

IN THE HIGH COURT OF JUDICATURE AT MUMBAI
CIVIL APPELLATE JURISDICTION
SECOND APPEAL NO.271 OF 1992

1. Mahadeo Bayaji Phadatare
2. Namdeo Bayaji Phadtare
Both residing at Vadapuri,
Taluka Indapur, District Pune ... Appellants

Vs.

1. Rukmini Tukaram Chavan
2. Sunil Tukaram Chavan
3. Pandu Tukaram Chavan
4. Mahesh Tukaram Chavan
5. Sunita Tukaram Chavan
6. Ganpat Kashinath Chavan
All residing at Vadapuri,
Taluka Indapur, District Pune ... Respondents

Mr. Kayval P. Shah for Appellant.
None for Respondents.

CORAM : R. G. KETKAR, J.
DATE : MARCH 25, 2015

ORAL JUDGMENT :

Heard Mr. Shah, learned Counsel for appellants at length.

2. By this Appeal under Section 100 of the Code of Civil Procedure, 1908 (for short 'C.P.C.'), original defendants No.2 and 3 have challenged the judgment and decree dated 14.09.1991 passed by the learned Additional District Judge, Baramati in Civil Appeal No.205/B-1989. By that order, the learned District Judge allowed the appeal instituted by

respondents No.1 to 5, hereinafter referred to as the plaintiffs and quashed and set aside the judgment and decree dated 15.07.1987 passed by the learned Civil Judge Junior Division, Indapur in Regular Civil Suit No.58 of 1978. The learned District Judge decreed the Suit and declared that the plaintiffs have half share in the suit properties as more particularly described in paragraph 1 of the plaint. The learned District Judge appointed the Collector or any gazetted officer subordinate to it, deputed by him in this behalf as Court Commissioner for effecting partition and separate possession of the plaintiffs' half share. The learned District Judge also ordered enquiry as regards mesne profits of plaintiffs' half share under Order 20, Rule 12(1)(c) C.P.C. The relevant and material facts that are necessary for the disposal of the Second Appeal, are as under:

3. Plaintiffs instituted Suit against the appellants, hereinafter referred to as defendants No.2 and 3 as also respondent No.6, hereinafter referred to as defendant No.1 for cancellation of agreement of sale dated 26.12.1975 as also for partition and separate possession. The subject matter of the present Second Appeal is lands bearing Gat No.286 admeasuring 3 Hectares 65 Ares and Gat No.287 admeasuring 3 Ares situate at Village Vadapuri, Taluka Indapur, District Pune (for short 'suit lands'). It is the case of the plaintiffs that Kashinath Chavan had 2 sons by name, Ganpat (defendant No.1) and Tukaram. Defendant No.1 was elder brother. Plaintiff No.1 is widow of Tukaram. Plaintiffs No.2 to 5 are children of Tukaram. It is the case of the plaintiffs that after the death of Kashinath, names of Tukaram and defendant No.1 were entered in the Records of Rights. Defendant No.1 Ganpat being the elder was shown as manager of joint family. As Tukaram was suffering from serious disease, defendant No.1 agreed to sell the suit lands in favour of defendants No.2 and 3. However, plaintiffs were not made aware of this

transaction. The said fact was disclosed to the plaintiffs only at the time of the Suit. The plaintiffs, therefore, claimed that the agreement of sale is not legal and valid. As per the agreement of sale, defendants No.2 and 3 did not institute Suit for specific performance and their claim for specific performance had also become time barred. The agreement of sale is also illegal in view of Section 31 of the Bombay Prevention of Fragmentation and Consolidation of Holdings Act, 1947.

4. Defendant No.1 filed written statement exhibit-16 and denied the suit claims. He admitted that the suit lands are ancestral joint Hindu family properties. Defendant No.1 denied that he executed agreement in favour of the defendant No.2 by playing deception on deceased Tukaram. He contended that deceased Tukaram and he himself executed agreement of sale in favour of defendant No.2. As per the recitals of the agreement, defendant No.3 is in actual possession of the suit lands. It was contended that the agreement of sale is binding on the plaintiffs. They cannot claim injunction against him being a co-owner.

5. Defendant No.2 resisted the Suit by filing written statement - exhibit 22. He contended that deceased Tukaram and defendant No.1 agreed to sell the suit lands in his favour. In pursuance thereof, the suit lands are in possession of the defendant No.3. Plaintiffs being legal representatives of deceased Tukaram are under an obligation to execute the sale deed. Defendant No.2 will file appropriate Suit for relief of specific performance. Deceased Tukaram was badly in need of money to meet the medical expenditure as he was suffering from Cancer. He, therefore, contended that the agreement of sale was entered into for the legal necessity.

6. On the basis of the pleadings of the parties, the learned trial Judge

framed the necessary issues. After considering the evidence on record, the learned trial Judge dismissed the Suit. Aggrieved by that decision, plaintiffs preferred Appeal before the District Court, which was allowed. It is against this decision, defendants No.2 and 3 have preferred the Second Appeal. On 22.06.1992, Second Appeal was admitted on the grounds (f) to (h), which are the substantial questions of law. Grounds (f) to (h) read thus,

(f) The lower Appellate Court ought to have held that the 6th respondent (i.e. the original defendant No.1) and his deceased younger brothers, Tukaram (the husband of last respondent 1st plaintiff and father of respondents No.2 to 5) together constituted a joint Hindu family and that for the legal necessity of the said joint family namely, for paying off the debts to the Land Development Bank, and to meet the medical expenses of the said Tukaram himself, who was suffering from Cancer agreed to sell the suit properties by an agreement for sale dated 26.12.1975 to the appellants and that the said agreement for sale was executed by the said deceased Tukaram himself and his brother the 6th respondent herein as the mention of the said joint family (the 6th respondent herein being the Karta and Manager of the said joint family);

(g) The lower Appellate Court erred in holding that the agreement to sell itself would not create right, title or interest in the suit properties in favour of the purchasers (i.e. the appellants herein) and that it was not necessary for the trial Judge to have dealt with it, in detail;

(h) The lower Appellate Court ignored the fact that the agreement for sale of the suit properties was followed by possession and that the appellants were put in possession of the suit properties in part performance of the suit agreement is one coupled with interest did create and was and is capable of creating right, title and interest in respect of the suit properties in favour of the appellants – purchasers and therefore, the suit agreement for sale was undisputable and irrevocable in as much as the appellants were and are bonafide purchasers for valuable consideration.

7. After admission of the Appeal, notices were issued to the respondents. Office remark shows that all the respondents are duly

served. However, they have not entered appearance.

8. In support of this Appeal, Mr. Shah strenuously contended that the learned District Judge committed serious error in allowing the appeal and decreeing the Suit. He submitted that the learned District Judge failed to appreciate that defendants No.2 and 3 are in possession of the suit lands in part performance of agreement of sale dated 26.12.1975. The said agreement is in writing. Defendants No.2 and 3 were and are always ready and willing to perform their part of contract. He submitted that all the necessary ingredients of Section 53-A of Transfer of Property Act, 1882 (for short 'Act') have been pleaded and proved. He further submitted that once the defence of Section 53-A is proved, plaintiffs are not entitled to partition and separate possession of their share. He further submitted that the plaintiffs admitted receipt of Rs.1,500/-, which fact is also noted by the learned trial Judge in paragraph 7. He, therefore, submitted that having paid entire consideration to the deceased Tukaram and defendant No.1, even if defendant No.2 did not plead readiness and willingness, nothing remained to be done by him. He, therefore, submitted that failure to plead readiness and willingness is not vital in the facts and circumstances of the present case as the defendant No.2 performed his part by paying the entire consideration.

9. I have considered the submissions advanced by Mr. Shah. I have also perused the material on record as also the original record. Perusal of agreement of sale dated 26.12.1975 (exhibit-45) shows that total consideration agreed between the parties was Rs.28,500/-. Out of that, the agreement recorded the payment of Rs.7,000/- and balance amount of Rs.21,500/- was to be paid. Perusal of paragraph 7 of the trial Courts' judgment shows that plaintiff No.1 appears to have admitted receipt of Rs.1,500/- after execution of agreement of sale for meeting the medical

expenditure of deceased Tukaram. Even if it is accepted that plaintiff No.1 admitted receipt of Rs.1,500/-, there is no evidence on record to show that defendants No.2 and 3 have paid Rs.20,000/- being the balance amount ($\text{Rs.21500} - \text{Rs.1500} = \text{Rs.20,000/-}$). That apart perusal of the written statement, exhibit-22, also does not indicate that defendant No.2 had set up defence under Section 53-A of the Act. He also did not plead readiness and willingness to pay the balance consideration. In short, there is neither pleading nor proof of payment of balance consideration of Rs.20,000/-.

10. Apart from that, perusal of the evidence on record as also the findings recorded by the learned District Judge shows that defendants No.2 and 3 are not in possession of the suit lands. Section 53-A of the Act reads as under:

“53A. Part performance.—Where any person contracts to transfer for consideration any immoveable 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.”

11. Perusal of Section 53-A shows that following conditions are required to be fulfilled for claiming benefit thereunder:

- (i) Agreement has to be in writing;
- (ii) The transferee has in part performance of contract taken possession of the property or any part thereof;
- (iii) The transferee has performed or is willing to perform his part of contract.

12. In the present case, defendants No.2 and 3 have not established that they are in possession of the suit lands, in part performance of the contract. They have also not pleaded and proved that they are willing to perform their part of contract. That apart, no such case was made out in the Courts below. On the other hand, defendant No.2 pleaded that he will institute Suit for specific performance of contract. In view thereof, I do not find that the learned District Judge committed any error in allowing the Appeal. The substantial questions of law formulated hereinabove are answered accordingly. In the result, Second Appeal fails and the same is dismissed. In the circumstances, no order as to costs. Before parting, I place on record my appreciation for the assistance rendered by Mr. Kayval Shah.

(R. G. KETKAR, J.)