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

SECOND APPEAL NO. 481 OF 2000

Ismail s/o Kabirsaheb,
age 65 years occupation agriculture
R/o Chata Taluka and Dist. Latur, (DIED) (Original Deft.No.2)
Through legal representatives:

- 1) Shaikh Afrubee Ismail,
age 65 years occupation household,
- 2) Shaikh Ahmed Ismail,
age 85 years occupation agriculture,
- 3) Shaikh Babu Ismail,
age 40 years occupation agriculture,
- 4) Shaikh Khajamiya Ismail,
age 38 years occupation agriculture,
- 5) Shaikh Gulab Ismail,
age 35 years occupation agriculture,
- 6) Shaikh Mannabee Sardar,
age 52 years occupation agriculture,
- 7) Shaikh Saherabee Dastagir,
age 36 years occupation agriculture,
- 8) Medake Chunnibee Hujur,
age 32 years occupation household,
- 9) Shaikh Taherabee Osman,
age 30 years occupation house wife
- 10) Sayyed Baibee Rasheed,
age 25 years occupation household

All R/o Chata Taluka and Dist. Latur.

... APPELLANTS

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VERSUS

1. Mohammad s/o Ibrahim,
age 35 years occupation agriculture
R/o Chata, now at village Chincholi Wadi
Taluka and District Latur. (Original plaintiff)
2. Kashim s/o Hussain,
age 60 years occupation agriculture
R/o Chata Taluka and Dist. Latur (DIED), (Orig. defendant No.2)
Through legal representatives:
 - 2/1. Saherabee Kasim Shaikh,
age 50 years occupation agriculture,
 - 2/2. Shaikhlal Kasim Shaikh,
age 29 years occupation agriculture
 - 2/3. Abedabee Isaq Shaikh,
age 32 years occupation household
 - 2/4. Rasheedabee Kasim Shaikh (Malaji),
age 60 years occupation householdAll R/o Chata Taluka and Dist. Latur. ...RESPONDENTS.

Mr Avinash Khande, Advocate, holding for Shri Girish L. Awale,
Advocate for Appellants,
Ms. Sheetal Salunke, Advocate, holding for Mr V.D. Salunke,
Advocate for respondent No.1,
Mr N.N. Jagdale, Advocate for respondents No. 2/1 to 2/4.

CORAM : N.W. SAMBRE, J.**DATE : 7th July, 2017****ORAL ORDER**

1. In Regular Civil Suit No. 353/1981, present appellant/original

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defendant No.2 suffered a decree for possession, which was confirmed in Regular Civil Appeal No. 62/1996. As such, this Second Appeal.

2. The learned Counsel for the appellant, apart from reasoning and grounds of appeal, in view of Section 53-A of the Transfer of Property Act, would urge that though the suit for specific performance is dismissed in default, the proceedings for restoration thereof are pending. According to him, the outcome in the present suit will adversely affect the right of the appellant/defendant No.2 in the suit for specific performance, and as such, the judgment and decrees in this Second Appeal be set aside, and it be directed that the suit be heard alongwith suit for specific performance filed by the present appellant.

3. The claim is opposed by the learned Counsel for respondent/plaintiff on the ground that the appellant was not diligently pursuing the suit for specific performance. According to the learned Counsel, the application for restoration was also dismissed, which demonstrates the negligent attitude on the part of the appellant. It is then claimed that there are concurrent findings and the appeal be dismissed.

4. From rival claims put-forth before this Court and upon perusal of

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the judgment and decrees of learned Trial Court and the Appellate Court, it is required to be noted that land survey No. 77-A after consolidation renumbered as Block No. 168 admeasuring 4H.01R situated at village Chatta Taluka Latur, which is the subject matter of the suit in question.

5. The plaintiff claimed title over the suit property, and as such, he brought the suit for possession in action.

6. The present appellant resisted said claim by filing written statement at Exh. 16, and claimed that though father of the original plaintiff/ respondent herein was owner of the suit property, it is claimed by the defendant that the respondent/plaintiff had no title to the suit property being successor to deceased Ibrahim. It is further claimed by the appellant that the plaintiff sold Western portion of the suit property to one Bhimrao Kamble by way of sale deed, who is in possession of the said property, and balance land to the extent of 10 acres remained in possession of the respondent/plaintiff. He would then further urge that on 4th of April 1960 deceased Ibrahim executed agreement of sale in favour of appellant and the possession of the suit land was delivered to him. It is also claimed that the permission for alienation as contemplated under Section 47 of the Hyderabad Tenancy and

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Agricultural Lands Act, remained pending. As such, the sale deed was not executed.

7. Considering rival submissions, the Trial Court framed issues at Exh. 33 and answered the issue of title in favour of the plaintiff/respondent. It is also held that plaintiff was in possession of the suit property earlier and he is also entitled for the relief sought. While recording such findings, the Trial Court considered the evidence of the plaintiff including that of oral and documentary. One Kaka Ganapati and Tukaram Balu, deposed in support of plaintiff's case at Exh. 9 and 29. Plaintiff examined himself at Exh. 84, one Digambar Ambekar at Exh. 87 and Bimbraj Dadarao at Exh. 88, whereas present appellant examined himself at Exh. 93.

8. Original defendant No.1 admitted claim of the plaintiff, which was also an issue, which is sought to be canvassed by the learned Counsel for the appellant.

9. The Trial Court after evaluating the evidence, recorded finding that the evidence of the present appellant/defendant No.2 is not reliable. The Trial Court then considered that the defence as is raised under section 53-A of the Transfer of Property Act, was not established.

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10. Apart from above, it is required to be noted that the Appellate Court in detail analysed submissions of the present appellant in Regular Civil Appeal No. 62/1996. The Appellate Court recorded that the nature of transaction to the agreement dated April 4, 1960, is an agreement for sale and held that the present respondent/plaintiff was not in possession of the suit property. However, while dealing with claim of possession, the lower Appellate Court has also taken recourse to provision of section 53-A of the Transfer of Property Act. The appellate Court then considered the aspects of sale of part of land in favour of Bhimrao Kamble and repayment of loan, which was obtained by present appellant/plaintiff. It is further observed, based on the evidence, that the possession of the land was forcibly taken by the present appellant.

11. While analysing the claim in the backdrop of Section 53-A of the Transfer of Property Act, it is to be considered whether present appellant was in permissive possession and his possession is protected in the backdrop of qualification under section 53-A of the T.P. Act. Admittedly, present appellant filed a suit for specific performance, which was not taken to its logical end, in sense was dismissed in default.

12. While seeking qualification under section 53-A of the T.P. Act, it was expected from the present appellant to establish that he was ready

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and willing to perform his part of contract for the suit property in question.

13. Even though pleadings to that effect are raised, I hardly found any sufficient case so as to infer ready and willingness of the present appellant so as to get the agreement of sale to its logical end by getting executed sale deed in his favour. No concrete material to that effect could be noticed to have been brought on record by the present appellant.

14. In the aforesaid backdrop, in my opinion, the appeal lacks merit. Hence appeal stands dismissed.

15. Though the present appellant is not diligent as regards steps to be taken by him for restoration of the suit for specific performance, however, it will be worth to observe here that if any steps are taken, the said proceedings be decided on its merit.

1. Protection of possession is continued for a period of six weeks i.e. upto 18th August 2017, in view of the fact that agreement is almost for more than 50 years old, under which he claims to be in possession.

(N.W. SAMBRE, J.)

pjm