

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

Second Appeal No. 0753 of 2009

District : Nanded

1. Rajeshwar s/o. Nagan Kale,
Aged 40 years,
Occupation : Agriculture,
R/o. Bannali,
Taluka Dharmabad,
District Nanded.

2. Shankar s/o. Satwaji Kale,
Aged 70 years,
Occupation : Agriculture,
R/o. Bannali,
Taluka Dharmabad,
District Nanded.

.. Appellants
(Original
defendants)

versus

Saraswatibai w/o. Rangoji Kale,
Aged 60 years,
Occupation : Agriculture,
R/o. Bannali,
Taluka Dharmabad,
District Nanded

.. Respondent
(Original
plaintiff)

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Mr. A.G. Godhamgaonkar, Advocate, for the appellants.

Ms. Geeta Deshpande, Advocate, for the respondent.

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CORAM : SMT. VIBHA KANKANWADI, J.

**Date of reserving
the judgment : 14th January 2019.**

**Date of pronouncing
the judgment : 15th February 2019.**

JUDGMENT :

01. Present appeal has been filed by the original defendants, challenging the judgment and decree passed in Regular Civil Appeal No. 24 of 2004, passed by learned District Judge-1, Biloli, District Nanded, dated 20-09-2009, whereby their appeal came to be dismissed. The said appeal was filed for challenging the judgment and decree passed by learned Civil Judge (J.D.), Dharmabad, District Nanded, in Regular Civil Suit No. 37 of 2000, dated 13-07-2004.

02. Parties are hereinafter referred by their nomenclature before the trial Court.

03. Original plaintiff had come with a case, that one Gangaram Mahadu, resident of village Gurujawla, was the owner and possessor of agricultural land bearing Survey No. 12/1/B admeasuring 1 hectare 21 R. Plaintiff is his legal representative. After demise of Gangaram, she succeeded to the said property. She resides at village Bannali which is her matrimonial home. She is also having some landed property from her deceased husband's side. She was unable to cultivate the land which was left by her father. Therefore, she allowed her uncle Nangan Satwaji to cultivate the said land on crop share basis. She used to go to Gurujawla in the sowing season and used to bear half expenses for

the purchase of seeds, fertilizers, etc. Thereafter, she used to go at the time of harvesting. She used to take half of the agricultural produce by deducting the incidental charges. According to her, till 1999, her relations with defendants were good. Defendant no.01 is the son of Nangan and defendant no.02 is her another uncle. It has been contended that the Government of Maharashtra had announced and paid compensation to the farmers on account of loss sustained by them due to heavy rains in 1999. The Block Development Officer, Biloli, had issued a cheque for Rs. 1,000/- in the name of plaintiff for the said land at Gurujawla. After the said cheque was issued, the relationship between defendants and the plaintiff became strained. They stopped giving half produce to the plaintiff and started claiming to be the owners on the basis of their cultivation. It is specifically stated that since 1999, possession of the defendants is illegal. Prior to that, it was permissive at the instance of plaintiff. She had thereafter applied to get her name mutated in the cultivation column. However, the defendants in collusion with revenue authority prepared a false and bogus *panchanama* in Grampanchayat Bannali. It was purported that plaintiff had executed a simple document i.e. on plain paper in favour of defendants. In fact, she has not conferred any right to them in any manner. Thereafter, plaintiff asked the defendants to hand over possession of the suit land

to her in 2000 but defendants refused. They created encumbrance and tried to raise loan. Therefore, she filed the suit for possession and mesne profits.

04. Both the defendants have resisted claim of the plaintiff by filing written statement. They have not disputed that the suit land was owned by Gangaram. It is stated, that father of defendant no.01 Nangan and defendant no.02 had purchased the suit land from Gangaram in 1965, for a consideration of Rs. 10,000/-. It is stated, that only formality of agreement to sell was completed and since then, they were cultivating the suit land as owner. It is stated, that plaintiff has no right over the suit land. The said agreement which was executed by Gangaram in their favour, was lost from the custody of defendant no.01 due to floods in his village in 1983. The fact of execution of the said agreement was within the knowledge of plaintiff and, therefore, she recognized the said right in favour of defendants by executing another document i.e. agreement executed on 20-05-1991 in presence of *panchas*. She agreed to honour the agreement to sell which agreed by her deceased father. She thereafter did not execute the agreement and started raising questions. They have denied that their possession over suit land was permissive in nature at the behest of plaintiff. It appears that by way of additional written statement, defendants put forward counter claim seeking

directions to the plaintiff to execute the sale deed on the basis of her agreement dated 20-05-1991 in which she had acknowledged that her father had agreed to sell suit land to them. It was also admitted by her, that her father had received the amount of consideration.

05. The original plaintiff filed written statement to the counter claim and denied all the allegations in the counter claim. She has specifically denied that her father had executed any agreement by accepting amount of Rs. 10,000/- in 1965. She has also denied execution of any agreement or a document on plain piece of paper on 20-05-1991.

06. Taking into consideration the said pleadings, issues came to be framed. Parties went to trial. After considering the evidence on record and hearing both sides, the suit was partly decreed. The defendants were directed to hand over possession of the suit land to the plaintiff within two months. Separate enquiry was ordered for mesne profits. The counter claim was dismissed.

07. Both the defendants approached District Court at Biloli by filing Regular Civil Appeal No. 24 of 2004. The said appeal has been dismissed by learned District Judge-1, Biloli, on 30-09-2009. Hence, present second appeal.

08. After hearing both sides, following substantial question of law has been framed vide order dated 16-10-2009 :-

" Whether the appellants were entitled to protection under Section 53-A of the Transfer of Property Act, though they did not take specific defence to that effect ?"

09. Heard learned Advocate Mr. A.G. Godhamgaonkar for the appellants. So also, heard learned Advocate Ms. Geeta Deshpande for the respondent. Perused the record & proceedings.

10. It has been vehemently argued on behalf of the appellants, that according to the plaintiff, after death of her father, she had become exclusive owner of the property and the said fact is almost not denied by the defendants. However, it is to be seen that according to her, she had asked the defendants to cultivate the land as she was unable to cultivate the same and, therefore, according to her, till 2000, possession of the defendants over the suit land is stated to be permissive in nature. Defendants had come with a specific case, that Gangaram had sold land to the father of defendant no.01 and defendant no.02 for a consideration of Rs. 10,000/- in 1965, though it is sometimes referred as agreement to sell or sale deed in the written statement. The said document was lost in floods of 1983. But plaintiff

had executed a document on 20-05-1991, thereby acknowledging the acts of her father. In the said document, she promised to execute the sale deed. Taking into consideration the substantial question of law that has been framed in the case, it is required to be seen whether the appellants are complying the requirement of Section 53A of the Transfer of Property Act. It is to be noted that the said document dated 20-05-1991 was produced at Exhibit 61. It was impounded by the learned trial Court. Therefore, there was a document in writing which was in respect of an immoveable property. It is signed by the plaintiff who is the owner of the property. In clear words, the said writing depicts that she had the intention to transfer the same. The said wish was as per the wish or acts by her father in 1965. She also acknowledged that her father had received amount of consideration i.e. Rs. 10,000/-. Under such circumstance, there was no question of any part of the act remained to be performed by the defendants. When there was no part remained to be performed by them, the question of readiness and willingness did not crop up at all. Both the learned Courts below had not considered this point in proper perspective. They have not considered that when nothing was required to be performed by defendants, it ought to have been held that defendants were ready and willing to perform their part of contract which was restricted only in getting the sale deed executed

in their favour.

11. Learned Advocate for the appellants further contended, that unnecessarily the oral evidence has been scanned in a different way. Testimony of DW 01 has been considered on the basis that he was not present at the time of execution of the document, whereas, in fact, when the document in the year 1965 was prepared, his father was present and he himself was aged 33 years at that time. The name given to the document has been misinterpreted and it was not considered that the nomenclature of the document was not important. Further, both the Courts have not considered that the pleadings in the written statement were coming from a rural area. Defendants are the rustic persons though they have addressed at some place that the document which was executed by late Gangaram was sale deed, yet in fact, it was an agreement to sell. In order to support his contention, he has relied on judgments of the Hon'ble Apex Court in *Kedar Lal Seal and another Vs. Hari Lal Seal* [AIR 1952 SC 47], *M/s. Ganesh Trading Co. Vs. Moji Ram* [AIR 1978 SC 484], *Madan Gopal Kanodia Vs. Mamraj Maniram & others* [AIR 1976 SC 461], *Smt. Manjushri Raha & others, etc. Vs. B.L. Gupta & others, etc.* [AIR 1977 SC 1158], on the ground as to how the pleadings are to be construed. In almost all the authorities, it is stated that when the pleadings are by a rustic villager or a rustic person, then the pleadings are required to be liberally construed. In this case,

the subject matter was identified. It was the agreement to sell. Exhibit 61 by itself was also an agreement and, therefore, its specific performance was asked. Further, both the Courts have not considered that when all conditions under Section 53A of the Transfer of Property Act have been fulfilled, then the possession of the defendants over the suit land ought to have been protected. He further relied on the decision of the Hon'ble Apex Court in *Shrimant Shamrao Suryavanshi & another Vs. Pralhad Bhairoba Suryavanshi (Dead) by L.Rs. & others* [(2002) 3 SCC 676], in which, in all six conditions have been laid down for proving a case under Section 53A of the Transfer of Property Act. He also submitted that the agreement Exhibit 61 alone will not stand and it will have to be read along with what is acknowledged. If reading in entirety is taken into consideration, then it can be definitely said that all six conditions have been fulfilled. Similar point has been dealt with by the Hon'ble Apex Court in *Vasanthi Vs. Venugopal (dead) through L.Rs.* [2017(5) Mh.L.J. 536].

12. Per contra, learned Advocate appearing for the respondent submitted that as per the ratio laid down in *Shrimant Shamrao Suryavanshi's* case (*supra*), certain conditions are required to be fulfilled in order to seek protection under Section 53A of the Transfer of Property Act. In order to have a complete contract, it ought to have been shown by the defendants that

the consideration was paid. Exhibit 61 does not make a mention that any consideration was paid to her on that day. As regards the alleged agreement which was executed by Gangaram, said document even as per the contention of the defendants, it was lost in the flood. Under such circumstance, the defendants cannot rely on the contents of that document which was not before the Court. The stand has been thereafter changed by the defendants at the time of evidence. In the testimony of DW 02, he has come with a theory that they had given half acre share to the plaintiff for cultivation. In fact, that cannot be considered as '*consideration*'. Further, the defendants have not come with a positive case, whether the document which was executed by Gangaram was a sale deed or it was an agreement to sell. If they had paid the entire amount of consideration, then why they had not got any registered document executed from Gangaram, is a question. If at all the defendants wanted to rely on Exhibit 61, they ought to have proved that the said document is fulfilling all the six conditions. When it is their contention, that such document was executed by plaintiff in the year 1991 itself and they had paid entire amount of consideration, then the question is, as to why they had not taken any steps to have sale deed in their favour, why they were required to wait till plaintiff filed the suit. They had not shown readiness and willingness during the lifetime of Gangaram and not

even thereafter when they have come with a case that Exhibit 61 was executed by plaintiff. Possession was not delivered to the defendants as a part performance of Exhibit 61. In fact, the plaintiff has denied execution of the said document. Under such circumstance, heavy burden was on the defendants to prove the said document. In order to support her contentions, she has relied on the decision of the Hon'ble Apex Court in *Nanjegowda & another Vs. Gangamma & others* [AIR 2011 SC 3774].

13. The first and foremost fact that is required to be considered is that at one breath, the defendants were denying the title of the plaintiff by contending that they had purchased the suit land from Gangaram in the year 1963 itself for consideration of Rs. 10,000/- and another breath, they were contending that there was an agreement to sell and the entire amount of consideration was given with possession of the suit property. One fact is not disputed, that the suit land originally belong to the father of the plaintiff i.e. Gangaram. As regards the pleading of the defendants i.e. present appellants, that they have already become owner of the property, is concerned, we may give leniency to the pleadings as they are come from rural area. The judgments of the Hon'ble Apex Court relied by the learned Advocate for the appellants show how the pleadings are to be construed when the pleadings are by rustic villagers,

cannot be disputed. However, at the same time, it will have to be taken that not at one place but at many places, the defendants have tried to contend that they had become owners in 1963 itself. Defendants have not stated the exact date of the sale deed. It has been stated that the sale deed or document was lost in the floods. However, at the same time, the pleadings do not show that it was a registered instrument. If it was a registered instrument, then defendants could have led secondary evidence to prove that document. In absence of any such registered instrument when as per their own contention, the amount was fixed at Rs. 10,000/- (more than Rs.100/-) then the transfer of immoveable property could not have been done without such instrument. Therefore, those pleadings which say that defendants have become owners of the suit property in 1963, will have to be discarded.

14. The defendants have come with a case, that agreement to sell was executed by Gangaram in their favour in the year 1963 and at that time itself, father of defendants no.01 and 02 had paid amount of Rs. 10,000/-. In order to prove the said agreement to sell, the defendants have examined DW 01 Rajeshwar. Definitely he was not present at the time of execution of that document, but he says that his father was present. Further evidence of defendant no.02 Shankar Kale has not given the date and other

particulars which are required to be proved a complete contract. What was agreed when the sale deed was to be executed, etc. are the points unanswered by him. Another fact which will have to be put to test, that if the agreement to sell was executed in the year 1963 and the entire amount of consideration was paid, then why sale deed was got executed from Gangaram during his lifetime. Admittedly, Gangaram expired prior to 1999, that means, he was alive for about 30 years after the alleged agreement to sell. Therefore, whatever evidence has been led by the defendants to prove that in the past i.e. in the year 1963, there was an agreement to sell, is not trustworthy and is unacceptable.

15. The defendants have further come with a case, that agreement dated 20-05-1991, plaintiff had acknowledged the earlier agreement. It is also to be noted that they do not consider at one place, that document dated 20-05-1991 itself is an agreement to sell. But at another breath, they are saying that it is acknowledgement of the agreement which Gangaram had entered into with them. Admittedly, plaintiff was not present when the alleged agreement took place in the year 1963. Without going through that document or ascertaining the facts, how plaintiff would have just blindly acknowledged said earlier agreement, is a question. Plaintiff has flatly

denied the execution of that document Exhibit 61. The said document has been exhibited by examining the witnesses. If we consider the contents of the same, it clearly shows that no amount of consideration was paid on that day. According to the learned Advocate for the appellants, by said document Exhibit 61, plaintiff has acknowledged receipt of amount of Rs. 10,000/- by her father. In fact, when the earlier agreement itself is not produced before the Court under the pretext that it is lost and agreement Exhibit 61 has been denied by the plaintiff, it is hard to believe that in the year 1991, plaintiff would have acknowledged the receipt of amount of Rs. 10,000/- by her father as a consideration for the sale of land in 1963. The conduct of the parties is also required to be considered. It can be seen that all along since prior to 1963 till 1999 i.e. when Gangaram expired, name of Gangaram was in the 7/12 extract and after his demise, the suit land was mutated in the name of plaintiff. If at all the sale deed was executed or in other words, defendants had purchased the said land from Gangaram, then they would have moved the revenue authorities for mutation of their names in the ownership column. Therefore, preponderance of probabilities are required to be considered. It supports the claim of the plaintiff, that after the demise of her father, since she was married and residing at a different place, she gave possession of the suit land to her uncle for

cultivation on crop share basis.

16. All these facts were necessary to be considered taking into consideration the substantial question of law that has been framed. Here, the original agreement under which it is stated that possession was handed over to the defendants or their predecessor, upon payment of certain amount, under a written document, in the year 1963 itself, has not been proved. As per the ratio laid down in *Shrimant Shamrao Suryavanshi's* case (*supra*), all those six ingredients or conditions are required to be proved in order to seek protection under Section 53A of the Transfer of Property Act. If we consider that the agreement to sell was entered into in the year 1963, then definitely when the suit was filed in the year 2000, the relief for seeking specific performance by the defendants was time barred.

17. In the Full Bench decision of this Court, in *Mahadeo Nathuji Patil Vs. Surjabai Khushalchand Lakkad & others* [(1994) Vol.96 Bom.L.R. 846], it has been observed thus :-

" When the general principle of law of limitation is that it is not applicable to a plea in defence, it is necessary that there must be an express provision in the statute so as to exclude or limit the application of the said general principle of law to a plea in defence under section 53A of the Act. When there is no such limitation placed under section 53A of the Act or any other statutory provision, there is no reason why the

statutory protection granted to a transferee in possession under section 53A of the Act upon the equitable consideration that he has performed his part of the contract and is ready and willing to perform further remaining obligations upon him under the contract should be whittled down by allowing the transferor to dispossess him although he has not shown his willingness to execute a registered document of title and has allowed the period of limitation to expire. "

18. Thus, even though the period of limitation to seek specific performance of the contract had come to an end for the defendants in this case, the question is whether they can seek protection under Section 53A of the Transfer of Property Act. A specific question was referred to the Full Bench and the said question was, "*Whether once the remedy of acquiring title by a suit for specific performance is lost to the vendee by lapse of time, right to protect his possession upon satisfying the conditions contained in section 53A of the Transfer of Property Act comes to an end ?*" By majority, the said question was answered in the negative. Therefore, here in this case, even if a specific defence was not taken by the appellants to protect their possession under Section 53A of the Transfer of Property Act, they were not entitled to seek any kind of protection under the said provision of law. This point can also be viewed from another angle also. The said protection under Section 53A of the Transfer of Property Act would be available to the person who claims to be in possession by virtue of an agreement to sell only upon satisfying the six

conditions enumerated in *Shrimant Shamrao Suryavanshi's* case (*supra*). Here, in this case, at the cost of repetition, it can be said that the defendants slept over their right to get the sale deed executed in their favour since 1963 though they claim that amount of Rs. 10,000/- i.e. the full consideration amount was paid. The submission on behalf of the appellants, that since entire amount of consideration was paid, nothing was left to be performed by the defendants and, therefore, they ought to have been held to be ready and willing to perform their part of contract, is unacceptable. It is for the simple reason, if everything has been done by them, then why they had not taken legal recourse to get the specific performance of the contract. This itself negatives the contention of the defendants, that they were ready and willing to perform their part of the contract. Equity also does not permit them to seek protection of their possession beyond the period of limitation when they have failed to prove that there was such an agreement in the year 1963. Therefore, the facts and circumstances of this case, in which the earlier agreement is not produced and the second agreement which has been produced at Exhibit 61 is stated to be merely an acknowledgement; defendants cannot seek protection under Section 53A of the Transfer of Property Act.

19. As aforesaid, preponderance of probabilities

on the basis of the evidence that has been adduced would show that defendants were put in permissive possession by the plaintiff. She had also received the amount of compensation which was the act of ownership exercised by her and under such circumstance, she is entitled to get possession as she does not wish to continue the said permissive possession further. Both the learned courts below have considered the facts as well as law on the point properly. The substantial question of law is answered in the negative in the facts and circumstances of the case.

20. In the result, the second appeal is hereby dismissed.

(Smt. Vibha Kankanwadi)
JUDGE

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Date : 15th February 2019

21. After pronouncement of judgment, learned Advocate appearing for the appellants submitted that the interim relief granted earlier be continued for six weeks further. The said oral prayer is opposed by the respondent, stating that now there is concurrent finding of all the three Courts and the litigation is old one.

22. It is to be noted that by order dated 16-10-2009, this Court while admitting the Second Appeal, had passed order on Civil Application Stamp No. 23682 of 2009. However, it will not be out of place to mention here, that it appears that since the Second Appeal was admitted, the interim relief was granted in terms of prayer clause "B" of the application till the final disposal of the Second Appeal. In fact, no detail discussion appears to have been made at that time. Now, the suit was for recovery of possession and mesne profits as well as for perpetual injunction was decreed; in first appeal, said decree was confirmed and in the second appeal, today, those decrees have been confirmed. Under such circumstance, no case is made out to extend the interim relief further. Hence, the oral prayer is rejected.

(Smt. Vibha Kankanwadi)
JUDGE

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