

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

Second Appeal No. 25 of 2002

Shantabai W/o. Fulchand Marwadi,
Age 58 years,
Occupation : Household/Agriculture,
R/o Himayatnagar, Taluka Hadgaon,
District Nanded
Through General Power of Attorney
Kishorchand P. Jain,
Age 24 years, Occupation : Business,
R/o Hyderabad (AP).

.. Appellant.

Versus

Rajkumar Laxmanrao Gajewar,
Age 33 years,
Occupation : Agriculture,
R/o Himayatnagar, Taluka Hadgaon,
District Nanded.

.. Respondent.

Shri. Satyajit S. Bora, Advocate, for appellant.

Shri. A.S. Deshmukh, Advocate, for respondent.

CORAM: T.V. NALAWADE, J.

DATE : 11th SEPTEMBER 2015

JUDGMENT:

1) The appeal is filed to challenge the judgment and decree of Regular Civil Suit No.49 of 1990 which was pending in the Court of the Joint Civil Judge, Junior Division, Hadgaon and also to challenge the judgment and

order of Regular Civil Appeal No.40/1997 which was pending in the District Court Nanded. Both sides are heard.

2) This Court, the other Hon'ble Judge, admitted the appeal on the following substantial question of law :-

Whether the protection of section 53A of the Transfer of Property Act is available to defendant, appellant ?

3) It is the case of the plaintiff, present respondent that, land Survey No.169 admeasuring 32 acres 7 gunthas situated at Himayatnagar, Tahsil Hadgaon was ancestral property of Laxman, father of the plaintiff. It is contended that this portion was eastern portion of survey number and the remaining portion was in possession of one Kondiba s/o Keraba. It is contended that Laxman had made some transactions in respect of some portion of this land but area admeasuring 7 acres 10 gunthas was with him till his death. It is contended that on the date of the suit the area in revenue record was shown as 6 acres 12 gunthas and so the suit is filed in respect of portion of 6 acres 12 gunthas. It is contended that Laxman

had given this land by way of mortgage to defendant Shantabai in the year 1960 for security of amount of Rs.1000/-. It is contended that the period of mortgage was 5 years.

4) It is the case of the plaintiff that possession was given to the defendant under the aforesaid transaction but the transaction was made on simple paper and not on stamp paper and it was not registered. It is contended that at the time of the transaction plaintiff was minor, aged of 3 years and his father died in the year 1974. It is contended that at the time of death of Laxman, plaintiff was only of 3 years of age and Laxman had left behind his widow and his three daughters. It is contended that as the transaction was not made on necessary stamp paper and it was not registered it was null and void and so the plaintiff is entitled to get back the possession as owner. It is contended that defendant has no money lending license and he cannot charge interest. He had prayed for possession of portion of 6 acres 12 gunthas and also for future mense profit. He had given hand sketch map of the suit property.

5) The defendant contested the matter by filing written statement. She contended that there was agreement of sale in favour of the defendant made by Laxman in the year 1960 and Laxman had agreed to sell the property for consideration of Rs.2100/-. It is contended that on two occasions after executing the agreement part of consideration was paid and receipts were passed by Laxman.

6) It is the case of the defendant that it was represented to her by Laxman that permission of the Collector was necessary and so she waited for taking permission by Laxman and the sale deed was not executed. It is her case that she was always ready and willing to pay remaining amount of consideration but Laxman did not execute sale deed. She denied the case that it was the mortgage transaction. Alternatively she contended that she has been in possession continuously for more than 25 years and she has become owner of the suit property and the suit is time barred.

7) In trial Court issues were framed. Both sides gave evidence. The trial Court held that there was no mortgage transaction and the defendant also failed to prove that there was agreement of sale in favour of the defendant for consideration of Rs.2100/-. The trial Court held that payment of Rs.2000/- by defendant to Laxman was proved. The trial Court held that plaintiff was owner and on the basis of title he was entitled to get possession. The first appellate Court has given similar finding and it is held that the defendant is not entitled to protection of section 53A of the Transfer of Property Act.

8) The learned counsel for the appellant/defendant mainly argued on the protection which can be given under section 53A of the Transfer of Property Act. He submitted that when fact of the possession of the defendant is admitted by the plaintiff and when the payment made by the plaintiff to Laxman is also proved, inference was easy that there was some written document of agreement. This submission is not acceptable. Even if the so called two receipts are read in evidence, it is difficult to ascertain that there was written agreement

made in the past and in pursuance of that agreement the payments were subsequently made by the defendant. In the document there is mention that property was already sold when the property was not sold and the defendant has come with case that there was agreement of sale. In this document there is no mention as to why the sale deed was not executed even when most of the part of the consideration was paid. There is nothing on the record to show that permission of some authority was required to be taken under the provisions of some Act for execution of the sale deed.

9) Learned counsel for the appellant placed reliance on some observations made by the Apex Court in the case reported as **AIR 2005 SC 3503 (Aniglase Yohannan v. Ramlatha)**. He took this Court through paragraphs 8 and 10. The Apex Court has discussed provision of section 16(c) of the Specific Relief Act 1963. The facts of each and every case are always different. When some transaction was made in the year 1960 it was necessary for the defendant to show that something was to be done by the promissor and only after that sale deed

could have been executed. For claiming protection of section 53A of the Act it was necessary for the defendant to prove that she was ready and willing to perform her part of the contract. When the parties admit that the defendant was put in possession, it needs to be presumed that he was in advantageous position and so steps ought to have been taken by the defendant for completion of the contract if there was really any agreement of sale.

10) Even if it is presumed that there was agreement made in the year 1960 it can be said that the promisor was alive for about 13 years after the date of the agreement but the defendant did not file suit for specific performance and there is no record to show that she made attempt to get executed the sale deed during life time of Laxman. In view of aforesaid circumstances it can be said that Laxman could have taken any defence in that connection and he could have also contended that there was no agreement of sale and it was a transaction for security of loan taken. The conduct of not filing of suit, not taking action during life time of Laxman needs to be considered and that helps in ascertaining as to whether

there was really agreement of sale and there was readiness and willingness on the part of the defendant to perform her part of contract. It is true that even if the suit is time barred, protection of provision of section 53-A can be given but in that case also it is necessary for the party claiming protection to establish that she was ready and willing to perform her part of contract. As the defendant failed to prove readiness and willingness and as there is no evidence of creation of agreement in writing, this Court holds that protection could not have been given by the Courts below. Thus the trial Court and the first appellate Court have not committed any error in giving relief of possession to the owner. The case of title of the defendant on adverse possession could not have been decided in favour of the defendant as the defendant herself admitted that with permission of Laxman, she got the possession and it was permissive possession. Name of Laxman was continued in the revenue record as owner.

11) Learned counsel for the appellant, defendant submitted that the defendant made improvement in the land, she dug a well and the expenses made by the

defendant need to be considered in view of provision of section 51 of the Transfer of Property Act. This can be done by the Court while preparing final decree as the mense profit needs to be determined.

12) In the result, the appeal stands dismissed. No order as to cost.

Sd/-
(T.V. NALAWADE, J.)

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