee takes possession of the whole or part of the property or if already in possession continues in possession;
- (7) such taking of or continuance in possession should be in part performance of the contract;
- (8) the transferee should do some act in furtherance of the contract; and
- (9) he should have performed, or be willing to perform, his part of the contract."

reflects that the contract in question based on which the possession was handed over to the defendant-respondent is in relation to an immovable property for a valid consideration and is in writing. The said contract contains signature of the transferor and could be ascertained with reasonable certainty as is rightly done by the lower appellate Court. The transferee who was put into possession remained therein throughout since 1964 and as agreed in furtherance of the contract, was ready and willing to perform his part.

23. Apart from above, it is required to be noted that the protection provided under Section 53A of the Act to the proposed transferee is a shield only against the transferor which dis-entitles him from disturbing

the possession of the proposed transferee who is put into possession in pursuance to agreement.

24. In the present case as the possession of the respondent is established by virtue of Exh.24 and also by oral evidence, in my opinion question of law that is sought to be raised particularly in regard to the applicability of doctrine of part performance and the suit being within limitation, time being an essence of contract, are rightly appreciated by the learned lower appellate Court.

25. For the reasons stated hereinabove, in my opinion, no case for interference in the second appellate jurisdiction is made out. The appeal lacks merit, stands dismissed.

(N.W. SAMBRE, J.)

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