

**IN THE HIGH COURT AT BOMBAY
APPELLATE SIDE, BENCH AT AURANGABAD**

SECOND APPEAL NO. 779 OF 1999
WITH
CIVIL APPLICATION NO. 5739 OF 1999.
WITH
CIVIL APPLICATION NO. 5740 OF 1999.

- 1 Rama S/o Dagadu Mirge,
(Deceased through his LRs.)
- 1A Dwarkabai W/o Rama Mirage
Age: 75 years, Occ: Agriculture,
R/o Shivajinagar, Near Hotel Dewas
Sillod, Tal. Sillod, Dist. Aurangabad.
- 1B Sheshrao S/o. Rama Mirge,
Age: 52 years, Occ: Agriculture,
R/o Shivajinagar, Near hotel Dewas,
Sillod Tal. Sillod, Dist. Aurangabad.
- 1C Subhash S/o Rama Mirge,
Age: 30 years Occ: Agriculture,
R/o Shivajinagar, Near Hotel Dewas,
Sillod Tal Sillod, Dist. Aurangabad.
- 1D Raghunath S/o. Rama Mirge,
Age: 40 years, Occ: Agriculture,
R/o. Shivajinagar, Near Hotel Dewas,
Sillod Tal Sillod, Dist. Aurangabad.
- 1E Keshrao S/o Rama Mirge,
Age: 49 years, Occ: Agriculture,
R/o Shivajinagar, Near hotel Dewas,
Dist. Aurangabad.
- 1F Sitaram S/o Rama Mirge,
Age: 46 years, Occ: Agriculture,
R/o Shivajinagar, Near Hotel Dewas,
Sillod Tal Sillod, Dist. Aurangabad.
- 1G Mahadu s/o. Rama Mirge,
Age 46 years, Occu. Agriculture,
R/o. Shivajinagar, Near Hotel Dewas,

Dist. Aurangabad.

- 1H Shivaji S/o Rama Mirge,
(deceased) through L.Rs.
- 1H1 Nandabai W/o. Shivaji Mirge,
Age: 40 Years, Occ: Agriculture,
R/o Sisarkheda, Tal Sillod,
Dist. Aurangabad.
- 1H2 Renukabai W/o. Santosh Dhotre,
Age 20 years, Occu: Agriculture,
R/o. Sisarkheda, Tal Sillod,
Dist. Aurangabad.
- 1H3 Bhagwan S/o. Shivaji Mirage,
Age 40 years, Occu: Agriculture,
R/o. Sisarkheda, Tal. Sillod,
Dist. Aurangabad.
- 1I Dhondiba W/o. Govindrao Kalate,
Age 55 years, Occu: Household,
R/o. Biyakhed, Tal. Sillod,
Dist. Aurangabad.
- 1J Kamlabai W/o. Kautik Khomane,
Age 27 years, Occu. Household,
R/o. Bharadi, Tal. Sillod,
Dist. Aurangabad.
- 1K Baburao S/o. Rama Mirge,
Age 34 years, Occu. Agriculture,
R/o. Sisarkheda, Tal. Sillod,
Dist. Aurangabad.

....Appellants.

Versus

- 1. Phulasing S/o. Tikaram Meher,
Deceased through L.Rs.
- 1-A Mathurabai Phulasing Bohare
Age:58 years, Occu: household,
R/o Adgaon Wadi, Tq. Phulambri,
District Aurangabad.

- 1-B Dhondubai Abalusing Chungade
Age: 56 years, Occu: Household,
At Post Talani, Tq. Sillod,
District Aurangabad.
- 1-C Ushabai Subhash Bedwal,
Age: 52 years, Occu: household.
R/o Galle Borgaon,
Tq. Khultabad, Dist. Aurangabad.
- 1-D Naginabai Bansising Bedwal
Age: 48 years, Occu: Household,
R/o Palasgaon, Tq. Kannad,
district Aurangabad.
- 1-E Nandabai Tarachand Nimwal
Age: 45 years, Occu: Household,
R/o Ganeshpur, Post Chincholi
Tq. Kannad, Dist. Aurangabad.
- 1-F Mahadu Phulsing Meher,
Age: 40 years, Occu: Service,
- 1-G Supdu Phulsing Meher
Age: 36 years, Occu: Agri.
- 1-H Sajjan Phulsing Meher
Age: 33 years, Occu: Agri.
- 1-I Gendabai Phulsing Meher,
Age; 75 years, Occu: Household,

1-F to 1-I R/o Upaliwadi,
Tq. Sillod, Dist. Aurangabad.
2. Harachand S/o Hiranman Meher,
Age: Major, R/o & Occu:
As above

....Respondents.

Mr. K.C. Sant, Advocate for appellants.

Mr. A.D. Kasliwal, Advocate for respondent Nos. 1A to 1-I & 2.

WITH
SECOND APPEAL NO. 781 OF 1999

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Age: Major, R/o & Occu:
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....Respondents.

Mr. K.C. Sant, Advocate for appellants.

Mr. A.D. Kasliwal, Advocate for respondent Nos. 1A to 1-I & 2.

CORAM : T.V. NALAWADE, J.
DATED : 25th April, 2016.

JUDGMENT :

1) The appeals are filed against judgment and decree of Regular Civil Appeal Nos. 283/1991 and 284/1991, which were pending in the Court of Joint District Judge, Aurangabad. Regular Civil Suit No. 30/1989 was filed by Phulsing, respondent of the present appeals for relief of declaration and for relief of possession of the suit property in the Court of Civil Judge, Junior Division, Sillod. After filing of this suit, Rama, present appellant filed R.C.S. No. 137/1989 in the same Court for relief of specific performance of contract. Rama had contended in that suit that the suit property of R.C.S. No. 30/1989 was in his possession and Phulsing had agreed to sell this property for lawful consideration and most of the consideration was paid by him to Phulsing. The Trial Court had dismissed the suit of Phulsing filed for relief of possession and it had decreed the suit of Rama, which was filed for relief of specific performance of contract. The District Court has set aside the decision given by the Trial Court in both the aforesaid suits. The suit of Rama is dismissed and the suit of Phulsing is decreed by the District Court. Both the sides are heard.

2) Phulsing is owner of Survey No. 45/2, admeasuring 11 Acres 3 Gunta situated at village Upali-Wadi, Tahsil Sillod. It is

the case of Rama that under agreement of sale Phulsing had agreed to sell 5 Acres portion to him for consideration of Rs. 6,001/- and the agreement was executed by Phulsing on 21.1.1975. It is the case of Rama that on the date of agreement, out of Rs. 6,001/- he had paid Rs. 3,000/- as a part of consideration and the possession was handed over to him by Phulsing. It is the case of Rama that on 12.2.1975, in presence of witnesses, he gave amount of Rs. 2,701/- to Phulsing and Bharna Pavti was executed by Phulsing in his favour. It is the case of Rama that in aforesaid way, out of the total consideration of Rs. 6,001/-, he had paid Rs. 5,701/- to Phulsing and he was ready and willing to pay remaining amount of Rs. 300/- to Phulsing. It is contended that on 12.2.1975 itself, he had offered to give remaining amount also, but Phulsing had voluntarily refused to accept the remaining consideration with malafide intention. It is his case that Phulsing had assured that he would execute registered sale deed whenever demanded by Rama.

3) It is the case of Rama that Phulsing then filed R.C.S. No. 30/1989 and made false contentions and denied the existence of such agreement and so, cause of action took place for him. It is his case that he issued legal notice to Phulsing and asked him to execute the sale deed, but Phulsing refused to

execute the sale deed. It is his case that he was ready and willing to perform his part of contract. It is his case that on the basis of documents executed in his favour by Phulsing, his name is entered in the revenue record and so, the relief of specific performance of contract needs to be given to him.

4) It is the case of Phulsing that defendant has no concern with the suit property. It is contended that defendant is rich and influential person of village Shiraskheda and he has evil eye on the suit property. It is contended that behind his back, defendant joined hands with revenue officer and got entered his name in the revenue record of the suit property in the year 1975. It is contended that in the year 1985, he came to know about this mutation and then he filed proceeding before revenue authority to challenge that mutation. It is his case that he had not executed any document in favour of Rama, but on the basis of false record created, Rama got his name entered in the revenue record and in the year 1985 Rama dispossessed him. The relief of possession was claimed on the basis of aforesaid contentions of Phulsing.

5) On the basis of aforesaid pleadings, issues were framed in both the suits by the Trial Court. The evidence was

recorded in the suit filed by Rama for relief of specific performance. It appears that the disputed documents were sent to hand writing expert along with specimen thumb impressions of Phulsing. Hand writing expert gave opinion that the thumb impression appearing on the agreement tally with the specimen thumb impressions of Phulsing. The expert could not give definite opinion in respect of Bharna Pavati.

6) The title of Phulsing over land Gat No. 45/2 is not disputed. Relevant revenue record is there. Substantive evidence is given by Phulsing that he had not made any agreement with defendant Rama and he had not handed over possession to Rama. He has given evidence that behind his back, Rama got mutated his name in the revenue record and so, revenue proceeding was filed by him against Rama in the year 1985. He has given evidence that as he is owner, the decree of possession of 5 Acres portion needs to be given to him. He examined one Sandu to support the contention that about 5 to 6 years prior to date of deposition i.e. in the year 1985 Rama took possession forcibly.

7) As against aforesaid evidence, Rama gave evidence that for consideration of Rs. 6,001/-, Phulsing agreed to sell the

suit property and on the date of the agreement i.e. 21.1.1975 amount of Rs. 3,000/- was given by him in presence of two witnesses and agreement was executed by Phulsing. He has given evidence that on subsequent date, he had offered the remaining amount of Rs.3,001/-, but Phulsing returned Rs. 300/- by saying that he would take that amount at the time of execution of sale deed. He has given evidence that Bharna Pavti was executed on that day by Phulsing in his favour. He examined Madhavrao Shejul, a witness of both agreement and Bharna Pavati to prove the execution and in his evidence, these documents are proved as Exhs. 41 and 42. One witness Punjaji Navale is examined by Rama to show that he is in possession.

8) The Trial Court had held that the suit of Phulsing was not within limitation as the possession was given by him to Rama under aforesaid agreement and the suit was not filed within 12 years. The Trial Court had held that the suit of Rama was within limitation and it was held that as most of the consideration was paid by Rama, he had shown his readiness and willingness and so, he was entitled to get the decree of specific performance of contract. The Trial Court had further held that Rama was entitled to protection of provision of section 53-A of Transfer of Property Act. All these findings are set aside by the

First Appellate Court. The District Court has held that Rama has failed to prove that agreement was executed in his favour by Phulsing. It is further held that suit of Rama was not within limitation. After giving such findings, the District Court gave the decree of possession to Phulsing. By the order dated 6.1.2003, this Court admitted both the present appeals on following substantial questions of law.

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- (i) Whether on the pleadings and the material brought on record by the present appellant the first Appellate Court was right in holding that the appellant was not always ready and willing to perform his part of contract and as such is not entitled to decree for specific performance of contract ?
- (ii) Whether the suit is barred by limitation ?

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- (i) Whether the appellant is entitled to retain his possession over the suit land by resorting to the provisions of Section 53-A of the Transfer of Property Act ?
- (ii) Whether the suit of the respondent is barred by time under Article 65 of the Limitation Act, 1963 and was liable to be dismissed ?

9) It is true that there can be oral agreement of sale of immovable property. When purchaser wants to use the provision of section 53-A of the Transfer of Property Act, in view of the wording, the condition given in section 53-A, the agreement needs to be in writing. When the agreement is in writing, it needs to comply the conditions laid down by the Stamp Act and also Indian Registration Act. As per the provisions of Bombay Stamp Act, necessary stamp duty needs to be paid by purchasing general stamp and writing the agreement on general stamp. It also needs to be kept in mind that revenue stamp used for affixing it on receipt is different than the general stamp. When title is shown to be transferred in a document, it needs to be treated as a sale deed and necessary stamp duty under the Stamp Act needs to be paid on the basis of consideration of the transaction. Further, in view of the provisions of Transfer of Property Act and Indian Registration Act, such document needs to be registered. If necessary stamp duty is not paid in respect of the document, which is used as sale deed, such document needs to be impounded by the Court when Court comes across such document in view of section 34 of the Bombay Stamp Act. If the party in whose favour the document is executed wants to use the document in the Court or for other purpose, he needs to

make payment of stamp duty and he also needs to make payment of penalty. Authority is created under the Stamp Act to ascertain the penalty and on the basis of that order the stamp duty and penalty needs to be paid. Only after payment of the stamp duty and the penalty, such document can be used in the Court. If the transaction is written after making payment of proper stamp duty the document needs to be registered if the document is to be used as sale deed. Though it is true that such document can be used for collateral purpose, if there is other defect like non payment of the stamp duty, such document cannot be used for collateral purpose also. The wording of section 53-A of the Transfer of Property Act shows that there is no relaxation to the condition of payment of stamp duty under this provision. This provision needs to be kept in mind before accepting it in the evidence.

10) The defendant has denied the execution itself of both the documents Exhs. 41 and 42. At the time of appreciation of such evidence, other circumstances like illiteracy of Phulsing, who has denied execution also needs to be kept in mind. Both the documents bear the thumb impressions. In the suit, Rama wanted to use Exh. 41 as agreement of sale, but general stamp duty was not paid on Exh. 41. If the transaction was to be in

writing, it was necessary to make the payment of stamp duty by purchasing general stamp and the document ought to have been written on such stamp. No explanation is given as to why such stamp was not purchased. In view of the provisions of section 34 of the Bombay Stamp Act, it was the duty of the Court to impound the document. That was not done. On this point, two reported cases were cited by the learned counsel for Rama and they are mentioned at proper place. Here only it needs to be observed that no procedure was followed to make the document admissible in evidence by Rama. Exh. 42 is described as Bharna Pavati and it shows that in previous document dated 21.1.1975 the suit property was sold to Rama. Thus, by using these two documents, Rama wanted to show that he has actually purchased suit property from Phulsing. The mutation entry made in favour of Rama, a copy of which is produced at Exh. 49 shows that Rama had represented to the revenue authority that he had purchased the property. Thus, Rama had used this document as document of sale transaction. In mutation, it was informed that the property was purchased for consideration of Rs. 5,700/-. The sale transaction, according to Rama, was of Rs. 6,000/-. Thus, apparently, he had no intention to pay remaining consideration.

11) The two reported cases on which the learned counsel

for Rama placed reliance are as under :-

(i) AIR 1961 SUPREME COURT 1655 [Javer Chand and Ors. Vs. Pukhraj Surana],

(ii) 2014 (5) Mh.L.J. 807 [Mahendra s/o. Mahadeo Deshbratar Vs. Kailash s/o. Bhauraoji Chandankhede].

This Court has carefully gone through the facts of the two reported cases. The facts were totally different and there the execution was admitted. In the present matter, execution is not admitted. In view of this circumstance, the documents were required to be proved and before proving of the execution, it was the duty of the Court to impound the document. Thus, the observations made in the two reported cases are of no help in the present matter.

12) There is no specific pleading in the written statement as to why Rama did not take steps for enforcing contract of sale when in the written statement itself it is mentioned that Phulsing avoided to accept the remaining amount of Rs. 300/- with malafide intention. There is one more circumstance like in the year 1985, Phulsing had started revenue proceeding to challenge the mutation made in favour of Rama. Thus, in the year 1985, it was within the knowledge of Rama that Phulsing had no intention to execute the sale deed. In spite of that

circumstance, suit was not filed within three years. It is already observed that by using mutation No. 49, Rama wanted to prove that he became owner. Thus, he had no intention to get specific performance of the contract from Phulsing. From the contents of written statement, it can be said that for about 18 years, no steps were taken by Rama for getting executed the sale deed even when according to him, Phulsing had refused to accept the remaining consideration with malafide intention. These circumstances also create doubt about the case of Rama that he had paid amount of Rs. 2,700/- subsequent to the execution of Exh. 41. In the evidence, first time Rama tried to say that the remaining consideration was to be paid at the time of execution of sale deed, but due to absence of specific pleading and due to the circumstance like getting mutation, Exh. 49, such case cannot be accepted and believed. Thus, the suit of Rama was not within limitation and the District Court has not committed any error in giving such finding.

13) The aforesaid circumstances and the conduct of Rama further show that he was not ready and willing to perform his part of the contract. If he had got the possession after making payment of only Rs. 3,000/-, it was necessary for him to take initiative and show that he was ready and willing to perform

his part of the contract. Due to the aforesaid circumstances, the District Court has rightly held that the subsequent payment of Rs. 2,700/- is not proved by Rama. Thus, Rama failed to prove that he was ready and willing to perform his part of the contract. In view of such findings, this Court holds that it is not possible to give protection of section 53-A of the Transfer of Property Act to Rama.

14) Even if it is presumed that Phulsing had taken false defence that possession was taken in the year 1985, this will not change the fate of the matter. Even if it is presumed that Rama got the possession under Exh. 41, that possession was permissive in nature. He was in possession under agreement of sale as per his case. Due to this circumstance, it was not possible to hold that Phulsing ought to have filed suit for possession within 12 years from the date of execution of Exh. 41. Thus, the Trial Court has committed error in this regard. No title has passed to Rama and so, there was no other alternative before the First Appellate Court than to give decree of possession in favour of Phulsing.

15) Some more cases were cited by learned counsel for appellant, Rama which are as under :-

(i) AIR 2001 SUPREME COURT 965 [Santosh Hazari Vs. Purishottam Tiwari (dead) by L.Rs.],

(ii) (2010) 10 Supreme Court Cases 458 [Pralhad and Ors. Vs. State of Maharashtra and Anr.],

(iii) 2009 (2) Mh.L.J. 98 [Jagdish Singh Vs. Madhuri Devi],

(iv) 2009 (4) Mh.L.J. 420 [Shriram Mandir Sansthan, Amravati Vs. Tulsiram s/o. Bhagirath Lohiya and ors.],

(v) One case decided by Punjab and Haryana High Court in the case of Teja Singh Vs. Ram Prakash Talwar dated 23rd August 1983,

(vi) 2006 (2) Mh.L.J. 644 [Sakharam Laxman Mathane Vs. Laxman Bahiru Dige],

(vii) (1969) 3 Supreme Court Cases 120 [Nathulal Vs. Phoolchand],

(viii) AIR 2002 (SC) 960 [Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi (D)],

(ix) (2009) 2 Supreme Court Cases 582 [Alok Bose Vs. Parmatma Devi and Ors.], and

(x) Second Appeal No. 298/1990 dated 23rd June 2009 decided by this Court (Other Hon'ble Judge).

The facts and circumstances of each and every case are always different. In view of the facts and circumstances of the present case, only the aforesaid findings are possible. Thus, all the points on which this Court had admitted the appeals need to be

answered against Rama and they are answered accordingly. In the result, following order is made.

ORDER

(I) Both appeals are dismissed. Civil applications are disposed of.

(II) The learned counsel for appellant requests for granting stay to the execution of judgment and decree for some time as he wants to challenge the decision. The other side has submitted that the stay was vacated about four months back and at present, there is no stay in existence. In view of these circumstances, stay is refused.

[T.V. NALAWADE, J.]

SSC/