

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

SECOND APPEAL NO.8 OF 1991

WITH

**CIVIL APPLICATION NO.3917 OF 2017 WITH
CIVIL APPLICATION NO.1553 OF 2017**

Shevantabai w/o Dadarao Ghatule
Age 30 years, Occu. Agril. & Household,
R/o Kallam, Tq. Kallam,
District Osmanabad

...APPELLANT
(Original Plaintiff)

VERSUS

1. Kishanrao s/o Dajiba Samudre,
Age 55 years, Occu. Agril. and
Sarpanch, R/o Dhoki, Taluka and
District Osmanabad,
(Deceased, deleted as per Court's order
dated 14/1/1991)

2. Gram Panchayat, Dhoki,
through the Sarpanch

...RESPONDENTS

.....
Shri S.S. Choudhary, Advocate for appellant
Shri S.S. Shinde, Advocate for respondent No.2
.....

CORAM: A.M. DHAVALÉ, J.

Date of reserving judgment : 29th November, 2018

Date of pronouncing judgment : 7th December, 2018

J U D G M E N T

1. This appeal under Section 100 of the Civil Procedure Code has been admitted on 14.1.1991 on Ground Nos.12, 16, 17,

18 and 19 as substantial questions of law. From the arguments advanced, though the execution of agreement to sell has been challenged, the substantial questions of law in the present case is:-

“Whether the defendant is entitled for protection under the doctrine of part performance under Section 53-A.””

2. The facts relevant for deciding the appeal may be stated as follows :

3. The appellant is original plaintiff and the respondents are original defendants. It is significant to note that the defendant No.1 i.e. respondent No.1 Kishan Samudre has reportedly died on 14.1.1991 and his legal representatives were not brought on record at any stage.

4. The subject matter of the lis is agricultural land at Survey No.5/2 + 3 + 4 + 5, admeasuring 4 acres 25 gunthas, situated at Dhoki, Taluka Osmanabad. Admittedly, the plaintiff Shevantabai was owner of and in possession of the suit property. She had purchased the same by two registered sale deeds dated 15.3.1973 and 9.8.1973. Her ownership was not disputed. At the relevant time, defendant No.1 Kishan Samudre was Sarpanch of defendant No.2 Grampanchayat, Dhoki. According to the plaintiff,

she is poor and illiterate village woman, residing at Kallam and maintaining herself by running a hotel. On 13.4.1978, the defendant No.1 Kishan along with one Narayan and Mujeeb came to her hotel and by coercion and undue influence, obtained her thumb impression on some writing. She had no intention to sell the land, she learnt that her thumb impression was obtained to make a show of agreement to sell, she immediately made complaints on 20.4.1978 to the Commissioner, Aurangabad with copies to Collector, Deputy Collector and Tahsildar. The plaintiff received notice from the defendants dated 29.6.1978 on 1.7.1978. The notice discloses that plaintiff agreed to sell the suit land for Rs.9000/- and received earnest money of Rs.2000/-. There was no such transaction at all. Thereafter the defendants started illegally using the suit premises for cattle market. In June 1978, when she went for cultivation of crop, she was obstructed. With these pleadings, the plaintiff prayed that she be declared owner and the alleged agreement to sell be cancelled and perpetual injunction not to disturb to her peaceful possession. In the alternative, she claimed that, she be put in possession.

5. The defendants, by written statement Exhibit 40, resisted the claim. They denied the allegations of coercion and undue influence. According to them, the Grampanchayat was in need of open space for holding a cattle bazaar. The plaintiff

came to know about it and she herself approached to them and showed willingness to sell the suit land for Rs.9000/- and accepted Rs.2000/-, and executed agreement to sell. She had produced the stamp paper dated 13.4.1978. It was a genuine transaction. The defendants had issued notice, calling upon her to execute the sale deed after receiving the balance amount. Though she received the notice, she did not reply. The defendants had dug ditches for plantation of trees and erected stones for tethering the cattle, but the plaintiff obtained exparte injunction and ploughed the land with plants and thrown out the stones. Hence, the suit be dismissed with compensatory costs.

6. The learned trial Judge framed issues. The parties led their evidence. The learned trial Judge, by judgment and decree dated 21.10.1983, held that the execution of suit agreement was proved and coercion and undue influence were not proved. The learned trial Judge surprisingly held that the possession was also proved. He, therefore, decreed the suit to the extent of declaration of ownership and perpetual injunction. The aggrieved defendants filed Regular Civil Appeal No.57/1984. The learned District Judge, Osmanabad, by judgment dated 20.9.1990, allowed the appeal. He held that, the agreement to sell and payment of earnest money were proved. There was no fraud, undue influence or coercion, therefore, the plaintiff was not

entitled for declaration and perpetual injunction. In para 23, he cursorily referred to Section 53-A of the Transfer of Property Act to hold that the appellant was entitled for protection. Hence this appeal.

7. Thus, there are concurrent findings of fact that there was a valid agreement to sell executed by the plaintiff in favour of defendant No.1 to 3, whereby the suit land was to be sold for Rs.9000/- and earnest money of Rs.2000/- was paid and possession was delivered. The said agreement is at Exh.92.

8. The order of admission showing Ground Nos.12, 16, 17, 18 and 19 as substantial questions of law is not happily worded. No specific substantial questions were framed, but no objections are raised by the learned Advocates. After hearing the learned Advocates, I record my findings on the substantial questions of law framed as under :

Issue No.I : Whether the defendants prove the terms and conditions alleged to have been incorporated in the agreement of sale ?

Finding : In the affirmative.

Issue No. II : Whether the agreement of sale would survive after expiry of three years ?

Finding : In the negative.

The agreement to sell would be unenforceable after three year from denial of execution, but it can be considered for part performance.

Issue No. III : Whether the appeal would abate due to death of Kishanrao Samudre, who died in 1986 i.e. during the pendency of Regular Civil Appeal No.57/1984 and his legal representatives were not brought on record ?

Finding : In the negative.

Issue No. IV : Whether the Regular Civil Appeal No.57/1984 was liable to be dismissed after death of Kishanrao Samudre as his legal representatives were not brought on record and the new Sarpanch elected by the Grampanchayat Dhoki or the name of new Sarpanch elected by the Grampanchayat Dhoki was not brought on record in the appeal ?

Finding : In the negative.

Issue No. V : Whether the defendants were entitled for protecting the possession of the land in dispute under the provisions of Section 53-A of the Transfer of Property Act as they have not filed the suit for specific performance of contract till this date on the basis of agreement to sell alleged to have been executed by plaintiff in favour of defendants on 13.4.1978 ?

Finding : In the negative.

Issue No. VI : What order ?

Finding : The appeal is allowed. The judgment and decree of appellate Court is set aside and the judgment and decree of the trial Court is modified. It is declared that, the plaintiff is owner of the suit land and the defendants do hand over possession of the suit land to the plaintiff.

REASONS :

9. Mr. S.S. Choudhari, learned Advocate for the appellant argued that the agreement to sell dated 13.4.1978 was not proved. There was coercion and undue influence. The Grampanchayat has not produced any documentary evidence. On 20.4.1978, the plaintiff has made complaints to the Dy. S.P., Commissioner and Tahsildar. Therefore, the findings of both the courts that the agreement to sell was a genuine document should be set aside.

10. He also submitted that, the defendant No.1 expired in 1991 and his Legal heirs were not brought on record in the first appeal. Therefore, the appeal stands abated.

11. Thirdly, he submitted that, since the date of agreement till date, the appellant has not taken any steps for specific performance of contract. He was not ready and willing

and, therefore, he is not entitled for protection under Section 53-A.

12. Per contra, learned Advocate Mr. S.S. Shinde for the respondent No.2 submitted that there are concurrent findings about proof and execution of agreement to sell by the plaintiff and delivery of possession. There are big buildings standing on the site. The possession is with the plaintiff, the plaintiff could not have claimed perpetual injunction. He argued that the defendant No.1 has entered into agreement only as a Sarpanch of the Grampanchayat. His death will not affect the rights of the Grampanchayat. Thirdly, he submitted that, the defendant has issued a notice for specific performance, which was not received by the plaintiff. The defendant has shown willingness to obtain the specific performance. Hence, the lower appellate Court has rightly set aside the decree passed by the trial Court and no interference is called for.

13. On carefully going through the evidence on record and the arguments advanced, I find that, though the Grampanchayat has not produced any resolutions and documentary evidence about payment of money, still the evidence before the trial Court indicated that there was genuine agreement to sell and the plaintiff failed to prove coercion and

undue influence. The concurrent view taken by the courts below in this regard is reasonable and probable view. There is no perversity. Hence, I find no reason to interfere with the same. Hence, the substantial question of law No.1 in the affirmative.

14. As far as substantial question No.2 is concerned, there is evidence that, the plaintiff had denied the execution of agreement to sell itself in the plaint. The suit ought to have been filed within three years from the date of refusal. The defendants have not taken any steps for filing the suit for specific performance nor made a counter claim. Therefore, their remedy is time barred. However, as held in **Shrimant Shamrao Suryawanshi Vs. Pralhad Bhairoba Suryawanshi (Dead) by L.Rs. and others [(2002) 3 SCC 676]**, the defendants can claim protection to their possession under the doctrine of part performance if the necessary ingredients are proved. Substantial question of law No.2 is answered accordingly.

15. The substantial question No.3 and 4 relate to the effect of death of defendant No.1, who was appellant No.1 in the first appellate Court. The facts clearly disclose that the agreement was executed by defendant No.1 with the plaintiff on behalf of Grampanchayat. The defendant No.1 was not personally party to the agreement. He was merely agent of the

Village Panchayat. The Village Panchayat was properly represented by the Sarpanch. The post of Sarpanch is not permanent and the persons go on changing from time to time. In the circumstances, defendant No.1 was in fact not a necessary party. The death of defendant No.1 cannot have any impact on the right of Grampanchayat, Dhoki, on whose behalf defendant No.1 was acting. Since the plaintiff has made personal allegations against defendant No.1 Kishan, he might have been proper party before the trial Court, but defendant No.2 is prosecuting its own rights under agreement to sell, for which defendant No.1 was not a necessary party and there would be no effect on the appeal on account of death of defendant No.1 in 1986. Hence, the substantial question of law No.3 and 4 are answered in the negative.

16. The right of protection under Section 53-A is in true sense the substantial question of law in this matter. It may be noted here that, the suit was for declaration of ownership for which there is no dispute. The suit was not only for perpetual injunction as alternative relief, as argued by Advocate for the respondent. The suit was also for possession. It is proved that defendant No.2 Grampanchayat was in possession of the suit property under agreement to sell. It is permissive possession.

17. It is well settled that a person who is owner of the property is entitled to claim possession from any person unless such person in possession has any legal right to retain the possession. The evidence on record, no doubt, shows that the possession of defendant No.2 is permissive possession. There is no substance in the contention that the plaintiff was in possession. Admittedly the cattle bazaar used to be held on the suit land even before filing of the suit and there are pleadings to that effect in the plaint. So, the only question is whether defendant No.2 is entitled to protect its possession or not. Defendant No.2 can claim protection only under Section 53-A of the Transfer of Property Act.

18. In Shrimant Shamrao Suryavanshi Vs. Pralhad Bhairoba Suryavanshi (Died) by L.Rs. and others (supra), the law in this regard has been clarified as follows :

“15. The Special Committee's report which is reflected in the aims and objects of the amending Act, 1929 shows that one of the purposes of enacting Section 53-A was to provide protection to a transferee who in part performance of the contract had taken possession of the property even if the limitation to bring a suit for specific performance has expired. In that view of the matter, Section 53-A is required to be interpreted

in the light of the recommendation of the Special Committee's report and aims, objects contained in the amending Act, 1929 of the Act and specially when Section 53-A itself does not put any restriction to plea taken in defence by a transferee to protect his possession under Section 53-A even if the period of limitation to bring a suit for specific performance has expired.

16. But there are certain conditions which are required to be fulfilled if a transferee wants to defend or protect his possession under Section 53-A of the Act. The necessary conditions are :

- (1) there must be a contract to transfer for consideration of any immovable property;
- (2) the contract must be in writing, signed by the transferor, or by someone on his behalf;
- (3) the writing must be in such words from which the terms necessary to construe the transfer can be ascertained;
- (4) the transferee must in part-performance of the contract take possession of the property, or of any part thereof;
- (5) the transferee must have done some act in furtherance of the contract; and
- (6) the transferee must have performed or be willing to perform his part of the contract."

19. Clause 6 shows that, the transferee must have performed or be willing to perform his part of contract. This

condition will have to be considered in the light of Section 16(1) (c).

20. In order to claim specific performance as well as for claiming protection under the doctrine of part performance, it is essential that the plaintiff must plead and prove his continuous readiness and willingness to perform his part of contract.

21. In this regard, I find that the written statement is vague. It is observed, the defendant thereafter issued notice to the plaintiff, calling upon her to execute the sale deed after receiving the remaining consideration. The said notice was acknowledged by the plaintiff, but she never replied the same nor executed the sale deed and filed this false suit. This written statement was filed on 31.1.1979 whereas the notice referred to was issued in September 1978.

22. In **Bal Krishna & anr. Vs. Bhagwan Das (Dead) by L.Rs. & ors. [AIR 2008 SC 1786]**, in para 8, it is observed that requirement of Section 16(c) is mandatory and in the absence of proof of the same that the plaintiff has been ready and willing to perform his part of the contract, suit cannot succeed. The plaintiff's readiness and willingness must be in accordance with the terms of the agreement. The readiness and willingness of the

plaintiff to perform the essential part of the contract would be required to be demonstrated by him from the institution of the suit till it is culminated into decree of the Court.

23. In **K.S. Vidyanadam and others Vs. Vairavan [AIR 1997 SC 1751]**, a period of six months was prescribed for execution of the sale deed, but no action was taken till the issuance of notice after two and half years, holding that the contract is to be performed within reasonable time. It was held that the total inaction on the part of plaintiff for violation of terms of agreement, which required plaintiff to balance amount, purchase the stamp paper and then ask execution of sale deed within six months, it was inequitable to grant a decree for specific performance.

24. In **Nanjappan Vs. Ramaswamy [(2015) 3 ALL MR SC 408]**, the original agreement to sell was executed on 30.9.1987 and as the appellant was unable to vacate the premises, the time stipulated was extended from time to time. There was delay in execution and due to pendency of the proceedings, when the matter came up after 27 years before the Apex Court, it was observed that, the value of the property have escalated very fast and it would not be equitable to grant decree of specific performance.

25. Thus, it is settled that the readiness and willingness of the plaintiff must be continuous and there should be proper pleadings and proof to show such continuous readiness and willingness. In the present case, the defendants have shown readiness and willingness only by notice issued in 1978. There are neither pleadings of continuous readiness and willingness nor there is evidence to that effect. There is complete inaction on the part of Grampanchayat to file a counter claim for specific performance of the contract.

No doubt, even when the remedy is barred, still the doctrine of part performance can come for protection of the purchaser under agreement to sell, but that does not mean that if the defendant No.2 has willfully or with gross negligence failed to take any action for performance of contract from 1978 till date, it can claim protection under Section 53-A.

26. From the facts and circumstances, I find that, the Village Panchayat has failed to prove continuous readiness and willingness and there is absolutely no evidence. On the contrary, there is total inaction for 40 years in obtaining the sale deed by paying the balance amount of Rs.7000/-. Considering the facts, the defendant is not entitled for protection.

27. In the result, the plaintiff was entitled for decree of declaration of ownership and for decree of possession. Hence, the substantial question of law No.5 is answered accordingly and I pass the following order :

ORDER

28. The Second Appeal is allowed. The judgment and decree of the first appellate Court is set aside. The judgment and decree of the trial Court is modified. The suit is partly decreed. The plaintiff is declared to be the owner of the suit property. The defendant No.2 is directed to deliver the possession of the suit property to the plaintiff within two months. The decree shall be drawn up accordingly.

29. In view of disposal of the Second Appeal, pending Civil Applications are disposed of.

(A.M. DHAVAL)
JUDGE

On oral request of Advocate Mr. S.S. Shinde for respondent No.2, the execution, implementation and operation of the decree is stayed for a period of four weeks, subject to the respondent No.2 furnishing undertaking to comply the decree in

case the challenge is not accepted, and shall furnish security to the tune of Rs.50,000/- (Rupees Fifty Thousand only) for that, before the Executing Court.

Parties to act upon authenticated copy/ print of uploaded copy of this judgment.

(A.M. DHAVAL)
JUDGE

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